

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

Appellant's Excerpt of Record
Volume 2 of 2

Pages 277-358

MR. INGALDSON: And Bill Ingaldson on behalf of Hooper Bay.

MR. BROWN: 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 CONTINUED

BY MR. BROWN:

Q And, Sergeant Joseph, I'm talking loud just so you can hear me. If I'm talking too loud, please tell me and if I'm not talking loud enough, please tell me and I will try to adjust that as well. Okay?

A Yes.

Q All right. Sergeant Joseph, do you have in front of you your use of force report?

A Yes, I have it.

Q Okay. If you could take a look at that, I'm going to mark that as deposition exhibit -- I believe that it's exhibit 9. Knowing that all of these are running together, I believe this is exhibit 9 and if you could take a look at that exhibit, did you complete this

A Oaks was just standing up.

Q At the time you deployed the taser, were all three officers standing?

A Two of us were standing, one was standing up.

Q So that is yes, all three were standing then when these were being deployed?

A It was deployed when one of the officers was standing up from the floor.

Q Okay. So walk me through this now. Oaks did tell us during his deposition that he fell once and he said that he got right back up. So your testimony today is that you started deploying the officer -- you just started deploying the drive stun right after the officers fell. Is that your statement today?

A I deployed -- I deployed the cartridge, not the drive stun.

Q Okay. You deployed the actu -- you deployed the what?

A The actual cartridge.

Q Okay. You deployed the actual cartridge first?

A Yes. Yes.

Q Okay. And when you deploy the actual cartridge, is that what has the prongs on it? Is that what you're talking about?

A Yes, that's the one with the....

Q How many cartridge -- how many cartridges do you have on

document or who completed this document?

A I suppose I did.

Q And when did you complete this document?

A On the day the incident happened.

Q And how many times does this document indicate that you drove stunned Thomas Olson?

A It says several times.

Q Was that five or six?

A That -- yes.

Q Okay. And during this time, you had actually walked over to where Thomas was on the -- sitting on the floor or were you doing it from the position where you were with his brother?

A I deployed from the -- where I was with the brother but that didn't work. He stood up. Hello?

Q Yup. We're here. I'm just going to hit the mute. I don't know if it'll help you come through better or what. There may be feedback but you need to speak up. Okay. So go on, where did you deploy it from?

A I deployed from standing by his brother. I was laying on the ground. He had others -- other officers.

Q Were you standing or sitting?

A I was standing.

Q At the time you deployed the taser, were all three officers standing?

one taser?

A One.

Q And when you deployed that taser on Thomas Olson, did you think it made contact or did not make contact?

A It wasn't being -- the first deployment wasn't effective. I then ran a second cycle. I saw that -- that wasn't effective so I had to go up and make a second contact with him.

Q And when you say it wasn't effective, was that because one of the prongs did not stick in him so it did not make a complete circuit? Is that your understanding or why was -- why do you think it was not effective?

A Because it -- the -- it didn't make any contact with the -- with him.

Q So if only one prong goes in, then the individual -- there's no circuit so the individual doesn't feel the full shock, is that correct?

MR. WIDMER: I'm going to object to that. I think that calls for expert testimony. I don't know if Mr. Joseph is familiar enough with the way -- I don't know if he's qualified as an expert in taser operation.

Q Just say if you know. You can still answer, Mr. Joseph. Do you know whether if just one prong goes in, does it shock the person fully or not?

A With one prong inside, it doesn't give a full effect.

Q Okay. So after you tried to do two drive stun -- or two cartridges, then you go back and you do the -- is that when you approach and you start drive stunning him?

A The first gun that -- I could not deploy two cartridges so I deployed one. I made two cycles. After the second cycle wasn't working, I walked up to the suspect and started doing the drive stun.

Q Okay. You say that you deployed -- you cycled twice. Help me understand what that means. Tell me.

A It's when -- it's when you let it cycle some -- for about four or five seconds.

Q And you do that with -- and the cycle is done with the benefit of the prongs being -- after the prongs are deployed, is that correct?

A Yes.

Q And so it has nothing to do with drive stunning. The cycle has nothing to do with drive stunning, is that right?

A Yes.

Q Okay. So then when you went and you drove stun him, you did that approximately five or six times, that was after the two cycles, is that correct?

A The drive stuns were done after the cycle.

Q And I believe the last time that we talked, you said some of those drive stuns were done while he was down on his

1 testimony?

2 A Yes.

3 Q And you were responsible -- you were dealing with -- I believe his name was at that time, is that correct?

4 A Yes.

5 Q Did you ever deploy a cartridge or attempt to drive stun that night?

6 A No.

7 Q And could you tell -- say why you did not do any of those things to ?

8 A I had -- reason I wanted.

9 Q I'm sorry, could you repeat that one more time, Sergeant Joseph?

10 A I had him in the position I wanted him where he wouldn't be kicking at me or any other officer.

11 Q Okay. I don't think I have any more questions for you at this time, Sergeant Joseph. Thank you.

12 MR. INGALDSON: I don't have any questions. Thanks.

13 MR. BROWN: Okay. We'll just wrap this up now.

14 Thank you.

15 MR. WIDMER: Thank you, Sergeant Joseph.

16 A Thank you.

17 (Off record)

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1 stomach with a -- and they were done on his back, is that correct?

2

3 A At least one of my drive....

4 Q Did you say at least one was or what did you say? Did you say at least one was or what did you say?

5

6 A I had at least one drive stun when he was down on his stomach and that was the last one. That....

7

8 Q And is it possible that there was more than one?

9 A Yes, it's possible that there was more than one.

10 Sergeant Simon may have a -- been doing a drive stun at the same time.

11

12 Q While he was down on his stomach, is that right?

13 A Yes.

14 Q Okay. I have nothing further. We're just going to wrap up here. This won't go as long just because, you know, we're on the phone but we'll just kind of wrap up. Mr. Widmer and Mr. Ingaldson might have some -- may have some questions as well.

15

16

17

18

19

20 EXAMINATION

21 BY MR. WIDMER:

22 Q Mr. Joseph, I'll -- Sergeant Joseph, I'll go first. My understanding is that we heard testimony that Officer Oaks and Sergeant Simon, they were struggling with Thomas Olson during this matter. Do you remember that

23

24

25

1 TRANSCRIBER'S CERTIFICATE

2 I, Linda S. Foley, hereby certify that the foregoing

3 pages numbered 2 through 52 are a true, accurate, and complete

4 transcript of deposition of Nathan Joseph 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 May 21, 2008

11

12 Linda S. Foley, Transcriber

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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

VIDEOTAPED DEPOSITION OF DIMITRI OAKS

Pages 2 through 75, inclusive

April 23, 2008

Hooper Bay, Alaska

Exhibit M

Page 2

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.)
15)
16)
17 No. 4BE-07-00026 CI
18)
19 VIDEOTAPED DEPOSITION OF DIMITRI OAKS
20)
21)
22 taken on behalf of the Plaintiff, pursuant to notice, at the
23 Sea Lion Corporation Boardroom, Hooper Bay, Alaska, before
24 Sean E. Brown, a Notary Public for the State of Alaska.
25)

Page 3

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I N D E X

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1 Hooper Bay, Alaska, April 23, 2008

2)
3 MR. BROWN: My name is Sean Brown and I am the
4 attorney representing Thomas Olson in this matter but I'm also
5 a notary for the State of Alaska and the first thing we want
6 to do is to swear you in and then we'll go around and intro --
7 let everyone introduce themself. Okay?
8 MR. OAKS: Yeah.
9 MR. BROWN: If you could raise your right hand and
10 if you could state your name?
11 MR. OAKS: Dimitri Oaks.
12 MR. BROWN: Dimitri Oaks.....
13 (Oath administered)
14 MR. OAKS: Yes.
15 MR. BROWN: Okay. Thank you. Introduce yourself.
16 MR. WIDMER: My name is Marthew Widmer. I'm from
17 Angstman Law Office. We represent Officer Oaks in this
18 matter. We also represent Officers -- Corporal Simons and
19 Sergeant Joseph.
20 OFFICER SIMON: I'm Sergeant Charles Simon. I was a
21 corporal.
22 MR. BROWN: Okay. Thank you.
23 MR. INGALDSON: Bill Ingaldson representing the City
24 of Hooper Bay.
25 SERGEANT: I'm a sergeant in HPD, sir.

2 (Pages 2 to 5)

April 23, 2008

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MR. BROWN: Thank you.

MR. OLSON: I'm Thomas J. Olson, Senior.

MR. BROWN: And my name is Sean Brown. I already introduced myself and I represent Thomas Olson.

DIMITRI OAKS

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:

Q Mr. Oaks, could you tell me how old you are?

A Oh, 58.

Q Fifty-eight? How long have you lived here in Hooper Bay?

A Oh, about 36 years.

Q Where were you from before that?

A Bristol Bay.

Q All right. What brought you to Hooper Bay?

A Oh, my wife. We moved here.

Q All right. Were you a police officer down in Bristol Bay area or.....

A No.

Q Where'd you live down in Bristol Bay?

A In King Salmon.

Q And what -- tell me a little bit about that. What does that mean?

A Oh, you mean the police academy?

Q Yeah.

A Well, let's see, the police academy, they teach you how to -- how to arrest people without trying to hurt them and how to do paper work and they teach you how -- how to make them policemen to where you can -- that'll help you along the way when you make an arrest so you don't hurt -- hurt -- get hurt or an -- hurt anybody.

Q How many days was that camp?

A It was two weeks.

Q Okay. And I called it a camp. Was it a -- is it a normal course that they have or what?

A I have it all right here. That's -- all I know is that's where they were -- the police academy was.

Q How many years ago was that?

A Oh, something like six to eight years ago, something like that.

Q And did you get any training on the taser use then?

A Yes.

Q All right. And are you certified to use a taser yourself?

A Yes, sir.

A Igiugig.

Q Okay. And your wife was originally from here in Hooper?

A Yes, sir.

Q All right. And then when you moved up to Hooper Bay, how soon after that did you become a police officer?

A Somewhere in '96, I think, 1996.

Q What led to that decision?

A We have VPSO Clinton O'Malley here and I used to rent out videos and he used to come and rent videos and he came over and kept constantly asking me to become a police officer because he was -- we became very good friends and he was -- it got -- it got to the point where he was being stuck in the jail almost 24 hours a day.

Q And so did you finally give in to that or....

A Yeah. Well, it took me about three, four weeks and I finally gave in to it.

Q All right. And so when you become an officer, what do you have to do?

A Oh, answer calls and go out and do patrols and watch traffic.

Q Do you have to go through any training?

A Back when I joined, there was no training.

Q Okay. Have you -- since then, have you had any training?

A Yes, sir, I went to a police academy.

Q Where was that?

Q Okay. So about six or eight years ago is when you received training on the taser?

A No. No.

Q I mean, at that police academy, did you then receive training on the taser?

A Not that I recall. We.....

Q Were they just -- they may not have been used then. I don't know. Do you remember?

A I don't think they were being used.

Q Yeah, I -- that's probably right. So back then when you took that police training, what type of techniques did they tell you to use to restrain someone who is -- who was kicking?

A Someone who was kicking?

Q Yup.

A Well, we were taught to use force if we have to and to tase them if we thought our lives were in danger.

Q Okay. But now, if your life was in danger but, I mean, let's back up a little bit here and talk about even before the tasers were used, back when you went to the academy or back when you went to the police academy, that two weeks of training that you had.

A Yes.

Q Okay. Now, back then, you said that tasers weren't used, right?

Page 10

1 A Yes.
 2 Q And so how did they show you back then to restrain
 3 people?
 4 A How to use moves where you can put somebody down on the
 5 ground without hurting them.
 6 Q And that -- I just want to tell you that is pretty
 7 sensitive so don't....
 8 A Okay. Thank you.
 9 Q You know, I just don't want you to think I learn anything
 10 back-handedly.
 11 A Oh, thank you.
 12 Q All right. Okay. I just wanted to tell him that that
 13 microphone is sensitive there.
 14 MR. INGALDSON: Oh, okay.
 15 Q So back -- you used the hand. What would you do now?
 16 How would you do....
 17 A Oh, usually, we take the hand and -- the arm and put it
 18 up behind their back and way it behind their back and put
 19 a little force on it where they'll feel -- feel a little
 20 pain and -- pain and they'll comply and give you their
 21 name.
 22 Q Okay. And what about somebody in handcuffs, what did
 23 they teach you to do in the academy then?
 24 A What do you mean by that?
 25 Q If you had somebody in handcuffs that was resisting, what

Page 11

1 did they teach you to do?
 2 A Well, they taught us to try to talk them into standing up
 3 and not to be so aggressive and to come along peacefully
 4 without -- and how to talk them in -- talk them into not
 5 doing anything anymore, to -- so they wouldn't have any
 6 more charges on them or -- charges on them.
 7 Q Okay. Now -- and if that didn't work, what were you
 8 taught to do in the academy?
 9 A Well, usually, we'd just try to stand them up....
 10 Q Okay.
 11 Aand try to -- try to tell -- make them walk to the
 12 snow machine or Honda, whichever we're using.
 13 Q Now, on the police report, I saw that -- I believe it was
 14 Officer Joseph, he -- actually, he laid down on
 15 him and held his legs. Have you heard of that happening
 16 before?
 17 A Oh, yes.
 18 Q All right. Is that one way to keep someone from kicking?
 19 A Yes, that's one way to keep them from kicking.
 20 Q Okay. And so if you had a person restrained on the floor
 21 in handcuffs and there were two officers, is it
 22 reasonable to think that you could grab the officer's
 23 jacket and -- or grab the -- I'm sorry, grab the
 24 defendant's jacket and pull them up off the ground or
 their clothing or their -- just grab them by their

Page 12

1 shoulders and pull them up?
 2 A Yeah, we -- we could have did that but he was just
 3 kicking so much.
 4 Q But, just in general, could -- is that something that you
 5 could do as a technique?
 6 A Yes.
 7 Q Okay. And -- all right. So then -- so you went to the
 8 academy, you got some training there and how many hours a
 9 week did you start working as an officer after that?
 10 A Well, we was working eight hours a day for five, you
 11 know, days.
 12 Q And how soon after -- what other training have you
 13 received then?
 14 A I went to -- I think I went to domestic violence training
 15 and EMT training. That's about it. Most of the young --
 16 mo -- mostly the young people were going to the
 17 trainings.
 18 Q Okay. Now, you also mentioned to me that you had taken
 19 some taser training. Who gave that to you?
 20 A Chief Hoelscher. He's our instruct -- he was the
 21 instructor for that.
 22 Q And he's still the chief here, is that right?
 23 A Yes, sir.
 24 Q Okay. Did he do all of the training for that?
 25 A Yes.

Page 13

1 Q And do you know what type of qualifications he had to do
 2 that training, by any chance?
 3 A No, I have not here. I think he -- I -- I don't know, he
 4 went to a lot of trainings. I don't -- so I wouldn't
 5 know.
 6 Q Did he ever travel or did you ever travel out of Hooper
 7 Bay to go meet with anyone else for any taser training?
 8 A No.
 9 Q Now, when you took that taser training, you told me
 10 earlier that you were supposed to use it when your life
 11 is in danger.
 12 A Or another life is in danger.
 13 Q Or another life is in danger. Okay.
 14 A Or if we thought we needed it -- needed to use it.
 15 Q Now, what do you mean by that?
 16 A Oh, like somebody was kicking -- kicking -- kicking both
 17 of the officers and wouldn't stop kicking and -- or
 18 hitting -- hitting some -- like sit -- some situations,
 19 we get where they're head-butting us and....
 20 Q Okay. So any time that -- what you were taught then by
 21 Chief Hoelscher was any time that you were getting kicked
 22 or head-butted or hit, it's okay to taser someone, is
 23 that correct?
 24 MR. WIDMER: I'm going to object to that. I think
 25 that's a mischaracterization. You may answer. You can answer

4 (Pages 10 to 13)

April 23, 2008

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1 the question.
 2 A What's that?
 3 Q Okay. Did Officer Hoelscher tell you it was okay to use
 4 the taser when you were hit?
 5 A No.
 6 Q Okay. When did he -- okay. Regarding just the hitting,
 7 when is it okay to use a taser when you were being hit?
 8 A When -- when -- a lot -- I think I recall I was told not
 9 to use the taser when they're handcuffed unless they were
 10 doing something to harm the -- the officers.
 11 Q And what do you mean by harm?
 12 A Well, like if they were kicking or head-butting or we get
 13 a lot of them that bite -- bite people too.
 14 Q Now, did you receive from the -- from Chief Hoelscher,
 15 did you receive the Hooper Bay Police Department general
 16 order for the use of force? I guess you're familiar with
 17 that as an officer, is that right?
 18 A Yes, sir. Yes.
 19 Q Can you tell me the five times -- the five restricted
 20 uses of the taser?
 21 A The what?
 22 Q The five restricted uses of the advanced taser. It's
 23 part of your general order.
 24 A No.
 25 Q Okay.

1 Q Can you identify which sergeant knocked?
 2 A Sergeant Nathan Joseph.
 3 Q Okay.
 4 A So we went in and Thomas was passed out on one bed and
 5 was passed out on another bed.
 6 Q What time of day was it?
 7 A Sort ti -- ti -- tight in the evening. I don't remember
 8 what time it was but it was toward the evening.
 9 Q All right. Go on.
 10 A Okay. We entered the building, as I was telling you.
 11 They were both passed out. There were kids. Some of
 12 them were awake and some of them were sleeping on the
 13 bed.
 14 Q All right. Let's back up a little bit. Now, you said it
 15 was in the evening when you got there. Right?
 16 A Mm-hmm.
 17 Q All right. First of all, let's start, so if it was 12:00
 18 o'clock in the afternoon when you went to someone's house
 19 and you found the people passed out or laying on the
 20 couch and on the bed asleep and the kids were still
 21 there, you may assume that they're passed out, is that
 22 right, or taking a nap?
 23 A Well, we try to wake them up first.
 24 Q Okay. And if you went at 5:00 o'clock in the afternoon
 25 and you saw a person on a couch and on a bed, what would

1 A I -- I was wondering how come am -- am I being asked all
 2 these questions when I never had a taser and I never
 3 tased anybody.
 4 Q Because you're an officer and you've been an....
 5 A Yeah. Oh, okay.
 6 Q I usually don't have to answer the questions here but you
 7 are an officer and you were there and I'm just wanting to
 8 find out what you've been taught....
 9 A Oh, okay.
 10 Qkind of get an idea of what the base level is. Now,
 11 you say in your -- I have a document here labeled the
 12 affidavit of Dimitri Oaks.
 13 A Yes.
 14 Q Did you write that?
 15 A No.
 16 Q Have you read this?
 17 A Yes.
 18 Q In that -- actually, let's just do this. so that night,
 19 tell me what happened when you first arrived at Boya's
 20 residence.
 21 A So what happened when we first arrived? Okay. We --
 22 when we first arrived, I -- I observed a -- the arctic
 23 entry and the inside doors were open and the sergeant
 24 knocked on the door and we kept knocking on the door. We
 didn't get no answers.

1 you think?
 2 A Well, depends on if they were having fumes of alcohol in
 3 there because a lot of times there's -- you can smell
 4 alcohol if they had been drinking when you go in and some
 5 places you don't go in.
 6 Q Okay. And if it was 10:00 o'clock at night, the same
 7 thing?
 8 A Yup.
 9 Q 2:00 in the morning?
 10 A Yes.
 11 Q Yes what?
 12 A What was that again?
 13 Q Okay.
 14 A Because I just woke up here not too long ago.
 15 Q All right. If you walked into a house and found someone
 16 laying on a bed and on a couch at 10:00 at night, would
 17 you just automatically assume they were passed out?
 18 A Oh, no, we'd attempt to wake them up, see if they were --
 19 if they had been drinking or not.
 20 Q Okay. And if it was 4:00 in the morning and two people
 21 were laying on the couch, would you assume that they're
 22 passed out or would you think they're asleep?
 23 A Oh, we'd wake them up and find out if they had been
 24 drinking, no.
 25 Q Okay. Would it surprise you to learn that this was

5 (Pages 14 to 17)

Page 18

actually 4:00 in the morning and not in the evening?

2 A Yes.

3 Q Okay. All right. So at 4:00 in the morning, you go up

4 to the door and what do you find?

5 A Oh, that Thomas was passed out on one bed and Peter was

6 out -- passed out on another bed.

7 Q Okay. Well, now, it's -- first of all though, you have

8 to get upstairs. What do you do to get upstairs?

9 A Walk up.

10 Q Just walk right up.....

11 A There's -- there's steps going right up.

12 Q Okay. Did you knock on the door?

13 A Sergeant did.

14 Q Okay. Was the door locked?

15 A Nope, it was wide open.

16 Q Okay. Which door was open?

17 A Both of them, out -- outside door and the inside door,

18 they were both wide open.

19 Q Okay. So the first two doors you came to were open, is

20 that right?

21 A Yes. Yes.

22 Q And then you went upstairs?

23 A Yes, or back -- there's only two doors, the door you go

24 in, the arctic entry door and then one -- one door or --

25 yeah, actually, there was three and then you go in,

Page 19

1 there's another door and then steps leading up to the

2 arctic entry and then there's a flip-over door that's

3 closed.

4 Q I've been there so.....

5 A Yeah.

6 Q Okay. But thank you for sharing. So the first two doors

7 are open so then you go up the steps, is that right?

8 A Ye -- yeah, and that -- that one was open also.

9 Q Okay. Now, what was the first thing you noticed when you

10 went inside?

11 A Oh, that all the kids were sleeping and except for a

12 couple of boys were -- I guess they might have gotten

13 woken up when we were going in the residence. I don't

14 know, really.

15 Q Lights on or off?

16 A The lights? They were on.

17 Q What do you do?

18 A Oh, I was with Sergeant Nathan Joseph. He went over to

19 try to wake up Thomas.

20 Q Did you walk alongside of him?

21 A Yes, sir.

22 Q And about how many steps would you say?

23 A Eight. Maybe a dozen steps or more.

24 Q Warm or cold inside?

25 A Oh, it was -- seems like it was kind of -- getting kind

Page 20

1 of cold because someone had left both of the -- all the

2 doors open and it was cold out.

3 Q Okay.

4 A It was getting kind of chilly in there, getting kind of

5 cold in there.

6 Q I think you said it was freezing out maybe in your

7 affidavit, is that right? Well, maybe it wasn't you,

8 maybe someone else. Cold out so it was cold inside?

9 A Yes, sir.

10 Q All right. Would it surprise you to learn that Officer

11 Joseph said it was very hot inside?

12 A Mmm. Okay.

13 Q Would that surprise you to learn that?

14 A It would.

15 Q Do you think he was telling the truth? What would be

16 your opinion of that?

17 A Oh, he could be.

18 Q Okay. So your opinion is that he was telling the truth

19 or not, in your opinion?

20 A Oh, in my opinion, he was telling the truth probably.

21 Q So it was probably very hot inside?

22 A Yeah.

23 Q Now, very cold outside. You said the doors were open.

24 A Yup, all the doors were open.

25 Q And it wouldn't make much sense that it'd be very hot

Page 21

1 inside then, would it, if the doors were all open?

2 A Oh, no.

3 Q Wouldn't make any sense, would it?

4 A No.

5 Q All right. Make more sense if maybe one or two of the

6 doors were closed or the story?

7 A Yes.

8 Q And that's how it would get hot inside?

9 A Yes.

10 Q All right. So you go inside into what Officer Joseph

11 tells us is a warm residence. It's 4:00 in the morning.

12 You see two men asleep. You've woken the kids up by

13 knocking on the door.

14 A Not all the kids, some of them.

15 Q What do you do next? Okay. So what do you do next?

16 A We went over to where Boya was sleeping. Sergeant

17 attempted to wake him up but I -- I also smelled a -- an

18 odor of alcohol in the air and he started getting

19 aggressive so the sergeant said he was going to detain

20 him. I think it was detain him for now and then ...

21 MR. BROWN: I'm a little concerned that the audio

22 may not pick up with the papers. What we may do is we may

23 call my office and just get them to record it there from the

24 phone if that works for everyone. Does that work? I may just

25 call my office, have them put it on speaker and record it

6 (Pages 18 to 21)

digitally. I'm just afraid that the papers and stuff, it may be picking that up rather than his voice and it -- it may not be though. I'm just saying that just to be definitely sure.

MR. INGALDSON: Do you want to go off record and listen to it?

MR. BROWN: Yeah, let's just test it here a little bit. We'll take a break.

(Off record)

MR. BROWN: Okay. Back on record and we just wanted to check the audio. It seems to be working fine. All right.

Q So you had just walked over to Boya laying on the bed and I believe that you said that you were going to try to detain him or that Officer Joseph was. What happens after that?

A Oh, Officer Joseph was going to de -- detain him so we handcuffed him up. He was resisting a little bit but got him handcuffed up. Then we were going to bring him down to the police department, Sergeant Simon and myself, and as we started going toward the arctic -- or not the arctic entry, the main door that -- you know, the door that flaps open to go down the steps, Boya started kicking. He started kicking and then he sat down on the floor, wrapped his legs around a pole and we were trying to pull his legs apart from the pole and then he started kicking some more.

A About six or seven.

Q And how were you walking? Who was in front, who was in back? How were you walking?

A Oh, Sergeant Simon had one -- one side of the arm and I had him on the other side and we were walking and we slipped on the -- I know I slipped on a trash bag that was full of -- I don't know what it was, just whatever was inside of it just took my foot out from under me.

Q So there was just a -- some type of bag on the floor?

A Yes, it was a black -- I know it was a black trash bag that was -- was on the floor.

Q Okay. But nothing else was on the floor?

A I looked down and my foot was....

Q So a black trash bag but nothing else was on the floor?

A Oh, that -- there was a bunch of -- there was some other stuff too. I can't remember what they were though.

Q What?

A The -- the -- the place was a mess.

Q So the lights were on?

A What's that?

Q The lights were on in the place?

A I think they was. I'm not sure.

Q Well, now, you said the place was a mess, is that right?

A Yes, you could see -- you could see stuff laying on the floor.

Q Okay. Now, how did you try to take his legs from the pole?

A Oh, well, I stepped to the side and he was trying to pull his foot apart so they can separate from being wrapped around the pole but each time he tried to take his foot, he just kept kicking, he'd kick out.

Q Mm-hmm. Now, what were you wearing?

A Police uniform.

Q Did you have on a coat?

A Yes.

Q What kind of coat?

A A police coat like the chiefs wear.

Q Did you get kicked or anything by Mr. Olson?

A On -- yes, sir, on the right -- right below my knee on the right side several different times.

Q How did Thomas land when -- Boya -- how did Thomas or Boya land when he fell?

A He was sitting down. In a sitting position.

Q So he stands up at the bed. Is that where he's handcuffed, at the bed?

A Yes.

Q Who handcuffed him?

A Sergeant Joseph.

Q Okay. And from there, he stands and how many steps would you say that he took before you fell?

Q Right. But now, you couldn't see that if it was dark at 4:30 in the morning in the winter, could you?

A Not a chance. No, I don't think so.

Q Now, it says in the police report that Nate and Joseph wrote that a flashlight was used to shine in Boya's face to see if he was awake or asleep and you wouldn't have had to use a flashlight if the light was on, would you?

A No, you wouldn't have to if -- if the -- the light was on.

Q So it could make sense that the lights were off, is that right?

A Oh, that's right.

Q And why wouldn't you turn the lights on?

A What you mean?

Q Why wouldn't you turn on a light if you're going into a place?

A Some places -- some houses you know where the light switches are and some you don't.

Q And if the lights were off, you could not see the people laying on the couch and the bed as soon as you went upstairs either.

A Oh, we seen them. There was -- there was light enough to where you could see who was who.

Q So the lights were on?

A Yes. I think they were on because I recognized Bo --

7 (Pages 22 to 25)

Page 26

Boya and then Yeah, the lights were on in the outside. They were on because I could -- from clean across from where I was with Boya, I could see Ugga struggling with

3 Q You could see who struggling with ?

4 A On the bed, yeah, trying to -- Ugga was trying to pin him down to the bed.

5 Q Okay. But now, that didn't happen for a little while, did it?

6 A What do you mean by that?

7 Q Well, I mean, you -- first you walk in, you see them laying there, is that right?

8 A Yes.

9 Q I'm just trying to get the timing down.

10 A Mm-hmm.

11 Q Okay? And 4:00 in the morning, they're laying there what looks like asleep. You walk over to them, is that right?

12 A Yes, we walked over to Boya.

13 Q Okay. You wake him up, is that right?

14 A Yes.

15 Q You handcuff him, is that right?

16 A Yeah.

17 Q And then you start to escort him out, you on one side, Joseph on the other side, is that right?

18 A No, Simon.

Page 27

1 Q Okay. So Simon's on the other side and then -- where's Joseph during this time?

2 A Oh, he was on the bed with was -- he was struggling with on the bed.

3 Q When did Simon come?

4 A Oh, when the -- when the sergeant called for assistance.

5 Q How long did that take?

6 A Oh, maybe coming around three to five minutes, something like that.

7 Q Okay. Let's back up. Who went over to the bed to wake up Boya?

8 A Sergeant Joseph.

9 Q Okay. Who was there when Boya was handcuffed?

10 A Just me and Sergeant Joseph and

11 Q Okay. And at what point -- so you're walking out with Boya. You're on one side, Joseph's on the other side?

12 A No, Simon.

13 Q Okay. So what's going on while you're waiting for Simon to get there?

14 A The sergeant had -- he was detaining on the -- on the bed and I was watching Boya.

15 Q Just sitting there watching him?

16 A Yeah, just standing there.

17 Q Were you talking to him?

18 A No.

Page 28

1 Q About how long did it take for Simon to get there?

2 A I don't know, like I said, between three to -- three to five minutes, something like that.

3 Q So now there's three officers in the house, is that right?

4 A Yes.

5 Q And Joseph is with

6 A Yes.

7 Qand he's detained him. Is that your belief?

8 A Yes.

9 Q And you have Boya on one shoulder and Simon has Boya on the other shoulder, is that right?

10 A Yes.

11 Q And you're walking out with him, is that right?

12 A We were -- we -- we were walking out with him.....

13 Q Okay.

14 Aand then he starts.....

15 Q And the lights are on?

16 A Yes.

17 Q And you slip on a trash bag or something on the floor, is that right?

18 A Yes.

19 Q Okay. And when you slip, who falls to the ground?

20 A Oh, both of us. All of us. In fact, I think all of us went down. Yeah, we all went down and he went -- he came

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1 down on a sitting position.

2 Q Okay. So all three of you fell. Do you think that you fell first because of the trash bag or who do you think fell first?

3 A I don't know, it's hard to tell. Everybody was going down.

4 Q Everybody went down?

5 A Yeah.

6 Q Yeah. All right. So you now have three off -- three people on the floor, the two officers and Boya. Now, Boya was handcuffed now, is that right?

7 A Yes.

8 Q His hands are behind his back?

9 A Yes.

10 Q Anything keep you from standing up?

11 A No, we were -- we were going to -- we were trying to stand back up and bring him back out -- bring him to the police department after we.....

12 Q So you stand up?

13 A Yes, and we were trying to get -- and he starts -- he starts kicking -- starts kicking and he kicked me several times on the leg and then I observed him to have bitten Simon several times on the jacket with his teeth.

14 Q So bit the jacket, not Simon?

15 A I don't know if he got to -- to the meat or not, he was

8 (Pages 26 to 29)

biting down.

Q Who stood up first, you or Simon?

A What's that?

Q Who stood up first, you or Simon?

A About all at the same time.

Q But now, you were there and you were actually watching him bite a jacket? Now, where were you....

A All getting up.

Q I mean -- and what view did you have? Were you above that or below that?

A Oh, I was just going -- getting up when I seen it.

Q Okay. So what were you looking at when you stood up?

A I was watching his feet because I didn't want to get kicked anymore.

Q Were you watching his feet or his mouth?

A His feet.

Q Okay. But I thought you just said that you were looking at his mouth.

A No.

Q Which were you looking at?

A I was looking at his feet because I didn't want to get kicked anymore.

Q So you didn't see him bite Simon's jacket.

A I did on my right as I was getting up, yes.

Q Okay. All right. So you stand up. So Simon's still

1 would they have said okay, well, if somebody's doing that, you just better leave?

