

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

Appellant's Excerpt of Record
Volume 1 of 2

Pages 71-139

Therefore, under the recent decision of *Sheldon v. City of Anchorage*, ___ P.3d ___ (Op
5238, March 14, 2008), the court will find that a grant of qualified immunity is appropriate.
Therefore IT IS ORDERED that summary judgment will be granted to defendant Hughes. Since any
liability that might attach to the City is based on his liability, summary judgment is also granted to
the City of Kotzebue.

Defendants shall file appropriate final judgment forms within 20 days of entry of this
order.

DATED AT NOME, ALASKA This 20th day of March, 2008

Besch

HEN BESCH
Superior Court Judge



Order Granting Summary Judgment
Fugate v. Hughes, City of Kotzebue 1R B-07-76 C1
Page 2 of 2

I certify that on 3-20-08
a copy of this document was furnished to me by
David Fugate
Joseph Fugate
Clerk William

Exhibit I
Page 2 of 2

Exc. 71

UPPER BAY POLICE
DEPARTMENT
DISPATCH

REPORT

DISPATCH CARD Date 12-28-2008 Case # 08-4180

Nature of Complaint Welfare Check

COMPLAINT CODE Welfare Check 654 TIME OF COMPLAINT 10:06

LOCATION Boya Olson's Residence

COMPLAINANT 1

OFFICER PERM IDENTIFIER NUJ77DD10 P.O. BOX #

PHONE # 308 ALCOHOL RELATED DRUG RELATED

PRESS RELEASE IN PERSON OFFICER OTHER VHE

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 FELONY MISDEMEANOR: 10:06 hrs. nathan and denari called base requesting assistance from another officer. charles notified of request and will respond to eric olson's residence.

S A M SAR: officer 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. thomas olson had to be tased to gain compliance.

DEATH

IMPORT SALE OF ALCOHOL SEE REPORT REF CASE TO

CALL RECEIVED BY ATN

TIME 10:06 TIME 10:11 DISPATCHER

TIME RECEIVED DWI VEHICLE

TIME DISPATCHED

MAR-20-2008 THU 03:18 PM HOME TRIAL COURT

FAX NO. 9074437299

P. 02/03

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

SECOND JUDICIAL DISTRICT AT KOTZEBUE

N. NIKOLAS PAGE,)
)
 Plaintiff,)
 vs.)
)
 CITY OF KOTZEBUE and)
 NORMAN HUGHES,)
)
 Defendants.)

Case No. 2KB-07-76 CI

ORDER GRANTING SUMMARY JUDGMENT

In this case the evidence, drawing all inferences in favor of the non-moving party, is that, while the actions of defendant Hughes may have been objectively unreasonable, the use of the Taser on the handcuffed, but resisting Page was within the range of force a reasonable police officer in Hughes' position could decide to use. The court also finds that the officer subjectively believed the use of the Taser was necessary and not improper. The plaintiff argues that the City of Kotzebue policy regarding use of force should have placed Hughes on notice that use of the Taser was improper. However, the policy is very general and as unhelpful as the existing state statute AS 17.25.070. Likewise the plaintiff suggests the Model Policy on use of Electronic Control Weapons is an appropriate standard to measure Hughes' conduct. However, the plaintiff had offered no evidence such model policy has been adopted by any police agency within Alaska. Even if the policy had been adopted, it limits the use of electronic weapons to individuals who are actively resisting, which the defendant was. Whether the particular offender's conduct was "overly assaultive" and whether other means can "reasonably" control the conduct seem the sort of questions that call out for application of the qualified immunity analysis.

Order Granting Summary Judgment
 Page v. Hughes, City of Kotzebue 2KB-07-76 CI
 Page 1 of 2

MAR 20-2008 THU 03:23 PM NOME TRIAL COURT

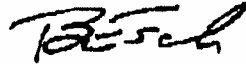
FAX NO. 9074437299

P. 03/03

Therefore, under the recent decision of *Sheldon v. City of Anchorage*, ___ P.3d ___ (Op
5238, March 14, 2008), the court will find that a grant of qualified immunity is appropriate.
Therefore IT IS ORDERED that summary judgment will be granted to defendant Hughes. Since any
liability that might attach to the City is based on his liability, summary judgment is also granted to
the City of Kotzebue.

Defendants shall file appropriate final judgment forms within 30 days of entry of this
order.

DATED AT NOME, ALASKA This 20th day of March, 2008



BEN ESCH
Superior Court Judge



Order Granting Summary Judgment
Hughes v. City of Kotzebue 2KB-07-76 CT
Page 2 of 2

I certify that on 3-20-08
a copy of the foregoing was read to the
David Henderson
Joseph Evans
Clerk William

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL 2019 11 25

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

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY

City of Hooper Bay police officers "tased" plaintiff Thomas Olson twelve times while he was handcuffed on the floor of his house. In the Ninth Circuit, a taser or other "less lethal" device may be deployed on a handcuffed individual when he is a threat to the safety of the officers or others; a taser may rarely, if ever, be used against a restrained suspect for purposes of compliance only.

In this case, taking the facts in a light most advantageous to the plaintiff, it was not legally permissible for the officers to deploy their tasers twelve to fifteen times. Because the contours of use of force laws were clearly defined at the time of the incident by case law, police department policies, and accepted police practices, qualified immunity does not shield the officers from liability; defendants' motion must be denied.

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FILE COPY

I. Statement of Facts:

On or about December 26, 2006, at approximately 4 a.m., Officers Dimitri Oaks and Nathan Joseph responded to a request for a welfare check at the home of their neighbor Thomas J. Olson in Hooper Bay, Alaska.¹

Upon arrival at Mr. Olson's home, the two officers noticed the door on the attic entry open, so they enter.² They then knocked on the next door and claim to have heard a voice saying come in.³ That second door opens to a ground level storage area where deep freezers and other items are located.⁴ To gain access into the home, the two officers had to climb a flight of stairs on their right and go through yet another door at the top of the stairs.⁵ The officers' testimony varies as to whether this third door was opened or closed.⁶

The officers stepped through the third door a little after 4:00 am.⁷ The third door opens into one large room on the second floor.⁸ No dividing walls are within the room.⁹ Upon entry into the room the officers could see easily because a dim light had been left on in the corner of the room.¹⁰ The officers noticed everyone was asleep, except for a child who had been awakened by the officer's knocking.¹¹ The two adults in the room were asleep in separate areas, one on the sofa another on a mattress.¹²

The officers first approached the individual on the mattress. That individual was

¹ See Exhibit 1.

² *Id.*

³ *Id.*

⁴ See Exhibit 2.

⁵ *Id.*

⁶ See Exhibit 3, p. 12 and Exhibit 4, p. 19.

⁷ See Exhibit 1.

⁸ *Id.*

⁹ See Exhibit 2.

¹⁰ See Exhibit 4, p. 19.