2 A No.

3 Q Would they have said you better shoot them?

4 A No.

5 Q What would they have said?

6 A Well, we -- we could have peppered him but we couldn't pepper him then -- though because there was kids in the house and a baby.

7 Q But in -- so in the police training you took years ago, what would they have said to do?

8 A I don't know.

9 Q You don't know?

10 A Oh, I can't remember.

11 Q So if there would have been another officer there without their taser, if all two -- the other two officers showed up without their taser, what would you have done?

12 A What would I have done?

13 Q Yeah.

14 A I had no -- like I told you, I didn't have a taser.

15 Q I know you didn't but the other officers did but if no one would have had one, what would you have done?

16 A What would I have done? Well, I would have tried to pin him to the floor so he -- pin his feet to the floor so he can -- wouldn't kick anymore.

1 down then or is he standing up?

2 A No, he got up too.

3 Q All right. Boya's still on the floor?

4 A Yes. He wraps his legs around the pole. He had his legs wrapped around the pole.

5 Q Okay. Now, on that police training that you had years ago, not the taser training, not any training you've had since then, nothing that Hoelscher's told you but in the training you had years ago, what do they tell you to do if somebody did something like that?

6 A They didn't tell us what to do.

7 Q They didn't tell you what to do?

8 A No.

9 Q If somebody was resisting arrest, they didn't tell you what to do?

10 A Well, to use a -- to use some force to try to get them to stop resisting.

11 Q What kind of force were you supposed to use?

12 A What do you mean by that?

13 Q Well, what were you taught back in that police training you went to years ago?

14 A Well, there was nothing we could do, any kind of force we could use, because he was kicking. Every time we tried to get close to him, he started kicking some more.

15 Q But now, in that police training you took years ago,

1 Q Okay. All right. Now, instead of pinning his feet to the floor so he wouldn't kick anymore, what did you see happen when an officer -- well, what did you see happen?

2 A At what point?

3 Q Well, you're standing up now.

4 A Okay.

5 Q Okay? And -- right, you stood up, Simon stood up and Boya's on the floor, is that right?

6 A Yes.

7 Q Okay. And what do you see happen?

8 A Well, he was kicking and -- like I told you, he was kicking away, trying to kick away and then....

9 Q On the floor?

10 A Yes.

11 Q Okay.

12 A He was kicking Sergeant Simon and myself while he was on the floor while we were trying to get him up to bring him to the PD and then I -- and then Sergeant Joseph tased him.

13 Q Okay. Joseph tased him? Now, Joseph -- so Joseph walks over from ' so....

14 A No, he's -- he was holding -- he was wrestling with on the bed trying to hold ' down and he -- he just aimed and -- not aimed and shot but point and shot.

15 Q So he's wrestling with another arrestee....

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1 A Yes, he was wrestling with....
 2 Qor another defendant and while he's doing that, he
 3 takes his taser out and aims it at someone else and
 4 shoots, is that right?
 5 A Yeah. Well, he knew who he was shooting. He -- he knew
 6 who he was tasing.
 7 Q Is that something you were taught by -- is that something
 8 Officer Hoelscher taught you to do?
 9 A What's that?
 10 Q To -- if you're in the middle of a wrestling match with
 11 one defendant, take out your taser and aim it at someone
 12 else?
 13 MR. INGALDSON: Object to the form of it.
 14 A Well, we were being assaulted.
 15 Q Okay. Was Officer Joseph being assaulted?
 16 A No, he was trying -- like I told you, he was trying to
 17 hold down
 18 Q Okay. And was there any reason -- just a second here.
 19 (Pause) Now, would it surprise you -- I know it's been
 20 some time but would it surprise you to learn that Officer
 21 Joseph wrote in his report that he heard Corporal Simon's
 22 taser go off first?
 23 A I don't know.
 24 Q Would that surprise you to hear that?
 25 A No.

Page 35

1 Q Okay. So is it possible that Simon actually tased Boya
 2 first?
 3 A I don't know, it could be.
 4 Q All right. Now, what do you know about tasers? If they
 5 make a noise, what does that mean?
 6 A Well, it depends on what type of noise they make.
 7 Q Okay. Did you ever -- what did -- what's that slogan,
 8 something like silence is golden or something like that?
 9 Tell me about that.
 10 A What do you mean by that?
 11 Q Well, as far as your training, actually, that your
 12 attorneys gave me that you learned so I was just asking
 13 you about that. I'll give it to you here. Well, just a
 14 second. Silence is Golden. Do you ever remember seeing
 15 this document? I'll give it to you.
 16 MR. INGALDSON: Sean, do you mind just identifying
 17 what it is?
 18 MR. BROWN: Yeah, I will. Yeah.
 19 Q I'm looking at exhibit F of defendant's motion for
 20 summary judgment. I'll mark this deposition exhibit I.
 21 A Okay.
 22 Q It should be A but dep -- deposition exhibit A. All
 23 right. Silence is Golden. Do you ever remember seeing
 24 this document?
 25 A Mmm.

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1 Q Or seeing that title?
 2 A Probably in my -- the training book.
 3 Q Okay.
 4 A Booklet.
 5 Q You forgot part of that.
 6 A Yes.
 7 Q Okay. Is it fair to say that you may have forgot some of
 8 the things you've learned in that training course?
 9 A Yes, I forgot some of it.
 10 Q All right. It says here if the subject is not reacting,
 11 the energy is most likely shorting out and may not be
 12 effective. Does that sound like something you've learned
 13 before?
 14 A Yes. On the tasers, yes.
 15 Q All right. So if you shot a taser at someone or if
 16 someone shot a taser at someone and that person yelled is
 17 that all you've got, bitch, or it feels like a vibrator,
 18 probably the connection was not made, is that correct?
 19 A That's true.
 20 Q All right. Because you would expect more of a reaction
 21 if a person was actually hit with a taser, is that right?
 22 A Yes.
 23 Q Okay. We've got a lot of documents here. I'm sorry.
 24 A Well, okay.
 25 Q Your attorneys are doing a good job. They gave a lot of

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1 documents to us. Now, so he -- his feet are wrapped
 2 around the pole and you say he's kicking and I -- help me
 3 understand how that is if someone's feet are around a
 4 pole, they're also kicking. Just tell me how they
 5 were....
 6 A Well, see, they were out like this. He would pull them
 7 apart and start kicking.
 8 Q And why didn't you just back up?
 9 A We did -- we did several times.
 10 Q Now, he....
 11 A But how else are we going to get him out of the building
 12 if we -- we keep -- let him keep his feet wrapped around
 13 the....
 14 Q And were his -- his hands were handcuffed the whole time?
 15 A Yes.
 16 Q And behind his back or in front of him?
 17 A Behind his back.
 18 Q Okay. And he was laying on the floor, hands behind his
 19 back?
 20 A Not laying, he was sitting for awhile.
 21 Q Okay.
 22 A Most -- most of the time he was sitting.
 23 Q All right. How -- so if a person's sitting, they really
 24 can't kick to the side, can they? They just kick
 25 straight up if they're sitting down, is that right?

1 A Oh, I think they -- when he pulled apart, he can kick
 2 this way, he can kick upwards and -- when he pulled his
 3 feet apart.
 4 Q Why did you not walk behind him?
 5 A Because I was already in front of him.
 6 Q Well, I -- I've been in the house and I know you have too
 7 but there was nothing preventing you from just walking
 8 behind him and (indiscernible - simultaneous speaking).
 9 A Yeah, but this is -- we were almost right up against the
 10 -- you seen the flap of the arctic entry?
 11 Q Mm-hmm.
 12 A Well, we was almost right up against that thing and -- to
 13 go down.
 14 Q All three of you?
 15 A No, just two of us and Thomas.
 16 Q All right. And -- but the pole's on the other side.
 17 A No, it's -- it's -- you go right up the steps in and
 18 right across from there, there's the pole as you went.
 19 Q But if his feet were around the pole, his back would have
 20 been toward the stair.
 21 A Yes.
 22 Q So his back was to you?
 23 A Yes. No, I was in front of him, see? I was in front
 24 down the -- the other side.
 25 Q Oh, I thought you said you both were behind him by the

1 Q Okay.
 2 A There's -- there -- there is a wall over here -- a wall
 3 over here.
 4 Q Right. Draw the wall then.
 5 A Okay. The wall's right here.
 6 Q Okay. And how was he sitting?
 7 A He was sitting facing the -- more like this way toward
 8 me.
 9 Q Oh, okay. But his legs were around the pole?
 10 A His back was toward -- his back was toward the door.
 11 Q Back was toward the door. Okay. Why didn't you all just
 12 walk around behind him and pick him up?
 13 A Because, like I told you, he kept kicking every time we
 14 moved.
 15 Q Okay. But his legs are wrapped....
 16 A He would move it -- he would unwrap his legs from the
 17 pole and move and start kicking. Every time we'd try to
 18 stand him up, he would do the same thing.
 19 Q But there's plenty of room in there that you could have
 20 moved around without being kicked?
 21 A No, there isn't that much room.
 22 Q Could you have walked over to the left?
 23 A I could have but that would -- that would have been way
 24 away from Boya.
 25 Q But his legs were around the pole and he was handcuffed,

1 stair.
 2 A No. See, he -- Simon was on one side and I was on the
 3 other side and when -- as you look at it that way, I was
 4 on the front side.
 5 Q Okay. Now, it just seems like your story's changing a
 6 little bit. I just want to be sure we're clear on it.
 7 Just a moment ago, you said that both officers were on
 8 the side of the stair. Is that what you just said?
 9 A No, I didn't say on the side of the stairs.
 10 Q Okay. I said all three of you and you said no, two of us
 11 were over where the little door flaps up.
 12 A Oh, okay.
 13 Q Is that right?
 14 A No, he wa -- Sergeant Simons was on this one side and I
 15 was on his other side.
 16 Q And let's draw that out. Draw where the stairs come up.
 17 A Okay. Here's where the stairs go up. You go up and
 18 there is a flapping door and over toward this way,
 19 there's a pole where he kept -- Simons was on this side
 20 and I was on this side and he kept wrapping his legs
 21 around this pole.
 22 Q Okay. What's this?
 23 A This is the space between here and the....
 24 Q Right, but that's not a wall.
 25 A No.

1 right?
 2 A Yes.
 3 Q So you could have circled around behind him?
 4 A No, I -- I couldn't have. I would have to step over
 5 somebody.
 6 Q Who would you have had to step over?
 7 A Either Boya or I'd have to go around Simon.
 8 Q But I thought he was sitting here with his back to this.
 9 A Yeah, but there's not enough -- there was not enough room
 10 in here to go around him.
 11 Q Could you have come to the side of him?
 12 A What do you mean by that?
 13 Q Could you have walked over and picked him up from the
 14 side?
 15 A Yeah, but he -- he was kicking.
 16 Q Okay. So now, when the first taser was deployed from
 17 Officer Joseph -- you believe it was Officer Joseph --
 18 where was he sitting here?
 19 A Okay. He was over here, somewhere around this bed here
 20 where -- where he was wrestling with .
 21 Q Okay. I thought . was on the couch.
 22 A Yeah. Well, it's a couch, yeah. Well, it was a couch,
 23 yeah. It was -- he was over in this area anyway. He was
 24 -- he was wrest -- wrestling with , trying to hold
 25 down.

Page 42

1 Q What's over here?
 2 A What's over here?
 3 Q I'm looking at....
 4 A Okay. There's more bunk -- there was more bunk beds.
 5 Q I'm marking that area with an A, what's over here.
 6 A Bunk beds. There was more bunk beds.
 7 Q Bunk beds?
 8 A Yes, bunk beds.
 9 Q Is that where Thomas was laying when you first went in?
 10 A Yes.
 11 Q Okay. And where are you standing there of those three
 12 dots you have there? Put the one that's you. Put a --
 13 an O on it.
 14 A Okay. What -- what period are you talking about?
 15 Q Right there when you drew that.
 16 A When I drew this? Well, I -- like I told you, I was over
 17 here.
 18 Q Okay. Put an O by that so we know. Okay. And who is to
 19 your right?
 20 A Sergeant Simon.
 21 Q Okay. Put an S there. And Boya is where?
 22 A Boya is right here.
 23 Q Legs where?
 24 A Wrapped around the pole.
 25 Q Sitting up?

Page 43

1 A Sitting up.
 2 Q Now, from there, he definitely couldn't kick you, could
 3 he?
 4 A Why wouldn't there. I'm -- I'm out of range at the
 5 time.....
 6 Q Oh.
 7 Abecause I was getting tired of getting kicked on my
 8 knee -- below my knee, either.
 9 Q And where were you standing when that was happening?
 10 A I was trying to -- we were trying to stand him up. We
 11 were both up close and then trying to stand him up
 12 and.....
 13 Q Okay. So you got some kicks on your knee?
 14 A Yes, sir.
 15 Q All right. And Simon got kicked where?
 16 A I don't know, I have no idea because the -- I was trying
 17 to keep from being kicked at the same time. I couldn't
 18 watch Simon -- Simon and try to -- he kept on being
 19 kicked. But I know he was being kicked.
 20 Q So as you got kicked on the shin or leg or knee or
 21 whatever, you back up a couple steps? Is that what you
 22 do?
 23 A Yes, I did.
 24 Q Okay. All right. Are you ever on the floor anymore
 25 other than that one time?

Page 44

1 A No.
 2 Q Okay. All right. How far do you think Officer Joseph
 3 was when he deployed that taser on Boya?
 4 A Well, about the length from this door maybe a little bit
 5 longer to where you're sitting.
 6 Q All right. Okay. So the first taser goes off. How many
 7 times do you think that Simon deployed his taser or a dry
 8 stun, in your estimate?
 9 A Either four or five times.
 10 Q And what about Joseph?
 11 A I have no idea, I wasn't paying attention to him, I
 12 was....
 13 Q All right. Now, what have you learned about from -- you
 14 said Chief Hoelscher trained you, is that right?
 15 A Yes.
 16 Q And what have you learned about the use of a taser? So
 17 this is about 12 times total, is that right?
 18 A What's that?
 19 Q How many times did you say Joseph did it?
 20 A I have no idea.
 21 Q Tasered? About how many times, in your estimate?
 22 A I have no idea how many times he....
 23 Q More than once?
 24 A Oh, most likely it was more than once.
 25 Q Okay. And then Simon about how many?

Page 45

1 A Maybe four or five.
 2 Q Okay. So we've at least got six or seven there, is that
 3 right?
 4 A Yes.
 5 Q Now, in the training you took from Chief Hoelscher, when
 6 was that?
 7 A Maybe three or four -- three -- maybe three years ago,
 8 something around there.
 9 Q So when you're standing there watching these two men, you
 10 -- now, you have seniority over them. I don't know that
 11 in rank wise but you've been there longer than these two
 12 men, haven't you?
 13 A More -- yes.
 14 Q Okay. So you've been there several years. You've had
 15 the academy training, is that right?
 16 A Police academy.
 17 Q Right, and you've also had training on the taser, is that
 18 right?
 19 A Yes.
 20 Q Okay. Now, you said earlier you do not remember the
 21 restricted uses of the advanced taser, is that right?
 22 A Yes.
 23 Q Okay. I want to remind you of some of those. Okay?
 24 A Okay.
 25 Q And this may help out the other guys too who are in here

12 (Pages 42 to 45)

but all right. 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 a substantial physical struggle that could result in injury to themselves or another person including the deploying officer. Do you remember reading that?

8 A Yes.

9 Q Okay. Now, is that what you were trained?

10 A Yes.

11 Q But you didn't remember it on that night, is that right?

12 A Oh.....

13 MR. INGALDSON: Object to the form.

14 Q You can still answer.

15 A I remembered it -- I remembered it that -- that night but I -- like I told you, I didn't have a taser so I -- I wasn't thinking but if I did have a taser, I most likely would have tased him because he was kicking, kicking, kicking us so much.

20 Q So you would have probably tased him too?

21 A If I had a taser.

22 Q So that would have added -- if there was 12, then you would have added some more, is that right?

24 MR. WIDMER: Objection.

25 MR. INGALDSON: Object to the form.

1 so -- 10 minutes. Let's put in another tape. This will be the end of this tape and we will put in another one now.

3 (Off record)

4 Q All right. Understand you are still under oath.

5 A Yes.

6 Q Okay. All right. We just had a short break. We return now. We are back on record and we were talking and we put in a new tape which is why we had to take the break.

9 So we were talking a little bit about what was going on that night. How do you finally get Boya on his feet?

11 A He finally decided he would come along.

12 Q Okay.

13 A He.....

14 Q Go on.

15 A He decided he -- he said I give up, I give up, I give up, I'll come along, I'll come on so he came along.

17 Q All right. Now, in that academy training you had year ago, what were some of the techniques that you would have used? I know that you said you would hold their legs down, restrain their legs. What were some of the other techniques besides that that you would have used?

22 A Oh, if he wasn't kicking, I would have tried to stay still, you know?

24 Q Okay. All right. Now, let me have here just a second. Officer Joseph had admitted to deploying the taser about

1 Q If there had have been 12 tasers, you would have tased him more, is that right?

3 MR. INGALDSON: Object to the form.

4 A Oh, no, not -- not if he was -- he was already tased so I didn't -- I didn't have -- have to but I -- I most likely would have tased him if I had one when I -- we first got there because the sergeant was wrestling trying to detain and I most likely would have tased him.....

9 Q Okay.

10 Awhile he was kicking us.

11 Q Did you do anything to stop either one of those guys from tasing Thomas multiple times?

13 A No, it just happened so fast.

14 Q How fast?

15 A It was real fast because he was kicking, next thing he was kicking -- he was kicking us and then we went down and.....

18 Q Now, your attorneys say that it took -- you had five minutes. That's not very fast. Five minutes is a long time.

21 A Yes.

22 MR. INGALDSON: Object to the form.

23 Q Is that right?

24 A (No audible response).

MR. BROWN: See how I'm doing on recording time here

1 five times and also Charles Simon has admitted to deploying the taser dry -- and drive stunning him.

3 A Okay.

4 Q Now, in that training that Hoelscher gave you, what are the common effects of being tasered?

6 A Oh, being tased? It sort of like freezes you up and then you can't leave.

8 Q Okay. That's one. What else? There's one, two, three, four, five, six, seven, eight, nine on the sheet that he learned.

11 A Okay.

12 MR. INGALDSON: Object to the form.

13 Q Do you have anything else that you can think of or just that one?

15 A Just that one.

16 Q Okay. Do you have any memory that a person may yell or scream when tased?

18 A Yes, some of them ye -- have a tendency to yell.

19 Q And Thomas yelled and screamed when he was tasered, right?

21 A Yes. He was yelling, yes.

22 Q Okay. So that's actually an effect of the taser, is that right?

24 MR. WIDMER: Objection, it's conclusory.

25 MR. INGALDSON: Object to the form, foundation.

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MR. BROWN: Okay.

1 Q The -- you can still answer. Yelling and screaming, you
 2 learned that yelling and screaming is a common effect of
 3 the taser, is that right?
 4 A Yes.
 5 Q And Boya yelled?
 6 A Not at first though. A little bit later on, he was
 7 yelling.....
 8 Q Because at first.....
 9 Areally loud.
 10 Q Right. When the taser actually made contact, that's when
 11 he was yelling, is that right?
 12 MR. INGALDSON: Object to the form.
 13 A No, he was still resisting.
 14 Q Did he yell?
 15 A Not that I could hear him.
 16 Q You didn't hear him yell?
 17 A No. No.
 18 Q Would it surprise you that Officer Joseph says that he
 19 was yelling so much at first that it woke Peter up in the
 20 police report? Would that surprise you?
 21 A It wouldn't surprise me.
 22 Q It also causes involuntary muscle contractions. Did you
 23 learn that?
 24 A Yes.

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1 Q So it could have caused kicking.
 2 MR. INGALDSON: Object to the form, foundation.
 3 A No, he was -- he was kicking when the taser was not going
 4 off.
 5 Q What is a muscle contraction?
 6 A Muscle contraction? It's when a muscle tightens up sort
 7 of.
 8 Q And then does it release?
 9 A Yes.
 10 Q And what can happen then? What did you learn?
 11 A That it can function again.
 12 Q But what did you learn about the muscle contraction?
 13 What should you expect could happen to a person?
 14 A What do you mean by that?
 15 Q Well, the involuntary muscle contractions, what does that
 16 mean?
 17 A What does -- does this have to do with Thomas?
 18 Q Well, it has to do with your training, see?
 19 A Oh, okay.
 20 Q Okay?
 21 A All right.
 22 Q And this is your training. I'm just going down the list.
 23 I'm sorry if I wasn't clear.
 24 A Okay.
 25 Q So I'm going down, harm and effects of EMD. This is the

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1 taser training here. I'll mark this exhibit....
 2 A Okay.
 3 QB. It says subject can fall immediately to the
 4 ground.....
 5 A Yes.
 6 Qyell or scream, right?
 7 A Yes.
 8 Q And it also says involuntary muscle contractions. I want
 9 to know what that means to you.
 10 A Oh, that his muscles stopped working.
 11 Q Subject may freeze in place with legs locked. Right? Is
 12 that what that says?
 13 A Yes.
 14 Q Subject may feel dazed and could you read the rest of
 15 that?
 16 A Potential pre.....
 17 Q Oh, I'm sorry, just read the rest of this one.
 18 A Oh, subject may feel dazed or several seconds -- for
 19 several seconds or minutes.
 20 Q So several minutes.
 21 A Could be, yes.
 22 Q Okay. And did you wait -- did you tell the officers to
 23 wait several minutes before deploying more tasers?
 24 A No.
 25 Q You just -- and you yourself said that you would have

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1 tased him too, right?
 2 A Most likely if I had -- I have a taser.
 3 Q Okay. And then so even though that you learned that he
 4 may feel dazed for several minutes -- right, you learned
 5 that?
 6 A Yes.
 7 Q Okay. And who taught you that?
 8 A At the training.
 9 Q Okay. Was that Chief Hoelscher?
 10 A Yes, sir.
 11 Q So Chief Hoelscher taught you this -- the things on the
 12 sheet, is that right?
 13 A Yes. Yes.
 14 Q Okay. Read the next one to me.
 15 A Which one are you talking about?
 16 Q The right under that, potential.....
 17 A Right under potential?
 18 Q Yes.
 19 A Temporary -- temporary and sensory.....
 20 Q I'm sorry, right above that. I'm sorry, I was wrong.
 21 A Potential vertigo.
 22 Q Okay. What does that mean to you?
 23 A I don't know.
 24 Q Okay. All right. So you're not sure of what that means.
 25 A Yes.

Q Did Chief Hoelscher ever tell you in training what that means?
 3 A He might have.
 4 Q Okay. But you don't remember it?
 5 A No.
 6 Q Okay. Do you still carry a taser now?
 7 A Yes.
 8 Q Okay. Do you think you may need a refresher course?
 9 A Oh, we -- we do get refreshing courses.
 10 Q When was the last time you had one?
 11 A Last year or I think it was last year.
 12 Q Did you go over this sheet?
 13 A I don't really remember.
 14 Q Do you think you may need more training about what that means?
 15
 16 A Oh, I'm not very good at spelling or in that words.
 17 Q And I'm not trying to make it difficult for you or hold you out here, I just want to make sure you're getting the training that you need. I'm not trying to put you on the spot but do you think that you could benefit from knowing what this word means?
 21
 22 A Most likely.
 23 Q Okay. All right. And then what's the next -- read the next ones.
 24
 25 A Temporary tingling sensation.

1 MR. INGALDSON: Same objection.
 2 MR. OLSON: Yeah, that should be good.
 3 Q Are you familiar with the Hooper Bay Police Department general orders affecting the use of force?
 4
 5 A Yes.
 6 Q Are you as an officer responsible for knowing the information within this document?
 7
 8 A Yes, sir.
 9 Q Is your belief that all officers are responsible for knowing the information within this document?
 10
 11 A Yes, sir.
 12 Q And this information was taught to you by who?
 13 A Instructors and Chief Hoelscher.
 14 Q Okay. So you've said that you smelled alcohol in the house, is that right?
 15
 16 A Yes.
 17 Q And now, some of these officers say there was slime on the floor. Have you -- did you see any slime on the floor?
 18
 19
 20 A What you mean by slime?
 21 Q I have no idea. That's what they say. I'm going to ask them what it is. I don't know what it is.
 22
 23 A Well, I know the floor was click. I didn't pay attention much to the floor.
 24
 25 Q So there could have been something flammable on the

1 Q Okay. And the next one?
 2 A May experience critical stress, amnesia, may not remember anything.
 3
 4 Q Okay. Now, are you responsible for knowing that information?
 5
 6 A Yes.
 7 Q Are all of these officers responsible for knowing that information?
 8
 9 A Yes.
 10 MR. INGALDSON: Object to the form, foundation.
 11 Q And when I'm talking about that information, I'm talking about the information from the training manual, The Common Effects of EMD, here on exhibit B. Do you understand that?
 12
 13
 14
 15 A Yes.
 16 Q Okay. Now, going back to exhibit A which was Silence is Golden, are all officers responsible for knowing this information?
 17
 18
 19 MR. INGALDSON: Object to the form, foundation.
 20 Q And what I'm talking about is are all officers responsible for knowing the information....
 21
 22 A Yes.
 23 Qthat's written on the Silence is Golden sheet on exhibit A?
 24
 25 A Yes. Yes.

1 floor, for all you know?
 2 A Could have -- could have been.
 3 Q Okay. Now, what does the use of force say about deploying the taser when there's something flammable in the area? Is there anything about that?
 4
 5
 6 A Oh, deploy -- deploying a fla -- a taser when there's something flammable on the floor?
 7
 8 Q Mm-hmm.
 9 A It could -- could start a fire....
 10 Q Okay.
 11 AI guess.
 12 Q And you didn't know what was on the floor that night?
 13 A No.
 14 MR. BROWN: I'm going to mark the Hooper Bay Police Department Use of Force as exhibit C.
 15
 16 Q Now, all of the charges against Thomas in this case were dismissed, is that right?
 17
 18 A I have no idea. I never paid attention to it.
 19 Q Do you ever get upset when charges against someone get dismissed?
 20
 21 A No.
 22 Q Have you looked at the photographs of Thomas that were taken?
 23
 24 A No.
 25 Q These are photographs that were produced by the police

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department....

1 A Mm-hmm.

2 Qand one of your attorneys along the way. All right?

3 A No.

4 Q And I am -- you have them? All right. These were the

5 photographs attached to the police report. All right?

6 Is that how Thomas looked when he was arrested?

7 A Thomas? Yes.

8 Q Are these the burn marks from the taser?

9 MR. INGALDSON: Object to the form, foundation.

10 A I have no idea, I didn't look at it. I don't know if

11 this one being presented of Thomas.

12 Q Did you look -- you didn't look at him when they brought

13 him in?

14 A He -- he didn't have his shirt off at the time.

15 Q Okay. So you didn't examine him then?

16 A No.

17 Q All right. Who would have taken these photographs?

18 A I have no idea.

19 Q All right. Can you identify the person in that

20 photograph with Thomas?

21 A Sergeant Simon.

22 Q Okay.

23 MR. BROWN: All right. And we'll put this over.

24 Q Before -- talking about just before this incident

25 happened, just the time period before this incident

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1 happened -- okay? You with me?

2 A Yes.

3 Q What can you tell me in any detail what Mr. Olson's,

4 Thomas Boya -- we call him several things here -- what

5 his criminal history is?

6 A What do you mean by that?

7 Q Do you -- are you aware of any of his criminal history?

8 Can you tell me anything about it? If you can't, that's

9 fine.

10 A No, just his -- only one that I know of, that's when I

11 had him on disorderly conduct.

12 Q Was that before or after this?

13 A Before.

14 Q Okay. Who is Ulrich Simon?

15 A He's a lieutenant on the back side.

16 Q All right. Did you handcuff Mr. Olson or did someone

17 else?

18 A No, I didn't cuff him.

19 Q Have you been tased yourself?

20 A Yes.

21 Q As part of your training?

22 A Yes.

23 Q Have you ever seen one of those -- they're called static

24 balls, I believe, is what your attorneys call them. It's

25 something the kids put their hands on to feel the static

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1 going into their hands and it makes the hair stand up on

2 their heads. Have you ever seen that?

3 A No.

4 Q Okay. Your attorneys just talk about it in their summary

5 judgment motion and I was just wanting to ask you about

6 it.

7 A Oh, okay.

8 MR. BROWN: And I believe that's all I have, Mr.

9 Widmer.

10 MR. WIDMER: I have just a few questions for you,

11 Officer Oaks.

12

13 EXAMINATION

14 BY MR. WIDMER:

15 Q You stated kind of a number of times about this but did

16 you use a taser the night when Boya was arrested?

17 A No.

18 Q Okay.

19 A I didn't know it.

20 Q You did -- you didn't carry a taser with you?

21 A No, we were -- they were just first issued in -- of --

22 and just some of the police officers had tasers at the

23 time and I didn't have one.

24 Q Okay. And one of the questions that Mr. Brown posed to

25 you were some other things you might have been able to do

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1 to subdue Mr. Olson.

2 A It was....

3 Q One of the things that he mentioned is he could have

4 tried to pin his legs to the ground. Do you remember him

5 asking those questions?

6 A Yes, we -- we made attempts but then he was -- he just

7 kept kicking.

8 Q Okay. And if you had continued to try to pin his legs to

9 the ground, do you think it might have been possible you

10 would have been kicked more?

11 A Yes.

12 Q Another question that I have -- we'll go back to what's

13 been marked as exhibit B and Mr. Brown asked you some

14 questions about some of the words into that and do you

15 remember reading this entry here where it says subject

16 may feel dazed for several seconds or minutes?

17 A Yes.

18 Q What do you understand dazed to mean?

19 A Dazed?

20 Q Mm-hmm.

21 A Is like they're motionless.

22 Q Like they're what?

23 A Is like they're motionless or not moving.

24 Q They're motionless? Is that what you said?

25 A Yeah, not moving anymore possibly, not mov -- no body

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function.

1 Q So have you ever been at a position in your life where

2 you felt dazed?

3

4 A When I got tased. Okay?

5 Q Okay.

6 A I couldn't function.

7 Q Were you able -- so you weren't able to kick when you

8 felt dazed?

9 A No.

10 Q Do you think that....

11 A I -- I was able to kick after it wore off though, you

12 see?

13 Q Okay.

14 A After the effect.

15 Q So while you were feeling the effects of being dazed, it

16 wasn't -- you don't believe it was possible for you to do

17 any kicking?

18 A Some -- some -- some people do kick, you know,

19 they're....

20 Q While they're dazed?

21 A Yes.

22 Q Okay.

23 MR. WIDMER: That's -- I don't have any questions.

24 MR. INGALDSON: I have just a couple questions for

25 you.

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EXAMINATION

1 BY MR. INGALDSON:

2 Q When Mr. Olson was on the floor and you said he was

3 grabbing the pole with his legs, remember that?

4

5 A Yes.

6 Q And he was kicking at you, right?

7 A Yes.

8 Q And in exhibit C, page 2-6 of that exhibit, it talks

9 about, first of all, reasons -- or uses of the taser. It

10 talks about -- and I'll let you read this but it talks

11 about if people are being tased, that you shouldn't tase

12 someone if they're restrained unless certain things

13 happened and, in fact, Mr. Olson had handcuffs on,

14 correct?

15 A Yes.

16 Q And one of the things it says is that you shouldn't

17 unless there's a substantial physical struggle that could

18 result in injury to either the person being restrained or

19 to any other person including the officers. Remember

20 that section?

21 A Yes. Yeah, I remember that.

22 Q And if the handcuffs didn't prevent, obviously, Mr. Olson

23 from kicking you, right?

24 A That's right.

25 Q And he kicked. How does that feel? Does it

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1 typically....

2 A Oh, it hurts. I got kicked on my knee several times and

3 below the knee and it hurts.

4 Q Now, there's a suggestion that well, geez, you could have

5 just gotten around behind him and dragged him out of

6 there. Do you remember that question of Mr. Brown?

7 A Yes.

8 Q When you tried to just drag Mr. Olson, how do you drag

9 him when he's wrapping his feet around a pole?

10 A He unwrapped his foot and then you say -- you say get

11 around him and try to detain him and, as we were trying

12 to detain him, he just -- he just kept -- like I told

13 you, he was sitting up and he kept turning, turning his

14 body, you know, each time we tried to get around him to

15 detain him.

16 Q And was he grabbing the pole with his legs?

17 A At times, he would wrap his legs -- when we tried to

18 stand him up, he'd wrap his legs back around the pole.

19 Q To keep you from pulling him away from there?

20 A Yes, sir.

21 Q Now, they also have in that same exhibit C a section on

22 page -- well, maybe this is section 2.6.2 that says

23 compliance techniques and it says the taser or OC weapons

24 -- OC is the pepper spray, right?

25 A Yes, sir.

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1 Q Taser or OC weapons are generally the first non-lethal

2 weapons used in the continuum. Is that what you're

3 taught, that when people are resisting, the first thing

4 you should try of a non-lethal weapon would be either the

5 taser or the OC?

6 A Yes, sir.

7 Q And it goes on to say you could also use certain arm

8 controls or restraint tactics, arm bar take-downs, wrist

9 locks and even impact weapons. Do you see that?

10 A Yes.

11 Q Now, I guess instead of using the taser, would it be fair

12 to say you could have taken your baton out and started

13 whacking Mr. Olson on the head?

14 A No, sir. No, sir.

15 Q I mean, that was possible to do. You had a baton, right?

16 A Yes, sir, but we were taught that baton is the last

17 resort -- oh, unless we were getting seriously injured or

18 somebody was getting seriously injured.

19 Q And a baton....

20 A It's the last resort.

21 Q A baton, if you hit someone with a baton, that's not

22 going to end his -- after the hit, they're going to

23 continue feeling that pain probably, right?

24 A Yes, sir.

25 Q And you might cause serious injury to the person.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
SECOND JUDICIAL DISTRICT AT KOTZEBUE

NICKOLAS PAGE,

Plaintiff,

vs.

CITY OF KOTZEBUE and
NORMAN HUGHES

Defendants.

Filed in the Trial Courts
STATE OF ALASKA, SECOND DISTRICT
at NOME

JAN 18 2008

By _____ Deputy

Case No. 2KB-07-76 CI

**MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY
FOR SGT. NORMAN HUGHES AND THE CITY OF KOTZEBUE**

Come now the Defendants and move this Court for an Order granting the Defendants Summary Judgment on all of the Plaintiff's claims on the grounds that the Officer in this matter has qualified immunity for his arrest of Plaintiff on September 17, 2006 and, as a result, there is no liability for the City of Kotzebue.

Dated this 16th day of January, 2008.

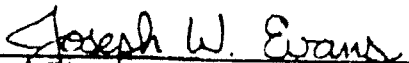

Joseph W. Evans, ABA #7610089
Attorney for Defendants Sgt. Norman Hughes
and the City of Kotzebue

Exhibit N

Exc. 297

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
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JAN 18 2008

BY _____ Deputy

Case No. 2KB-07-76 CI

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Introduction

Sgt. Norman Hughes is entitled to qualified immunity in this matter and, as a result, the City of Kotzebue is also entitled to be dismissed from this matter. Hence, the claims against the City of Kotzebue and Sgt. Norman Hughes should be dismissed with prejudice.

Facts¹

Sgt. Hughes, the individual defendant in this matter, and Nickolas Page, the plaintiff in this matter, had contact with one another on June 2, 2005, in the early-morning hours, when Sgt. Hughes and KPD Officer Trae Bower, were dispatched to Building on

¹ This statement of facts is taken from the Deposition of Sgt. Norman Hughes attached hereto as Exhibit "A," the Use of Force Report of Sgt. Hughes and Maniilaq Health Center record, attached hereto as Exhibit "B," and the Criminal Complaint, Indictment and Information in Case 2KB-05-318 CR, attached hereto as Exhibit "C."

Nickolas Page v. City of Kotzebue, et al.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Page 1 of 15

Shore Avenue in Kotzebue, regarding Nickolas Page's assault on [redacted]. In the course of investigating this matter, the police officers located Nickolas Page coming out of the back door of [redacted] Grocery Store ([redacted] on Shore Avenue) carrying a backpack full of store merchandise valued at over \$300. Page had no receipts for the merchandise and the store was closed at that hour. (The store manager stated that Page did not work at the store and had no right to be inside the store.) In Case No. 2KB-05-318 CR, Page was indicted for burglary in the second degree (A.S. 11.46.310) and charged by information with two counts of assault in the fourth degree (A.S. 11.41.230(a)(1)) and one count of theft in the third degree (A.S. 11.46.140(a)(1)).

On October 6, 2005, Nickolas Page pled no contest to the burglary charge and to one count of assault in the fourth degree - DV. (The other assault and theft charges were dismissed by the State.) He was sentenced to 18 months with 12 months suspended on the felony burglary charge and 270 days with 180 days suspended on the assault 4-DV charge. See, Judgment and Order of Commitment/Probation attached hereto as Exhibit "D."

On Sunday, September 3, 2006, Nickolas Page attempted suicide. Sgt. Hughes was one of the KPD officers who found Page and rushed him to Maniilaq Health Center in Kotzebue. See, Exhibit "E" attached hereto, KPD Call Detail Report and Maniilaq Health Center records.

On Sunday, September 17, 2006, Sgt. Hughes and KPD Officer Holman were on patrol in Kotzebue when they were stopped by Page's girlfriend, Lena Henry (a/k/a Lena Yenne), at 4:00 a.m. Ms. Henry stated that Nickolas Page was drinking and appeared suicidal. At the time she stopped the officers, Ms. Henry was speaking to Mr. Page on her

cell phone. She gave Sgt. Hughes her cellular phone and he heard Nickolas Page say that he was determined to successfully commit suicide by hanging himself.

Officer Holman and Sgt. Hughes went to House No. _____ and found Page, who had the odor of alcohol on his person and exhibited red, watery eyes and slurred speech. When confronted, Mr. Page denied that he was suicidal. Sgt. Hughes told him that he had heard him threaten suicide during his cellular phone conversation with Lena Henry and that Page needed to go to the hospital. Page requested to speak to his counselor/doctor at Maniilaq Health Center. After he spoke to his counselor/doctor, the doctor asked to speak to Sgt. Hughes, at which time he informed Sgt. Hughes that Nickolas Page needed to be taken to the hospital for evaluation. Mr. Page was also told that his doctor wanted him to be transported to the hospital. Page told Officer Holman and Sgt. Hughes that he would not go to the hospital "without a fight" and that it would take both officers to get him there.

Mr. Page refused to submit to a portable breath test, at which point State of Alaska Probation Officer Jason Brown was called. After Jason Brown arrived, and spoke with him, Nickolas Page submitted to a breath test and registered a 0.099 BrAC. It was also determined that Page had not only been drinking but had ingested some medications. Mr. Page was placed in handcuffs without incident at the home, transported to the hospital and placed in a treatment room. The handcuffs were removed and the officers stepped outside the room.

Mr. Page then became verbally abusive and began knocking things around in the Emergency Room. Page refused several commands to stay on the bed. Finally, Sgt. Hughes forced Mr. Page to sit on the bed and told him to stay there or he would be strapped down. Page then complied and no further force was required at that time.

After evaluating Nickolas Page, the treating personnel at Marillaq Health Center recommended that he be admitted to the hospital under a Title 47 admission. Mr. Page refused to be admitted. Probation Officer Brown decided that it would not be safe to leave Mr. Page at the hospital due to his aggressive behavior. Due to his violation of the conditions of his release on his burglary and assault convictions, Mr. Page was arrested and placed in handcuffs without incident. Mr. Page was escorted out of the emergency room by Officers Hecker, Holman, Sgt. Hughes and Probation Officer Brown.

Once outside the emergency room, Sgt. Hughes noticed that Mr. Page had a cigar in his mouth. Sgt. Hughes told Mr. Page that he had to take the cigar from him and reached for it. Mr. Page pulled away from Sgt. Hughes and bit down on the cigar to prevent Sgt. Hughes from removing it from his mouth. Sgt. Hughes removed the cigar from Mr. Page's mouth at which time Mr. Page became more aggressive and verbally abusive. Once they were in the elevator at MHC, Mr. Page pulled away from Sgt. Hughes and shoved him with his shoulder.

Sgt. Hughes put Mr. Page up against the elevator wall to control his movements. Mr. Page began yelling and swearing and told Sgt. Hughes to hit him. (Sgt. Hughes did not hit Page.) As they exited the elevator, Mr. Page again shoved Sgt. Hughes with his shoulder. Sgt. Hughes placed Mr. Page against the wall, again, and told him to stop his aggressive behavior. Once they began walking, Nickolas Page shoved Sgt. Hughes, again. Sgt. Hughes then took Mr. Page down to the floor in order to control Page's aggressive behavior -- holding onto him to prevent Page from injuring himself as he was placed on the floor.

After Mr. Page seemed to have calmed down, Sgt. Hughes told him to stand up. Page refused and, again, Page told Sgt. Hughes to hit him. (Sgt. Hughes declined Page's

challenge to hit him.) Sgt. Hughes lifted Mr. Page up and walked him to the patrol car. When Page refused to get into the patrol car, Sgt. Hughes pulled out his taser and ordered Page to get into the patrol car. Page refused and, once again, pushed Sgt. Hughes to prevent him from putting Page in the patrol car. Officer Holman then went to the other side of the car and assisted Sgt. Hughes in placing Nickolas Page inside the patrol car. Once inside, Page began violently kicking at the door. Sgt. Hughes opened the door and told Page that he would be tasered if he did not stop his violent and aggressive actions. Sgt. Hughes told Officer Holman that they needed to transport Page to the Jail, as soon as possible. As they drove to the Jail, Page continued to violently kick the door.

When they arrived at the Kotzebue Regional Jail ("KRJ"), Mr. Page got out of the car unassisted and walked into the KRJ. He shoved Sgt. Hughes two more times before entering the booking room. Mr. Page was placed into the restraint chair and his handcuffs were left in place. Mr. Page refused to stay seated and was forced back down into the chair two times by Sgt. Hughes. The last time, Sgt. Hughes held Mr. Page in the chair while the other Officers attempted to strap him into the restraint chair.

Sgt. Hughes was standing in front of Mr. Page, holding him down by the chest, when Mr. Page wrapped his legs around Sgt. Hughes' legs/then upper body and pulled the officer towards him. Mr. Page was squeezing Sgt. Hughes with his legs and Sgt. Hughes was unable to get away from him without using force.

Sgt. Hughes pulled out his taser and touch-tasered (drive-stunned) Mr. Page in the stomach. Mr. Page immediately let go of his leg-hold on Sgt. Hughes and the taser was pulled away from Mr. page. As Sgt. Hughes pulled the taser away from Mr. Page, the probes deployed and struck Mr. Page in the stomach. At that point the taser was already off

Spelling

**OPER BAY POLICE
DEPARTMENT
DISPATCH**

REPORT

DISPATCH CARD

Date **12-26-2006**

Case # **06-4150**

Nature of Complaint **Welfare Check**

COMPLAINT CODE **Welfare Check 9547** TIME OF COMPLAINT **0355**

LOCATION **Boya Olson's Residence**

COMPLAINANT

OFFICER PERM IDENTIFIER **NJ17/DO10** P.O. BOX #

PHONE # **4395** ALCOHOL RELATED DRUG RELATED

PRESS RELEASE IN PERSON OFFICER OTHER VHF

MISC INFO: "C" called and asked if officers could go and check on Boya Olson and her kids at their house. Thomas Olson is intoxicated and alone with the kids.

LOG ONLY 0415 hrs. Nathan and Dennis called base requesting assistance from another officer. Charles notified of request and will respond to Eric Olson's residence.

FELONY Peter was charged with 5 counts of reckless endangerment. Thomas "Boya" Olson was also charged with 5 counts of reckless endangerment plus 3 counts assault 4 police officer and resisting arrest.

MEANOR

SAM Thomas Olson had to be tased to gain compliance.

SAR

DEATH

IMPORT SALE OF ALCOHOL SEE REPORT REF CASE TO

CALL RECEIVED BY **CO2** ATN

TIME 10 8 TIME 10 8 DISPATCHER **ROBERT UNK**

TIME RECEIVED DWI VEHICLE

TIME DISPATCHED

Exhibit O
EX-100

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

| | | |
|-----------------------|---|-----------------------|
| THOMAS J. OLSON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Case No. 4BE-07-26-CI |
| |) | |
| CITY OF HOOPER BAY, |) | |
| OFFICER DIMITRI OAKS, |) | |
| OFFICER CHARLES SIMON |) | |
| and OFFICER NATHAN |) | |
| JOSEPH, |) | |
| |) | |
| Defendants. |) | |

DEPOSITION OF MICHAEL D. LYMAN, Ph.D.,
produced, sworn and examined on the 2nd day of
July, 2008, between the hours of eight o'clock in the
forenoon and six o'clock in the afternoon of that day,
at the offices of the Buttonwood Business Center,
3610 Buttonwood Drive, Columbia, Missouri, before
Kim D. Murphy, Certified Court Reporter, within and for
the State of Missouri.

Exhibit P

APPEARANCES

For the Plaintiff

POWER & BROWN, LLC
By: Michael Brown
P.O. Box 1809
Bethel, AK 99559
mbrown@powerbrown.com

For the Defendants:

INGALDSON, MAASSEN & FITZGERALD, P.C.
By: William H. Ingaldson
813 W 3rd Avenue
Anchorage, AK 99501-2001
907-258-8750
bill@guarpe-law.com

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- B. IACP National Law Enforcement Policy Center-
Electronic Control Weapons-2005
- C. IACP National Law Enforcement Policy Center-
Use of Force-2001
- D. IACP National Law Enforcement Policy Center-
Use of Force-2001

Court Reporter:
Kim D. Murphy, CCR

1 A. I have. I reviewed my file, which I
2 brought with me today.

3 Q. Okay. And have you had a chance to have
4 any discussions with Mr. Brown about your deposition?

5 A. I have just this morning.

6 Q. And about how much time have you spent
7 planning for your deposition?

8 A. Probably six to eight hours, I would say,
9 off and on.

10 Q. What do you mean, off and on?

11 A. Well, I mean, it's not a full - a full six
12 to eight hours. For an example, I looked at some of
13 the file yesterday, and some of the file the day
14 before, a little bit in the morning, a little bit in
15 the afternoon.

16 Q. You prepared a report in this case;
17 correct?

18 A. Yes.

19 Q. And that report was dated May 28th of 2008?

20 A. That's correct.

21 Q. Since you prepared your report have any of
22 your opinions changed?

23 A. No.

24 Q. And have you reviewed any other documents
25 or any other evidence since you prepared your report?

1 IT IS HEREBY STIPULATED AND AGREED, by and
2 between counsel for the Plaintiff and counsel for the
3 Defendant, that this deposition may be taken in
4 shorthand by Kim D. Murphy, CCR, and afterwards
5 transcribed into typewriting, and the signature of the
6 witness is expressly reserved.
7 * * * * *

8 MICHAEL D. LYMAN, Ph.D.,
9 of lawful age, produced, sworn and examined on behalf
10 of the Defendants, deposes and says:

DIRECT EXAMINATION

QUESTIONS BY MR. INGALDSON:

13 Q. Would you state your name the record,
14 please?

15 A. Michael Douglas Lyman.

16 Q. And you're - you go by Dr. Lyman?

17 A. Yes, I do?

18 Q. And you teach at the University of
19 Missouri?

20 A. I teach at Columbia College, a private
21 college here in town.

22 Q. And Dr. Lyman, before I get started here, I
23 just want to ask you a couple background matters. Have
24 you done anything in preparation for your deposition,
25 reviewed any documents, anything like that?

1 A. I don't believe so. I have received
2 depositions, and off the top of my head, I don't
3 remember if I received those before or after I
4 believe I received them before I issued the report,
5 because I think I actually footnoted certain things out
6 of those depositions.

7 Q. Okay. And approximately how much time do
8 you have into this case?

9 A. That would be on my invoice. I can tell
10 you that I have invoiced for about a little over \$4,000
11 from the Power Brown Law Firm. But I would say 20 to
12 25 hours as an estimate.

13 Q. And do you bill by the hour for your work?

14 A. Yes.

15 Q. And what's your hourly rate?

16 A. \$200.

17 (Deposition Exhibit A was marked for
18 identification by the reporter.)

19 BY MR. INGALDSON.

20 Q. Dr. Lyman, for identification I've marked
21 what I believe is your report as Exhibit A. Is that a
22 copy of the report you prepared in this case?

23 A. Yes.

24 Q. And in your report on page 9 and 10, pages
25 9 and 10 it indicates some materials that you reviewed

1 to prepare your report: is that an accurate depiction
2 of everything that you reviewed?

3 A. Yes.

4 Q. And have you been to Hooper Bay, Alaska?

5 A. No, I have not.

6 Q. Have you been to Bethel, Alaska?

7 A. No.

8 Q. Have you been to Alaska?

9 A. I have.

10 Q. And where in Alaska have you been?

11 A. It was the Kenia Peninsula about a year and
12 half ago.

13 Q. A fishing trip?

14 A. No. A jury trial.

15 Q. You were doing work there?

16 A. Yes.

17 Q. And who were you working for then?

18 A. I would have to look at my Curriculum
19 Vitae. I've got it here though, if I may.

20 Q. Go ahead. Sure.

21 A. (The witness indicated.) It doesn't say.
22 It only gives the name of the case. But I believe
23 Chuck Robinson, Charles Robinson.

24 Q. Okay.

25 A. And I want to say Sanoma (ph sp) I might

1 involved in, and you indicate as expert testimony at
2 hearings, and that you've appeared at trials?

3 A. Yes.

4 Q. I take it, though, that that's not -- is
5 that all the cases you've appeared in or is that just
6 the most recent ones?

7 A. As far as my report goes, that is not a
8 complete list, but I have provided a complete list that
9 I brought with me today and it's attached to my CV.

10 Q. Okay. I went through your report just
11 while I was flying down here, and I may have got this
12 wrong, but it looks like you've done work and you
13 mentioned in your report both on the plaintiff and the
14 defense side; correct?

15 A. Yes.

16 Q. You'd agree, though, would you not, in
17 terms on the police force, most of your work's been on
18 the plaintiff's side?

19 A. In terms of testimony, but not in terms of
20 necessarily cases that I have reviewed. But you're
21 correct.

22 Q. Okay. I noticed, for example, of the cases
23 where you indicated that you were an expert, 27 of the
24 cases listed here on use of force were for the
25 plaintiff and eight for the defense; does that sound

1 be mispronouncing that. But it's in the -- one of
2 those towns in the --

3 Q. Soldata (ph sp?)

4 A. Yes. Yes. Forgive me.

5 Q. And what was the name of that case?

6 A. That was the Rogers case. Shawn Rogers
7 versus the State of Alaska.

8 Q. And what was your role in that case?

9 A. To evaluate the criminal investigation
10 conducted by the state police involving a shooting that
11 took place in a bar. And it was a criminal matter.

12 Q. And you were working for the criminal
13 defense attorney in that case?

14 A. That's correct.

15 Q. Have you done any other work in Alaska?

16 A. No.

17 Q. When were you retained by Mr Brown's firm?

18 A. I believe it was the spring of '07 March,
19 if I'm not mistaken.

20 Q. And do you know how it came about that you
21 were hired by Mr. Brown's firm?

22 A. No, not other than just receiving an
23 initial phone call from Mr. Brown.

24 Q. I've looked through your report, and in
25 your report it has the list of cases that you've been

1 about right?

2 A. In terms of testimony, yes.

3 Q. And in terms of trials, you've testified
4 ten times for the plaintiff and none for the defense on
5 use of force; does that sound about right?

6 A. May I take a look at my CV just quickly?

7 Q. Sure.

8 A. I believe that's correct.

9 Q. Now, on the cases that you've been hired to
10 look at the use of force by law enforcement officer
11 cases that you've been hired by the defense, have there
12 been times when after reviewing the case you've come to
13 the conclusion that the officer, in your opinion, did
14 use excessive force?

15 A. You're asking for those cases that I've
16 reviewed for the defense?

17 Q. Right.

18 A. I think I have on occasion. Once, maybe
19 twice, over the seven years that I've been doing this.

20 Q. Okay. And the other times that you've been
21 hired by the defense on use of force, you've come to
22 the conclusion that the use of force was warranted and
23 proper?

24 A. Yes. To the best of my recollection.

25 Q. Do you remember the cases where you were

1 hired by the defense and you found that the use of
2 force was excessive?

3 A. No. Not right off the top of my head, I
4 haven't. The cases that I'm referring to -- and I'm
5 trying my best to recall, because I've been involved in
6 a number of them over the years -- but I believe it was
7 more a matter of I just didn't agree with the things
8 that were said in the complaint.

9 There are variations of force that maybe I
10 might have taken issue with and not totally agreed with
11 the attorneys -- the city attorneys. But for the
12 couple that I'm -- that I'm thinking about -- and I
13 just do not remember the names of those cases right
14 now -- but, you know, I think I agreed that it was
15 questionable, but I needed more information, something
16 along those lines.

17 Q. Okay. And you would agree, would you not,
18 that evaluating an officer on use of force, that there
19 may be situations where if you were the police officer
20 you may have done something different, you may have
21 used a different tactic, but that doesn't
22 necessarily -- that in and of itself doesn't
23 necessarily mean that the officer used improper or
24 excessive force, correct?

25 A. Because I would have done something

1 tend to agree with that, it might. But what makes a
2 determination as to whether that is a more appropriate
3 tactic is the level of threat or resistance offered by
4 the subject. That is -- has to be considered right
5 along with the force options to the officer.

6 Q. Okay. And when a suspect is threatening an
7 officer, do you agree that different officers might
8 perceive that threat differently?

9 A. It's hard to answer that question. Because
10 threats can come in a number of different venues. You
11 know, from verbal to physical to implied. You know, an
12 officer has to consider a subject's ability to make
13 good on a threat. You know. The opportunity to do the
14 threat. Do they have the physical wherewithal to
15 deliver on a threat?

16 So all of those things have to be
17 considered. And that's the point. The point is, is
18 that when an officer uses force or elects to use a
19 certain force option, the barometer, if you will, to
20 determine reasonableness has to be based on the level
21 of threat or resistance by the subject.

22 Q. Sure. And to follow up on that, if a --
23 let's talk about verbal threats. A suspect might make
24 a verbal threat that some officers might say, well, I
25 didn't think they were real serious, I wasn't really

1 different?

2 Q. Right.

3 A. No. I don't think that inherently in and
4 of itself means that the officer was incorrect. But I
5 think the fact that one individual who's an officer
6 would do something different than another individual,
7 if nothing else, illustrates that it's important to
8 consider options available to the officers.

9 Q. Okay. Sure.

10 A. Provided, of course, the course of action
11 is objectively reasonable.

12 Q. Sure. And when you're effectuating an
13 arrest, especially an arrest where there's some
14 resistance, that's a dynamic situation where things are
15 ongoing and the officer has to react quickly, correct?

16 A. Generally they do, yes.

17 Q. And --

18 A. That's a safe statement to make.

19 Q. And if an officer for -- some officers, for
20 example, might be more proficient with certain
21 handholds, hand moves than other officers, and for that
22 officer that may be a more appropriate tactic than an
23 officer that may not be as proficient at that
24 technique, correct?

25 A. Well, I think the keyword is "might." I

1 worried about that, where another officer may say I
2 thought he was gonna follow through on that verbal
3 threat, correct?

4 A. It's possible. It depends on the
5 circumstances whether or not that determination is a
6 reasonable one.

7 Q. Sure. And those circumstances include,
8 among other things, the tone of voice of the person
9 who's making the verbal threat, that would be one thing
10 you'd consider, right?

11 A. In part, yes.

12 Q. Another might be the visual appearance of
13 the person, how the person's face looked, if they were,
14 for example, making a threat, but kind of laughing,
15 that might be different than making a threat with
16 creased eyebrows and a look on their face like they
17 meant business, that is something that you would
18 consider, correct?

19 A. I agree with that.

20 Q. And another thing that might make a
21 difference if they were making a threat, and, for
22 example, clinched their fist, as opposed to someone who
23 was just standing there in a relaxed posture, correct?

24 A. Yes.

25 Q. And now let's talk about threats such as

1 that. A threat of someone clinching his or her fist.
 2 That may be something that one officer might perceive,
 3 as the person clinching their fist, "I really didn't
 4 think they were going to hit me," whereas another
 5 officer, if they were clinching their fist, I've been
 6 in scuffs before with people and thought they might be
 7 coming after me." that's something two different
 8 officers might view differently?

9 A. I think it's a matter of context. The
 10 circumstances under which a person's fists are
 11 clinched. People clinch fists for a number of
 12 different reasons. Some do it when they're nervous,
 13 I suppose. And some do it when they are threatening.

14 It would depend on the circumstances
 15 leading up to the clinching of that person's fist as
 16 well. Whether it is in an environment or a situation
 17 that would lead a reasonable officer to believe that
 18 this person is positioning themselves for some sort of
 19 an attack, or if they're just doing it for some other
 20 reason.

21 Q. Sure. One of the issues, too, might be
 22 that the officer might look at it and determine the
 23 seriousness of a threat, would be the relative size
 24 between the officers? If you had a small, female
 25 officer and a 350-pound weightlifter, body-builder male

1 still, when the person pulled the knife on him, what he
 2 thought he meant, he felt threatened even though
 3 ultimately he thought he could subdue them.

4 If a police officer sees someone wielding a
 5 knife, someone's threatening me, but I really didn't
 6 think they were going to go after me with it, the same
 7 thing, and this guy means business, and he might be
 8 coming after me, I'm not going to take the chance,
 9 right?

10 A. I don't know that I would -- I wouldn't
 11 agree with that either, only because, based on my
 12 experience and what I know about police work as a
 13 trainer and as a practitioner, if a person pulls a
 14 knife, that's a threat. That's a dangerous situation.
 15 And I think categorically that is a threat. The extent
 16 to which that is an imminent threat is in question
 17 based on the proximity of that person and their ability
 18 to do something.

19 But even somebody standing there with a
 20 docile look on their face, that's not a threatening
 21 look on their face, if they're holding an edged weapon,
 22 that's certainly a threat, and that's a more
 23 articulable threat, I believe, than your previous
 24 example of the clinched fists.

25 Q. Okay. And in your work as a -- let me back

1 suspect, the female officer may perceive that
 2 differently than if the roles were reversed if it was a
 3 350-pound bodybuilding police officer and a 90-pound
 4 young lady; correct?

5 A. Well, I don't know that I would agree with
 6 that categorically. I think size is an important
 7 factor, but it depends on what the person is doing.

8 Q. Sure.

9 A. Size, in and of itself, should not be
 10 threatening to a professional law enforcement officer.
 11 There has to be other variables considered that would
 12 lead a reasonable officer to believe that this person,
 13 in addition to their size and other things that they
 14 know about the person may pose a threat.

15 Q. Sure. Sure. Just because someone's a big
 16 person doesn't mean that that person is going to go off
 17 on you?

18 A. Right.

19 Q. Right. And even if people have weapons --
 20 I'm thinking as an example, back early in my career as
 21 a prosecutor -- where a person threatened another
 22 person with a knife. And the person he threatened had
 23 been in -- was in the military, been in four branches
 24 of military, an older gentleman, and he felt ultimately
 25 that he would be able to take care of himself, but

1 up a little bit. Prior to teaching, you actually were
 2 a police officer; right?

3 A. Yes.

4 Q. For 11 years; is that right?

5 A. I was.

6 Q. Okay. And you mentioned that you made
 7 several, I think, in your career, 600 -- in excess of
 8 600 felony arrests?

9 A. I was involved in over 600, yes.

10 Q. These were for felonies, yes?

11 A. Yes.

12 Q. If you add up the misdemeanor arrests, the
 13 number's probably considerably higher?

14 A. It's higher. Not considerably because we
 15 didn't make that many misdemeanor arrests, frankly.

16 Q. And this was in Oklahoma?

17 A. Kansas and Oklahoma.

18 Q. Must have been some pretty bad areas that
 19 you worked?

20 A. We would concentrate on, you know, the drug
 21 traffickers, and most drug violations that we would
 22 deal with were felony violations.

23 Q. Adding it up, it's about five a month on
 24 the average or so for arrests. That seems like quite a
 25 bit.

1 A. Sometimes it could be notably higher than
2 that. I mean, you could have a drug raid in one
3 evening and net 35 people.

4 Q. And during your career were there occasions
5 where you arrested people that resisted the arrest?

6 A. Yes.

7 Q. And were you ever threatened where you felt
8 in fear of bodily injury during the arrest?

9 A. Yes.

10 Q. And were you ever verbally threatened?

11 A. Yes.

12 Q. And when you were verbally threatened were
13 there times because of the nature of the verbal
14 threatening that you felt in fear of possible personal
15 injury?

16 A. In my case, in my cases, plural, the
17 answer's no. Because the arrest that we affected, it
18 was more than just myself. You know, I had, you know,
19 other officers with me to assist.

20 Q. Okay. Did during your 11 years as a police
21 officer did you ever deal with suspects that were
22 intoxicated?

23 A. Yes.

24 Q. How about highly-intoxicated suspects?

25 A. I did.

1 use of force continuum -- and they're called a lot of
2 different things -- but beginning with the lowest level
3 of force all the way up to the use of deadly force and
4 everything in between, officers are not necessarily
5 required to start with, now verbal or just, you know,
6 if you're going into a dangerous situation you know
7 where there's barricaded suspects, you may or may not
8 choose to start with verbal.

9 You know, if there are shots fired or
10 something, you could start at a notably higher force
11 response than that. Just depends on what you're
12 confronted with and what was reasonable under the
13 circumstances.

14 Q. Sure. And if you go, for example, to make
15 an arrest, and you have information that the suspects
16 are armed, and maybe in a drug house or something and
17 they may be suspecting trouble, you might go with your
18 guns drawn, right?

19 A. Yes.

20 Q. But when -- if you have a situation where
21 you don't have that situation, but you have someone
22 that you see that immediately you don't perceive a
23 threat, when you first see the person, but you go to
24 effectuate the arrest and the person -- would it be
25 fair to say that one of the things you try is explain

1 Q. And did you ever arrest highly-intoxicated
2 suspects?

3 A. Yes.

4 Q. And did you ever arrest highly-intoxicated
5 suspects where those suspects resisted your arrest?

6 A. Yes.

7 Q. Okay. And were there times suspects
8 resisted your arrest where you had to use force to
9 arrest them?

10 A. Yes.

11 Q. Okay. And in your experience with
12 arresting intoxicated suspects -- let me back up a
13 little bit.

14 In your experience with arresting suspects,
15 it would be fair to say would it not, that you want to
16 try and use the least amount of force as you have to to
17 effectuate the arrest.

18 A. I agree with that.

19 Q. And when you're -- one of the things that
20 you do is you try and reason with the person, correct,
21 talk to the person?

22 A. If that happens to be a logical option
23 given what you're confronted with, yes.

24 Q. Could you explain what you mean by that?

25 A. Well, I mean, if you want to consider the

1 to the person that he or she is being placed under
2 arrest?

3 A. Yes.

4 Q. And in some situations you want to explain
5 why, correct?

6 A. Well, I would think in all situations you
7 would want to explain why, barring any unforeseen
8 reason not to.

9 Q. Okay. And would agree that in cases you've
10 worked where the person's intoxicated, that intoxicated
11 persons don't always understand and react positively to
12 explanations of why they are being arrested as compared
13 to non-intoxicated people?

14 A. Well, if you know that a person -- if you
15 know for a fact with certainty that the person's
16 intoxicated, I think it would depend on the
17 intoxication. You know, you have to make a field call
18 to that effect. Maybe have the benefit of a field
19 sobriety test, or maybe you don't. Or maybe have the
20 benefit of knowing that the person has been drinking
21 for the last three or four hours at a bar. Just in the
22 hypothetical. And that would lead a reasonable officer
23 to believe that they might be beyond the legal limit.

24 But, you know, I don't think it's fair to
25 make a distinction about levels of intoxication for

1 somebody.

2 Q. Sure.

3 A. Rather than just make the blanket
4 observation that if a person is quote/unquote
5 intoxicated, that a certain response should be
6 forthcoming.