¹¹ *Id.*

¹² *Id.* at pp. 20, 22.

their neighbor Thomas Olson.¹³ Given the small size of Hooper Bay everyone knew his/her neighbor. The individual on the sofa was Thomas Olson's brother who was also a neighbor of the officers. Officer Joseph, the supervising officer, went over to wake him. None of the officer's knew of Mr. Olson's felony or teenage attempt to harm himself.¹⁴

After the two were awake, Officer Joseph determined the two were intoxicated and called for Officer Simon to come to the home.¹⁵ Officer Joseph reasoned that one officer needed to watch the children while the other two officers transported Thomas Olson and his brother to the jail.¹⁶ Officer Oaks did not explain why another officer was called instead of calling the children's mother who was nearby at her mother's home.¹⁷

Officer Simon and Officer Oaks stood Mr. Olson handcuffed Mr. Olson's hands behind his back.¹⁸ The two officers then started to escort Mr. Olson from the home, one on each side of Mr. Olson.¹⁹ Mr. Olson stood and walked with Officer Oaks on one side and Officer Simon on the other.²⁰ When Officer Simon arrived, the officers determined that the level of Mr. Olson's intoxication did not prevent him from maneuvering down the stairs with his hands behind his back.²¹

Mr. Olson walked between the officers. Id. The third officer, Officer Joseph was seated a few feet away on the sofa with Mr. Olson's brother. The three took a few steps

¹³ *Id.* at p. 20.

¹⁴ *See* Exhibit 3 at p.9, Exhibit 4 at p. 59, and Exhibit 5 at p. 51-52.

¹⁵ *See* Exhibit 3 at pp. 23, 24.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See* Exhibit 4 at pp. 22,24.

¹⁹ *Id.* at p. 24.

²⁰ *Id.*

²¹ *Id.* at p. 29.

and slipped or tripped over a trash bag on the floor. All three fell in a pile on the floor.²²

Mr. Olson, handcuffed, fell back on his hands causing a high level of pain – which lead to yelling and confusion.²³ The two officers who fell along with Mr. Olson began to stand up.²⁴ At the same time, Mr. Olson began to stand also, but was unable to rise to his feet because of being handcuffed. Instead he rose to a seated position.²⁵

In Mr. Olson's efforts to regain his balance and stand, he inadvertently kicked Officer Simon in the chest as Office Simon also attempted to stand.²⁶ In the confusion of the fall, which was no fault of Mr. Olson's, everyone grew excited and the situation escalated. As for who fell first, Oaks commented, "I don't know, its hard to tell. Everybody was going down," but throughout Thomas remained handcuffed.²⁷

As the officers stood, Officer Joseph, who did not fall watched from the sidelines. After seeing Mr. Olson's foot contact Officer Simon, Officer Joseph withdrew his Taser and fired its two prongs toward Mr. Olson who was seated with his hands cuffed behind his back.²⁸

When the Taser's two prongs hook into a person's skin a circuit is formed which causes an electrical shock.²⁹ Here, a full electrical circuit was not formed by Officer Joseph's initial Taser discharge because only one of the two prongs hooked under Mr. Olson's skin. The hook under Mr. Olson's skin caused a vibrating sensation. Officer Joseph then released another charge, even though the circuit was not fully formed. This

²² *Id.*

²³ *See* Exhibit 2.

²⁴ *See* Exhibit 4 at pp. 24, 28.

²⁵ *See* Exhibit 2.

²⁶ *See* Exhibit 1.

²⁷ *See* Exhibit 4 at pp. 28-29.

²⁸ *See* Exhibit 1.

²⁹ *See* Exhibit 5.

caused another vibrating sensation and more confusion in the room.³⁰

Throughout both discharges, Mr. Olson remains seated on the floor with his hands cuffed behind his back.³¹ Officer Simon and Officer Oaks state that Mr. Olson kicked at them while in that position.³² Officer Simon reached between Mr. Olson's legs and drive stunned Mr. Olson on the inner thigh, within a few inches from his genitals.³³

It should be noted that "[a] subject's ability to kick, or move at all, is inconsistent with the very nature of the Taser . . . because as an electronic control weapon, [it] is designed to immobilize the muscle groups of the person being tased to the extent that they collapse."³⁴ As a result, "it is doubtful if not completely doubtful that [Mr. Olson] would be physically able to kick after being tased."³⁵

Next, Officer Simon moved behind Mr. Olson. Officer Simon conceded that he could have picked Mr. Olson up at that point from behind.³⁶ Officer Oaks was safely in front of Mr. Olson, and Officer Joseph was seated a few feet away on the side of Mr. Olson. At this point, no officer was in range of any imminent harm. The room, having no dividing walls, provided sufficient room for the officers to move about.³⁷

Officer Simon, standing behind the seated Olson, only once attempted to [re]strain Mr. Olson up from behind after he was in the floor.³⁸ Instead of attempting to further restrain Mr. Olson without tasing him, Officer Simon reaches over Mr. Olson's shoulder

³⁰ See Exhibit 3.

³¹ See Exhibit 1 and Exhibit 6.

³² See Exhibit 4 at pp. 36-37 and Exhibit 5 at pp. 19-20.

³³ *Id.*, Exhibit 7 and Exhibit 8.

³⁴ See Exhibit 9.

³⁵ *Id.*

³⁶ See Exhibit 5 at 51.

³⁷ See Exhibit 4 at p. 43.

³⁸ See Exhibit 5 at p. 51.

and administers more drive stuns from the taser. Officer Joseph joins in.³⁹

The officers roll Mr. Olson on to his belly. Mr. Olson, who has been tasered multiple times, is under control, face down, and hands cuffed behind his back.⁴⁰ Without provocation, Officer Joseph and Officer Simon begin to simultaneously administer additional drive stuns to Mr. Olson's back.⁴¹ In less than five minutes Mr. Olson was tasered over 12 times, which caused over 20 burns to his body.⁴²

The City of Hooper Bay trained the officers that the effects of each taser discharge lasts up to several minutes. The officers were also trained that a person who is restrained should only be tasered if there was a possibility of causing substantial bodily injury.⁴³

Officer Oaks was initially trained at the Police Academy six to eight years ago. He was not trained to use a taser but was instead, trained to use soft hand techniques. Later, the Hooper Bay Police Chief, James Hoelscher, trained him taser use. Oaks testified that, "Well, they taught us to try to talk them into standing up and not to be so aggressive and to come along peacefully without -- and how to talk them in -- talk them into not doing anything anymore . . ." ⁴⁴ He testified that if an arrestee kicks, an officer can simply lay on the arrestee's legs with the officer's full weight to prevent further kicking.⁴⁵

Photographs taken of Mr. Olson while he was still incarcerated at the Yukon Kuskokwim Correctional Center show the burn injuries caused by the tasing.⁴⁶ Upon his release from custody, he sought medical treatment for the taser burns and numbness to his wrists caused

³⁹ See Exhibit 6 and Exhibit 7.

⁴⁰ See Exhibit 2, Exhibit 3 at p. 51.

⁴¹ *Id.*

⁴² *Id.* and Exhibit 6.

⁴³ See Exhibit 10.

⁴⁴ See Exhibit 4 at p. 11.