7 Q. I guess maybe my question wasn't clear.
8 What I was trying to get at, have there been occasions
9 where you've tried to reason with intoxicated people
10 with little or no success as compared to your ability
11 to reason with non-intoxicated people?

12 A. I don't remember any, but I wouldn't doubt
13 it.

14 Q. Okay. Have there been times when you've
15 arrested people where you've -- I think you said
16 earlier that there have been times where you've had to
17 use force; correct?

18 A. Yes.

19 Q. What type of force have you had to use in
20 arrests?

21 A. Used soft-handed control techniques. In
22 some cases heavy-handed control techniques. I've been
23 involved in situations where deadly force was used.
24 Not by myself, but I was involved in cases where there
25 was gunplay. I've been involved in arrests where we

1 weapon. When you use it as a control weapon or a
2 control device, you simply hold it like this. (The
3 witness indicated.) On either end of the device. And
4 generally what that is used to do is to help you direct
5 individuals to the ground.

6 Q. Okay

7 A. To gain control of them.

8 Q. You were holding your hands up. Near
9 about -- I don't know -- a little over a foot, maybe
10 15 inches apart across your chest. And would that
11 be -- you're imitating holding the baton, that would be
12 each end --

13 A. Yes.

14 Q. -- would be in your hands?

15 A. Exactly.

16 Q. And would you use that behind someone to
17 hold them or use it to push it forward or --

18 A. Generally I've never used it from behind
19 someone because, you know, that would run the risk of
20 choking them. And, you know, some chokes are more
21 dangerous than others. We stayed away from choke holds
22 all together. We used the baton as a control device to
23 direct individuals in kind of a front fashion.

24 Q. And have you ever used it in an impact --
25 as an impact tool?

1 had to use our batons as control devices. I carried a
2 Monadnock 24, which was part of our raid gear, that we
3 would use for execution of search warrants. I guess
4 those are all that come to mind.

5 Q. Did you ever use pepper spray?

6 A. I had pepper spray assigned to me. I don't
7 remember using it.

8 Q. Okay. Did you ever have an electronic
9 control weapon assigned to you?

10 A. No.

11 Q. Have you ever used one?

12 A. No.

13 Q. I think a lot of those came out probably
14 since you've retired, would that be fair to say, or at
15 least regularly used in the police force?

16 A. Regular use, yes.

17 Q. And when you used a baton as a control
18 device, can you -- did you do that on more than one
19 occasion?

20 A. Yes.

21 Q. And could you tell me some examples of how
22 you would use a baton to control someone?

23 A. A baton can be used two ways, as a control
24 device and as an impact weapon. Impact weapon is
25 notably a higher response for force than a control

1 A. I never had to, no.

2 Q. Have you been with other officers who had
3 to use it as impact tool?

4 A. Yes.

5 Q. And by that you mean you actually hit
6 someone with it?

7 A. Yes.

8 Q. At the time you observed officers using it
9 as an impact tool, based on the circumstances that you
10 saw it, did you think their use was appropriate?

11 A. I did.

12 Q. Okay. And this baton, what's it made of?

13 A. It's a composite material. I can't tell
14 you specifically what it's made of. It's not wood.
15 But it's a -- it has a little bit of flexibility. I
16 think there is a fiberglass component there somewhere.

17 Q. It's heavy, right?

18 A. No. No. It was not that heavy.

19 Q. These aren't, like, led-lined or something?

20 A. That, I don't know. But it was not
21 particularly heavy.

22 Q. It's not like a broomstick handle, or is
23 it?

24 A. It is. It is. The Monadnock is not the
25 mainstream baton, I think, right now. Right now it's

1 the Asp baton that's more commonly carried, just
2 because it's more convenient. It can be carried on
3 one's belt much easier. The Monadnock was not. It had
4 a side handle protruding from it that would not allow
5 you to use it in different ways. We were all certified
6 to use it by the Monadnock instructors. It was just a
7 lightweight composite impact weapon.

8 Q. Okay. And one of the dangers, of course,
9 is that you can hurt the suspect; right?

10 A. Of course.

11 Q. Cause bruising; correct?

12 A. Yes.

13 Q. Even broken bones; correct?

14 A. Yes.

15 Q. But in spite of that, there are certain
16 circumstances where you agree it's appropriate to use a
17 baton; correct?

18 A. Yes.

19 Q. And you -

20 A. It's a nationally-recognized weapon.

21 Q. And to follow up, have you taught the use
22 of force continuum?

23 A. Yes.

24 Q. Taught it in your university classes?

25 A. I teach it currently in my university

1 Q. And have there been times where you've
2 wrestled the person to the ground, where there's been
3 more than one police officer involved in wrestling the
4 person to the ground?

5 A. I have.

6 Q. And it's fair to say, is it not, that if a
7 suspect is aggressively resisting arrest, even with two
8 or three police officers, it can be very difficult to
9 subdue that person just with your hands?

10 A. I don't know that I would say it would be
11 very difficult. An individual certainly can present a
12 challenge to two or three officers. But it's pretty
13 generally accepted that three officers are sufficient
14 to subdue an individual who is unarmed, and certainly
15 not otherwise posing, you know, a threat to the
16 officers, maybe just being uncooperative.

17 Q. What if the person is actively fighting
18 back, swinging their arms, kicking their feet, that
19 type of thing?

20 A. Three officers should be able to subdue
21 that person.

22 Q. How about two officers?

23 A. Possibly.

24 Q. Not quite as certain?

25 A. Well, if there's - if the individual is

1 classes, and I was involved on a regular basis teaching
2 it as a law enforcement instructor as well.

3 Q. And in this case, did you review the use of
4 force continuum that the Hooper Bay police followed?

5 A. I do remember looking at that, yes.

6 Q. And how about the Alaska State Troopers,
7 did you get a chance to read the use of force
8 continuum?

9 A. I don't remember seeing that.

10 Q. In any event, I think you said earlier the
11 use of force continuum doesn't necessarily require that
12 you start at the bottom and work your way up; correct?

13 A. Depending on what you are confronted with
14 with regard to the levels of threat and available
15 options.

16 Q. And as an example, depending on the level
17 of threat, you may use your baton right away depending
18 on the level of threat?

19 A. And depending on whether or not there are
20 any options that would allow you to gain control of a
21 situation using less force.

22 Q. Have you ever in the course of arresting
23 someone gotten involved where you had to wrestle the
24 person to the ground?

25 A. I believe so.

1 actively fighting as an assailant.

2 Q. Yeah.

3 A. And what is your question?

4 Q. Swinging or kicking, you know, sort of like
5 a street brawl?

6 A. It would depend on the capabilities of that
7 person to deliver a strike with their fist or with
8 their feet. Obviously, kicking, which is at issue in
9 this case, kicking frontwards and kicking backwards,
10 there's a big difference in the two. The position of
11 the person is at is in question. You know, whether
12 they're able physically to deliver what one would
13 perceive as a deadly kick.

14 Same goes for striking you now with hand
15 strikes, whether or not they're able to. Or whether
16 they were successful in doing that. And so it just
17 depends on the level of aggression on the person's
18 part.

19 Q. And in the course of your experience were
20 there ever times where you were involved in an arrest
21 where the suspect didn't have an actual weapon, but the
22 suspect resisted arrest to the extent that one of the
23 officers trying to make the arrest received some
24 injuries?

25 A. No.

1 Q. Have you heard about such situations?

2 A. Not that I can recall.

3 Q. Is that something that you just can't
4 imagine happening?

5 A. Your question is whether or not an officer
6 could receive injuries from.

7 Q. An unarmed suspect?

8 A. An unarmed. Oh, I think that could happen.
9 It depends on the dynamics of the situation.

10 Q. And have there been times where you've had
11 to handcuff people?

12 A. Of course.

13 Q. And have you ever had times where you've
14 handcuffed a person and the person became aggressive
15 and violent after being handcuffed?

16 A. Yes.

17 Q. And can you imagine a situation where even
18 if a person's handcuffed that person could cause injury
19 to a police officer?

20 A. Yes. Provided they are in a tactical
21 position to do so.

22 Q. Okay. Do you know in this case whether
23 Mr. Olson - he goes by Boya - whether Boya was
24 handcuffed in front or back?

25 A. In back.

1 some of your report, but I just want to make sure that
2 I understand what I believe to be sort of the bottom
3 line of what you're saying here and tell me if I'm
4 wrong, if my summary's wrong.

5 But is it true, it's your opinion that
6 under the objectively reasonable standard discussed in
7 the Graham case, that you believe the police officers,
8 Hooper bay police officers' actions was not objectively
9 reasonable in this case?

10 A. Correct.

11 Q. And there were three officers involved in
12 this arrest, correct?

13 A. That's right.

14 Q. Is that your opinion as to all three
15 officers?

16 A. Well, Oaks did not deploy a Taser, but Oaks
17 was present at the time of the situation. And I would
18 say the involvement of Oaks by virtue of him not having
19 a Taser, by virtue of him not deploying a Taser would
20 be notably less than those of Simon and Joseph.

21 So the concern that I have is the
22 deployment of the Taser against Boya because he was
23 incapacitated, in my opinion, by virtue of being
24 handcuffed. So I'd say primarily against Simon and
25 Joseph.

1 Q. And in the cases that you've worked on for
2 plaintiffs on use of force cases, have there been times
3 where a plaintiff's attorney has hired you to look into
4 the use of force and you've come up with the opinion
5 that you thought the use of force was appropriate?

6 A. Yes.

7 Q. How many times?

8 A. Probably -- I don't know total how many
9 times -- but probably four times in the last month.

10 Q. Okay.

11 A. And maybe as as a dozen times since 2001.

12 Q. Okay. Do you remember any of those? Are
13 any of those cases once in your CV?

14 A. No. Those cases would be ones that I did
15 not accept.

16 Q. Okay.

17 A. Those would be telephone conversations, in
18 most cases conference calls with attorneys who are
19 interested in hiring me to evaluate their case, and
20 giving me the fact and circumstances as they see them,
21 and me making a determination based on that
22 conversation that the case doesn't have any merit, on
23 what little I know about it. But that's all I have to
24 work with in situations like that

25 Q. Okay. And I'm going to go in detail in

1 Q. And do you think -- is it your opinion that
2 both Simon and Joseph failed to meet the objectively
3 reasonable standard by their use of the Taser?

4 A. Yes.

5 Q. Okay. And is that because -- okay, so let
6 me just talk about Oaks.

7 Do you have any reason to believe that
8 Oaks' conduct was not objectively reasonable?

9 A. Well, I believe that Oaks had a duty to
10 intervene, and I don't see in the case file where he
11 made efforts to do that during the course of the
12 interaction between the other two officers and Boya.

13 Q. How long did this interaction take place?

14 A. Just a matter of minutes. It was a quick
15 situation. I can't give you an exact period of time.

16 Q. Did you get an opportunity to listen to the
17 tape-recording?

18 A. I have

19 Q. I didn't see that in your report listed
20 here.

21 A. Oh. It should have been here. It's here
22 in the file. If it's not in my report then that is a
23 mistake because it was provided.

24 I don't see it here. And that was an
25 oversight.

1 Q. Is there anything else in your -- that you
2 looked at that is not in your report?

A. Not that comes to mind.

4 Q. But did you listen -- did you listen to
5 that before you wrote your report or after?

A. Yes, before.

7 Q. And it's true, is it not, that this whole
8 arrest took place -- I mean, this whole sequence of
9 events took place over about five minutes?

A. Yes.

11 Q. And during that time frame what should Oaks
12 have done?

A. Oaks should have intervened.

Q. How?

15 A. Well, he has -- it's a very small room.
16 He's in close proximity to Joseph and Simon. If
17 nothing else, he should have verbally spoken up and
18 expressed his concern that the Taser is excessive under
19 these circumstances and not necessary.

20 Q. And Nathan, in fact, was Oaks' superior, is
21 that correct?

A. Yes.

23 Q. And this was during the heat of the arrest;
24 correct?

A. Yes.

1 of that room.

2 Q. And in this case, your opinion that --
3 well, first of all, can you tell me -- because I saw in
4 your report the use of the word -- I've used it in my
5 questions -- objectively reasonable standard. What
6 does that mean in layman's terms?

7 A. That the use of force by an officer judged
8 by a reasonable officer facing similar circumstances
9 would not be punitive. In other words, would not be
10 subjective. And would be reasonable in the sense that
11 no other alternatives existed for a lower level of
12 force that would have accomplished the same level of
13 control.

14 Q. Okay. You said a lot there. When you said
15 would -- you said would not be punitive and then would
16 not be subjective?

17 A. Right. In other words, objective just
18 means that the use of force cannot be punitive.

19 Q. What do you mean by punitive?

A. To punish.

Q. Okay.

A. Personal.

23 Q. So I understand that there are times when
24 the use of force is appropriate to gain compliance;
25 correct?

1 Q. And you think it's appropriate, in fact not
2 just appropriate, but you think that it's something
3 that should be done, that an officer during the heat of
4 trying to arrest someone should criticize in front of
5 the suspect another officer?

6 A. Oh, I think not to do so would be
7 dereliction of duty.

8 Q. How many times have you done that in your
9 career?

A. I haven't had an opportunity to.

11 Q. So every arrest that you've been involved
12 in, you thought that all the officers in your 11 years,
13 every arrest, all the officers used the appropriate
14 force?

A. Yes.

Q. Never used excessive force?

A. I did not witness excessive force.

18 Q. You said this was a small room. How big
19 was the room?

20 A. I can't give you the dimensions. I only am
21 basing my comment on the comments from the individuals,
22 and that it was a one-room situation where the four
23 children were there. And and Thomas -- was
24 on the sofa. Thomas was on the bed. It was all
25 contained in one room. And I don't have the dimensions

1 A. Of course.

2 Q. In other words, you don't have to use it
3 only for self-defense?

4 A. That's right. But it has to be reasonable
5 under the circumstances.

6 Q. When you say punitive, what you mean is
7 you're not using it for self-defense, you're not using
8 it for compliance, you're using it just to aggravate,
9 inflict pain or to punish?

A. To punish.

Q. The suspect, right?

12 A. Out of a sense of more of a personal
13 motivation, subjective motivation.

14 Q. Right. Okay. But that was only part of
15 the objectively reasonable standard?

A. Yes.

17 Q. You said something about -- about the
18 subjective, what did mean by that?

A. Well --

20 Q. It's not based on the subjective view of
21 the officers, but rather the objective view of other
22 officers?

23 A. Of that officer. It has to be based on
24 the -- that officer being objective rather than
25 subjective.

10 (Pages 34 to 37)

1 Q. Okay. So let me see if I understand this.
2 What you're saying is, that under the objectively
3 reasonable standard, another officer -- let me strike
4 that.

5 So the test would be whether or not the use
6 of force was reasonable to -- I'm having trouble here.

7 So the test is not whether the officer
8 using the force subjectively thought it was reasonable,
9 the test is whether objectively an officer -- a
10 reasonable officer in that position would have used
11 that type of force; is that right or not?

12 A. I agree with that.

13 Q. Okay. And --

14 A. It just can't be personal, which would be
15 subjective. And it has to be reasonable. I didn't
16 mean to interrupt. I'm sorry. It has to be reasonable
17 in the sense that the level of threat, or level of
18 resistance offered by the subject, you know, has to be
19 considered. And if there are lesser levels of force
20 available at the time that will still achieve control,
21 then those are the ones that should be pursued rather
22 than a higher level.

23 Q. Okay. And so to come about it a different
24 way then, if the officer -- the standard's not then
25 what the officer -- what that individual officer

1 subjectively thinks he or she needs to use a certain
2 level of force and believes based on his or her
3 training that the use of force is lawful. But in
4 looking at it later, you look at it and say, geez,
5 there were other methods you could have used, other
6 tactics you could have used, lesser degrees of force
7 that could have been used. In that situation would
8 that be something where in spite of the officer's
9 subjective beliefs, in spite of what the officer might
10 have believed he or she was lawfully entitled to do,
11 that officer still would have used excessive force or
12 unreasonable force?

13 MR. BROWN: Objection; form.

14 THE WITNESS: If I understand you
15 correctly, I think that is the case. And if I could
16 explain I think the reason that that is the case is
17 because the end does not justify the means.

18 The things that have to be considered in an
19 officer's use of force isn't so much what they decide.
20 It doesn't -- I mean, whatever decision they make is
21 not necessarily okay. The decisions that they make in
22 the field have to be tempered by a number of things.
23 One of those things is policy. Nationally-recognized
24 procedure. And another one of those things is what a
25 reasonable officer would perceive as the appropriate

1 reasonably believed based perhaps on his or her wrong
2 or inaccurate assessment of the situation and
3 assessment of the -- his or her understanding of what
4 he was or she was allowed to do; that's not the test?

5 MR. BROWN: Objection; form.

6 THE WITNESS: No, I don't agree with that.
7 I think that's something different than what I was
8 saying.

9 BY MR. INGALDSON:

10 Q. Okay.

11 A. The objectively reasonable standard applies
12 to the individual applying force. And that's pretty
13 straightforward. And it simply says -- I don't mean to
14 keep repeating myself -- but it simply says that that
15 officer who is applying force cannot be -- cannot do so
16 out of a personal sense. It has to be objective,
17 otherwise, it's subjective, personal. And it has to be
18 reasonable under the circumstances. And that
19 reasonableness is based on available options for the
20 officer and the level of threat or resistance by the
21 subject.

22 Q. Okay. Let me ask a hypothetical then.
23 What if an officer effectuates an arrest, and that
24 officer, based on his or her perceptions, thinks that
25 he or she needs to use a certain level of force,

1 course of action under the same circumstances.

2 Q. Okay. And you talked about policy. It's
3 your opinion, is it not, that Officer Nathan and Simon
4 did not follow the policy?

5 A. Officer Joseph?

6 Q. Yes. Nathan Joseph.

7 A. Yes.

8 Q. Joseph and Simon, you're right. Nathan
9 Joseph.

10 A. Okay. That is my opinion.

11 Q. Okay. We'll get to that in a little bit.
12 So let me go over a few things in your report and I'll
13 get to some of these more specific areas. In terms of
14 Taser use, have you ever used a Taser?

15 A. No.

16 Q. Have you ever been Tased?

17 A. No.

18 Q. You talk in here about standards from the
19 International Association of Police?

20 A. Chiefs of Police.

21 Q. Chiefs of Police?

22 A. Yes.

23 Q. IACP?

24 A. Yes.

25 Q. And they use an acronym -- I'm sorry, ECW?

1 A. Electronic control weapons.
 2 Q. And that's much broader, of course, than
 3 just a Taser, that includes other types of
 4 electronic controlled weapons?
 5 A. It's a generic term, that's right.
 6 Q. In fact, you mention in paragraph 42 of
 7 your report that 40 subjects have died after being
 8 subjected to ECW deployment?
 9 A. That's what the IACP has noted, yes.
 10 Q. But the -- and you go on to say, "While the
 11 same sources deny that the ECW was the cause of those
 12 deaths, it is prudent to question the extent the use of
 13 the ECW and the 40-plus deaths are more than a simple
 14 coincidence." That was your opinion; correct? Or it
 15 is your opinion; correct?
 16 A. Can I take a quick look at that?
 17 Q. Yes, paragraph 42. That last statement
 18 is -- that last sentence.
 19 Do you know how many arrest subjects have
 20 died after being subjected to a baton use?
 21 A. Not off the top of my head, no.
 22 Q. Do you know how many subjects have died
 23 after being subjected to heavy-handed control tactics?
 24 A. That would have to be the same answer, not
 25 off the top of my head.

1 settle. And that involves the Tasing of an
 2 individual who died, if not on the scene, immediately
 3 at the hospital thereafter. So that is an example of
 4 one case. And I would have to just look at my caseload
 5 to see others. But that would be the immediate
 6 response to your question.
 7 And I certainly can get you the name of
 8 that case. I just do not have that material in front
 9 of me right now.
 10 Q. Okay. So you can provide that to Mr. Brown
 11 and he can give it to me?
 12 A. Of course I will.
 13 Q. And the attorney was John Phelps?
 14 A. John Phelps. Yes.
 15 Q. P-h-e-l-p-s?
 16 A. Yes.
 17 Q. And he is an Arkansas attorney?
 18 A. He is.
 19 Q. And what area of Arkansas?
 20 A. I don't recall. But I can get that to you.
 21 I can get you that at the break.
 22 Q. Do you know who the defense attorney was in
 23 that case?
 24 A. No.
 25 Q. And what was the police force? What police

1 Q. But subjects have died after both of those
 2 types of controls have been used; correct?
 3 A. Yes.
 4 Q. Okay. And in terms of the ECW deployment,
 5 are you aware of one person that died after being
 6 subjected to a Taser?
 7 A. Yes.
 8 Q. Okay. Tell me about it.
 9 A. Well, I've been involved with a number of
 10 cases. I think the IACP is stating just that.
 11 Q. That's saying ECW deployment. I'm talking
 12 about the Taser. A Taser. Anyone that's ever died
 13 after being subjected to a Taser, are you aware of even
 14 one such incident?
 15 A. Yes. I've been involved in cases where
 16 that has happened.
 17 Q. Tell me the cases.
 18 A. Can I take a look at my list?
 19 Q. You can look at anything. Sure.
 20 A. Okay. There are no cases that I've
 21 provided testimony on. I have been involved in cases
 22 that have settled or that are still kind of ongoing.
 23 One case that comes to mind, the one that I
 24 was thinking of when I responded was one out of
 25 Arkansas. A John Phelps is the attorney. That one did

1 force was involved?
 2 A. I don't recall that right now.
 3 Q. How long ago did you work on that case?
 4 A. About a year and a half ago. I submitted a
 5 report and I was not deposed, did not provide expert
 6 testimony.
 7 Q. And were there allegations that the person
 8 died as a result of the electrical shock or something
 9 else?
 10 A. I didn't make those allegations. There was
 11 a question as to whether or not that happened. That's
 12 a medical determination that I'm not qualified to make.
 13 Q. Okay. Do you know, did anyone make that
 14 determination?
 15 A. I don't know. I just looked at it from the
 16 use of force perspective.
 17 Q. Okay. So what you know is that a Taser was
 18 used, and you know that the suspect died, but you don't
 19 have any knowledge as to whether the death was causally
 20 related to the Taser?
 21 A. That's right.
 22 Q. Okay. And would that be the same in any of
 23 your other cases?
 24 A. Yes.
 25 Q. Okay. Did you get -- have you ever

1 reviewed the manuals for the Tasers?
 2 A. Yes.
 3 Q. And what Tasers to your recollection were
 4 used in this case?
 5 A. X-26. I'm sorry, M-26.
 6 Q. And are there different types of Tasers?
 7 A. There have been yes, manufactured several
 8 different types.
 9 Q. Did both officers use an M-26?
 10 A. I don't recall right now.
 11 Q. It's my recollection that one of the
 12 officers had a different type of Taser, but you don't
 13 have any knowledge of that?
 14 A. I just don't recall.
 15 Q. And the M-26, do you know how that works?
 16 A. In terms of what, I'm sorry?
 17 Q. Well, how it -- what it does to people, how
 18 it works, how you deploy it?
 19 A. There's two ways to deploy it. One is
 20 through the use of the prongs. And those have
 21 connectors that can actually connect the weapon with
 22 the prongs. The prongs are essentially straightened
 23 out fish hooks that are designed to attach themselves
 24 to the subject's clothing. The connection, the
 25 electrical connection is then made. The cycles are

1 Q. And they're connected with a wire that goes
 2 all the way back to the Taser, right?
 3 A. Yes.
 4 Q. If that wire breaks they won't work, right?
 5 A. That's correct.
 6 Q. And when you shoot someone with a Taser, do
 7 you know, can that -- the length of that electrical
 8 current be adjusted by the user or is that always five
 9 seconds?
 10 A. I believe that is five seconds, and it has
 11 to be manually overridden, and I believe there's a way
 12 to do that. But it can be --
 13 Q. Longer, shorter or both?
 14 A. Both.
 15 Q. And do you know, was that method ever used
 16 on Mr. Olson?
 17 A. Yes.
 18 Q. Do you know --
 19 A. The initial application by Sergeant Joseph.
 20 Q. How many times was that mode used where you
 21 shoot the prongs?
 22 A. One time.
 23 Q. And do you know if that had any effect?
 24 A. I don't believe it did.
 25 Q. Why do you say that?

1 five-second cycles. And generally there's one
 2 cartridge per weapon and you have to reload. There is
 3 a record of the use of the weapon that's available
 4 through a computer download.
 5 The second form of deployment is a
 6 drive-stun. Where the weapon is actually physically
 7 put into contact with a person and the two prongs
 8 complete the electrical connection.
 9 Q. And how long does that last?
 10 A. Those are five-second intervals as well.
 11 And they can be renewed, of course.
 12 Q. Do they have to be five-second intervals if
 13 you use a drive-stun mode?
 14 A. No. They can be discontinued.
 15 Q. And by discontinued, what do you do to
 16 discontinue it?
 17 A. There's a mechanism. I can't give you
 18 exactly what, but there's a mechanism by which it can
 19 be discontinued.
 20 Q. Like letting off the trigger, for example?
 21 A. Yes.
 22 Q. And do you know what effect when you --
 23 first of all, when you use a prong, you actually shoot
 24 the prongs at someone, right?
 25 A. Yes.

1 A. Because I think that, as I recall,
 2 Sergeant Joseph made a statement that he didn't think
 3 it was effective. And there's even a kind of a
 4 corroborating statement made by Thomas Olson that said
 5 it felt like a vibrator.
 6 Q. Was he saying it felt like a vibrator when
 7 he was shot with it or when he was drive-stunned?
 8 A. My recollection is when he was shot with
 9 it.
 10 Q. When you listened to the tape could you
 11 hear the Tasers going off?
 12 A. Yes.
 13 Q. And did you hear times when the Taser was
 14 going off where it sounded like a toy machine gun?
 15 A. Yes.
 16 Q. Okay. And when you hear that kind of
 17 sound, what does that indicate?
 18 A. That it's being deployed.
 19 Q. And does it indicate when you hear that
 20 sound that a shock's being delivered?
 21 A. Yes.
 22 Q. And were there ever times when you couldn't
 23 hear anything, where someone maybe heard Boya yelling
 24 or something, but you couldn't hear that machine gun
 25 kind of sound?

1 A. Yes.
2 Q. And when you don't hear anything, what does
3 that indicate?

4 A. Well, it could indicate a drive-stun that
5 you just do not hear. You know. They are not as
6 audible as the application with the prongs.

7 Q. But if you're not hearing anything, would
8 that indicate that no electric current's going through,
9 or less electric current's going through?

10 A. I don't know that you can make a
11 determination with a drive-stun in that regard.
12 Because it depends on a lot of other things. Just
13 depends on the clothing and the extent to which
14 something like that can be picked up by the microphone.

15 Q. Now, when you shoot someone with the prongs
16 in that mode, according to the manufacturer, what is
17 that supposed to do to the person?

18 A. It's supposed to disable their muscle
19 groups and incapacitate them where they fall down.

20 Q. Have you ever seen someone who's been
21 Tased?

22 A. I've seen the video provided by the
23 company.

24 Q. Okay. Essentially it locks up the muscles,
25 just like all the muscles cramp and get rigid, right,

1 Simon on more than one occasion? Each of them did it
2 more than once, right?

3 A. Yes.

4 Q. Of the times they did it, can you tell me
5 how many times there was sufficient contact to cause
6 pain and/or muscle tension to Mr. Olson?

7 A. I don't know that it's possible for me to
8 answer that. The evidence of that, of course, can be
9 seen in the marks on Mr. Olson's body from the
10 photographs that were taken. Those are consistent with
11 what I have seen in my review of Taser cases. Burn
12 marks. You know, that might be a ballistics or a
13 medical determination, but it's still consistent with
14 what I have seen. And so I hope that that's responsive
15 to your question.

16 But in terms of the, you know, the
17 clothing, for an example, that might have been in
18 between Mr. Olson's skin and the Taser device, I'm not
19 in a position to say, you know, where that was or if
20 that took place.

21 Q. And you're not an expert, your area of
22 expertise does not include identifying burn marks as
23 coming from a Taser, correct?

24 A. That's correct.

25 Q. Okay. And how many overall cases have

1 and then when the electrical current stops, the person
2 collapses?

3 A. That's correct.

4 Q. And that incapacitates the person, right?
5 I mean, that's what it's supposed to do, incapacitate
6 the person, right?

7 A. It is.

8 Q. Okay. Now, in the drive-stun, does the
9 same thing happen?

10 A. The drive-stun does not have quite the same
11 impact as the prong in the order. It's more of a pain
12 compliance. Although it does have the ability to
13 disrupt the muscle groups.

14 Q. In fact, that what the drive-stun is, it's
15 pain compliance. It does not cause that tensing of the
16 muscles and the collapsing of the person in the
17 drive-stun mode correct?

18 A. I wouldn't say that. My understanding is
19 that it does have a lesser effect in terms of the
20 collapsing of the muscles, but that it's -- it does
21 have generally the same effect as the prongs.

22 Q. And can you tell -- I'm going to get to the
23 number of times and ask some questions about that --
24 but can you tell me, do you know that it was -- the
25 Taser was deployed by both Sergeant Joseph and Officer

1 you -- use of force cases have you been involved in
2 that involved some type of electronic control device?
3 More than three or four?

4 A. Oh, yes, 10 to 12 possibly.

5 Q. Have you done, besides the case we were
6 talking about, any other cases in Alaska?

7 A. No.

8 Q. And this case, of course.

9 A. No. Let me clarify, if I may. I have
10 been, and was, I guess, past tense, retained by the
11 Power Brown Law Firm on another case. And that case
12 has been settled. So I did not provide expert
13 testimony in that case.

14 Q. What case was that?

15 A. That was the Anvil case.

16 Q. And what was the issue in that case?

17 A. I honestly don't recall as I sit here now.

18 Q. Must have been use of force, right?

19 A. I think it was use of force. And I just
20 don't remember the specifics.

21 Q. Was a Taser involved in that case?

22 A. I don't remember.

23 Q. How long ago was that?

24 A. A year.

25 Q. How many active cases do you have?

1 A. What do you mean by "active?"
 2 Q. Right now, how many active cases do you
 have that you're working on as a consultant or expert?
 4 A. Probably six to eight in different stages
 5 of progression.
 6 Q. And how many a year do you work on?
 7 A. That varies.
 8 Q. In the last two or three years?
 9 A. No. That varies. I think I review between
 10 30 and 40 a year.
 11 Q. In the last two or three years how much
 12 money have you made as an expert consultant?
 13 A. Do you want collectively over three years?
 14 Q. No, each year on average, about?
 15 MR. BROWN: Objection; relevance.
 16 THE WITNESS: Around 250,000.
 17 BY MR. INGALDSON:
 18 Q. Per year?
 19 A. Yes.
 20 Q. And how much money have you made -- do you
 21 get paid as a teacher, professor?
 22 A. Around 80,000.
 23 Q. Do you do any other work to earn money?
 24 A. Yes. I write books. Textbooks. I have
 25 five out there.

1 Q. Hang on just a minute. Which ones?
 2 A. Police and Introduction. And the Criminal
 3 Investigation book as well.
 4 Q. Can you show me which one that is?
 5 A. (The witness indicated.) No. I.
 6 Q. Where would someone go to get these books?
 7 A. You can order them through Barnes & Noble
 8 or Amazon.com. They're readily available.
 9 Q. Okay. And how about have you written any
 10 articles dealing with police use of force?
 11 A. Only with regard to police pursuits, as I
 12 recall.
 13 Q. Okay. That was the decision -- The
 14 Decision to Chase: Revisiting Police Pursuits and The
 15 Appropriateness of Action?
 16 A. Yes.
 17 Q. And did that deal with, like, police cars
 18 chasing after someone?
 19 A. Yes. It does.
 20 Q. And were there situations where you thought
 21 that is not appropriate?
 22 A. Yes.
 23 Q. That's been an issue in Anchorage, whether
 24 they should call off a chase or not because of
 25 accidents that have happened; is that the type of thing

1 Q. Okay. And have you written any textbooks
 2 in the last three or four years?
 3 A. I write about two a year. Revise about two
 4 a year.
 5 Q. And do you get royalties on that?
 6 A. I do.
 7 Q. How much do you get about? Say in the last
 8 two or three years on average are you getting that?
 9 A. On the average?
 10 MR. BROWN: Objection; relevance.
 11 THE WITNESS: On the average of maybe
 12 50,000 a year.
 13 BY MR. INGALDSON:
 14 Q. Any other sources of income?
 15 A. Not me personally.
 16 Q. Let me talk a little bit about your -- the
 17 books that you've published. I looked through the
 18 books that you've listed. And have you published any
 19 books relating to use of force for police officers?
 20 A. Yes.
 21 Q. Can you identify those for me?
 22 A. That would be the policing
 23 book, which is called The Police and Introduction. And
 24 my criminal investigation book, which is titled
 25 Criminal Investigation.

1 you were looking at?
 2 A. It is.
 3 Q. In the present matter -- and just so I
 4 understand it, I know you mentioned this earlier -- but
 5 you're critical, are you not, of the use of the Taser
 6 by Officers Nathan and Joseph and Simon, correct?
 7 A. Yes.
 8 Q. Are you critical of the fact that they used
 9 a Taser at all or just the number of times they used
 10 it?
 11 A. Of the fact that they used a taser at all
 12 and the number of times, both.
 13 Q. So it's your opinion that a Taser should
 14 not have been used at all?
 15 A. That's right.
 16 Q. But you don't take issue with the fact that
 17 they placed Mr. Olson under arrest, do you?
 18 A. I do.
 19 Q. You take issue with the fact that they
 20 placed Mr. Olson in handcuffs?
 21 A. If Sergeant Joseph believed that he was
 22 posing a threat, I think it would be appropriate to
 23 temporarily detain somebody in handcuffs.
 24 Q. But, okay. So that part you don't
 25 criticize, but you criticize the fact that they were

1 going to arrest him?

2 A. Yes. I questioned the existence of
3 probable cause.

4 Q. And why do you say that?

5 A. Based on my training and my being a trainer
6 and what I have been published in, and my experience
7 for that matter. Two things, the entry of the officers
8 into the residence, which my understanding was
9 authorized by one of the children, a four-year old, a
10 four-year old boy. And I know this is a legal matter
11 to an extent, but it's also a practical matter because
12 law enforcement officers are taught in police academies
13 about this type of stuff. And it's my belief a
14 four-year-old does not have legal authority to let --
15 to give consent for officers to enter a house. And the
16 other issue is, is that I don't see any violation of
17 the law as I understand it --

18 Q. Okay.

19 A. Once the officers were inside the
20 residence.

21 Q. Let me follow up on that a little bit. Let
22 me ask you this: Have there been times where you've
23 been hired and have looked at certain facts of the case
24 and have come up with certain opinions, and then after
25 you've come up with those opinions you've learned that

1 that. But I've seen a lot of cases where reports have
2 not been properly written. So, you know, for
3 clarification of the record --

4 Q. Right.

5 A. -- mistakes happen.

6 Q. Sometimes through inadvertence, sometimes
7 through oversight, sometimes through just carelessness,
8 right?

9 A. Are you referring to report writing?

10 Q. Right.

11 A. Yes.

12 Q. But when you write -- when you wrote your
13 statement of facts here would it be fair to say you
14 were trying to be as accurate as possible?

15 A. I was trying to be, yes.

16 Q. And you're -- when you say that, you
17 mentioned that you had questions as to whether there
18 was even authority for the officer to enter, and
19 although you clarified it or qualified it by saying
20 you're not expressing what the law is, but that your
21 understanding -- it's your understanding that Mr. Boya
22 did not violate any laws or any evidence of violation
23 of any laws, right?

24 A. Based on what I observed in the file, yes.

25 Q. Okay. Now, what is your understanding as

1 some of the facts you were told were wrong, or maybe
2 were given additional facts, and after receiving that
3 additional information you then changed your opinion?

4 A. Yes.

5 Q. Okay. And so it's important -- you would
6 agree that -- strike that.

7 In fact, your opinions in this case are
8 based on your understanding of the facts and
9 circumstances that happened the night of Boya Olson's
10 arrest, correct?

11 A. Yes.

12 Q. Okay. And you've indicated in your report,
13 you've listed under the facts and background section,
14 starting at paragraph 11, various facts as you
15 understand them, correct?

16 A. Yes.

17 Q. And agree that it's important to be
18 accurate in your rendition of the facts, right?

19 A. As much as possible.

20 Q. And part of that comes from working as a
21 police officer where you learned that it's important to
22 write a police report to be as accurate as possible;
23 correct?

24 A. Well, police officers certainly should do
25 that when they write reports. And I was taught to do

1 to why the police officers even went over there?

2 A. It was a welfare check based on a phone
3 call allegedly made by , which would be
4 Mr. Boya's girlfriend and mother of their children.

5 Q. What were the officers told? Look at
6 paragraph 12 of your report if you want to refresh your
7 memory. I'm not trying to do a memory test here.

8 A. That's fine. I appreciate that. That
9 Mr. Olson had been drinking and she was concerned that
10 he was alone with the children.

11 Q. Now, did she say Boya Olson or
12 was drinking?

13 A. I believe . Let me take a second
14 look.

15 Q. Okay. And do you know, did she say that
16 Boya Olson had been drinking?

17 A. I don't recall that.

18 Q. Would that be significant?

19 A. It would be. I just don't recall that.

20 Q. You didn't put it in paragraph 12 and I
21 don't know if that was on oversight or something to
22 your memory she did not tell them that?

23 A. Well, my recollection right now is that I
24 don't remember reading that. If it's in the file it
25 should have been in that statement. That would be an

1 oversight, excuse me.

2 Q And if -- so if the officers were told that
3 Boya had been drinking and that he was along with the
4 children, that would be significant; you would agree,
5 right?

6 A Well, I question the significance of it.
7 Let me explain. I think when the police receive a
8 call, I think they should make reasonable attempts to
9 address the call. But if the only information that
10 they had was that somebody had been drinking, I think
11 there's more information needed to make a determination
12 that the level of drinking was somehow some way causing
13 a problem, or in violation of the law or somebody was
14 in danger. Or that there was -- what the specific need
15 was

16 And I think the response to the house was
17 appropriate. But, you know, if there's no legal
18 authority to go in, barring an emergency, for an
19 example, you know, somebody calling out for help or
20 some other perceived emergency on the part of the
21 officers, I do not believe they have the authority to
22 go in there.

23 Q So if the officers get a call to do a
24 welfare check, and by welfare check you understood that
25 to mean to check on the welfare of these minor

1 officers themselves to somehow get back in touch with
2 Ms. Smith and find out what she would prefer to do.

3 And I think the logical request would be
4 under those circumstances is to have her come out to
5 the house.

6 Q So they get a call of a welfare check and
7 they hear someone, a young voice say come in, and it's
8 your opinion that they should, if they recognize it as
9 being a voice of a child, they should not enter?

10 A They should not enter. They should make
11 efforts to try to see if an adult can come to the door
12 where they can visit with the adult. But they should
13 also be at the same time trying to contact
14 again to find out more information.

15 Q The fact that the -- do you know what an
16 arctic entrance door is?

17 A No.

18 Q The fact that the arctic -- looking at
19 paragraph 13 of your report -- you write down, "Upon
20 arrival, officers observed that the arctic entrance
21 door and the inside door to the residence were open."

22 I'll explain to you an arctic entrance
23 door, for people that live in the north, is similar to
24 a door in an enclosed foyer, but you have a door that
25 goes to the outside that some people call an arctic

1 children; correct?

2 A Yes.

3 Q And if the officers are called to do a
4 welfare check and have reports that the adults that are
5 there have been drinking, and they go to the house,
6 okay, see the arctic entryway open, the door to the
7 living area open, and are told by a young child when
8 they knock are told to come in, is it your opinion that
9 they should have just turned around and left?

10 A Well, I would take issue with a couple
11 things in the structure of the question. It's my
12 understanding that there were three doors. That the
13 outside door, the furthest most outside door was open.
14 But based on statements made by Sergeant Joseph, I
15 believe it was in his deposition there are other doors.
16 There's another door, and you go up the stairs and
17 there's a third door going into the residence. So I
18 don't recall that door being open. The one that goes
19 directly into the residence

20 So, just to let you know what my
21 understanding of the record is in that regard. But
22 hearing a voice that is clearly identifiable as a child
23 saying, "Come in," if that voice does not come across
24 as an emergency, I think a prudent course of action
25 would be for the police dispatcher, or, you know, the

1 entry door, and then you have a foyer area, and then
2 you have another entrance, and that's what an arctic
3 entrance was.

4 A It was my understanding, in trying to
5 respond to your question, it was my understanding it
6 was the outer-most door.

7 Q And so if officers arrived after hearing
8 the need of a welfare check, adults that have been
9 drinking and officers arrive at the scene and find the
10 door to the outside door to the residence open and the
11 inside door to the residence open, and there are young
12 children there, would that be significant to you?

13 A Well, it is significant, yes. But that
14 does not rise to the level of accepting a
15 four-year-old's permission to come into the house.
16 I think the prudent course of action would be to call
17 , and if she gives permission for them to go
18 in, she, in fact, is a resident there, then they have
19 their consent to go in. It's as simple as that.

20 Q So if they -- why would it be significant
21 that the arctic entrance door and the door of the
22 residence were open? Why would that be significant?

23 A Significant only because it's, you know,
24 it's -- if it's cold outside, and Joseph said that it
25 was, he said it was freezing outside, you know, that

1 would be something that would be unusual. But again, I
2 don't know that I have information to respond to the
3 significant -- the significance of that door, because I
4 don't know, for an example, if ice or snow was keeping
5 that door from shutting properly, or if normally it
6 should have been closed. You know, I just don't have
7 that information.

8 Q. Sure. And, of course, down here in
9 Columbia, Missouri, you probably don't get 14-below
10 Fahrenheit weather very often, do you?

11 A. Not often.

12 Q. And probably don't get snow even that
13 often, huh?

14 A. Well, unfortunately, we do. We had about
15 20 inches last year.

16 Q. Last a day or so?

17 A. Certainly not to the extent, I'm sure, that
18 Alaska gets.

19 Q. And if you have a four-year-old child
20 that's talking to you, and you have doors to the
21 residence wide open, it's not just a concern of cold
22 going in the building, but there's also a concern that
23 this four-year-old child could wander outside and end
24 up freezing to death; right?

25 MR. BROWN: Objection; form.

1 could certainly have contacted her by phone, I would
2 think.

3 Q. If you were a Hooper Bay police officer
4 that responded to this call, wouldn't it have concerned
5 you that at 4 in the morning you get a call, you get
6 dispatched based on a call of a mother of children, and
7 the dispatch report is that there are minor children
8 and that there's two adults who have been drinking.
9 And they want to check on the welfare of the children.
10 And you go there and all you hear is a child's voice.
11 Wouldn't it give you concern, if you were the police
12 there at 4 in the morning, when you knock on the door
13 that there's a child that is answering your knock, a
14 child that's up?

15 A. I would be concerned if I didn't hear a
16 child's voice. I think the fact that, you know, that
17 the child was saying "Come in" rather than calling for
18 help, I think, you know, the urgency was not there.
19 The concern, yeah. Of course. And I think that they
20 should have gone out there. You know. But how they
21 proceed I think was problematic.

22 Q. And if they heard nothing when they knocked
23 on the door what should the police officers have done?

24 A. Contact and find out what her
25 preference is.

1 THE WITNESS: That would be a concern if it
2 is to be accepted that all the doors between the child
3 and the outside were open.

4 BY MR. INGALDSON:

5 Q. And you just don't know that as you sit
6 here?

7 A. I think there's evidence that the door
8 leading to the -- directly into the living room, into
9 the room itself was closed only because Joseph said he
10 heard a voice.

11 Q. Would that be significant to you if the
12 door was open, would that change your opinion whether
13 the officers should have entered?

14 MR. BROWN: Objection; form.

15 THE WITNESS: No. It wouldn't. Because
16 what would be the law enforcement benefit of that, if
17 the officer is standing there, for an example, the
18 child isn't going to leave. They're prohibiting him
19 for doing so. If they are unable to get any of the
20 adult inside the residence to come to the door, then
21 the prudent course of action would be to contact

22 for consent, or better yet, a visit to the
23 house, depending on where she is. I'm not clear
24 exactly where she was proximity-wise, and the extent to
25 which it was possible for her to come over. But they

1 O. And what if they couldn't get a hold of
2 ?

3 A. Then they need to base a determination on
4 what they know. If they have a reasonable belief that
5 there's an emergency and they should make entry into
6 that house, then they need to do that. But I didn't
7 see that in this case.

8 Q. So they should have just left, based on
9 what you saw?

10 A. I think they should have investigated
11 further. If there's somebody living downstairs, visit
12 with them, if possible. Continue to investigate, but
13 not rush to judgment by rushing in in absence of an
14 articulable emergency or justification to do so.

15 Q. And do you know what problems alcohol
16 possesses to Bush communities in Alaska?

17 A. Are you asking for statistics? Anything?

18 Q. Have you looked into that at all?

19 A. I wouldn't know what to look into. If
20 you're suggesting that there's a certain culture or
21 people who are more prone to problems with alcohol than
22 other persons in the state, or other persons in other
23 states, I'm not clear on what your question is.

24 Q. I'm not suggesting that. What I'm asking,
25 have you looked at all into the problems related to

1 alcohol, crime, child neglect, those types of issues of
2 alcohol's effect on Bush communities in Alaska?

3 A. Not in Bush communities, but I've been
4 published for 20 years on the effects of alcohol.

5 Q. Do you know that that in Alaska there are
6 villages that are dry that do not allow alcohol at all?

7 A. I don't know that. I'm not questioning
8 that.

9 Q. But, in fact, that would be a factor if you
10 were a police officer in a village in Alaska, that
11 would be a fact that would be significant to you? In
12 other words, how you act as a police officer is
13 dependent on the recognized problems in your community,
14 right?

15 A. In a very general sense, yes. But to the
16 point that it provides specific justification, just
17 general knowledge that there happens to be an alcohol
18 issue in the community, I just don't believe rises to
19 the level of a specific justification to enter a house
20 absent any specific information about what's going on
21 inside.

22 Q. So if these officers did as you suggested
23 when they heard that, and did nothing and tried to get
24 a hold of the mother and couldn't and just left and
25 something happened to those children, would you expect

1 Q. And why do you say that?

2 A. Well, it would -- that's based on my
3 understanding of the circumstances. Now, I'm not
4 claiming to be intimately familiar with Alaska state
5 law, if there's some kind of a statute or some kind of
6 a law that I am not aware of, of course that would make
7 the difference. That wouldn't require the officers to
8 make an arrest. But based on my training and my
9 education and experience in policing, I don't see at
10 the time Boya was placed under arrest where he had
11 committed any offense.

12 Q. Now, you did agree that the initial
13 handcuffing would have been appropriate just
14 momentarily to detain him while they were
15 investigating, you agreed with that?

16 A. Provided Joseph perceived Olson's actions
17 as threatening.

18 Q. And do you agree that it would have been
19 appropriate for the police officers to try to determine
20 whether Boya and/or were intoxicated?

21 A. Well, they did that. It shows that they
22 did that.

23 Q. Was that appropriate?

24 A. That they at least inquired about it. They
25 didn't conduct a field test.

1 that someone like Mr. Brown might have called you up
2 and said, "Hey, the police officer didn't do enough
3 here. These children got hurt because they were
4 derelict in their duties?"

5 A. Well, they could have, but I'm not
6 suggesting that. I think my testimony here is that
7 they should have continued their investigation. And
8 included in that would have been to contact
9 Possibly to contact neighbors. Possibly to get ahold
10 of the phone number to the Olson residence and call
11 that. And just investigate in whatever manner that
12 they can to determine if, in fact, there's anything
13 inside that is worthy of police intervention.

14 Q. Let's get over the fact of whether they had
15 a right to go in under a law, if a child says come in,
16 the police can come in. Okay. Assuming that that's
17 the case, and they went in there, had legal authority
18 to enter -- and the Judge will decide that fact --

19 A. I understand.

20 Q. -- if that issues raised. If they had
21 legal authority to go in there, once they were in
22 there, and with what they observed, then is it your
23 opinion that they had -- they had no right to place
24 Boya under arrest?

25 A. Based on what they knew, yes

1 Q. Well, my question is, do you agree it was
2 appropriate for the officers to try to determine
3 whether or not and Thomas Olson were intoxicated?

4 A. That has to be guided by the law. And
5 whether or not it would be in the best interest of law
6 enforcement. In other words, if there is a specific
7 statute that says that if there's an -- if the parents
8 are intoxicated at a certain level then the children
9 are to be considered in danger, so I think I'll have to
10 defer to the law on that one. Because absent any
11 specific information about just how intoxicated they
12 might have been, it was not, in my opinion, it was not
13 conclusive that they were intoxicated. Only that the
14 odor of alcohol was smelled on their breath. And there
15 was no field test based on the information that I
16 reviewed in the file. No field test in this matter.
17 And he was responding to their questions and, you know,
18 I did not see a violation of the law

19 Q. Okay. So let me ask you this. In Missouri
20 is it okay for parents to be intoxicated with their
21 minor children?

22 A. I don't know regarding the statutes. I
23 don't know

24 Q. Well, how about in Oklahoma where you
25 worked as a police officer?

1 A. I don't know of any of the places that I
2 worked, because I never had to respond to those types
3 of calls.

4 Q. So if you don't recall responding, and you
5 don't know what the law is, what would you do as a
6 police officer?

7 A. I find out.

8 Q. How do you find out?

9 A. You would initially go through the
10 dispatcher. You would probably have some kind of a
11 manual or a document that you carry in your patrol
12 vehicle. Presumably there would be a legal advisor, a
13 supervisor that would have knowledge that you could
14 refer to. That happens all the time.

15 Q. I'd like you to assume that in Alaska that
16 there is a law that -- are you familiar with the Alaska
17 law endangering the welfare of a minor?

18 A. No. I think I stated that I was not.

19 Q. All right. Assuming for the purpose of my
20 question that it is unlawful in Alaska for adults who
21 have guardianship or supervisory control over minors to
22 be intoxicated -- and this is assuming there's not
23 another sober adult that can take care of the kids --
24 if you're along with the kid, you're endangering
25 the welfare of a minor. If that is a circumstance, if

1 loud, in a very loud voice; right?

2 A. He was.

3 Q. Consistent with someone who has either kind
4 of gone off the deep end as being upset and/or someone
5 who's pretty drunk, right?

6 A. Well, I wouldn't necessarily consider all
7 intoxicated persons as belligerent persons. I think it
8 depends on the circumstances on that. And that's a
9 leap of faith I'm not prepared to make. But I would
10 say that he was certainly being uncooperative.

11 Q. And it was more than uncooperative, though.
12 I mean, he was screaming and yelling, and he was
13 threatening; correct?

14 A. He was screaming and yelling and using
15 profanity. And I don't remember any threatening
16 remarks made by him. Other than that he would file the
17 lawsuit.

18 Q. And while that doesn't necessarily mean he
19 was intoxicated, those actions certainly are consistent
20 with someone who's intoxicated; correct? They're not
21 inconsistent with it?

22 A. They're not inconsistent. I don't know
23 that I would say that they're consistent. That might
24 call for a clinical evaluation of some sort.

25 Q. But as a police officer, that's one of the

1 those are the circumstances, then you do agree, do you
2 not, it would be appropriate for Officers Joseph and
3 Oaks, I guess, who came to the call, to determine
4 whether these men were intoxicated?

5 A. (The witness nodded his head.)

6 Q. Especially in light of their report that
7 they'd been drinking and concerned about child welfare?

8 A. I would say the answer is yes provided they
9 had a legal right to be there in the first place.

10 Q. And then after are Mr. Boya's momentarily
11 detained so this investigation can take place, and as
12 you understand the facts, the officers and Boya slipped
13 on trash or something on the floor and they all fell
14 down, right?

15 A. Yes.

16 Q. And Boya became belligerent after that,
17 right?

18 A. Boya became -- I wouldn't characterize as
19 belligerent. I mean, uncooperative. I mean, possibly
20 belligerent. Maybe we're mincing words here, but --

21 Q. You heard that tape; did you not?

22 A. I did.

23 Q. He was screaming, yelling, using profanity?

24 A. Yes.

25 Q. He was there threatening. He was very

1 things you're called on to do. Have you ever stopped
2 someone for DUIs?

3 A. I've dealt with people that have been
4 intoxicated.

5 Q. Have you ever stopped someone for driving
6 while intoxicated?

7 A. No.

8 Q. Have you dealt with people that they were
9 intoxicated and you knew that without having to do a
10 field sobriety test, right?

11 A. I think the answer is yes. I knew they
12 were intoxicated, but I certainly didn't know the
13 level, whether it was the legal level or not.

14 Q. And, in fact, the use of the Taser wasn't
15 until after Mr. Boya became combative; correct?

16 A. Till after he was on the floor, that's
17 right. I wouldn't use the -- agree combative. Because
18 I don't know how that's defined. But you know, if you
19 want to use the word angered, I'm more comfortable with
20 that. That activity began, as I recall, after he was
21 on the floor after the three had fallen.

22 Q. And, in fact, at least the testimony and
23 affidavits of the officers were that they had kicked
24 the officers?

25 A. Yes.

1 Q. Right. Including, particular kicking, I
2 think one in the chest and one in the shin, right?

3 A. That's what they say.

4 Q. And those were all before he was Tased for
5 the first time; right?

6 A. I believe so. But he was also handcuffed
7 at the same time.

8 Q. I understand that. But if someone's
9 handcuffed they can kick you pretty hard; right?

10 A. If they're in a physical position to do
11 that. If they're standing they certainly can't. He
12 was not standing. The extent to which he could deliver
13 a kick that would pose any kind of a realistic danger
14 to an officer while he's seated on the floor I think is
15 highly questionable. In fact, the officers in this
16 case never said that they felt that they were danger by
17 virtue of the kicking.

18 Q. Well, you mentioned that in your report.
19 They don't -- they didn't say. What are they supposed
20 to do, announce on the tape, "I feel that I am in
21 danger because you kicked at me?"

22 A. No.

23 Q. No one does that, do they?

24 A. They made that statement after they had a
25 chance to -- after a period of time had gone by and

1 know why Mr. Brown did not ask those questions?

2 A. I would have to be able to read his mind.
3 Of course not.

4 Q. And the reason that that is significant to
5 you is that -- is that you believe that the Hooper
6 Bay -- it's my understanding, and in your report here,
7 that pursuant to the Hooper Bay policy that they are
8 not authorized to use the Taser except for purposes of
9 self-defense if they feel that they are in imminent
10 danger of death or serious injury; isn't that what you
11 say here?

12 A. Yes.

13 Q. Okay. And that's --

14 A. Great bodily injury.

15 Q. Otherwise they should not use a Taser,
16 right, that's your understanding of the Hooper Bay
17 policy?

18 A. Well, there's more to it than that. But
19 that's a good summary of the policy, of course, because
20 the policy says that.

21 Q. And in any event, though, the Tasing, you
22 do agree, happened after the kicking incidents
23 happened?

24 A. That's my recollection. They were at the
25 front end of the scuffle.

1 they still had never said that they --

2 Q. When were they supposed to say that?

3 A. If they ever felt that that was the case
4 presumably.

5 Q. But when?

6 A. In the depositions, in their reports.

7 Q. What'd they say in the depositions?

8 A. It's what they didn't say that I'm
9 testifying to. They didn't say they were in danger by
10 virtue of the kicking.

11 Q. Were they asked that question?

12 A. I don't remember if they were asked the
13 question or not. But the information was not provided.

14 Q. Mr. Brown took their depositions; correct?

15 A. Yes.

16 Q. Did you talk to Mr. Brown before those
17 depositions?

18 A. Did I?

19 Q. Yeah.

20 A. No. I don't believe so.

21 Q. Did you tell him that, hey, find out if
22 these guys felt they were in danger, ask him that, did
23 you tell him that?

24 A. No.

25 Q. If those questions were not asked, do you

1 Q. Now, when -- at one point, too, the
2 contradicted testimony is that Boya grabbed onto a
3 pole; correct?

4 A. With his legs, yes.

5 Q. And, in fact, he grabbed on to the pole and
6 was keeping officers from moving him; right?

7 A. Essentially, yes.

8 Q. And what should the officers have done
9 then?

10 A. Pried their legs apart and moved him out of
11 there.

12 Q. Okay. And when they're prying his legs
13 apart, and if he's holding on tight with his legs and
14 he's kicking at them, what should they do?

15 A. Well, you do the same thing that you did
16 with and that is hold the legs so they're not
17 kicking so he doesn't have an opportunity to do that.
18 And restrain them. You have the capability to do that
19 with some sort of a leg restraint if it's available.

20 Q. And if the person still doesn't let go of
21 the pole, what do you do, walk away and leave them?

22 A. No, there's three officers there. I
23 believe three officers have the capability to remove
24 him from that pole and take him into custody.

25 Q. Well, one of the officers is with

1 right?

2 A. Yes.

3 Q. And, in fact, you say , they were
4 holding legs down. -- let's back up a
5 little bit. Let's go to your report on
6 paragraph 24 through 26. And, in fact, in this
7 situation Joseph reported that , after he woke him
8 up, got up, he saw getting ready to kick,
9 that Joseph asked if he was going to kick, and
10 said, yes, I'm going to. And Joseph grabbed
11 and placed him on the floor. And was he able to
12 control with just basically soft hands. That
13 would be an example of soft hands, right?

14 A. Yes.

15 Q. And that was appropriate, right?

16 A. Yes.

17 Q. And if the officers had done that with
18 Boya, you'd have no complaints, right?

19 A. I'm saying that that is what they should
20 have done with Boya.

21 Q. And if they had done that with Boya you'd
22 have no complaint?

23 A. Providing the Taser was not used.

24 Q. If they just used the soft hands and that
25 had worked and they didn't have to take him?

1 A. I would say so.

2 Q. Now, first of all, what about / One
3 of the officers would have had to leave right?

4 A. Possibly. I believe that two officers
5 could have gotten Boya off the pole.

6 The position of Boya on the pole I think is
7 helpful in evaluating this case. Because all Boya was
8 trying to do -- and there's no evidence to the contrary
9 -- when he had his legs wrapped around that pole, to
10 stay put and not go to jail. He wasn't hurting
11 anybody. He was on the floor. He was handcuffed. His
12 legs are wrapped around. So there's no rush. There's
13 no emergency. The manner in which acts, they need
14 to treat him accordingly. If kicks, then the
15 response needs to be appropriate.

16 If the kick is something that can
17 reasonably be considered a threat, you know, if he
18 stands up and kicks. But I don't know what resources
19 were available to these officers in terms of additional
20 manpower, equipment that might have been available in
21 patrol vehicles. But I would suggest that they had
22 time on their side. And there was no urgency to
23 overreact, no need to overreact with regard to Boya,
24 he's not going anywhere.

25 Q. What do you mean by terms of equipment in

1 A. Yes. Because Boya was essentially
incapacitated by virtue of being handcuffed.

3 Q. Now, doesn't it suggest to you that if the
4 officers are using soft-hand controls for that
5 if that would have worked they would have done the same
6 thing with Boya?

7 A. No.

8 Q. Is it your testimony that they were just
9 gratuitously Tasing Boya because they didn't like him
10 or something?

11 A. I think there's evidence that's consistent
12 with that in the file.

13 Q. What evidence?

14 A. I don't know about them not liking him or
15 not. Well, the evidence is very straightforward, and
16 that is that the Tasing was excessive and
17 unnecessary. And consistent with being punitive,
18 especially those when Boya was placed stomach down in a
19 prone position, and they were still drive-stun
20 Tasing, delivered to his back at least to maybe as
21 many as four or five times

22 Q. Okay. Now, you talk about the officers
23 should have been able to pry him off. With three
24 officers they should have been able to pry him off the
25 pole, right?

1 their vehicles?

2 A. In terms of leg restraints or flex cuffs.

3 Q. Do you know if they use snowmobiles and
4 four-wheelers?

5 A. I don't know specifically, but presumably
6 there would be police equipment in the vehicles,
7 whatever they are.

8 Q. So they should go down and get leg
9 restraints, that's what you're saying they should do?

10 A. If they have resources available that would
11 help them take Boya into custody at a lower level than
12 deploying Tasers against him while he's handcuffed,
13 that is what they should have done.

14 Q. Okay. And it's true, is it not, that by
15 wrestling, trying to pry his arms off, when you have
16 someone who's already kicked at you, trying to pry his
17 legs off, that one of the fears when you pry his legs
18 off is that he'll kick at you? That's a fear, a
19 reasonable fear, right?

20 A. It's a fear.

21 Q. And it's a reasonable fear, right?

22 A. Well, it's a reasonable fear. But the
23 extent to which he could deliver any kind of a damaging
24 blow I think is the whole question here.

25 Now, there's evidence, physical evidence in

1 this case that he was Tased in the lower right leg,
 2 almost groin area. And if the jury is to believe that
 3 the marks on the lower right inside of his leg are, in
 4 fact, Taser marks, then they would have to infer that
 5 one of the officers, Joseph or Simon, were able to
 6 physically reach down there and to deliver those
 7 drive-stuns. I would assume also that if that were the
 8 case they were not all that threatened by the kicking.

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

12 A. They would use their arms, their strength.

13 Q. And to use their arms to pry off the legs,
 14 they're going to have to bend down and grab ahold of
 15 the foot or ankle or something, right?

16 A. That's right.

17 Q. And that puts their face in very close
 18 proximity to that foot, necessarily, doesn't it?

19 A. I disagree with the assumption that Boya
 20 would pose a kicking threat if you have one officer
 21 physically containing each leg.

22 Q. So when -- my question was, if they go down
 23 and grab at his foot, their face is in close proximity
 24 to his foot, right?

25 A. Right.

1 delivering closed-fist punches at the time.

2 Q. But, come on, they have two officers, and
 3 one can each grab a hand to get rid of those punches
 4 and protect those, right?

5 A. The use of the baton under that
 6 circumstance was authorized under policy.

7 Q. So if the policy authorized it, then it
 8 would be okay, you would agree with that?

9 A. In the policy authorizes it, it is okay,
 10 provided the policy is consistent with
 11 nationally-recognized standards of care, and consistent
 12 with the objectively reasonable standards of care.

13 Q. Let's talk about the nationally-recognized
 14 standards of care. Because turn to paragraph 40, if
 15 you would, of your report.

16 And you quote from the International
 17 Associations of Chiefs of Police, use of force policy,
 18 and you state, "Officer may -- this is a quote from
 19 that publication -- "Officer may only use that level of
 20 force that is objectively reasonable to bring an
 21 incident under control." Do you see that?

22 A. Yes.

23 Q. Okay. And then you -- will you read into
 24 the record what you say next?

25 A. "Implicit in this statement is that the

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

5 A. Well, you said if he was able to do that.
 6 And if he was able to do that, I think that would be a
 7 consequence of that. But I don't believe that two
 8 officers would permit that to happen.

9 Q. The time that you used a baton, why didn't
 10 you just go tackle the person and wrestle the person
 11 down?

12 A. Actually, that was being done in
 13 conjunction with my use.

14 Q. Why did you take the baton out? Why would
 15 you need the baton?

16 A. It's just an aid.

17 Q. Was it punitive?

18 A. No. Because he wasn't struck. He was just
 19 directed down to the ground.

20 Q. You said you've seen people struck with a
 21 baton that you thought was okay?

22 A. Yes.

23 Q. Why wouldn't those people just take -- call
 24 for extra backup and wrestle the person?

25 A. Because they had weapons, or the person was

1 actions of the officer must be reasonable, and that all
 2 lower level means to accomplish control of a subject
 3 must be used before resorting to a higher level."

4 Q. Okay. Now, in fact, earlier in this
 5 deposition you said that you don't have to start with
 6 the lower levels first, right?

7 A. Well, I think I qualified that. And I'm
 8 not saying anything different here. It has to be
 9 reasonable.

10 Q. Right. But here you're saying that you
 11 must use lower levels before you resort to a higher
 12 level, and now you're saying -- earlier --

13 A. No. No. You're taking it way out of
 14 context. Because I also say here in the very sentence
 15 above that, that it must be reasonable.

16 Q. Right. In getting back to my example of
 17 using the baton, where people are punching at you, a
 18 lower level of force would be to just get in and
 19 wrestle with the person and grab the person's arms and
 20 not use the baton, right?