⁴⁵ *Id.*

⁴⁶ See Exhibit 8.

by the handcuffs.⁴⁷ Health care providers noted 25 individual burn marks. On January 2, 2007, Mr. Olson also obtained additional photographs of his injuries.⁴⁸ Photographs taken January 26, 2007, several weeks after the incident⁴⁹ and photographs taken July 17, 2007, a half a year after the incident, reveal the severity of the burn marks caused by the tasing.⁵⁰

II. The Standard for Summary Judgment

Defendants, as the summary judgment movants, are required to establish that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law.⁵¹ All reasonable inferences must be drawn in plaintiff's favor.⁵² It is well established that the evidentiary threshold necessary to preclude the entry of summary judgment is low.⁵³ Thus, where there exists any genuine issue of material fact, the court may not grant a motion for summary judgment.⁵⁴ In determining if there is a genuine issue of material fact the court must view the facts in a light most favorable to the non-moving party.⁵⁵ The party opposing summary judgment is not required to show it will prevail at trial.⁵⁶ Where reasonable minds could differ as to the facts of a case, the question is one for the jury.⁵⁷ An unresolved question of material fact precludes summary judgment.⁵⁸

In qualified immunity cases, the burden of proof requires defendant to produce

⁴⁷ See Exhibit 11.

⁴⁸ See Exhibit 12.

⁴⁹ See Exhibit 13.

⁵⁰ See Exhibit 14.

⁵¹ *Valdez Fisheries Dev. v. Alyeska Pipeline*, 45 P.3d 657, 664 (Alaska 2002).

⁵² *Id.*

⁵³ *Crawford v. Kemp*, 139 P.3d 1249, 1253 (Alaska 2006).

⁵⁴ *Moore v. State*, 553 P.2d 8, 15 (Alaska 1976).

⁵⁵ *Beck v. Haines Terminal & Highway Co.*, 843 P.2d 1229, 1230 (Alaska 1992).

⁵⁶ *Gablick v. Wolfe*, 469 P.2d 391, 395 (Alaska 1970).

⁵⁷ *Tush v. Pharr*, 68 P.3d 1239, 1249 (Alaska 2003).

⁵⁸ *Id.*, See also *Trembly v. Starr-Wood Cardiac Group, P.C.*, 3 P.3d 916, 920 (Alaska 2000).

evidence requiring plaintiff to "go beyond his or her pleadings."⁵⁹ The defendant bears the burden of demonstrating that there are no genuine issues of material fact.⁶⁰

At least one commentator has noted that qualified immunity/excessive force cases commonly involves questions of material fact that can only be resolved by a jury.⁶¹ Case law from the Ninth Circuit indicates the same; at least one court found it impossible to rule on qualified immunity before trial.⁶²

III. The Qualified immunity Standard

AS 12.25.070 limits the amount of force police officers may use in making an arrest; AS 09.65.070 grants discretionary function immunity to municipal employees. Accordingly, even if the force used by an officer is excessive under AS 12.25.070, AS 09.65.070 may still shield him from liability. To cope with the inherent conflict between immunity and excessive force, Alaska courts have adopted a standard that "closely conforms" with federal qualified immunity law.⁶³

Federal law, as announced by the U.S. Supreme Court in *Saucier v. Katz*,⁶⁴ requires application of a two part test to qualified immunity/excessive force claims. The Alaska Supreme Court adopted this two prong test in *Sheldon v. City of Ambler*. Under it, courts must first determine whether the force applied was "objectively reasonable," if it was, then the second inquiry is to whether or not the officer's use of force was

⁵⁹ *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).

⁶⁰ *Id.*

⁶¹ Karen M. Blum, *The Qualified Immunity Defense: What's 'Clearly Established' And What's Not*, 24 *Touro L. Rev.* 501, 522 (2008). *Compare*

⁶² *Compare* *Beaver v. City of Federal Way*, No. CV05-1938MJP, 2006 WL 3203729 (W. D. Wash. Nov. 3, 2006)(finding summary judgment inappropriate where factual disputes exist) *with* *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137 (W.D.Wash. 2007)(subsequent resolution of factual disputes at trial allowed court to grant qualified immunity).

⁶³ *Sheldon v. City of Ambler*, 178 P.3d 459, 463 (Alaska 2008).

⁶⁴ 533 U.S. 194 (2001).

“reasonable” was clearly excessive in light of the law then available to the officers.⁶⁵

Because the second prong depends on the officers’ understanding of the law, some courts consider it the subjectively reasonable prong.⁶⁶

If “[t]he contours of the right [to use force are not] sufficiently clear that a reasonable official would understand that what he is doing violates that right,” immunity applies.⁶⁷ “If the law d[oes] not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.”⁶⁸ For purposes of this brief, we refer to the two prongs as “excessive force” and “qualified immunity.”

The clear separation of the excessive force inquiry from the qualified immunity inquiry necessitates, at least in federal courts, a “rigid order of battle;”⁶⁹ at the start of their inquiry courts must apply the first prong; then, only if excessive force is found, the court proceeds to the second prong, the qualified immunity inquiry.⁷⁰ The *Sheldon* court remarked that this rigid, federal ordering has been heavily criticized, but refused to rule on whether or not Alaska courts are required to follow the same order.⁷¹

Defendant appears to have misunderstood the brief discussion of ordering in *Sheldon*, and assumes that *Sheldon* permits Alaska courts to decide the qualified immunity issue without first making a finding as to excessive force.⁷² Because defendant does not address the issue of excessive force in its Motion, the discussion of the first prong below is

⁶⁵ *Sheldon*, 178 P.3d at 465.

⁶⁶ *Id.*

⁶⁷ *Saucier*, 533 U.S. at 202.

⁶⁸ *Sheldon*, 178 P.3d at 463 (citing *Saucier*, 533 U.S. at 202).

⁶⁹ *Brosseau v. Haugen*, 543 U.S. 194, 201-202 (2004) (Breyer, J., concurring).

⁷⁰ *Saucier*, 533 U.S. .

⁷¹ *Saucier* footnote 37, 468.

⁷² Motion for Summary Judgment on Qualified Immunity, 16 (“The court need not even reach the further question of whether there is a genuine issue of material fact over whether an officers’ behavior was objectively unreasonable”).

brief.⁷³

A. The first prong of the *Saucier* test – Excessive force

The use of force in making arrests in Alaska is authorized and limited by statute: AS 11.81.370 is an affirmative grant of power to the police, allowing an officer to use “nondeadly force... to the extent the officer reasonably believes it necessary to make an arrest.” AS 12.25.070 restricts the police power, requiring that officers “not subject a person arrested to greater restraint than is necessary and proper for the arrest and detention.”

Federal courts apply *Graham v. Connor* to excessive force claims.⁷⁴ *Graham* established the “objectively reasonable” standard for judging excessive force and lists several factors trial courts should consider in applying the test. Alaska courts have also relied on *Graham* in assessing excessive force.⁷⁵

“[P]roper application [of the objective 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.”⁷⁶

i. The officers used excessive force in arresting Thomas Olson.

At the very least, there are disputed facts that necessitate a jury’s opinion regarding the use of force in this case. Officers arrived at Plaintiff’s house on the night of December

⁷³ At a certain point it may be strictly academic... the case law seems to imply that qualified immunity hurdle is a lower one than the excessive force one for defendants to clear.

⁷⁴ 490 US 386 (1989).

⁷⁵ See *Wasserman v. Bartholomew*, 38 P.3d 1162 (Alaska 2002).

⁷⁶ *Graham*, 490 US at 396.

26, 2006 investigating a possible case of endangering the welfare of a child in the second degree, a possible violation of AS 11.51.110.⁷⁷ Endangering the welfare of a child in the second degree is a *violation*.

The officers entered the house and woke Plaintiff up. Plaintiff immediately asked them to leave. At this point it is doubtful whether the officers even had probable cause to remain in the dwelling.