21 A. Actually, in the example that I gave you,
 22 those were the lower levels of force for that
 23 situation.

24 Q. The baton was?

25 A. Yes.

1 Q. Was lower than grabbing the arms?

2 A. Well, a baton to be used as a control
device is one of the lowest levels of force on the
continuum.

5 Q. How would a baton be used in the impact
method?

7 A. You're asking me about both things.

8 Q. But --

9 A. I think your question just specifically
identified the use of the baton as a control device.

11 Q. Maybe I misunderstood you. I thought you
said there were times that as a police officer, when
you were there in an arrest, used a baton in the impact
mode, and you described a situation where the people
were punching with their fists, and it was proper and
appropriate in your mind to use a baton in the impact
mode?

18 A. Yes.

19 Q. Okay. And what I'm saying is, if you can
control someone's feet with just grabbing them, why
don't those officers just have control of the arms?

22 A. Because the arms were restrained. Are we
talking about the same thing?

24 Q. No, no, no. If the officers in our case
could have used their arms to control Boya's legs, why

1 And on top of that, there was a shooting

2 where an agent was killed, and I was kind of involved
3 in that situation. And I had done some police training
4 as a result of that. And I enjoyed it, so I thought it
5 was, all things considered, it was time for a career
6 change.

7 Q. Okay. Were you ever disciplined?

8 A. No.

9 Q. But you did sit on some disciplinary
boards; correct?

11 A. Yes.

12 Q. Did you review use of force internally?

13 A. Yes.

14 Q. And were there times where you found
15 officers did use excess of force?

16 A. Yes, we did. A time or two, yes.

17 Q. And were there times that you found that
18 the force used was justified?

19 A. Yes.

20 Q. Was that more often the case?

21 A. I don't know the breakdown. We didn't have
22 all that many cases. But I would say probably that was
23 more often the case.

24 Q. Okay. Getting back to the arrest here in
25 this case, do you recall a time when told

1 couldn't the officer in the case that you were involved
in have used their arms to control the suspect's arms?

3 A. I understand. Fair question. And the
4 answer to that is because the person was not
5 restrained. The person was actively fighting. In
6 fact, the person was -- what is characterized as an
7 assailant. And that's very different than Mr. Boya's
8 circumstances with his handcuffs secured.

9 (A break was taken.)

10 BY MR. INGALDSON:

11 Q. Dr. Layman, why did you leave the police
12 force in Oklahoma?

13 A. A number of reasons together. In spite of
14 the high cost of oil today, the oil rigs and the oil
15 companies in Oklahoma, which is very oil-dependent,
16 they were going under just left and right. And
17 creating a very serious financial crisis to the point
18 that the Governor made an announcement that no state
19 employees would have a raise for four to five years.
20 No. 1.

21 No. 2. I was asked to accept a promotion,
22 which I appreciated the offer, but it was to be a field
23 supervisor down in the lower corner of the state, in
24 McCallister, and I didn't want to move. I had just
25 bought a house

1 one of the children to go get a pliers to help his --
2 the child's father? Do you recall hearing that?

3 A. I don't recall that.

4 Q. If something like that did happen would
5 that be significant?

6 A. You're saying if I asked one of the
7 children to go retrieve pliers?

8 Q. Basically said, "You can help your dad, go
9 get pliers."

10 A. Well, I think if I were a responding
11 officer and I were to hear that, I mean, a pliers are
12 not necessarily a weapon. You have to, you know, be
13 realistic about it. But I wouldn't be comfortable with
14 one of my detainees giving directives to kids to, you
15 know, accumulate hardware, even though the hardware may
16 be hard to determine how that pair of pliers might have
17 posed a problem ultimately. But significant, yes, but
18 a major significance, I'm not so sure.

19 Q. Now, just before we took the break a little
20 bit ago, you were talking about how you think what
21 should have happened is the officers should have just
22 pried Boya's legs off the pole. And after they got his
23 legs off the pole, what should they have done?

24 A. Made arrangements to transport him. If he
25 was under arrest, made arrangements to transport him to

1 the station.

2 Q. What do you mean?

3 A. Take him to the station in whatever way
4 that they do. Whatever accepted method there is to do
5 that. You know, you mentioned earlier that they might
6 have been on the snow machines or something of that
7 nature. Whatever the prescribed method would have been
8 to transport him to the station.

9 Q. How were they going to get him out of the
10 room and down the stairs?

11 A. Just through physical force. Just
12 physically direct him down the stairs. I mean, that
13 problem happens every day across the country.

14 Q. And if he's -- even though he's handcuffed,
15 of course, Boya can't just sit down, he can kick at
16 them if they're walking with him, he can do all those
17 things, right?

18 A. And they can also carry him out, and they
19 can also call for assistance, if assistance was needed,
20 from their own department, perhaps from another
21 department, depending upon what the resources are. Put
22 him in leg restraints. You know. You know, it depends
23 on what resources are available. But there are three
24 officers there, and, you know, he -- he was under
25 arrest. You know, they need to force him down, get him

1 know. If, in fact, the children remember close enough
2 to be affected by the spray.

3 Q. If there were no children present, it was
4 not the concern about the children being affected by
5 the pepper spray would pepper spray in your opinion
6 been appropriate?

7 A. Yes.

8 Q. Why is that?

9 A. Because that's a low level of a control
10 weapon.

11 Q. And that would be appropriate to gain
12 compliance, to use to gain compliance, pepper spray?

13 A. Yes.

14 Q. Why would pepper spray be appropriate to
15 use, gain compliance, but not a Taser?

16 A. Because the Taser is generally a higher
17 level intermediate weapon. And it is just -- there are
18 other options available to law enforcement officers.

19 Q. Why do you say a Taser's higher level than
20 pepper spray?

21 A. Can I add another component to my response?

22 Q. Absolutely.

23 A. Before I respond to that?

24 Q. Sure.

25 A. The other reason is because it's against

1 out of there.

2 Q. Would it have been appropriate for them,
3 instead of using the Taser, to use the baton in this
4 situation in your opinion?

5 A. It could have been utilized as a control
6 device.

7 Q. How so?

8 A. Not as an impact weapon, however.

9 Q. As an impact weapon that would have been
10 inappropriate and excessive?

11 A. Absolutely.

12 Q. As a control device how would they use a
13 baton?

14 A. To simply minimize his movement.

15 Q. You mean to hold his legs down or
16 something?

17 A. To hold him down, yes, legs included.

18 Q. How about pepper spray? Would that have
19 been appropriate to use?

20 A. I believe Oak stated that he considered
21 pepper spray and he decided against it, because the
22 size of the room and the fact that there were children
23 in the room. If that is to be accepted and I have not
24 been to the room, to make my own determination, but I
25 think that's a reasonable statement on his part. You

1 policy. The facts and circumstances that the officers
2 were facing were inconsistent with those identified in
3 the policy

4 Q. The Hooper Bay policy?

5 A. Yes.

6 Q. I understand that. But setting aside the
7 Hooper Bay policy for a minute, first of all, would
8 pepper spray have been within Hooper Bay policy, use of
9 pepper spray?

10 A. I believe so.

11 Q. So if the Taser was within Hooper Bay
12 policy, then would your answer be different, then that
13 would be acceptable if it was within the policy?

14 A. No.

15 Q. Why?

16 A. Are you asking about Taser or spray?

17 Q. Okay. I understand that you've testified
18 that the -- as I understand it, that the Taser -- one
19 of the reasons the Taser was inappropriate is because
20 it was against Hooper Bay policy?

21 A. Yes.

22 Q. And I'm asking you hypothetically, if the
23 Hooper Bay policy allowed the use of a Taser under
24 these circumstances, then would the use of the Taser
25 have been okay?

1 A. Well, I have a hard time answering that.
 2 Because I cannot think of any circumstances,
 3 hypothetical or not, by which the use of a Taser would
 4 be appropriate for a subject who is bound by handcuffs
 5 and lying belly down prone on the floor. So I guess I
 6 have to take issue with that part of your hypothetical
 7 which suggests that they would be authorized to do
 8 that. I can't imagine any police officer or police
 9 policy that would authorize the use of a Taser under
 10 that circumstance.

11 Q. Okay. Maybe I misunderstood about the
 12 policy. As I understood it, because there wasn't, in
 13 your opinion, the threat of serious physical injury or
 14 death --

15 A. Yes.

16 Q. -- you don't need the threat of serious
 17 injury or death in the Hooper Bay policy to use pepper
 18 spray; is that right?

19 A. That's right.

20 Q. You can use pepper spray to gain
 21 compliance; correct?

22 A. Yes.

23 Q. And so I'm asking, if it was a matter of
 24 policy for Hooper Bay to use the Taser to gain
 25 compliance, then would the use of a Taser have been

1 (Deposition Exhibits B, C and D were marked
 2 for identification by the reporter.)

3 BY MR. INGALDSON:

4 Q. Dr. Lyman, we've marked as Exhibits B, C
 5 and D some documents that you brought with you today.
 6 These are the documents that you were referring to when
 7 you mentioned that the IACP guidelines, you say that
 8 Tasers are not to be used for compliance, or maybe I
 9 misstated what you said.

10 A. Well, only that they're to be used against
 11 persons who are violent or are potentially violent,
 12 which are as a weapon of protection, rather than a
 13 weapon of compliance.

14 Q. Okay

15 (An off-the-record discussion was held.)

16 BY MR. INGALDSON:

17 Q. Why, if you have such an opinion, why or
 18 what is it about Tasers, as compared to pepper spray,
 19 that in your opinion makes it inappropriate to use
 20 Tasers for compliance?

21 A. Because a Taser is a higher-level weapon
 22 than an OC spray.

23 Q. And when you say a higher-level weapon,
 24 what do you mean?

25 A. It's generally higher on the use of force

1 okay in these circumstances?

2 A. Well, the Taser -- my answer is no.
 3 Because the nationally-recognized standards of care and
 4 the guidelines identify the Taser as a weapon to
 5 protect the officer, rather than a compliance device.

6 Q. Okay. So even if the Hooper Bay policy
 7 allowed it as a compliance, it would not be proper,
 8 the Hooper Bay policy would be in violation of these
 9 national standards?

10 A. Yes. Correct.

11 Q. And what guidelines were you referring to?

12 A. The International Associations of Chiefs of
 13 Police guidelines, and my familiarity with the Taser
 14 International Training Manual, which I have read for
 15 other cases, which characterizes it as the appropriate
 16 use of a Taser for focused aggressors. And the IACP
 17 identifies the appropriate use of the Taser for persons
 18 who are violent or potentially violent. And in my
 19 opinion, a person who is restrained with handcuffs lying
 20 prone, belly down on the floor, does not meet that
 21 criteria

22 Q. Do you have those IACP guidelines with you?

23 A. Yes. I brought them for you.

24 Q. Can I take a look at those?

25 A. Of course.

1 continuum that I have reviewed. The ones that have
 2 been utilized by police departments around the country.

3 Q. And so the jury understands, what do you
 4 mean by higher level? What does that mean from a
 5 practical standpoint?

6 A. Well, we spoke earlier today about
 7 continuum, and about how it represents levels of force
 8 from the very lowest level to the highest level, which
 9 would be deadly force. And the Taser or the electronic
 10 control weapon, but the Taser included, is generally
 11 toward the top end of the -- usually around the area of
 12 impact weapons, one or two levels under deadly force.

13 Q. So by a higher level of force, you mean it
 14 by higher level on the continuum, it's a higher level
 15 of force is what you mean?

16 A. Yes.

17 Q. And that's because, what, it causes more
 18 pain, a more long-lasting effect or what?

19 A. Well, it is just a -- I think the answer is
 20 yes to that. But not limited to that. I mean, it's
 21 just a weapon that subjects the subject to 50,000
 22 volts, and it's one that incapacitates the person. One
 23 that has the potential to cause physical problems with
 24 the person, depending upon where they are Tased. And
 25 if they fall down and experience some residual problems

1 with it.

2 And, of course, there's the information
3 that's set forth by the IACP that says there is a
4 concern that it can have even more serious results
5 because persons have died after being Tased. And that
6 is in the paperwork that I gave you.

7 Q. We've, of course, already talked about
8 persons dying, and, in fact, you don't know the basis
9 of those statements, and, in fact if the manufacturers
10 dispute that they were caused by Tasers, and, in fact,
11 you're not aware of one case where the medical causal
12 connection has been reached between the Taser and the
13 death; is that correct?

14 MR. BROWN: Objection; form.

15 THE WITNESS: Where the medical
16 determination has been made that the Taser actually
17 caused the person's death, I have not seen that.

18 BY MR. INGALDSON:

19 Q. And you mentioned 50,000 volts. Do you
20 know how many amps are deployed with this Taser?

21 A. I don't recall.

22 Q. But it's the amps that cause the actual
23 harm to people, not the volts; correct?

24 A. Well, I'm -- I wouldn't suggest that, no.
25 I don't agree with that. I do agree that the amperage

1 A. No, I did not know that. But it's good to
2 know that. It also safe to say that, you know,
3 anything from knee strikes, fist strikes, all these
4 different types of weapons cause some modicum of pain,
5 up to and including the discharge of a firearm. So
6 just because they cause pain, that's not to say that
7 they're all in the same category. There are different
8 levels of pain. And, you know, it's just generally
9 accepted that the Taser is a mid to higher range rather
10 than lower range.

11 Q. And you mentioned fist strikes. There are
12 times when it's appropriate for officers to use fist
13 strikes; is that correct?

14 A. Of course there are.

15 Q. Would fist strikes be above or below Taser
16 in the continuum of force?

17 A. They are generally below Tasers.

18 Q. Really?

19 A. Generally. From what I've seen. They can
20 be on the same level.

21 Q. How about impact with a baton?

22 A. Impact weapons are one level beneath deadly
23 force.

24 Q. So they'd be above the Taser?

25 A. Yes.

1 is what generally is a concern, you know, when people
2 get electrocuted and whatnot. I wouldn't say that the
3 use of the Taser in the administration of 50,000 volts
4 is a benign experience for the person who's being
5 Tased. It is painful. And --

6 Q. I'm sorry to interrupt you. You don't
7 know, you've never been Tased, so you don't know what
8 it feels like, do you?

9 A. I don't know what it feels like, that's
10 true. I have never been Tased.

11 Q. Now --

12 A. I'm basing -- just for clarity of the
13 record, I'm basing my comments on statements made by
14 parties in this case and their depositions. With
15 regard to, you know, the pain compliance. I think that
16 term is used. I'm also basing it on statements made by
17 or contained in the Taser International Manual.

18 Q. And pepper spray causes pain as well,
19 right?

20 A. It does.

21 Q. That can last for 30 minutes or longer
22 afterwards?

23 A. I believe that's correct.

24 Q. In Alaska they use pepper spray to keep
25 bears aware; are you aware of that?

1 Q. So with the Boya case, if the officers had
2 taken a baton out and started beating on his legs to
3 get him to release his legs, that would have been
4 excessive in your opinion?

5 A. Yes.

6 Q. And so if the officers can't pry someone's
7 legs off of something, if they couldn't pry Boya's
8 legs, what should they have done? If they tried and
9 couldn't do it, what should they have done?

10 A. Well, I don't know that one can make the
11 assumption that they couldn't do that. I mean, after a
12 period of time, he would be -- he would be able to be
13 placed into custody. But --

14 Q. So they should just keep trying to pry his
15 legs until they're successful?

16 A. My answer is yes they should keep trying.
17 Just because a person is being uncooperative, and this
18 can go in the hypothetical -- or in the practical
19 aspects of this particular case -- just because a
20 person is being uncooperative, if the level of threat
21 does not increase, then the level of force cannot
22 increase. You don't just keep raising the bar in terms
23 of force if the threat level remains at a low level.

24 Q. So if they can't get his legs off, they
25 should -- and they -- and he doesn't do anything but

1 continue to grab onto their – doesn't kick anymore at
2 them, just lays there and they can't get his legs off,
3 then they should just leave him?

4 A. If they're unable to get his legs off, what
5 they cannot do is raise the level of force against him,
6 because his level of threat is not being raised against
7 the officers. And that is all important in these
8 use of force cases. Now –

9 Q. What do they do then?

10 A. What they do do is the very best that they
11 can to get those legs off. And if they are not able to
12 do that while they're on site, they should summon help
13 to assist.

14 Q. And if there's no other help available,
15 then what?

16 A. Well, in another hypothetical, I mean, I
17 just don't believe that there's not other help
18 available. I just don't believe that.

19 Q. Never been to Hooper Bay, have you?

20 A. You're asking me to assume something that
21 is a quantum leap of faith that no help would be
22 available, just infinitely to help those officers. I
23 just don't believe that that would be the case.

24 Q. But if there was no other help available
25 then they just –

1 Q. He's still raising it, right? Or not?

2 A. It would probably be beyond that, but it
3 would be an acceptable range of force to use certainly,
4 not a leap to an impact weapon or a Taser.

5 Q. Okay. So in that situation, if the officer
6 Tased him, that would be inappropriate?

7 A. Yes. Absolutely.

8 Q. If the officer pepper-sprayed him, would
9 that be appropriate? That might be okay?

10 A. I don't think that would be appropriate
11 based on the structure of your hypothetical.

12 Q. Under my hypothetical, let's say the
13 officer took his baton out and beat him, hit him on the
14 hand and he didn't let go, and would that be okay?

15 A. No.

16 Q. What if the officer hits him on the hand,
17 hits him on the back of the head, and finally wrestled
18 him down and threw him down to the ground?

19 A. Hitting him on the back of the head is
20 deadly force.

21 Q. And that would be inappropriate?

22 A. Absolutely.

23 Q. So under your opinion and hypothetical, if
24 the officer took the baton and hit him on the hand,
25 that would be enough to be excessive?

1 A. Then they continue to try to pry his legs
2 off until such time that he possesses a level of threat
3 that would justify a higher level of force.

4 Q. Let me give you another hypothetical then,
5 okay. Let's say that we have a case – I'm trying to
6 do something different without legs. Let's say we have
7 a case where a person is – there's a domestic dispute
8 that the police officers are called to. And are you
9 familiar with four-wheelers?

10 A. ATVs?

11 Q. Yes. And they have handlebars like bicycle
12 handlebars on them?

13 A. Yes.

14 Q. And so the suspect goes and grabs onto the
15 handlebars, and a police officer comes by and says, let
16 go of that, and the suspect says no, and he doesn't let
17 go. And the officer tries to pry his hands off and
18 can't do it.

19 In that situation, what should the officer
20 do? Just call for more help? Or can the officer --
21 the guy's not threatening him, not hitting him, not
22 kicking him, but he won't let go.

23 A. Probably pressure point techniques.

24 Q. But he's raising the level then, isn't he?

25 A. A pressure point technique is a very low –

1 A. Well, I think the answer is yes. But I'm
2 going to couch that with the statement that it would
3 depend on what the officer knows about the capabilities
4 of the person. It would depend on what the officer's
5 resources are. Any officers on their way. It would
6 depend on what the person has done in terms of a
7 violation of the law. All of those things in their
8 totality feed into an officer's decision to raise the
9 level of force.

10 Q. But here's -- I thought you said unless --
11 earlier I thought you said unless the suspect raises
12 the level of force the officer cannot raise the level
13 of force, have you changed that?

14 A. No.

15 Q. So if all this guy's doing is hanging onto
16 the handlebars and not letting go, and the officer
17 wants to separate him from the ATV, to separate him
18 from the female, and he won't let go of the handlebars,
19 in that situation if the officer takes his baton out
20 and hits him across the hands, that's okay?

21 A. I believe so. Is the person under arrest?

22 Q. He's trying to get him to let go.

23 A. No. That is not acceptable.

24 Q. Would it be different if he's trying to
25 place him under arrest?

1 A. It would depend on what the crime would be.
 2 Was it for a violent crime? Was it a crime for which
 3 the officer would reasonably believe that the person
 4 would be capable of inflicting imminent death or
 5 serious bodily injury? I think it would depend on the
 6 circumstances.

7 Q. The officer could take the baton, if, for
 8 example, he believed that the person had recently
 9 stabbed someone to death and the person might do that
 10 to him?

11 A. And have the capability to do it.

12 Q. If the person won't let go, and he tries --
 13 can't pry his arm off, so he takes the baton, whacks
 14 him, that doesn't work, he hits him in the back of the
 15 head, you said for sure that would be too much?

16 A. Striking someone with an impact weapon in
 17 the back of the head falls into the range of deadly
 18 force. And whether or not that would cause a person to
 19 die is another question. But that is absolutely,
 20 across the board, within the realm of deadly force for
 21 an impact weapon.

22 Q. How about wrestling him off of there and
 23 throwing him to the ground?

24 A. Of course.

25 Q. How about wrestling him, throwing him to

1 evaluation of these cases has to be made based on what
 2 a reasonable law officer faced under the similar
 3 circumstances would do.

4 Q. Well, that's the Graham standard you're
 5 talking about?

6 A. Yes.

7 Q. Okay. But I'm saying even if from the
 8 objective standpoint as you've mentioned you think this
 9 is excessive force, if the officer believed he was
 10 authorized to do that, believed it was necessary,
 11 subjectively believed it was necessary, and reasonably
 12 believed he is authorized -- in other words, thought,
 13 you know, his understanding of the guidelines were that
 14 this was okay -- in that situation it still would be
 15 excessive in your opinion, right?

16 A. It would become excessive at the point
 17 where it was unnecessary.

18 Q. Okay. And in terms of our case, getting
 19 back to our case, Officers Joseph and Simon, you've
 20 already testified you believe their use of force was
 21 excessive. They, in fact, though believed -- you read
 22 their depositions, right?

23 A. Yes.

24 Q. And the statements that they've given?

25 A. Yes.

1 the ground, he hits his head on the ground and he died;
 2 is that excessive force?

3 A. It wouldn't be excessive force if the
 4 officer's actions were reasonable, and if that was the
 5 lowest level of force that could be used to control the
 6 situation available to the officer at the time.

7 Q. You just said that would not be reasonable,
 8 right, under my hypothetical? That would not be
 9 unreasonable?

10 A. To strike him or throw him down?

11 Q. All three.

12 A. To do them together?

13 Q. All three of them.

14 A. Right, to do them altogether?

15 Q. That would be excessive?

16 A. Yeah.

17 Q. What if the officer believed that he was
 18 authorized to do that? Would that make a difference?

19 A. Well --

20 Q. Even though you think it's excessive, what
 21 if the officer believed, you know, I thought I was
 22 authorized to do that, wouldn't matter?

23 A. Well, it makes the difference in the sense
 24 that it can still be unreasonable, regardless of what
 25 the officer thinks. Because the determination in the

1 Q. And they believed that they were acting
 2 within the Hooper Bay Police guidelines. They believed
 3 that, right?

4 A. That's what they stated --

5 Q. Right.

6 A. -- as I recall.

7 Q. And they believed that the force they were
 8 using was reasonable and necessary. They believed
 9 that, right?

10 A. That's what they stated.

11 Q. And you have no reason to believe that
 12 those statements are not truthful?

13 A. Well, I acknowledge that that's what they
 14 stated.

15 Q. And, again, I understand that it's still
 16 your testimony that the force was excessive, but you
 17 have no reason, do you, or you're not aware of any
 18 evidence that would suggest that their subjective
 19 belief, what they testified their subjective beliefs
 20 were, was not truthful?

21 A. I don't understand. I'm sorry.

22 Q. That wasn't a very good question. Both
 23 Officer Joseph and Officer Simon testified that they
 24 believed that they were acting within the Hooper Bay
 25 Police guidelines, and that they believed their actions

1 were necessary and reasonable. That's what they
2 testified to, right?

A. Yes.

4 Q. And you have no reason -- or you're not
5 aware of any evidence that those subjective beliefs
6 that they held that they, in fact, did not hold those
7 subjective beliefs, do you?

8 A. I think there's evidence that that was not
9 the case.

10 Q. What evidence?

11 A. The evidence that the use of the Taser was
12 not necessary, it was excessive, No. 1, at any time.
13 But No. 2, more specifically, that the use of the Taser
14 by both Simon and Joseph when Boya was prone, belly
15 down and handcuffed, was absolutely unnecessary. And
16 that any reasonable officer under the same
17 circumstances would view that as being excessive,
18 unnecessary, and unreasonable.

19 Q. And when Boya was -- where do you find that
20 Boya was Tased when he was belly down in a prone
21 position? Where's the evidence of that?

22 A. Joseph admits it. And Simon admits it as
23 well.

24 Q. Anywhere else?

25 A. There is evidence on Boya's back, which is

1 the thigh area?

2 A. Yes.

3 Q. In fact, when you read the Taser manual, if
4 you want to for compliance purposes, that's where they
5 recommend Tasing, isn't it, because of the muscles in
6 the large muscle groups that you have both on the
7 inside of your leg -- and I can't remember what it's
8 called, the muscle on the outside of your leg -- but
9 that's where they recommend that you Tase for the
10 pain compliance?

11 A. Provided it's justified in the first place.

12 Q. I understand that. In terms of the
13 location, that's where they recommend that you Tase
14 them?

15 A. Yes. But the point I was making is that it
16 has to be accessible. If the jury is to believe
17 that, you know, he was kicking and posing some kind of
18 a danger, I think one can defer there was no danger at
19 the time that application was made, because the officer
20 that made that was able to get to that region of his
21 body.

22 Q. But if someone has their legs wrapped
23 around the pole, and at that particular moment won't
24 let go, and you want to get the person to comply with
25 you, one thing you might do if you can't pry them off,

1 more circumstantial, you know, I acknowledge. But
2 marks on his back that are consistent with his being
3 Tasered while he's on his stomach.

4 Q. Or sitting down and kicking?

5 A. I acknowledge that, but it's still
6 consistent with.

7 Q. So your basis, your opinion in your
8 rendition of facts, is that Boya was Tased, at least
9 twice while he was prone, belly down, is really based
10 solely on Joseph and Simon's deposition testimony?

11 A. Well, their statements, yes.

12 Q. What statements?

13 A. Well, just general statements that they
14 have made.

15 Q. Either --

16 A. And specifically the depositions

17 Q. Either in police reports or depositions or
18 both?

19 A. Yes.

20 Q. You don't recall where?

21 A. Well, I recall specifically in the
22 depositions. Possibly in the reports. I don't
23 remember specifically about those.

24 Q. And we talked about where the Tasing
25 occurred, and the Tasing on the legs, on the leg and

1 you said you might use pressure point, right?

2 A. Yes.

3 Q. And another thing that you might do if it
4 was allowed under your policy, would be to use the
5 Taser, and if you're going to Tase them in the leg, if
6 you wanted to get that leg to cooperate, that's where
7 you would Tase them if you wanted them to relax that
8 grip, right?

9 A. Well, I do not recall that being
10 identified, first of all, in the Tasing National
11 Manual. If it is, I don't recall it. But, No. 2,
12 obviously you would have to be justified to use the
13 Taser in the first place.

14 Q. Right. And so we're getting back to
15 whether it's justified to use a Taser for compliance,
16 essentially, and you say it's not?

17 A. Well, that's not the only issue. That is
18 one issue certainly.

19 Q. In terms of Tasing, if you -- what is a
20 higher level of force, if you have such an opinion, to
21 Tase someone for two seconds or five seconds?

22 A. I don't have an opinion on that. But
23 Tasing is Tasing.

24 Q. But if you do it for five seconds, then the
25 electrical current is going through the person longer

1 than for two seconds?

2 A. That's true.

3 Q. And so you would expect more pain? You
4 would expect more of an immobilizing effect, right?

5 A. Well, I agree with that. But I think it's
6 important just to clarify the record that Tasing is
7 Tasing, just like a shotgun or a handgun round going
8 through somebody's body. That is what it is. It
9 doesn't matter what grain it is, if it's a hollow
10 point, it's still a gunshot.

11 So the application of the Taser is still a
12 Taser. And I think breaking it down to the number of
13 seconds that the Taser is deployed might be
14 significant, but I think what is more significant is
15 the decision to deploy the Taser. Especially given the
16 fact that the Hooper Bay policy does not make a
17 distinction as to two seconds versus five seconds.

18 Q. I understand that. But you're seriously
19 not saying that Tasing two seconds versus five seconds
20 is like shooting a bullet?

21 A. No. I'm simply making the comparison that
22 the use of weaponry with regard to the use of force
23 continuum, or an officer's decision to use force is
24 based on the deployment of that weapon, and not the
25 types of rounds that are fired in the handgun or the

1 report paragraph 55, let's do it in order. Let's start
2 at paragraph 30. This is under the facts and
3 background section, right?

4 A. Yes.

5 Q. In paragraph 30 you state that - I guess
6 you can start off earlier, paragraph 28 - when Boya
7 would not move his legs to let go of the pole, Simon
8 threatened to use his Taser if he continued to not
9 comply, right?

10 A. Are you on 28?

11 Q. Twenty-eight, yeah. Officer Simon
12 threatened to use the Taser if he didn't comply, right?

13 A. Yes.

14 Q. And so at least he's trying verbal commands
15 before using it, you'd agree with that?

16 A. Based on what they say, that's true.

17 Q. And that's consistent with what you heard
18 on the tape, right?

19 A. Yes.

20 Q. And then Simon physically applied Boya -
21 he drive-stunned him, right?

22 A. Yes.

23 Q. And Boya responded. What'd Boya respond?

24 A. I have, "Is that all you got, bitch?"

25 Q. What does that indicate to you?

1 length of time that the Taser is deployed.

2 Q. I understand that in terms of use. I'm
3 just saying that you would agree, would you not. Tasing
4 someone for five seconds is a higher level of force
5 than Tasing someone for two seconds?

6 A. I think it administers a logically higher
7 level of pain. And if you want to characterize that as
8 a higher level of force, I'm not comfortable doing
9 that.

10 Q. Or a longer level of pain?

11 A. A longer level of pain. But I'm not
12 comfortable saying it's a higher level of force,
13 because that suggests that maybe the Tasing can be
14 reasonably located on two different locations or more
15 on any use of force continuum.

16 Q. I think you're anticipating somewhere I'm
17 going and I'm not. If you Tase someone for two
18 seconds, and do that twice, how does that compare to
19 Tasing them once for five seconds, actually getting
20 shocks for a shorter amount of time?

21 A. I understand that. I think the answer to
22 that is outside my area of expertise.

23 Q. Okay. Fair enough. You talked about the
24 number of Tasings in here. What I'd like to do is,
25 looking at your report at the very conclusion of your

1 A. Pretty much what Boya actually stated, and
2 that was he just felt it vibrating. Sensation.

3 Q. Okay.

4 A. Felt like a vibrator without any pain
5 associated with it.

6 Q. Which means one of two things, either there
7 wasn't good contact and he didn't get much of a shock,
8 or for whatever reason, intoxication, adrenalin,
9 whatever reason, it wasn't having much - wasn't having
10 much effect against him, one of those things, right?

11 A. That's possible.

12 Q. And then he - you said Simon responded by
13 drive-stunning him again, right, numerous additional
14 times?

15 A. Yes.

16 Q. And now if you don't make good contact and
17 someone says, "Is that all you got, bitch," it would be
18 appropriate, assuming it's okay to in the first place
19 to do it, it would be appropriate to try it again,
20 right?

21 A. Well, when you say, "assuming it's
22 appropriate in the first place to do it," the
23 assumption that you make is that the level of threat
24 justifies the use of the Taser. So you have to
25 remember that use of force situations are dynamic.

1 Force can go up, force can go down. Resistance can go
2 up and go down, and the force has to match the level of
3 threat.

4 So if you try it one time and the
5 person's -- if it is to be believed that that first
6 time is justified, and if it is also to be believed
7 that that level of threat has not changed, then an
8 additional application would be appropriate.

9 Q. But in fairness, you do not believe the
10 first one was justified, right?

11 A. That's right.

12 Q. And so it's really -- would it be fair to
13 say the issue isn't how many times he was Tased, it's
14 the fact that he should never have been Tased at all?

15 A. That's right. Well, let me say that the
16 number of times that he is Tased is an important issue
17 in this case. I mean, it's not just whether he
18 shouldn't have been or whether he should have been.
19 It's that he was Tased repeatedly, up to and
20 including being Tased while he was on his stomach and
21 incapacitated the entire time by handcuffs.