Despite the assertions in their affidavits, the officers confirmed during depositions that they had no knowledge of plaintiff's prior felony or his attempt to harm himself.

The officers proceeded to handcuff plaintiff, and asked him to stand to do a "test." It is unclear from the audio of the incident whether Thomas was ever made fully aware of exactly why police were in his house. Over a roughly ten minute period the officers tased him twelve to fifteen times.

All of the tases occurred while plaintiff was handcuffed and on the floor: several occurred while he was seated with his legs wrapped around a poll, and others occurred after he had been rolled over onto his stomach. Taken in a light most favorable to plaintiff, any movements that the plaintiff may have made that could have resembled kicks, must be interpreted as muscle twitches resulting from the taser applications.⁷⁸ Regardless of whether the kicks are construed as real threats to the officers or as simply spasms, the officers admit that could have simply stood plaintiff up.

Even if Thomas was a threat to kick the officers, he had ceased becoming a threat and was merely non-compliant at the time the officer reached between his legs to tase

⁷⁷ Defendants make a half-hearted attempt to characterize the investigation as one into a possible reckless endangerment, a violation of AS 11.41.250(a) (a misdemeanor) but it is clear from the statutory language and the facts of this case that this was a stretch. See Defendant's Motion for Summary Judgment, 5.

⁷⁸ See Expert Report of Michael D. Lyman, Page 6, paragraph 51.

plaintiff's thigh (had he been a threat, it is doubtful the officer would have wanted to put his hand there). When plaintiff was tasered while on his stomach, there is no conceivable way he could have been considered a threat.

Applying *Graham* to the facts, there is at least a jury question regarding the use of appropriate force: at least two of the tases occurred while plaintiff was lying on his stomach with his hands behind his back, clearly not a threat to anyone in the house.⁷⁹ The other tases occurred when he did not pose a threat and the officers could have simply reached under his shoulders and picked him up (instead of reaching between his legs and tasing him).

B. The Second Prong of the *Saucier* test – Qualified Immunity

The second prong examines whether the officers' conduct was "subjectively" reasonable, whether the law limiting the use of force was "clearly established" at the time of the incident and the officers were put on notice that their conduct was unauthorized. Assessing the state of the law requires the court to survey information available to officers *at the time of the offense*. *Sheldon* held that notice, and the contours of the law, can be gleaned from "look[ing] to our own jurisdiction and other jurisdictions to see if there are any cases, laws, or regulations which would suggest that the type of action taken by the officer is considered unlawful."⁸⁰

In *Hope v. Pelzer*, the U.S. Supreme Court found that notice need not come only from cases with substantially similar facts: "officials can still be on notice that their

⁷⁹ Expert Report of Michael D. Lyman, page 6, paragraph 46.

⁸⁰ *Sheldon*, 466.

conduct violates established law even in novel factual circumstances.”⁸¹ “[T]he salient question that the Court... [should ask] is whether the state of the law [at the time of the incident] gave respondents *fair warning* that their alleged treatment of [the suspect] was unconstitutional.”⁸²

Aside from notice provided by actual cases, the totality of facts known to officers at the time of the incident is relevant in assessing the reasonableness of their use of force.⁸³

However, “the subjective beliefs of the officer are, of course, irrelevant,”⁸⁴

Qualified immunity is an “essentially legal” analysis, and can only be addressed by a court when relevant, material facts are undisputed.⁸⁵

i. Notice of legal use of force in excessive force/taser cases:

The Hooper Bay Police Department’s General Orders indicate that “the 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 injury*.”⁸⁶ The expert’s report notes that training guidelines for taser use

prohibit[] [taser] use against anyone unless the person demonstrates an overt intention to use violence or force against the officer or others or resists detention and arrest and other alternatives for controlling them are not reasonable or available under the circumstances.⁸⁷

Additionally, case law at the time of the incident put the defendants on notice that a taser could be deployed against a handcuffed individual only if he represented an

⁸¹ 536 U.S. 730, 741 (2002)

⁸² *Id.* (emphasis added).

⁸³ *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), *Edgerly v. City and County of San Francisco*, 495 F.3d 645, 654 (9th Cir. 2007).

⁸⁴ *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007).

⁸⁵ *Franklin v. Fox*, 312 F.3d 423, 437 (9th Cir. 2002).

⁸⁶ General Order, Hooper Bay Police Department, Page 2-6 (attached to Defendant’s Motion for Summary Judgment)(emphasis added).

⁸⁷ Expert Report of Michael Lyman, page 6, paragraph 43.

immediate threat. For example, in *Beaver v. City of Federal Way*,⁸⁸ a federal court in Washington denied a summary judgment motion because it found that the suspect's movements on the ground, which defendants argued were threatening, could have reasonably been interpreted as reactions to the taser, and not attempts to flee.⁸⁹

Although it found no taser cases specifically on point, the *Beaver* court's reliance on *Graham v. Connor* and *Billington v. Smith*⁹⁰ indicates that those two cases should also serve as notice to the officers in this case. *Billington*, a Ninth Circuit excessive force case, which essentially applies the *Graham* test discussed above, is applicable here. The *Beaver* court found that these factors put the defendants on notice that multiple tasings (the *Beaver* plaintiff was tased seven times) were illegal absent a showing that he was attempting to flee or a threat to safety. In any event, the facts were insufficient for the *Beaver* court to rule, as a matter of law, that there was no threat and that the suspect was attempting to flee.

Following trial, the *Beaver* court⁹¹ revisited the excessive force issue. Relying on *Hope v. Pelzer*, the court applied use of force standards from other, non-taser cases.⁹² The court found that the use of pepper spray and police dogs involved "less lethal force", like a taser, and was sufficiently analogous to determine that the force was excessive. One of the cases addressed by the *Beaver* court, *Smith v. City of Hamet*,⁹³ which involved application of pepper spray and bites from a police dog, was decided before December 26, 2006 and serves as relevant notice of excessive force law for purposes of this motion.

⁸⁸ No. CV05-1938MJP, 2006 WL 3203729 (W. D. Wash. November 03, 2006).
292 F.3d 1177 (9th Cir. 2002).

⁸⁹ No. CV05-1938MJP, 2006 WL 3203729 (W D. Wash. Nov. 3, 2006).

⁹⁰ *Billington v. Smith*, 292 F.3d 1177 (9th Cir.2002).

⁹¹ 292 F.3d 1177 (9th Cir. 2002).

⁹² *Id.* at

⁹³ 394 F.3d 689 (9th Cir. 2005).

Smith v. City of Hamet involved officers responding to a possible domestic violence situation at a residence. During the course of the arrest, the officers deployed pepper spray approximately five times and instructed a police dog to bite the suspect twice. The court applied the archetypal *Graham* and *Billington* factors to determine that the use of force was indeed excessive. The *Beaver* court held that *Smith* provided notice that a resisting suspect, who is not particular "bellicose" and who is pinned down may not be subjected to certain levels of force; "police officers may not use force when, as here, a suspect is not a threat, even if the suspect is not fully complying with the officer's commands."⁹⁴

Similarly, a 2007 district court case from Michigan, *Landis v. Cardoza*,⁹⁵ relied on pre-2007 excessive force/pepper spray cases to find that an officer's use of a taser constituted excessive force. The court found that it was "appropriate to draw a parallel" between a taser and pepper spray because "[b]oth instruments temporarily incapacitate individuals by causing pain and are intended to permit law enforcement officers to take resisting individuals into custody without having to resort to lethal force."⁹⁶ The court analyzed *Greene v. Barber*,⁹⁷ *Vaughn v. City of Lebanon*,⁹⁸ and *Champion v. Outlook Nashville Inc.*,⁹⁹ all cases holding that the use of pepper spray on a suspect who was not a threat was excessive force. *Greene* held that use of pepper spray was excessive force, even when the suspect was resisting arrest but still not a threat. Reasoning that tasers are substantially similar to pepper spray, the court found that the same standards applied to use

⁹⁴ *Beaver*, 507 F.Supp.2d at 1149 (the *Beaver* court ultimately found that the officers were immune, in part because *Smith* was decided after the *Beaver* events).

⁹⁵ 515 F.Supp.2d 809 (E.D. Mich. 2007).

⁹⁶ *Ibid* at 814.

⁹⁷ 310 F.3d 889 (6th Cir.2002).

⁹⁸ 18 Fed.Appx. 252, 2001 WL 966279 (6th Cir.2001).

⁹⁹ 380 F.3d 893 (6th Cir.2004).

of a taser.

Despite the lack of reported taser cases, there are a substantial number of unreported ones. In the following cases from the Ninth Circuit (all decided prior to December 26, 2006), courts found that the use of a taser where there was no threat to officer or third party safety was excessive: *Muro v. Simpson*¹⁰⁰ (holding that tasing a non-compliant subject who had been rendered helpless by a previous taser application is excessive force), *Harris v. County of King*¹⁰¹ (discharge of a taser on a compliant suspect when the officer's safety is not in jeopardy is clearly excessive), *Hudson v. City of San Jose*¹⁰² (even though a suspect was resisting arrest within the definition of the penal code, he was "pretty much incapacitated", requiring that the officers' summary judgment motion on the use of taser and baton be denied), *Rios v. City of Fresno*¹⁰³ (taser use was excessive where plaintiff was smaller than the officers, was arrested for a minor offense, and there was conflicting testimony regarding the extent of "resistance"), and *LeBlanc v. City of Los Angeles* (the single most important factor in the excessive force inquiry is the threat posed by the suspect – a jury could reasonably conclude that applications of a taser on a handcuffed, schizophrenic suspect who was overdosing on drugs was excessive).

In four of the cases cited above, *Muro*, *Harris*, *Hudson*, and *Rios*, not only was the force found excessive, but the courts found the contours of the law sufficiently clear (there was "notice") to defeat the second prong of the *Saucier* inquiry as well. Clearly then, on December 26, 2006, when defendants entered plaintiff's home, the contours of the law

¹⁰⁰ Not Reported in F.Supp.2d, 2006 WL 2536609, E.D.Cal.,2006. No. 1:03-CV-6619 OWW SMS. Aug. 31, 2006

¹⁰¹ Slip Copy, 2006 WL 2711769 W.D.Wash September 21, 2006 No. C05-1121C.

¹⁰² Not Reported in F.Supp.2d, 2006 WL 1128038 N.D.Cal.,2006. April 27, 2006 April 27, 2006

¹⁰³ Slip Copy, 2006 WL 3300452, E.D.Cal.,2006. November 14, 2006 No. CV-F-05-644 OWW/SMS

regarding the use of force, and the use of tasers specifically, were clear enough to put officers on notice that some conduct was impermissible. If plaintiff in the instant case shows a dispute of fact which would place the defendants' conduct outside the contours of that right, summary judgment is inappropriate and the motion must be denied.

ii. Notice applied to the facts of the instant case:

There is significant disagreement in this case between the facts alleged in the officers' affidavits (attached to defendants' Motion for Summary Judgment), the versions of the incident the officers recounted in the depositions, Plaintiff's version of the incident as contained in his affidavit, and the facts revealed by the audio recording. Taken in a light most favorable to the Plaintiff, however, the relevant facts are:

- Plaintiff was tased twelve to fifteen times. All of these occurred while he was handcuffed on the ground.
- Some of the tases occurred while plaintiff was seated on the ground with his legs wrapped around a poll. Plaintiff and plaintiff's expert have found that any kicks that occurred while he was in this position were the result of the taser, and did not pose a threat to the officers. Even if this interpretation of the "kicks" is discounted, it is uncontested that an officer felt safe enough to reach between plaintiff's legs to tase him. It is also uncontested that the officers could have stood him up if they wanted.
- The other tases occurred while plaintiff was lying face down on his stomach. Plaintiff was clearly not a threat in this position.
- At several points during the tasing officers told plaintiff to "comply" before tasing him. This indicates that the tases were done for compliance

purposes, and not to bring a suspect who posed a threat under control.

- Despite what was claimed in defendants' affidavits, the officers at plaintiff's house that night had no knowledge of his prior felony or that Thomas may have attempted to commit suicide.

As the *Beaver* court denied the motion for summary judgment based on reasonable interpretation of the suspect's movements on the ground, so should this court deny defendants' motion based on a reasonable interpretation of plaintiff's "kicks." Plaintiff's expert opines that the "kicks" could only reasonably be interpreted as reactions to the taser, and that it is not likely that an individual tased as much as plaintiff to even be able to kick.¹⁰⁴

The officers further knew that taser's are a "less lethal weapon" that should only be used in limited circumstances.¹⁰⁵ Case law and the officer's own training put them on notice that plaintiff was not a threat during the incident and that tases in order to provoke compliance were improper. In sum, the facts indicate at least a dispute regarding the threat posed by Plaintiff at the time he was tased. Taken in a light most favorable to Plaintiff, he posed no threat, and the tases can only be justified as a means of compliance. However, after one tase without result, further tases, much less fifteen were impermissible on these grounds. As discussed in the previous section, such tases were outside the contours of the law.

Additional factors for the court to consider are the facts that _____ was restrained at the time of the tasings, meaning plaintiff was outnumbered by officers three-

¹⁰⁴ Expert Report of Michael D. Lyman, page 7, paragraph 51.

¹⁰⁵ The allegations from the affidavits that the officers thought a taser did not cause pain are absurd. Not only did the officers testify at deposition that they did know it was painful, they were no doubt aware of high profile deaths involving the use of tasers on the West Coast. See

to-one; there is no allegation that plaintiff ever advanced toward the officers or at any time was in any way capable of harming officers who were not standing directly in front of him (why didn't the officers simply stand behind him and pick plaintiff up?); and because he was handcuffed on the floor, plaintiff's range of movement was severely limited.

In light of these facts, *Smith v. City of Hamet*, *Beaver*, *Hudson v. City of San Jose* gave defendants "fair warning" that it was illegal to tase defendant if he did not pose a threat.