22 Q. Ultimately, though, the Tasing had an
23 effect and he complied, right? Boya ultimately
24 complied?

25 A. Boya ultimately complied. Whether it was a

1 justification for what they did, he's basically
2 admitting that he was resisting and fighting, and they
3 needed to use this effort to subdue him?

4 MR. BROWN: Objection.

5 BY MR. INGALDSON:

6 Q. Do you agree with that?

7 A. No. I think that's, you know, he -- I'm
8 not in a position to state what he was thinking.

9 Q. But getting back to the number of times
10 here, at paragraph 30 you said, "After being Tased an
11 estimated four to six times Boya began kicking." Do
12 you see that?

13 A. Yes.

14 Q. And so there you have Simon -- you have
15 Simon Tasing him four to six times, right?

16 A. Yes.

17 Q. And then you talk about Joseph, and on
18 paragraph 32 you say, "Joseph deployed a total of three
19 times," right?

20 A. Initially, yes.

21 Q. Doesn't say initially.

22 A. That's what it says in 32, that's right.

23 But I think I clarify that in 33.

24 Q. And then it says, "Boya allegedly continued
25 to fight and continued to kick as Joseph made two more

1 result of the Tasing, I'm not in a position to say.

2 Q. And you have been involved in situations
3 where people, in arrest situations, where people's
4 adrenalin is flowing and people get pretty pumped up,
5 right?

6 A. I have.

7 Q. And people can do pretty incredible things
8 then, right?

9 A. Seemingly.

10 Q. Some incredible feats of strength and
11 endurance while that adrenaline's flowing, right?

12 A. Seemingly.

13 Q. Here at the end after Boya was arrested, do
14 you remember what he said to Joseph?

15 A. I don't remember specifically what you're
16 referring to.

17 Q. When it was done, he said something to the
18 effect of, "Geez, that was a good struggle," you know,
19 and those type of comments. And, "You guys put up a
20 good fight." You know, those type of comments, didn't
21 he?

22 A. I remember something about that.

23 Q. And really when you hear those comments and
24 listen to them on the tape, it sounds like he's saying
25 that he's not really at that time questioning the

1 Taser contacts. Joseph reported that Boya stopped
2 fighting at this point," right?

3 A. Yes.

4 Q. So we have there four to six times by
5 Simon, and, what, three to five times, or was it by
6 Joseph at this point?

7 A. I think that's what it would come out to.

8 Q. Okay.

9 A. But let me say if I can that it is not
10 clear in this case how many times Boya was Tased.
11 And one of the things that I had difficulty with is
12 going through, again and again, trying to figure out
13 just exactly how many deployments there were.

14 In fact, I don't think the officers are in
15 total agreement in their statements and depositions as
16 to exactly how many Taser applications there were.

17 Q. Okay. And then in paragraph 46 you put --
18 you list reasons why you believe the use of the Taser
19 was particularly egregious, right?

20 A. Yes.

21 Q. And one of them is, No. 5, is that he was
22 Tased a minimum of six times and as many as 12 times,
23 right?

24 A. That's right.

25 Q. Is that your best estimate?

1 A. No, it's not. And that is an estimate,
 2 No. 1. And that is also inconsistent with the
 3 determination that I made later on in the report in
 4 which I said as many as 15 times.
 5 Q. Let's look at that, paragraph 55.
 6 Paragraph 55 you say - I'll show you where I'm
 7 pointing - the second paragraph - minimum of 15 and
 8 as many as 18 deployments, right?
 9 A. Yes.
 10 Q. So you go from, in the same report, from
 11 Simon doing it four to six times, and Joseph three
 12 times, for a total of seven to nine times, to paragraph
 13 46, where you have it's six to 12 times it was used,
 14 and now towards the end it's 15 to 18 times?
 15 A. Yes.
 16 Q. Why do you keep changing numbers?
 17 A. Well, the numbers identified in item 55 on
 18 page 8, as you see, I have footnoted. Those are the
 19 times that I stand by in the report. And I will admit
 20 that they are inconsistent.
 21 Item 46 that says 12 times is not
 22 footnoted. That was an estimate, and that should have
 23 been changed by me before I submitted the report. And
 24 it got past me and it didn't.
 25 But I stand on record as saying that based

1 the probes. The rest were drive-stuns.
 2 Q. That statement in and of itself, a cycle
 3 five or six times and the dry-stunning, well, three or
 4 four times, I mean, you don't add those numbers
 5 together. That would be either drive-stunning or you
 6 shoot the probes. Those are the only ways you can use
 7 it, right?
 8 A. You can apply additional charges,
 9 additional cycles, you certainly can.
 10 Q. What do you mean?
 11 A. If there's a drive-stun and there's one
 12 cycle applied, a one, five-second cycle applied, there
 13 can also be a second cycle applied which is two
 14 applications. And that's how I interpreted his
 15 statement.
 16 Q. You're saying he held it there for
 17 30 seconds, 25 to 30 seconds, kept recycling it there?
 18 A. His statement is he did a cycle five or six
 19 times and the drive-stunning was three or four times.
 20 So I think that's subject to interpretation. That's
 21 how I interpreted it.
 22 Q. You're interpreting it now in the worst
 23 possible way for the officers, aren't you?
 24 A. I don't think so, because I give a range on
 25 each one of these.

1 on these footnotes on page 8 in item 55 are the most
 2 documentable applications of the Taser in this case.
 3 But I don't think the record is completely clear about
 4 just exactly how many there are.
 5 Q. Well, so you're saying now 55 is based on
 6 Simon's testimony and Joseph's testimony at their
 7 depositions?
 8 A. Yes.
 9 Q. And it sounds like 46 is based on what you
 10 counted before that by listening to the tape and so
 11 forth?
 12 A. I think that's safe to say.
 13 Q. Look at paragraph 55. "Joseph deployed his
 14 Taser at least eight, and as many as ten times. He
 15 stated I did a cycle five or six times and the
 16 drive-stunning was, well, three or four times." Do you
 17 see where I read that?
 18 A. Yes.
 19 Q. What is a cycle?
 20 A. A cycle would be a five-second cycle
 21 that's at least how I interpreted it.
 22 Q. A cycle of what?
 23 A. A charge
 24 Q. Is that shooting the probes out?
 25 A. No. There was only one application with

1 Q. Five or six times. Well, that's all right.
 2 A. I tried to give a range. And I've got
 3 eight to ten times down here, and I say up here 15 to
 4 18 times. I'm trying to be objective about it using
 5 their statement on what they did.
 6 Q. Let's go back to paragraph 46. The fact
 7 that Boya was handcuffed, you agree, do you not, that
 8 even though he's handcuffed he still could pose a
 9 threat? It's possible to pose a threat when you're
 10 handcuffed if your legs are not in leg restraints?
 11 A. I think it depends on what the person is
 12 doing. In this case the record's pretty clear, if not
 13 completely uncontested, that Boya was on the ground the
 14 entire time during the course of the Taser-ing.
 15 And, yes, in the hypothetical somebody who
 16 is handcuffed can head-butt somebody if they're
 17 standing upright. They can deliver kicks that can
 18 damage an officer if they're standing upright. But
 19 those circumstances do not apply in this case.
 20 Q. Now, in fact, in listening -- let's go down
 21 to paragraph 47. You state, "There was no effort on
 22 their part," meaning the police officers, right, to
 23 communicate why they were there and to calm the
 24 situation before it got out of hand." That is simply
 25 not true, is it, that statement?

1 A I think it is true. I know and I
 2 acknowledge that Joseph did tell Boya that they were
 3 there for a welfare check. So to that extent, that was
 4 done.
 5 But, again, in context and out of fairness
 6 to just accuracy, Boya had just spoken up. He had a
 7 flashlight shined in his face. I think a reasonable
 8 officer, in addition to doing what Joseph did, I think
 9 what Joseph did in the initial stages of what he did
 10 was appropriate in making that statement. But I think
 11 a continued explanation as to what it was that they
 12 were doing there, you know, the phone call, the
 13 concerns that they had would have been appropriate, and
 14 I don't see where that happened.
 15 Q Dr. Lyman, in all fairness to you, is it
 16 possible that you wrote this paragraph 47 before you
 17 had a chance to listen to the tape?
 18 A I don't recall.
 19 Q In fact, when you listen to tape, you can
 20 hear Joseph, and he's talking in a calm voice. He is
 21 being respectful, courteous, polite; isn't that true?
 22 A Initially, yes.
 23 Q And when Boya -- even after Boya is
 24 screaming, yelling, using profanity, threatening when
 25 this struggle's ongoing, Joseph is still talking in a

1 the kicks, however you want to look at it, that are
 2 identified by the officers in this case never resulted
 3 in any -- that I know of, that I have seen anyway --
 4 did any damage to the officer. I haven't seen any
 5 medical reports. I haven't seen any photographs of any
 6 bruising. I don't see any comments made by any of them
 7 about how they were in danger about what he was doing.
 8 Q Because looking at the policy you do not
 9 believe that there's evidence that this physical
 10 struggle presented an immediate threat or death or
 11 great bodily harm?
 12 A That's right. I stand by my testimony that
 13 I believe that there was a substantial struggle taking
 14 place.
 15 Q What is a substantial struggle? It's not
 16 defined anywhere. I don't want to confuse the jury
 17 You could have a substantial struggle and not be
 18 injured at all, right?
 19 A I'm just responding to your question.
 20 Q Do you agree with what I said? You could
 21 have a substantial struggle without being injured at
 22 all, right?
 23 A Yes. And I don't think I said otherwise.
 24 Q You've arrested people, I thought you said
 25 earlier, that actually got involved where there were

1 calm, respectful voice, right? He never raises his
 2 voice, he never uses profanity, he never threatens
 3 Boya?
 4 A I believe so.
 5 Q And, in fact, you would agree, would you
 6 not, that although you think these guys could have held
 7 Boya, that there was a -- that at least according to
 8 officers' testimony, Boya was kicking at him, made
 9 contact with two of the officers in the leg and his
 10 stomach with the kicks?
 11 A Yes.
 12 Q And there was a substantial struggle going
 13 on with these guys at that time -- even though you
 14 think they should have taken different actions -- there
 15 was a substantial struggle that was going on between
 16 the officers and Boya at that time?
 17 A I would not say a substantial struggle.
 18 Boya was on the ground handcuffed. No.
 19 Q What is a substantial struggle?
 20 A A substantial struggle would be a struggle
 21 that would place officers in reasonable fear of their
 22 well-being, and that was not the case in this case.
 23 Q Reasonable fear of their well-being? What
 24 do you mean by that?
 25 A Just what it says. The alleged kicks, or

1 sort of wrestling matches going on, right?
 2 A Yes.
 3 Q You would agree those were substantial
 4 struggles? One of them you used your baton as a
 5 compliance --
 6 A I would characterize that as a substantial
 7 struggle.
 8 Q And from what you heard on the tape, with
 9 the noise, with Boya going on -- assuming the officers
 10 are telling the truth about being kicked at and being
 11 kicked themselves -- that would be evidence that --
 12 whether or not there was imminent serious physical
 13 injury or death -- that still was a substantial
 14 struggle?
 15 A I would not characterize it like that,
 16 because he was handcuffed and he was on the ground.
 17 Q So you're saying if someone's handcuffed
 18 and on the ground, that no matter what the
 19 circumstances, it could never be a substantial
 20 struggle?
 21 A I would never characterize it like that,
 22 no.
 23 Q No matter what?
 24 A A struggle, at best. Not a substantial
 25 struggle.

1 Q. Do you believe that the actions by Boya
2 kicking at the officers could have resulted in injury
to the officers?

4 A. Under the circumstances in this case, no.

5 Q. Well, when he kicked the officer in the
6 shin, if that, in fact, happened, and it hurt the
7 officer, that would be an injury, right?

8 A. I wouldn't characterize that as an injury.
9 There's no evidence that it was an injury.

10 Q. So if I reach across the table and punch
11 you in the face, that would not injure you, unless I
12 knocked your teeth out or something?

13 A. Punching somebody in the face and kicking
14 them in the shins are two different things. One, I
15 think, can more reasonably be characterized as an
16 injury or an action that could result in an injury, and
17 the other, I think, is not as likely to do that.

18 Q. So what's your definition of injury?

19 A. Some physical damage to the body.

20 Q. Doesn't have to be permanent, does it?

21 A. No.

22 Q. If you do something that causes pain to
23 someone else, that's an injury, right?

24 A. I don't know that that's an injury
25 necessarily.

1 asking me if Boya made that statement?

2 Q. You say here -- I'm quoting from your
3 report: "Note that Boya stated that he was handcuffed
4 immediately before he got up from the couch." Is that
5 a fact that if true was significant, in your opinion?

6 A. Well, other than the fact that he was on
7 the bed rather than the couch.

8 Q. Okay.

9 A. Initially, you know, he -- he was located
10 on the bed where Peter was on the couch.

11 Q. Okay.

12 A. I guess I don't know how to respond to that
13 when you say "significant."

14 Q. I just wondered if that was a fact that was
15 thrown in there for any reason.

16 A. Just trying to clarify the facts and
17 circumstances.

18 Q. I don't know if that's something you
19 considered in support of your opinion or not.

20 A. It's just part of the recitation of what I
21 perceive the facts to be.

22 Q. Okay. Was it significant at all to you
23 that the officers didn't feel a need to Tase Peter?

24 A. Yes.

25 Q. How so?

1 Q. And if he is kicking at someone, and he had
2 kicked him in the face, you'd agree that Boya could
3 have injured the officer by kicking him in the face or
4 in the nose or something?

5 A. If the officer places themselves in a
6 position to get kicked, and, in fact, that occurred,
7 yes. But I was responding to your question as to
8 whether or not I feel that that could have happened,
9 and, no, I don't. Based on three law enforcement
10 officers against one guy who's setting down with his
11 hands behind his back, no.

12 Q. And looking at paragraph 55 of your
13 opinion, is it your testimony that officers cannot use
14 a Taser unless the officers have been first injured?

15 A. No.

16 Q. Let me just go through a couple of the
17 facts that have you listed in here. On paragraph 20
18 you state, "Note that Boya stated that he was
19 handcuffed immediately before he got up from the
20 couch." Is that -- if that, in fact, the statement is
21 true, is that significant?

22 A. Boya was over by the bed area.

23 Q. So is the fact that Boya stated that, is
24 that significant to your opinion?

25 A. I don't understand your question. You're

1 A. Because they were both placed under arrest.
2 And had verbalized that he would kick. That he
3 would provide essentially the same resistance that the
4 officers are claiming Boya was responsible for. But
5 yet they elected not to deploy the Taser on him,
6 because holding his legs took care of the concern.

7 Q. Look at paragraph 30 of your report. You
8 say, "After being Tased an estimated four to six times,
9 Boya began kicking." Where did you get that from?

10 A. Well, I don't have it footnoted. I can't
11 give you a citation on that. I mean, I think it's in
12 the record that he was kicking during the course of the
13 Tasing. But I also acknowledge that he was kicking
14 early on, as we have also discussed.

15 Q. Okay. So you're just saying that really
16 should have been, "Boya continued kicking?"

17 A. Yes.

18 Q. Okay. On paragraph 43, this quote that you
19 have --

20 A. Yes.

21 Q. Is that from one of these documents,
22 Exhibit B, C or D?

23 A. Yes. Let me tell you which one. It is
24 from Exhibit B. It's footnoted on the next page.

25 Q. In looking at that quote, it says, "The

1 model policy prohibits ECW," that's electronic control
2 weapons, right?

A. Right.

4 Q. Which a Taser would be included in?

5 A. Yes.

6 Q. "Demonstrates an overt intention to use
7 violence or force against the officer or others or
8 resists detention and arrest and other alternatives for
9 controlling them are not reasonable or available under
10 the circumstances."

11 A. That's right.

12 Q. So, in fact, under the IACP, a Taser could
13 be used for compliance if there were not other
14 reasonable or available sources under the
15 circumstances, correct?

16 A. No. Because that particular segment that
17 you read is out of context compared to where it further
18 explains later in that same paragraph in that. "With
19 these cautions in mind, ECW's was may be deployed
20 consistent with a professionally recognized philosophy
21 of us of force, that is, use only that level of force
22 that reasonably appears necessary to control or subdue
23 a violent or potentially violent person."

24 Q. But if you read that first sentence, it
25 says, "Demonstrates an overt intention to use violence

1 subdue a violent or potentially violent person, and you
2 can also use it against people to gain compliance for
3 people who resist detention and arrest?

4 A. It doesn't say "to gain compliance." It
5 refers to violent or potentially violent persons.

6 Q. You're just picking out parts of this.

7 A. No, I think that's what you're doing. I am
8 trying to look at it in its entirety.

9 Q. But -- okay. And I'll move on.

10 If you read this whole thing in its
11 entirety, the section that you are relying on is
12 qualifying the preceding section that talks about how
13 you identify violence, force and resistance, right?

14 A. I'm not sure I understand the question.
15 I'm sorry.

16 Q. All right. I'll move on. On paragraph 53,
17 I want to make sure there's not a meaning for a word in
18 here that I don't understand. You talk about the use
19 of the Taser being patently unreasonable. What's the
20 difference being unreasonable and patently
21 unreasonable, anything?

22 A. No.

23 Q. Okay. On paragraph 54, you state, "The
24 record shows Boya was verbally abusing the officers,
25 but not to the point of being threatening."

1 or force against the officer or others or resists
2 detention and arrest." It doesn't say that it's
3 prohibited to use it against a person. It doesn't say
4 in that first sentence that it only prohibits use
5 against violent -- or people who resist detention or
6 arrest.

7 A. It doesn't say that in that sentence, but
8 you cut that sentence in half. But it also says, "And
9 other alternatives for controlling them are not
10 reasonable or available under the circumstances."

11 Q. Exactly. Exactly. That's what I said in
12 my first question. Under the IACP you can use the
13 Taser to -- against persons who are resisting detention
14 and arrest if alternative -- other alternatives for
15 controlling them are not reasonable or available under
16 the circumstances?

17 A. If they are violent or potentially violent.
18 That's part of this same paragraph.

19 Q. This sentence doesn't say that.

20 A. I know. I acknowledge that. The paragraph
21 that's trying to make the point does. That's part of
22 the paragraph. And the paragraph concludes with the
23 statement that the person must be violent or
24 potentially violent.

25 Q. And so you can use them to control or

1 In fact, after listening to the tape, would
2 you agree that Boya was making threats to the officers?

3 A. Can you tell me where you're reading?

4 Q. Yeah, I'm sorry. Right here, where it
5 says, "The record shows."

6 A. I see now. I don't recall him making any
7 physical threats to the officers.

8 Q. Okay. And you say, "If Boya was
9 predisposed to fight the officers, he had the
10 opportunity to do it before he was handcuffed." But,
11 in fact, that does not mean that after he was
12 handcuffed that he didn't get upset and become
13 resistive, does it? I mean, putting people in
14 handcuffs doesn't just automatically placate them, does
15 it?

16 A. Well, it certainly disables them from an
17 attack. You know, an attack with one's fists or
18 weapons of opportunity that they might grab. That's
19 what I was referring to.

20 Q. Have you ever heard with respect to Tasers
21 the quote "Silence is golden?"

22 A. I read that in the excerpts attached to the
23 Motion for Summary Judgment.

24 Q. Have you read that yourself anywhere?

25 A. I think that's part of the Taser

1 International Literature.
 2 Q. Do you know what that means?
 3 A. I don't recall what it means right now.
 4 Q. You're not of the opinion, are you, that
 5 the use of the Taser, that was causing Boya to kick?
 6 Let me ask that in a different way.
 7 It's not your opinion that Boya wasn't
 8 actually kicking, but his muscles were twitching
 9 because he was being Tased?
 10 A. I think that would be a kind of a clinical
 11 determination beyond my expertise.
 12 Q. In fact with the Tasing, you're not aware
 13 of anything from you read that Tasing would cause you
 14 to involuntarily kick or punch or something like that?
 15 A. Right. I think I stated in my report that
 16 it relaxes the muscle groups.
 17 Q. Right. Okay. So in your paragraph earlier
 18 where you said after being stun-driven several times
 19 Boya -- I think you clarified -- continued kicking,
 20 that was your understanding and your belief is that
 21 those were intentional, voluntary kicks by Boya?
 22 A. Well, again, I don't know that I'm in a
 23 position to even say what they were from. But based on
 24 my understanding of the use of the Taser, I think it's
 25 safe to say that they didn't result from the electrical

1 gives a green light to potential constitutional
 2 violations on a systemic basis.
 3 Q. Mr. Ingaldson asked you about the silence
 4 is golden, and if you were familiar with what that
 5 indicated. You are not an expert about how to use a
 6 Taser, is that right?
 7 A. That's right.
 8 Q. You are use of force expert, is that right?
 9 A. That's correct.
 10 Q. Could you tell the jury what that means?
 11 A. My expertise in the use of force deals with
 12 the application of an array of weapons, from high-level
 13 weapons, to intermediate, to low-level weapons as they
 14 relate to levels of resistance or threat by the
 15 subjects on which they are used.
 16 This is one of the things, if not one of
 17 the primary things taught in police academies
 18 nationwide for officers on the street to be able to
 19 judge the amount of force that they're using based on
 20 the resistance provided by subjects that they
 21 encounter.
 22 So my expertise from a practical standpoint
 23 as a trainer, and an officer, and as a researcher. Is
 24 dealing with the application of really all of the
 25 weapons as they relate to the proper use on the

1 charge from the Taser. I don't know that for a fact.
 2 Q. Right. Okay.
 3 MR. INGALDSON: That's all the questions I
 4 have. Thanks.
 5 MR. BROWN: I just have a couple.
 6 CROSS EXAMINATION
 7 QUESTIONS BY MR. BROWN:
 8 Q. Should the Hooper Bay city official who
 9 wrote the use of force policy which you have reviewed
 10 in this matter, if Chief Holter should testify at trial
 11 and tell the jury that the policy he wrote specifically
 12 permitted the officers to engage in this level of force
 13 as applied in this situation, what would your response
 14 be to that and why?
 15 A. That this level of force is inappropriate
 16 given the level of threat demonstrated by Mr. Boya --
 17 Mr. Thomas. I'm sorry, Mr. Thomas Olson. And that a
 18 directive such as that is inconsistent with
 19 nationally-recognized protocols for use of force and
 20 inconsistent with nationally-recognized standards of
 21 care that set forth the objectively reasonable
 22 standard.
 23 Q. Do you think a policy such as that would
 24 raise some liability issues for the City of Hooper Bay?
 25 A. Yes. In the sense that it essentially

1 continuum.
 2 Q. And I know that during your testimony so
 3 far you've talked about many of your qualifications
 4 that you have in being a use of force expert, and
 5 you've also talked about your years of work as a police
 6 officer, and the training and the books that you have
 7 written.
 8 Based upon your expertise and your
 9 training, what would have been -- and after reviewing
 10 the testimony given in this case by the officers, the
 11 police reports, the use of force reports and the other
 12 documents that you have seen -- what would have been,
 13 in your opinion, an appropriate way to have Boya
 14 removed from the home that evening?
 15 A. To use soft-handed techniques until such
 16 time that a higher level of force is justified based on
 17 a reasonable threat posed by Boya.
 18 Q. And nothing in your review of these
 19 documents ever indicated that any higher level of force
 20 such as the use of the Tasers was necessary?
 21 A. That's right.
 22 MR. INGALDSON: Object to the form.
 23 MR. BROWN: And that's all I have.
 24 REDIRECT EXAMINATION
 25 QUESTIONS BY MR. INGALDSON

1 Q. Just one quick follow-up. In your report,
2 you, first of all, you've not been asked to do an
analysis as to the City of Hooper Bay and its policies
and manuals, have you?

4 A. No. I was asked to review this case.

6 Q. And in terms of the written policy that
7 Hooper Bay has in terms of use of force, you have no
8 disagreements with the written policy, right?

9 A. I have a concern that the use of force
10 policy fails to identify appropriate levels of
11 resistance or threat to correspond with levels of force
12 that officers are authorized to use, yes.

13 Q. You haven't said anything about that in
14 your report though?

15 A. I'm just responding to your question.

16 Q. Right. But your report, you haven't
17 addressed that?

18 A. Correct.

19 Q. And you haven't provided any -- you haven't
20 done any literature, research on that issue, you
21 haven't even looked at it in-depth at the whole policy,
22 have you?

23 A. Well, I looked at the policy that I
24 received, and I'm not aware of there being more
25 policies or more pages included. But I think we spent

1
2
3 July 5, 2008

4 POWER & BROWN, LLC

5 Attn: Michael Brown

6 P.O. Box 1809

7 Bethel, AK 99559

8 Re: THOMAS J. OLSON vs. CITY OF HOOPER BAY, OFFICER
DIMITRI OAKS, OFFICER CHARLES SIMON and OFFICER NATHAN

9 JOSEPH

10 Dear Mr. Brown:

11 Please find enclosed your copy of the deposition of
MICHAEL D. LYMAN, Ph.D. taken on July 2, 2008, in the
12 above-referenced case. Also enclosed is the original
signature page and errata sheets.

13 Please have the witness read your copy of the
transcript, indicate any changes and/or corrections
14 desired on the errata sheets, and sign the signature
page before a notary public.

15 Please return the errata sheets and notarized signature
page to William H. Ingaldson for filing prior to trial
16 date.

17 Thank you for your attention to this matter.

18 Sincerely,

19 Kim D. Murphy, CCR

20 Enclosures

21 cc: Michael Brown

1 the lion's share of today's meeting talking about
2 threat versus force.

3 Q. Okay.

4 MR. INGALDSON: That's all I have. Thanks.
5 Nothing further. Thank you.

6 MR. INGALDSON: A mini and an e-mail.

7 MR. BROWN: An e-mail.

1 STATE OF)
2 COUNTY OF)

3 I, MICHAEL D. LYMAN, Ph.D., do hereby certify:

4 That I have read the foregoing deposition;

5 That I have made such changes in form and/or
substance to the within deposition as might be
6 necessary to render the same true and correct;

7 That having made such changes thereon, I hereby
subscribe my name to the deposition.

8 I declare under penalty of perjury that the
foregoing is true and correct.

9
10 MICHAEL D. LYMAN, Ph.D.

11 Executed this day of
12 2007, at

13
14 Notary Public:
15 My Commission Expires.

16
17 Signature page to: Michael Brown

18 kdm:MICHAEL D. LYMAN, Ph.D., 07/02/2008
19 THOMAS J. OLSON vs. CITY OF HOOPER BAY, OFFICER DIMITRI
20 OAKS, OFFICER CHARLES SIMON and OFFICER NATHAN JOSEPH

WITNESS ERRATA SHEET

Witness Name: MICHAEL D. LYMAN, Ph.D.
Case Name: THOMAS J. OLSON vs. CITY OF HOOPER BAY,
OFFICER DDMITRI OAKS, OFFICER CHARLES SIMON and OFFICER
NATHAN JOSEPH
Date Taken: July 2, 2008

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Witness Signature: _____

CERTIFICATE OF REPORTER

I, Kim D. Murphy, Certified Court Reporter,
within the State of Missouri, do hereby certify that
the witness whose testimony appears in the foregoing
deposition was duly sworn by me; that the testimony of
said witness was taken by me to the best of my ability
and thereafter reduced to typewriting under my
direction; that I am neither counsel for, related to,
nor employed by any of the parties to the action in
which this deposition was taken, and further that I am
not a relative or employee of any attorney or counsel
employed by the parties thereto, nor financially or
otherwise interested in the outcome of the action.

Certified Court Reporter

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 JAMES HOELSCHER

Pages 2 through 15, inclusive

April 23, 2008

Hooper Bay, Alaska

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

THOMAS J. OLSON,)

Plaintiff,)

CITY OF HOOPER BAY,)

OFFICER DIMITRI OAKS,)

OFFICER CHARLES SIMON and)

OFFICER NATHAN JOSEPH,)

Defendants.)

No. 4BE-07-00026 CI

VIDEOTAPED DEPOSITION OF JAMES HOELSCHER

taken on behalf of the Plaintiff, pursuant to notice, at
Hooper Bay, Alaska, before Sean E. Brown, a Notary Public for
the State of Alaska.

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C - Hooper Bay Police Department Use of
Force Manual 6

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Hooper Bay, Alaska, April 23, 2008

MR. BROWN: All right. I think we all know each other here but my name is Sean Brown and I am the attorney for Mr. Olson and I think that we also know that the purpose of this deposition is very focused. I just want to ask you a few questions. If you could, please raise your right hand. I am a notary of the state and I would like to issue the oath to you.

(Oath administered)

MR. HOELSCHER: Yes

JAMES HOELSCHER
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

Q Okay. Thank you. All right. And could you please give your name?

A James Hoelscher

Q Okay. And your mailing address?

A P.O. Box Hooper Bay, Alaska 99604

(Pages 2 to 5)

April 25, 2008

1 All right. What I have here in front of me is the Hooper
 2 Bay Police Department Use of Force Manual and it's
 3 previously been attached to Mr. Oaks' deposition and I'll
 4 attach it to yours as exhibit A for your deposition but
 5 do you recognize this manual?
 6 A Yes, I do.
 7 Q Okay. And did you author this manual?
 8 A Yes.
 9 Q Okay.
 10 MR. WIDMER: Sean, do you want to use continuous
 11 depo -- or exhibits of all of them so you don't have to re-
 12 mark them and each one is an exhibit?
 13 MR. BROWN: That's right. Okay. Perfect. We'll do
 14 that then. So we'll continue with this and it is exhibit C
 15 from the last deposition. All right?
 16 Q And what is your position with the City?
 17 A I'm the chief of police.
 18 Q And you are responsible for training the officers
 19 regarding the use of the taser?
 20 A Yes, I am.
 21 Q Okay. And you're -- are you familiar with what's been
 22 marked as exhibit B, The Common Effects of EMD?
 23 A Yes.
 24 Q And this was B of the last exhibit and also Silence is
 25 Golden, exhibit A, are you familiar with that?

1 that where the entire taser policy came from was that e-
 2 mail group?
 3 A If not all of it, the majority of it.
 4 Q Okay. And did you re-word it at all yourself?
 5 A No, I -- I don't believe I did.
 6 Q And speaking specifically to paragraph two, would that
 7 have been -- and I'm looking at page two, six and on, the
 8 summary judgment -- for several of these pages, number
 9 two, six, so, to be more specific, on the summary
 10 judgment is given as exhibit G-8 of 13 and I'm looking
 11 specifically at paragraph two on that page and that
 12 specific paragraph, did you alter the paragraph in any
 13 way when you received it that you have memory of?
 14 A No.
 15 Q Okay. How long have you been employed by the City of
 16 Hooper Bay?
 17 A About 12 years.
 18 Q And how often did you give refresher courses on the use
 19 of force?
 20 A Oh, I tried to about once a year.
 21 Q Okay. Do you recall when you did that last?
 22 A No, not off the top of my head.
 23 Q Okay. Thank you.
 24 MR. BROWN: Do you have...
 25 MR. WIDMER: I see.

1 A Yes.
 2 Q All right. And are these common handouts or overheads
 3 that you would use in training?
 4 A They're overheads and handouts.
 5 Q Okay. And the taser, electronic device section -- and
 6 I'm looking specifically at page two of six. Do you have
 7 any memory where you got the content for this section?
 8 A Yes.
 9 Q Okay. And where did that come from?
 10 A We're part of a group. It's called Cop Share.
 11 Q Okay.
 12 A And when we need help with certain policies or manuals or
 13 training or anything, for that matter, it's kind of like
 14 a network of police officers, police departments that are
 15 willing to help out each other and I requested anybody
 16 that might have a taser policy and I got a reply back and
 17 they gave model policies which I adopted this one.
 18 Q Do you recall which city provided this taser device
 19 training?
 20 A No.
 21 Q Okay. So just somewhere on the web is all that you can
 22 offer is for as where it came from, is that correct?
 23 A Not the web, from individual police departments, police
 24 officers in a e-mail group.
 25 Q Okay. And this section goes on for several pages. Is

1 MR. BROWN: That's -- I'm just giving you that in
 2 case you needed to ask questions regarding the taser,
 3 essentially.
 4 MR. INGALDSON: I don't have any questions for Mr.
 5 Hoelscher.
 6 A Can you show me where the G-8 was?
 7 Q Yes, I can.
 8 A Well, that's this section here.
 9 Q Just that all the pages are labeled through six at the
 10 bottom.
 11 A Oh, G-8. Okay.
 12 Q G-8.
 13 A Okay. Thank you. I'm looking through these already.
 14 MR. WIDMER: Were you done asking questions? Did
 15 you.
 16 MR. BROWN: I am, yes.