IV. The tasings were punitive

Immunity in excessive force cases is "qualified," meaning it does not protect officers for all conduct; malicious or corrupt actions by municipal employees are not afforded any immunity protections.¹⁰⁶

In this case there are no admissions which would indicate that the officers deployed their tasers punitively or maliciously; we would expect no such admissions. However, the facts of the strikes would permit a jury to arrive at that conclusion:

- **The strikes on Thomas's thigh:** a jury could reasonably conclude that they were intended to strike Thomas's genitals, and therefore meant to be punitive. Thomas indicates in his affidavit that the officers were trying to tase his genitals, and, indeed, there is little other explanation for what would cause an officer standing behind plaintiff, who was seated at the time, to reach over him and tase the plaintiff on the inner thigh. Such tases can have no legitimate police purpose and are clearly malicious.
- **Thomas was tased twelve to fifteen times:** a jury could reasonably

¹⁰⁶ See *Thoma v. Hickel*, 947 P.2d 816, 818-819 (Alaska 1997).

conclude that tasing someone who is restrained on the floor fifteen times over a roughly five minute period was malicious. Indeed, many of the tases were continuous, meaning only a few seconds passed between the times when one tase ended and another began. With such a short interval between tases, there is no way the officers could have intended them to accomplish any legitimate purpose.

As an alternative theory to what was discussed above, defendants' motion must be denied because, taking the facts in a light most beneficial to plaintiff, the tases were malicious.

V. Contrary case law

Defendants cite two authorities in their Motion that appear to run counter to the cases cited in this brief. One, a Minnesota case, *Schumacher v. Halverson*,¹⁰⁷ held that a single tasing of a non-compliant suspect was not excessive. This case has limited value to the present case; even if the defendants thought that a single tase of a suspect was within the contours of the law on December 26, 2006, the cases from the Ninth Circuit cited above still gave them "fair warning" that repeated tases aimed solely at compliance were improper.

Defendants also attached an order from a recent Kotzebue case, *Nicholas Page v. City of Kotzebue*,¹⁰⁸ to their Motion. Although the Order grants a defense motion for summary judgment based on qualified immunity, it's unclear exactly what facts the court relied on. Most significantly however, the Kotzebue court's order improperly relies on the

¹⁰⁷ 467 F.Supp.2d 939 (D. Minn. 2006).

¹⁰⁸ 2KB-07-76 CI

finding "that the officers subjectively believed the use of the Taser was necessary and not improper." Although the second prong of the test is sometimes called the "subjectively reasonable" prong, the subjective beliefs of the officers are not relevant to the inquiry.¹⁰⁹

CONCLUSION

Taken in a light most favorable to plaintiff, the facts indicate that he was not a threat to defendants during the incident on December 26, 2006. Case law and taser training materials put the police on notice that using the taser to make plaintiff compliant was outside the contours of the law. As a result, defendants are not entitled to qualified immunity; the Motion for Summary Judgment must be dismissed upon this party at the address below.

DATED this 29th day of May, 2008 at Bethel, Alaska.

POWER and BROWN, LLC
Attorneys for Plaintiff

By: *Ryan Jerman*
Ryan Jerman
ABA No. 0711073

#0205012

POWER AND BROWN LLC
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¹⁰⁹ See *Inouye*, 504 F.3d at 712.

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of
May, 2008, a true copy of the foregoing
document was put in the court box of:

Angstman Law Office
P.O. Box 585
Bethel, Alaska 99559

William Ingaldson
Ingaldson, Maassen & Fitzgerald
813 W. 3rd Avenue
Anchorage, Alaska 99501

By: Sarah Dronenburg

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Opposition to Motion For Summary Judgment
Olson v. Hooper Bay
Case No. 4BE-07-26 CI
Page 22 of 22

Exc. 96

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 ON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT ON QUALIFIED IMMUNITY**

The Court, having been duly advised, considered the briefings of the parties and all supporting evidence, **HEREBY FINDS** that Defendants' Motion for Summary Judgment on Qualified Immunity is **DENIED**.

DATED: _____

HONORABLE LEONARD R. DEVANEY
SUPERIOR COURT JUDGE

POWER AND BROWN LLC

Attorneys At Law

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

THOMAS J. OLSON,)
)
 Plaintiff,)
 vs.)
)
 CITY OF HOOPER BAY,)
 OFFICER DIMITRI OAKS,)
 OFFICER CHARLES SIMON, and)
 OFFICER NATHAN JOSEPH,)
)
 Defendants.)

Case No. 4BE-07-26 CI

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Exhibit 1



STATE OF ALASKA DEPT. OF PUBLIC SAFETY

Case No.	HPB-06-4150
Date Investigated	12-26-2006
Officer	Unit
"C"	HPB PD

Reporting Officer	PermID	Investigating Agency
Nathan Joseph	NJJ7	Hooper Bay Police

INFORMATION:

On 12-26-06 at approximately 0402 hours the Hooper Bay Police Department received a call from wanting officers to go do a welfare check on her live in boyfriend whom she has kids with and that Thomas has been drinking. Officer Demetrn Oaks and I responded to the complaint.

OBSERVATION:

Upon arrival of the residence I observed both the arctic entrance door and the inside door to be wide open, I knocked on the door approximately four times and heard a faint voice stating come in, as we entered and went upstairs I knocked again and heard the same faint voice say come in, I then went to the top of the stairs and saw a person to be passed out on the couch, I then looked to the east of the residence and observed another person to be passed out on the bed, I then walked to towards the person on the couch and saw that there were three toddlers ranging from 1 to four years of age and one newborn. I then asked the oldest kid where everyone was and he said they weren't here, I asked him if he was sober and he stated no, I then asked him if he was drinking and he said yes. I observed there to be trash on the floor, the floor was slippery like there was slim on the floor making in hard to walk in some parts of the residence.

I then walked to the east end of the residence and flashed my flashlight on Boya and asked him where everyone was and he stated that he was good, and asked how come we came into his residence, he was informed that we were doing a welfare check and saw that both the doors to the residence were open, and he replied oh really. I asked Boya to stand up so I could do a quick test on him he stated that I was trespassing, and I informed him that I wasn't trespassing, he then stated again that your trespassing in my house, he was asked if he was drinking and kept stating that we were trespassing. I then told him to place his hands behind his back for now, and that the handcuffs were being placed on him safety reasons. After getting the restraints on Boya I then tried to wake up [redacted] who is Boya's brother. I tried several times to wake up [redacted] but was unsuccessful.

After attempting to have Thomas taken out of the residence I went and woke up [redacted] and that I shook him hard and called out his name several times, I then called dispatch to have another officer go over to the residence to assist with Thomas and [redacted] and getting another family member to the residence to take care of the kids. Approximately five minutes later Corporal Charles Simon came over to the residence to assist with the situation inside of the residence, I instructed them to take Boya to the Police Department. Thomas then started struggling with Cpl. Simon and Officer Oaks, both slipped from the trash on the floor and fell to the floor. [redacted] kept trying to get up, I had to put him on the couch at least three times and tell him to stay put, and while Cpl. Simon and Officer Oaks were struggling with Boya I observed [redacted] get ready to kick, I asked him several times if he was going to kick, and that he stated "yes I am going too." I then grabbed him and placed him down to the floor and when he stated that he's not going to do anything I put him onto the couch and held him down with his leg's together so he wouldn't kick.

Boya then used his wrapped his legs around the beam and wouldn't let go, Cpl. Simon and Officer Oaks were. Cpl. Simon then continued to instruct Boya to let go of the beam but Boya would not listen to the instructions that Cpl. Simon was giving him. Cpl. Simon then threatened to use his taser to drive stun Boya if he continued not to comply, I heard Cpl. Simon's taser go off when I was holding [redacted] to the couch and looked to see what was going on, Boya then yelled out "is that all you got bitch"

Ⓞ

0027

REVISED AND APPROVED BY	PermID	Date

PAGE 5



STATE OF ALASKA DEPT. OF PUBLIC SAFETY

Case No.	HPB-06-4150
Date Investigated	12-26-2006
Officer	UnID
Unit	HPB PD

Reporting Officer	Armed	Investigating Agency
Nathan Joseph	NJJ7	Hooper Bay Police

12-203 (REV. 1-00)

OBSERVATION: continue...

Even being drive stunned several times he did not comply. When Boya started kicking again I observed Officer Oaks to get kicked twice on the leg and fell down, Boya then started moving towards Officer Oaks, I pulled out my taser and deployed, the prongs landed on Boya's right shoulder one in the lining of his jacket where it didn't make contact with his skin I deployed two cycles Boya was not able to feel the cycle going through because one did not make any contact with his skin. when I noticed nothing was happening I went up to make a second contact with Boya he continued to fight, he then grabbed him and put him onto the floor he kicked towards Cpl. Simon again I made another contact after the contact I got kicked in the chest, and when Boya went onto his belly I made two more contacts, an that was when he finally stopped fighting. Boya was repeatedly instructed to stop resisting by Officer Simon.

INFORMATION:

That Boya was escorted to the police department by Officer Simon and myself, once at the police department, I took pictures of where the prongs were, and Officer Simon assisted with taking pictures of where Boya was drive stunned. The toddlers that were inside of the residence were: 2 or 3 years of age, 1 or 2 years of age, about 1 years of age, and a newborn. That I tried to get the dates of birth from there mom but she had become uncooperative, and would not give the dates of births for the kids that were in the residence and would not confirm the names of the kids. Boya complained about his wrist hurting and that we tried to get the on health aide Lorraine Tomaganuk but she stated that there is nothing they could do for him while he is to intoxicated, and that he can go to the clinic later on when he is sober. Officer Simon went to the residence of Thomas "Boya" Olson and residence, I was later escorted to the police department by Officer Oaks after Boya was processed. Officer Simon remained at the residence of Thomas "Boya" Olson and s residence, until someone went to the idence.

INVESTIGATION:

I arrested and charged Thomas "Boya" Olson and with four counts of reckless endangerment, three counts of assaulting police officers, and resisting arrest, after investigation revealed that Boya was found to be past out in the residence, with four of his children in the residence and both the arctic entrance and inside door to be wide open, while being escorted out of the residence officers slipped and fell to to the floor with Boya, and that was when Boya started kicking at officers in the chest and legs. Officer Simon was kicked on the chest and twice on the leg on to the right thigh and the other to the left shin causing pain and discomfort to his legs, Boya then turned to Officer Oaks kicked him twice on the left leg and continued to kick at Officer Oaks when he was on the floor. I deployed my taser when I was holding down to the couch and a few minutes later I got kicked on the chest when I went to make a second contact after nothing happened on the first two cycles of my taser, the kick placed me in fear of imminent physical injury, making me think that I was going to get hurt.

I arrested and charged on four counts of reckless endangerment after investigation revealed that had been drinking alcohol and was pasted out on the couch with three toddlers and one unidentified new born in the residence with both the arctic entrance and inside door to be wide open, with nobody sober inside with the toddlers and new born.

REVIEWED AND APPROVED BY	Armed	Date

PAGE 0028



STATE OF ALASKA DEPT. OF PUBLIC SAFETY

Case No	HPB-06-4150
Date Investigated	12/28/2006
Detach	Unit
"C"	HB PD

Reporting Officer	PamID	Investigating Agency
Demetri Oaks	DO10	Hooper Bay Police

12 202 (REV. 1/00)

SUPPLEMENT

INFORMATION:

That on 12/26/2006 at approximately 0355 hours. called the Hooper Bay Police Department and stated asked if us police officers could check on her kids at her house because Thomas J. [BOYA] Olson] was drunk and that he might be alone with the kids. Sergeant Nathan Joseph and myself respond to Thomas J. [Boya] Olson residence.

OBSERVATION:

That when Sergeant Nathan Joseph and myself arrived at Thomas Olson residence I observed that the artic entry and the inside door and all the doors was wide open and that when we went into the residence I also observed Thomas Olson to be passed out on a bed and to be passed out on couch and that there was three young kids and an infant on another bed and that the residence was a mess.

INFORMATION:

Sergeant Joseph then woke up Thomas Olson told him to put his hands behind his back and that he was under arrest for endangering the welfare of his kids. after we cuffed up Thomas and SGT. Joseph then hand cuffed peter. SGT. Joseph then woke up. Sgt. Joseph then called Base and had them call Cpl. Charles Simon to come and assist us and to call. to come and take care of her kids. As CPL Simon arrived him and I tried to take Boya Olson out of the residence and he wrapped his legs around a pole. As I tried to get his legs lose from the pole he started kicking and kicked me on the knee and leg causing me pain and discomfort and then he kicked Cpl. Simon causing him pain and discomfort. Cpl. Simon and myself then slipped on some trash in a trash bag and we fell down and Thomas Started kicking some more. CPL. Simon then tased Thomas and all Thomas did was fight some more. Sgt. Joseph then took out his taser while he was holding down and he tased Thomas Olson and that made Thomas corporate and to be Taken to the police department by Sgt. Joseph and Cpl. Simon. and I stayed with and the kids. Cpl. Simon then returned and we brought to the Hooper Bay Police Department

G

REVIEWED AND APPROVED BY	PamID	Date

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

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Exhibit 2

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

AFFIDAVIT OF THOMAS J. OLSON

STATE OF ALASKA)
)ss.
 FOURTH JUDICIAL DISTRICT)

Thomas J. Olson, being first duly sworn, upon oath deposes and states as follows:

1. My name is Thomas J. Olson. I am over 21 years of age and fully competent in all respects to make this Affidavit. I have personal knowledge of all facts stated herein, except as otherwise qualified, and all such facts are true and correct.
2. I am the plaintiff in the above referenced matter.
3. I live with my companion, _____, and our six children in an upstairs apartment in Hooper Bay, Alaska.
4. On or about December 25, 2006, there were 3 doors that the officers had to walk through to get to into our living quarters.

5. One door was the outside arctic entry door; the next door opened into the downstairs storage area of our home, and the next door was at the top of the stairway leading into our living space.
6. When anyone walked into our living space, they could see the entire area, because no walls blocked the view.
7. On or about December 25, 2006, the door at the arctic entry would not stay closed and would pop open on its own. We eventually had to get a new door because it wouldn't stay closed. Two other doors separated that door from our living space.
8. On or about December 25, 2006, the living space was very warm. I understand even the officers agree with this.
9. On the evening of December 25, 2006, my brother, _____, and I drank a couple cups of homebrew. Because I limited my drinking, I have a clear memory of events that occurred on that night.
10. Our two older children were spending the night with their grandparents. Later in the evening, we put our five year old, our 3 1/2 year old and our 1 1/2 year old to bed. Then, _____ nursed our 1 month old baby and put her to bed. After she put our baby to bed, she went to her mother's house to get some black pull. _____ closed the door at the top of the stairs.
11. I got tired of waiting for _____ to come back so I went to bed. The kids were sleeping where they normally sleep. _____ spent the night and slept on our couch.
12. Sometime after 4:00 a.m., I was sound asleep when Nathan Joseph and Dimitri

Oaks came into my house and woke me up. I was not "passed out," I was just asleep like everyone else in the village at that time of morning. As soon as they woke me up, they rolled me over and cuffed my hands behind my back. I did not know why they were there or who let them in the apartment.