EXAMINATION

BY MR. WIDMER

19 Q Chief Hoelscher, the -- if you use a taser in the stun
 20 mode, can you describe the difference between the stun
 21 mode and the other mode?
 22
 23 A Yes, there's the drive stun mode and there's the
 24 deployment of the cartridges. There's a big difference
 25 being the cartridge deploys two probes that fire anywhere

1 from up to the civilian cartridge is 15 feet to law
 2 enforcement which have 31 feet now and they -- they
 3 stick. They have barbs that stick to the person's
 4 clothing or into their skin and they deliver the -- the
 5 pulse, the taser pulses in between the connections. That
 6 pulse mimics a wave that confuses or is -- mimics a
 7 similar -- it's called a T-wave that makes a muscle's
 8 involuntary contract -- involuntarily contract in between
 9 those probes so, basically, the greater the distance
 10 between those probes, the more effective it is whereas a
 11 drive stun is a pain compliance because there is nowhere
 12 that you can really subdue a person muscularly within the
 13 space of a taser drive stun so it's only used as a pain
 14 compliance but it is the same current that cycles
 15 through, the biggest difference being the probes and the
 16 dist -- distances between the contacts.

17 Q And there was this sheet that you were asked to identify
 18 where -- that's entitled Silence is Golden. If you have
 19 a good contact with someone versus not having a good
 20 contact, is there a difference in the sound that you hear
 21 on the taser?

22 A Ye -- yes, there is.

23 Q And what's the difference?

24 A If you don't have a good contact, you'll hear, it's
 25 louder and if you have a good contact with somebody, you

1 Q And you now have had -- as a chief of police, would it be
 2 fair to say you've had an opportunity to look -- to
 3 review the police report in this case?

4 A Yes

5 Q And to review what happened in this case?

6 A Yes

7 Q And there's a civil lawsuit that's being filed and you,
 8 as the chief of police, would you be responsible for the
 9 City as well in terms of looking into the lawsuit and
 10 seeing if the police department did anything wrong?

11 A Yes

12 Q And, based on your training of the officers involved in
 13 this incident, Officer Simon -- excuse me, Sergeant Simon
 14 and -- did you see -- based on what you saw, did there --
 15 the choice to use a taser, was that consistent with what
 16 they were taught or inconsistent?

17 A It was consistent with what they were taught

18 Q And how about in terms of -- well, based on your review
 19 of the case, your listening to the tape, your review of
 20 everything that happened that night for Sergeants Joseph
 21 and Simon, did you -- did their actions -- were there
 22 something that is -- in what they did, is that something
 23 that -- do you have any criticisms of what they did,
 24 based on what you saw?

25 A No.

1 can't hear much of anything, especially if you listen to
 2 a recording. It's very difficult to pick up.

3 Q And did you listen to the tape of the arrest in this
 4 case?

5 A Yes, I did.

6 Q And could you hear that something that sounded, in
 7 layman's terms, like a kid's flame machine gun or
 8 something, sort of a

9 A Yes.

10 Q Would that be the sound of the taser?

11 A Yes, that would

12 Q And when you hear it that loud like that, would that be
 13 consistent based, in your experience, with a good contact
 14 or not a good contact or no contact?

15 A Bad contact or one of the probes didn't make a
 16 connection

17 Q And if you -- one of the probes does not make a
 18 connection or you have a bad contact, what's the person
 19 going to feel if anything?

20 A It's hard to -- maybe a little tap -- a little tap of
 21 electricity if anything

22 Q So if you hear someone saying something to the effect of
 23 that feels like a vibrator, would that be con

24 A No, I -- I would imagine that they didn't get the full
 25 contact

1 Q And was there anything, based on what you saw, anything
 2 that should have given them reason to believe that what
 3 they did was improper or, most importantly, unlawful?

4 A No.

5 MR. WIDMER: That's all the questions I have for the
 6 witness

EXAMINATION

7 BY MR. BROWN:

8 Q Do you think -- these photos were produced to your
 9 attorney on May 2nd, 2007 and the photos that I am
 10 showing you now, there's one, two, three, four, five,
 11 six, seven, eight, nine, 10, 11, 12, 13, 14, 15, 16, 17,
 12 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31,
 13 32 and if you need a few moments to look at those, you're
 14 welcome to. I'm not trying to fool you by surprise or
 15 anything but, looking at those photos and seeing that
 16 these were taken at YKHC by a member of my office and
 17 looking at those photos and seeing the way that Mr. Olson
 18 looked after his arrest, does that change your
 19 opinion

20 A No

21 Q of the officers' conduct? Well, look at them all

22 MR. WIDMER: Now, just for clarification, are you
 23 asking him if these are taser marks?

1 MR. BROWN: No, I'm not asking that, I'm saying
2 assume that those are taser marks because that's what Mr
3 Olson says they are.

4 A: I'm not going to assume anything.

5 Q: Okay. All I'm saying is just for purposes of this
6 question...

7 A: Okay.

8 Q: ...if those are taser marks, do you think your officers
9 acted improperly?

10 A: Before I answer that, I'm going to make it clear that I
11 don't think those are taser marks and if they were, they
12 did not act in -- they did not act properly.

13 Q: They did not act properly. Okay.

14 A: You know, if -- if you say that there's 20 some odd --
15 how many are you saying that are there actually? I mean,
16 you got several different pictures of the same one. Can
17 you please clarify exactly how many there are? If
18 there's -- if there's one mark for every taser that the
19 officers said that they did, then I have no doubt that
20 they did the right thing but if you're trying to -- I
21 don't know what you were trying to do by counting earlier
22 and saying if those are all 28 taser marks, if
23 you're...

24 MR. WIDMER: He's just counting the pictures.

25 A: Okay. I'm sorry, I got confused.

1 Q: I just want you just to look at the pictures...

2 A: Okay.

3 Q: ...and so -- okay. But I got your opinion and thank
4 you. I have nothing further.

5 A: But that -- my opinion was based on a few -- when I
6 thought that there was over 20 taser marks. My opinion,
7 if these -- if that's all there is, I don't know exactly
8 how many there are. If these are contacts from the
9 taser, my opinion doesn't change if the officers did the
10 right thing or not. I believe they did the right thing.

11 Q: Even if these are contacts from the taser, you believe
12 they did the right thing?

13 A: Yes.

14 Q: Okay. Thank you.

15 MR. BROWN: Okay. All right. I have nothing
16 further.

17 MR. WIDMER: Okay.
18 (Off record)

19

20

21

22

23

24

25

1 TRANSCRIBER'S CERTIFICATE
2 I, Linda S. Foley, hereby certify that the foregoing
3 pages numbered 2 through 15 are a true, accurate, and complete
4 transcript of deposition of James Hoelscher in Case No. 4BE-
5 07-00026 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 April 25, 2008

10 Linda S. Foley, Transcriber

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.

Case No. 4BE-07-26 CI

**ORDER GRANTING SUMMARY JUDGMENT FOR DEMETRI OAKS & PARTIAL
SUMMARY JUDGMENT FOR THE CITY AS TO THE CLAIMS AGAINST OAKS**

Plaintiff's complaint is premised on the assumption that Officer Demetri Oaks deployed a taser on December 26, 2006. Officer Oaks has satisfied his burden on summary judgment by showing that he never deployed a taser and was not even armed with a taser at the Thomas "Boya" Olson residence on December 26, 2006.

Accordingly, the Court grants summary judgment in favor of Demetri Oaks on plaintiff's claims. For the same reasons, the City is granted partial summary judgment against plaintiff to the extent plaintiff's claims against the City were premised on Demetri Oaks' conduct.

DATE: 8/24/08



BY:

Hon. Leonard R. Devaney, III
Superior Court Judge

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Motion for Summary Judgment
Olson v Hooper Bay, Case No. 4BE-07-26 CI

I certify that on 8/21/08
copies of this form were sent to:

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P+B, ALD

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Exc. 348

AUG 13 2008

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

THOMAS J. OLSON,)

Plaintiff,)

v.)

Case No. 4BE-07-26 CI

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

Defendant.)

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT ON QUALIFIED
IMMUNITY**

Before the Court is the Defendants' Motion for Summary Judgment on Qualified Immunity. This Court held oral argument on the motion on July 31st, 2008. For the reasons stated below, this Court GRANTS the Defendant's Motion.

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

"A party moving for summary judgment must make a prima facie showing that there is no genuine issue of material fact and must demonstrate that the movant is entitled to judgment as a matter of law." *Winschel v. Brown*, 171 P.3d 142, 145 (Alaska 2007); CR 56(c). The trial court is to draw all reasonable inferences of fact from the proffered materials against the movant and in favor of the non-moving party. See *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985). The movant bears the entirety of the burden of proof that it is entitled to summary judgment, "[t]hat is, unless the moving party points to undisputed facts or admissible evidence establishing a prima facie case entitling it to summary judgment as a matter of law, the opposing party has no obligation to produce evidence supporting its own position." *Prentzel v. State, Dept. of Public Safety*, 169 P.3d 573, 581 (Alaska 2007)(quoting *B. R. v. State, Dep't of Corr.*, 144 P.3d 431, 433 (Alaska 2006)). "To defeat summary judgment, the opposing party may in turn offer admissible evidence reasonably tending to dispute the moving party's evidence, thus establishing that a genuine issue of material fact remains to be tried." *Winschel*, 171 P.3d at 145 (citing *Olson v. Teck Cominco Alaska, Inc.*, 144 P.3d 459, 463 (Alaska 2006)). "The non-moving party may not, however, rest upon mere allegations, but must set forth specific facts showing that there is a genuine issue of material fact." In addition, "[t]o create a genuine issue of material fact there must be

more than a scintilla of contrary evidence.' *Olivit v. City and Borough of Juneau*, 171 P.3d 1037, 1142 (Alaska 2007) (quoting *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005)). "It is well established that 'the evidentiary threshold necessary to preclude the entry of summary judgment is low.'" See *Crawford v. Kemp*, 139 P.3d 1249, 1253 (Alaska 2006) (quoting *Hammond v. State, Dep't of Transp. & Pub. Facilities*, 107 P.3d 871, 881 (Alaska 2005)). The trial court has the duty to review the entirety of the record on a motion for summary judgment, including pleadings, affidavits, depositions, admission, answers to interrogatories and related materials to determine whether any of the factual issues presented "suggest[] the existence of any other triable genuine issues of material fact." *Prentzel*, 169 P.3d at 582 (quoting *Jennings v. State*, 566 P.2d 1304, 1310 (Alaska 1977)); CR 56(c).

II. LAW OF QUALIFIED IMMUNITY

Qualified immunity is a defense at law available to government officials who can prove that their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Alaska adopted the federal qualified immunity analysis. *Sheldon v. City of Ambler*, 178 P.3d 459 (Alaska 2008). Qualified immunity in the federal system is interpreted broadly. *Crawford v. Kemp*, 139 P.3d 1249, 1253 (Alaska 2006) (citing *Malley v. Briggs*, 475 U.S. 335, 340 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.")). It is a privilege that confers immunity from suit, not just to liability, which "is effectively lost if a case is erroneously permitted to go to trial." *Saucier v. Katz*, 533 U.S. 194, 200-1 (2001). Therefore, "[w]here the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Id.* at 200.

"In determining whether an officer is immune, a court considers (1) 'whether an officer's actions were objectively reasonable' and (2) 'whether the officer might have reasonably believed that his actions were reasonable.'" *Estate of Logusak ex. rel. Logusak v. City of Togiak*, 185 P.3d 103, 109 (Alaska 2008) (quoting *Sheldon*, 178 P.3d at 463). The *Sheldon* court left open the procedural question of whether the court's immunity inquiry may precede the liability question, and the movants here focus their arguments on the second prong without conceding the first. *Sheldon*, 178 P.3d at 467 n.37. Qualified immunity and excessive force are distinct inquiries. *Sheldon*, 178 P.3d at 467. For the purpose of creating an exhaustive record, this Court will conduct both.

Claims that law enforcement officers have used excessive force during the course of arrest or 'seizure' of a free citizen are analyzed under the Fourth Amendment 'reasonableness' standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Wasserman v. Bartholomew*, 38 P.3d 1162, 1170 (Alaska

2002)(trial court did not err in adopting Fourth Amendment framework as analogous to state law claim). This Court notes at the onset that *Graham* did not answer whether the Fourth Amendment continues to be applicable to claims of excessive use of force where, as here, the force claimed to be excessive occurs after the seizure of a person, and there is a split in federal authority on this issue. *Graham*, 490 U.S. at 395 n.10; compare also *Fontana v. Haskin*, 262 F.3d 871, 879 n.5 (9th Cir. 2001) (“[T]he Fourth Amendment prohibition against unreasonable search and seizure continues to apply after an arrestee is in the custody of the arresting officers”)(collecting authorities and noting circuit split) with *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (rejecting ‘continuing seizure’ doctrine and holding Fourteenth Amendment sets the applicable standard). As both parties briefed this claim under a Fourth Amendment theory, this Court will apply the Fourth Amendment standard.

The court is directed to balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (internal citations omitted). The inquiry under this objectively reasonable prong is: “Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A proper application of the Fourth Amendment reasonableness test “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396. If there is no constitutional violation from the allegations, then further inquiry into immunity is unnecessary. *Saucier*, 533 U.S. at 201. The “‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396. The test is objective not subjective, therefore the subjective intent of the officer is irrelevant to the inquiry. *Id.* at 397-9. “Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.” *Saucier*, 533 U.S. at 207.

The second prong asks “whether the officer might have reasonably believed that his actions were reasonable.” *Sheldon*, 178 P.3d at 463. As the *Saucier* Court explained: “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.” 533 U.S. at 205. This standard encompasses reasonable but mistaken beliefs of the officer, even when the officer has violated a constitutional right by acting objectively unreasonable. *Sheldon*, 178 P.3d at 463. “If the law does not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Id.* at 463 n. 11 (citing *Saucier*, 533 U.S. at 202). “The law is ‘clearly established’ if the

contours of the right are sufficiently clear that a reasonable official would understand that his actions violate that right." *Prentzel v. State*, 169 P.3d 573, 586 (Alaska 2007) (citations omitted); see also *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citations omitted); see also *Sheldon*, 178 P.3d at 466 (directing lower courts to strike balance between officers always on notice from generalized use of force statutes and officers never on notice that their particular use of force under their specific circumstances unlawful).

The Alaska Supreme Court rejected the argument that the generalized use of force statutes - AS § 11.81.370 and AS § 12.25.070 - provided "notice to officers that specific actions taken in specific circumstances may or may not be reasonable." *Sheldon, supra*. The Alaska Supreme Court instead adopted the approach of looking within Alaska and to other jurisdictions for cases, laws, or regulations which "would suggest that the type of action taken by the officer is considered unlawful. The existence of such laws or cases would demonstrate, or at least serve as probative evidence, that there was some kind of 'notice' that the officer could have had about the legality of his actions." *Id.* The focus is on what reasonable officers in the same position "could have about the legality of his actions," with mere subjective beliefs about the reasonableness of the force insufficient. *Sheldon*, 178 P.3d at 465.

III. DISCUSSION

This Court has reviewed the record in this case, including: the pleadings; affidavits from the plaintiff; the defendant officers; the deposition testimony; the police audio recording of the incident; the exhibits and submissions of the parties; the motion work; and the oral argument. At the onset, this Court agrees with the Plaintiff that the officers' use of force here should be viewed in stages. Drawing all inferences in favor of the non-movant Plaintiff asserting the injury, this Court finds that the initial Taser usage of the Defendant officers on the handcuffed but actively resisting Plaintiff in this case was objectively reasonable. This Court finds that subsequent uses of the Taser by Officers Simon and Joseph was not objectively reasonable, but it was within the range of force reasonable officers in the defendants' position could have believed reasonable and lawful.¹

In this case, on December 26th, 2006, at approximately 3:55 a.m., the City of Hooper Bay Police received a request for a welfare check at the Olson residence in Hooper Bay from informed police dispatch that her boyfriend, the Plaintiff Thomas "Boya" Olson, was intoxicated in the home and that there were several small children there without other supervision. According to Mr. Olson's affidavit, the children in the apartment were ages 5, 3 1/2, 1 1/2 and 1 month respectively. See

¹ Plaintiff withdrew is complaint against Officer Dimitri Oaks on record on July 31, 2008. *Olson v. City of Hooper et al.*, Case No. 4BE-07-26 C1

Exhibit 2 of Plaintiff's Motion, Olson Affidavit. The Plaintiff admitted in his affidavit that he and his brother had "drank a couple cups of homebrew" earlier that evening but disputes that he was intoxicated during these events. *Id.* Sgt. Nathan Joseph and Officer Dimitri Oaks of the City of Hooper Bay Police Department responded to the home. The entirety of the officers' interaction with the Plaintiff is audio recorded. The two officers observed that both the door at the artic entry was open as well as another door that led into a downstairs storage area and into a stairwell were open. Joseph Deposition, p. 12; Oaks Deposition, p. 18. The Plaintiff's affidavit admits that the artic entry door was open, and the Plaintiff at oral argument stated that both these doors were in fact open. See Exhibit 2 of Plaintiff's Motion. The audiotape reveals that Sgt. Joseph knocked on the inside door a series of four times and one of the children invited the officers in. Joseph Deposition p. 11; Oaks Deposition p. 16. The two officers proceeded upstairs to the living area. Joseph Deposition, p. 12; Oaks Deposition, p. 19; Olson Affidavit p. 3 (son may have opened door at top of stairs). A child's voice can be heard on the audio tape speaking with the officers after the officers make entry. The inside of the living area was hot and there was at least one light on in the single room. Joseph Deposition, p. 12; Oaks Deposition p. 19; Olson Affidavit. Sgt. Joseph approached the Plaintiff as he was sleeping and shined his flashlight into his face. From the audiotape, Sgt. Joseph announces that he was in the house to do a welfare check, that the door was open, and asked the Plaintiff to stand up 'to run a real quick test' on him. Sgt. Joseph put the unarmed Plaintiff in handcuffs with his hands behind his back in the bed for the purpose of investigative detention after the Plaintiff started to sit up and clench his fists. Joseph Deposition p. 19; Oaks Deposition p. 37. Officer Joseph stated in his deposition that he decided to arrest both adults, presumably for Endangering the Welfare of a Child in the Second Degree, after smelling alcohol on their breath. See *Prenzel*, 1659 P.3d at 587 (warrantless arrest for very minor criminal offenses justified under federal law, quoting *Aiwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)). This Court declines the Plaintiff's invitation to second guess this decision of the officers in not considering alternatives to arrest. *Sheldon*, 178 P.3d at 4467.

While the severity of the crime the officers were investigating on the welfare check is a violation,² both of these officers stated in their deposition testimony that they knew the plaintiff's aggressive past history with police. Sgt. Joseph stated in his deposition that he knew the Plaintiff had "a past history with other police officers that responded to calls" and that he knew from his review of department records that the Plaintiff had "been assaultive towards police officers in the past." Joseph Deposition, p. 13-15. Officer Oaks stated in his deposition that he knew the Plaintiff from a previous encounter for disorderly conduct. Oaks Deposition, p. 59.

This Court finds, from the evidence presented, that the Plaintiff actively resisted arrest and that the situation before force was applied was rapidly escalating out of control. The Plaintiff refused to

² AS § 11.51.110(a)(2), (c).
Olson v. City of Hooper et al.,
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comply with numerous verbal commands and remained belligerent throughout the initial encounter, before any force was applied. This was conceded by the Plaintiff at oral argument. It is apparent from the audio recording of the contact. Children are screaming and crying. The Plaintiff becomes very agitated and yells repeatedly that the officers are trespassing. The Plaintiff's brother is heard throughout the tape yelling encouragement to the Plaintiff. Sgt. Joseph stated in his deposition that he had to hold legs down to prevent him from kicking, which Mr. Olson said he was about to do. Joseph Deposition at p. 32. Sgt. Joseph can be heard calling for backup officer at least twice on the tape as the Plaintiff becomes more agitated. Sgt. Charles Simon arrives and, with Officer Oaks, attempts to escort the Plaintiff out of the house. All three fall to the floor. The Defendant kicked at and attempted to bite the officers while on the floor, prior to the Taser deployment. Oaks Deposition p. 29, 51; Joseph Deposition p. 30-1. Sgt. Joseph deployed the cartridge of the Taser from his position. It is undisputed that this deployment was not effective, as only one dart made contact with the Plaintiff's skin, which broke the circuit and prevented the five second electrical charge cycle from being effective. Sgt. Simon then deployed his Taser on the Plaintiff in the 'drive stun' mode. The Plaintiff stated on the audiotape "Is that all you got? . . . Feels like a vibrator." Viewing facts in the light most favorable to the nonmoving, the Plaintiff was Tased fifteen to eighteen times³ by Sgt. Simon and Sgt. Joseph while he was handcuffed, with most occurring when the Plaintiff was seated with the Plaintiff's legs wrapped around a ceiling to floor pole in the house and at least some while he was prone on the ground on his stomach.

This Court finds the initial deployment of the Taser by Sgt. Joseph and the initial deployments by Sgt. Simon objectively reasonable. The officers were faced with an immediate threat of bodily harm from the Plaintiff kicking and biting them in a rapidly deteriorating situation in the home. In his deposition, the Plaintiff's own expert, Dr. Michael D. Lyman, candidly stated that pepper spray would have been an appropriate use of force in the circumstances presented, which is on the same continuum of force as a nonlethal compliance technique as the Taser under Hooper Bay's policies. Compare Lyman Deposition at 96 with Defense Exhibit G page 3. This Court does not suggest that the department's policies are equivalent to the constitutional finding of objective reasonableness; however, this Court is in agreement with the authorities, here cited by the Plaintiff, that draw a parallel between nonlethal uses of force for purposes of constitutional analysis. The use of the Taser to subdue a suspect who repeatedly ignores police instructions and acts belligerently towards police is not excessive force. See e.g., *Zivoinovich v. Barner*, 525 F.3d 1059, 1073 (11th Cir. 2008) (citing *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir.)).

³ There is a genuine issue of disputed fact on how many times the Plaintiff was Tased, with Plaintiff in their response motion stating 'twelve to fifteen times' and Plaintiff's expert estimating a range of 15 to 18 times. Compare Plaintiff's Motion at 17 with Plaintiff's Exhibit 9 at p. 7 para. 56. Taking all issues of material fact in favor of the party asserting injury, this Court will use the expert's estimation.

cert. denied, 543 U.S. 988 (2004)). This Court holds that those initial deployments were objectively reasonable and not excessive.

This Court, however, agrees that "the issue becomes less clear" with each application of the Taser. *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137, 1140, 1144-5 (W.D. WA 2007). This Court holds that there is a genuine issue of material fact presented as to the objective reasonableness of the subsequent uses of force. This Court will then proceed to analyze these under the second prong of the qualified immunity inquiry.

IV. WHETHER THE OFFICER MIGHT HAVE REASONABLY BELIEVED THEIR ACTIONS WERE REASONABLE?

The Plaintiff and the Defendant both cite to unpublished decisions for the proposition that the officers had notice of the lawfulness of their conduct. This Court rejects that unpublished orders from the federal district courts in Washington and California would give notice to officers in Hooper Bay, Alaska, of the unlawfulness of their conduct. The Plaintiff in oral argument conceded that these decisions would not themselves serve as notice. This Court also rejects the notion that the unpublished superior court order in *Page v. City of Kotzebue*, 2KB-07-76CI, would give notice to officers in Hooper Bay that their conduct was lawful. None of these cases are examples of citable authority that give guidance to practitioners.

The Defendants in their reply and at oral argument heavily rely upon *Sheldon* for the proposition that the officers could have had a reasonable belief that their conduct was lawful given the type of force approved by the Alaska Supreme Court there. This argument is misplaced. First, *Sheldon* was decided on March 14th, 2008, far after the arrest of the Plaintiff here and thus it cannot serve as a basis for finding that the law was clearly established in December of 2006. Second, in *Sheldon*, the court focused its analysis on injuries resulting from a 'bear hug' and takedown maneuver used by the village police officer. *Estate of Logusak*, 185 P.3d at 109 (citing *Sheldon*, 178 P.3d at 462). The *Sheldon* court held that that particular use of force by the village police officer was not unreasonable. As the court later explained in *Logusak*, "Because the VPO did not reasonably know that a 'bear hug' could result in death and because the act itself was not on its face excessive or egregious, we held that he had acted reasonably and that therefore the city was immune." *Estate of Logusak*, 185 P.3d at 109 (citing *Sheldon*, 178 P.3d at 467). This Court declines to read *Sheldon* as providing notice that this particular use of force in this set of circumstances was reasonable.

The Plaintiffs in their opposition heavily rely upon *Beaver v. City of Federal Way*, 2006 WL 3203729 (W.D. WA 2006)(unpublished), later proceedings in, 507 F.Supp.2d 1137 (W.D. WA 2007), for the proposition that the officers' use of force was objectively unreasonable and that they were on notice

from the decision that their conduct violated established law. The Plaintiff also argues that there is a genuine issue of material fact on the voluntariness of the Plaintiff's kicking movements by virtue of the Taser's ability to cause involuntary muscle contractions, which the Plaintiff contends the *Beaver* decision supports.

In *Beaver*, the plaintiff sued two officers and the City of Federal Way pursuant to 42 U.S.C. § 1983 for excessive force that deprived the plaintiff of his constitutional rights under color of law. *Beaver*, 507 F.Supp.2d at 1139. The specific facts, as found by the magistrate's report and recommendation, were that the plaintiff was Tased after fleeing from a reported residential burglary and after disregarding an officer's verbal command to stop. *Beaver*, 2006 WL 3203729 *6. The use of force at issue was eight deployments of the Taser on the unarmed plaintiff, who was given inconsistent commands by the two officers on the scene on how to comply. *Id.* at *2,6. The district court adopted the magistrate's finding that there was a genuine issue of material fact on excessive use of force and declined to decide whether the law put the officer deploying the Taser on notice that his conduct would be clearly unlawful, instead finding that "there are factual disputes as to the parties' conduct or motives" that summary judgment is inappropriate to resolve. *Id.* at *3. The case proceeded to a three-day, non-jury trial in front of the magistrate, who issued his findings of fact and conclusions of law. *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137, 1140 (W.D. WA 2007). The court found that the initial three recorded uses of the Taser⁴ were objectively reasonable, and that while "the issue becomes less clear" with each application of the Taser, the court would not second guess the officers decision to apply the Taser for the first few applications in a rapidly evolving situation where he was alone with a felony suspect under the influence of intoxicants who ignored his verbal commands. *Id.* at 1144-5 (citing *Graham*, 490 U.S. at 396). As to the subsequent deployments, the court found they were objectively unreasonable, but that the officers were nevertheless entitled to qualified immunity because at the time the Fourth Amendment violation occurred, "the contours of Fourth Amendment jurisprudence and, in particular, excessive force claims of this type, were not sufficiently clear that a reasonable officer would have understood that multiple tasings of Mr. Beaver under these circumstances violated his rights." *Beaver*, 507 F.Supp.2d at 1148.

First, this Court rejects the notion that the unpublished summary judgment order in *Beaver* would give notice to officers in Hooper Bay of the unlawfulness of their conduct. Second, this Court views the *Beaver* court's approach to decline to decide on summary judgment the second prong of the qualified immunity and then decide to grant qualified immunity after trial as inconsistent with *Saucier*. Compare *Beaver*, 507 F.Supp.2d 1137 with *Saucier*, 533 U.S. at 200-11 (privilege of qualified immunity "is effectively lost if a case is erroneously permitted to go to trial"). This Court disagrees with that

⁴ The plaintiff in *Beaver* stipulated that the police had probable cause to arrest and to the first application of the Taser. *Beaver*, 507 F.Supp.2d at 1143.
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court's decision to decline to decide the second prong of the qualified immunity standard on summary judgment, as inconsistent with federal and Alaska precedent. Accordingly, this Court declines to follow this approach. This Court also finds this case factually distinguishable from the one at bar and rejects the Plaintiff's arguments that the *Beaver* court's decision supports their other arguments here. This Court also notes that, according to the CM/ECF docket system, the *Beaver* litigation and decision of the lower court is stayed pending direct appeal to the Ninth Circuit Court of Appeals (Ninth Circuit Docket No. 07-35814).

The Plaintiff's expert suggests that the International Association of Chiefs of Police Model Policy on the use of Electronic Control Weapons is an appropriate standard to measure the conduct of Sgt. Joseph and Sgt. Simon. However, the Plaintiff has offered no evidence that this model policy has been adopted by any police agency within Alaska. Even if the policy had been adopted, it limits the use of Taser to situations like the case at bar, where it "reasonably appears necessary to control or subdue a violent or potentially violent person." See Plaintiff's Exhibit 9, page 6.

The Defendants point to the Hooper Bay Police Department General Order on use of the Advanced Taser for the argument that the officers were instructed by the policy as to the objectively reasonable level of force for the Taser, and therefore their reliance on the policy, even if mistaken, was reasonable. The policy reads in relevant part: "The Advanced Taser shall not be used on a restrained or controlled subject unless the actions of the subject present an immediate threat of death or great bodily harm or substantial physical struggle that could result in injury to themselves or any other person including the deploying officer." See Defendant's Exhibit G, page 8. Chief Hoelscher testified at his deposition that he chose this policy from several model policies he obtained from an online network of police departments; he adopted the policy unedited. See Hoelscher Deposition, page 7-8.

This Court has grave concerns about the implications of the Defendant's argument. Chief among these concerns is that police departments may, out of self-interest to avoid suit, elect to adopt regulations that are facially, objectively unreasonable and then argue that officers are entitled to qualified immunity for their reasonable reliance upon them. The converse could also be true - that a police officer who otherwise would be entitled to qualified immunity for reasonable but mistaken beliefs as to the lawfulness of his or her conduct would be deprived of that immunity by an internal department regulation that sets higher standards than the Fourth Amendment baseline, as no reasonable officer in their position at that department could have thought that action would be lawful. This Court notes for the record that the officers here could have reasonably relied upon this policy on the use of the Taser as part of their training, but rejects the Defendant's argument that this should be accorded any weight under the qualified immunity analysis. Though the *Sheldon* court directed lower courts to review "regulations which would suggest that the type of action taken by the officer is considered unlawful," this Court doubts that internal

department regulations of the department being sued should be the piece of "probative evidence that there was some kind of 'notice' that the officer could have had about the legality of his actions." *Sheldon*, 178 P.3d at 466.

Upon review of Alaska and the law presented by the parties, this Court finds that, at the time of the arrest here, the contours of Fourth Amendment jurisprudence on the claims of excessive force involving Tasers was not sufficiently clear such that a reasonable law enforcement officer in the officers' position under these circumstances would have known that the multiple tasings of the Plaintiff violated his Fourth Amendment right to be free of excessive use of force. "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341(1986)). This Court finds Sgt. Joseph and Simon are entitled to qualified immunity. *Sheldon*, 178 P.3d at 467.

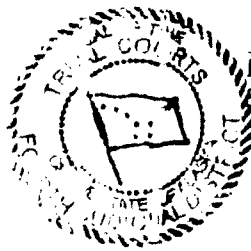
IV. CONCLUSION

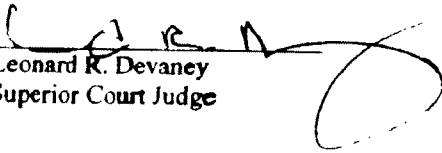
The Defendant's Motion for Summary Judgment on Qualified Immunity is GRANTED as to Defendants Officer Charles Simon and Officer Nathan Joseph. Since any liability that might attach to the municipality here is derivative of claims against the two individual officer defendants, summary judgment is also GRANTED to the City of Hooper Bay.

Defendants shall file the appropriate final judgment forms within 20 days of entry of this order, pursuant to CR 56(c).

IT IS SO ORDERED.

Dated at Bethel, Alaska this 1st day of September 2008.




Leonard K. Devaney
Superior Court Judge

I certify that on 9/2/08
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