13. I knew that I had done nothing wrong so I asked them what's going on. I told them to leave and that they were trespassing. I told them several times that they were trespassing and that I hadn't done anything wrong. Even so, I did not resist when they put the handcuffs on me.
14. I knew that these officers had a bad reputation for arresting and tasing people in Hooper Bay for no reason.
15. My kids and I were all asleep. Nobody was hurt or in danger. My kids were only harmed when the officers barged into our house, woke everybody up and caused a horrible scene.
16. The officers say that they knocked on the door at the bottom of the stairs. Because of the officers' knocking, I believe that my four year old son was awakened by their knocking and opened the door at the top of the stairs.
17. Officer Joseph radioed for Charles Simon.
18. When Charles Simon arrived, he and Dimitri Oaks stood me up to take me out.
19. As we walked out, one of them slipped on something on the floor. In his deposition I heard Oaks say it was a trash bag. When he slipped he pulled the rest of us down.
20. I did not struggle or cause the fall. There was no "slime" on the floor.
21. All three of us fell to the floor. I didn't know what was going on. I tried to

- stand up with the officers again, but was unable to get my feet under me, because my hands were cuffed behind my back and I could not get my balance.
22. As I tried to stand, Joseph tased me from where he was sitting. All I felt was a vibration. After attending the officers' depositions, I understand now that was because only one of the two prongs initially contacted me.
23. Then, Simon began tasing me on my back. This was much more severe than the first tase from Joseph and really hurt. At one point, Simon even reached between my legs and tased me on my inner thigh close to my private parts.
24. I became very afraid, as would any man, so I wrapped my legs around the pole in our house.
25. I wish the officers had talked to me more so that I could have understood what was going on.
26. Instead of talking to me, the officers woke me in the middle of the night with a flashlight in my face, cuffed me, dragged me to the floor, then tased me repeatedly even reaching toward my privates and burning me there.
27. Simon continued tasing me, and he and Oaks told me to let go of the beam, but I could not understand what was going on.
28. After attending the officers' depositions I now understand that this is common among people who have been tased to not understand what the officers are commanding. I learned that a person who is tased can not be expected to understand the officer's commands for up to several minutes.
29. When I did not respond to their commands, Joseph joined Simon and just kept tasing me. They tased me repeatedly on my stomach while I was laying on my

back. Then, they rolled me over onto my stomach and tased me on my back at the same time -- together.

30. I was on the floor the entire time while they burned me with the taser. Oaks did nothing to stop them.
31. Each time the officers tased me, the muscles in my body reacted, including the muscles in my legs.
32. Other than Joseph's first taser when I felt a vibration, each time they tased me after that it was really painful.
33. By the time the officers finally calmed down, they had tased me so many times that I had at least 22 burn marks on my body. I had trouble walking at that point because of the multiple burns to my body and severe pain it caused.

END OF AFFIDAVIT.

DATED this 29 day of May, 2008, at Hooper Bay, Alaska.

Thomas Olson
THOMAS OLSON

SUBSCRIBED AND SWORN to before me on the 29th day of May, 2008, at Hooper Bay, Alaska.

Cherie Fuller, Post Master
Notary Public
State of Alaska
My commission expires: 1/employment



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

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Exhibit 3

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
NORTH JUDICIAL DISTRICT AT BECHEL

DEMAN (Plaintiff),)
)
 Plaintiff,)
)
 v.)
)
 CITY OF HOOPER BAY,)
 OFFICER LIMITED PARTS,)
 OFFICER CHARLES SIMON and)
 OFFICER NATHAN JOSEPH,)
)
 Defendants.)

N.J. 4BE-07-0026 CI

VOLUME 1

EXEMPTED DEPOSITION OF NATHAN JOSEPH

Pages 2 through 40, inclusive

April 23, 2008

Hooper Bay, Alaska

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<p>IN THE SUPERIOR COURT FOR THE STATE OF ALASKA FOURTH JUDICIAL DISTRICT AT BETHEL</p> <p>THOMAS J. OLSON,))) Plaintiff,)))) CITY OF HOOPER BAY,) OFFICER DIMITRI OAKS,) OFFICER CHARLES SIMON and) OFFICER NATHAN JOSEPH,))) Defendants.)</p> <p>No. 4BE-07-00026 CI</p> <p>VOLUME I</p> <p>VIDEOTAPED DEPOSITION OF NATHAN JOSEPH</p> <p>taken on behalf of the Plaintiff, pursuant to notice, at the Sea Lion Corporation Boardroom, Hooper Bay, Alaska, before Sean E. Brown, a Notary Public for the State of Alaska.</p>	<p>INDEX</p> <table border="0"> <tr> <td>1</td> <td></td> </tr> <tr> <td>2</td> <td></td> </tr> <tr> <td>3</td> <td></td> </tr> <tr> <td>4</td> <td>EXAMINATION BY:</td> </tr> <tr> <td>5</td> <td></td> </tr> <tr> <td>6</td> <td>Mr. Brown</td> </tr> <tr> <td>7</td> <td></td> </tr> <tr> <td>8</td> <td>EXHIBITS:</td> </tr> <tr> <td>9</td> <td></td> </tr> <tr> <td>10</td> <td>F - Affidavit of Nathan Joseph</td> </tr> <tr> <td>11</td> <td></td> </tr> <tr> <td>12</td> <td>G - Police report</td> </tr> <tr> <td>13</td> <td></td> </tr> <tr> <td>14</td> <td></td> </tr> <tr> <td>15</td> <td></td> </tr> <tr> <td>16</td> <td></td> </tr> <tr> <td>17</td> <td></td> </tr> <tr> <td>18</td> <td></td> </tr> <tr> <td>19</td> <td></td> </tr> <tr> <td>20</td> <td></td> </tr> <tr> <td>21</td> <td></td> </tr> <tr> <td>22</td> <td></td> </tr> <tr> <td>23</td> <td></td> </tr> <tr> <td>24</td> <td></td> </tr> <tr> <td>25</td> <td></td> </tr> </table>	1		2		3		4	EXAMINATION BY:	5		6	Mr. Brown	7		8	EXHIBITS:	9		10	F - Affidavit of Nathan Joseph	11		12	G - Police report	13		14		15		16		17		18		19		20		21		22		23		24		25	
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<p>Page 3</p> <p>APPEARANCES</p> <p>For the Plaintiff:</p> <p>SEAN E. BROWN POWER & BROWN, LLC Box 1809 Bethel, Alaska 99559 (907) 543-4700</p> <p>For the Defendants:</p> <p>MATTHEW WIDMER ANGSTMAN LAW OFFICE Box 585 Bethel, Alaska 99559 (907) 543-2972</p> <p>WILLIAM H. INGALDSON INGALDSON, MAASSEN & FITZGERALD, PC 813 West Third Avenue Anchorage, Alaska 99501 (907) 258-8750</p>	<p>Page 2</p> <p>Hooper Bay, Alaska, April 23, 2008</p> <p>MR. BROWN: Suit yourself. You look good. All right. Once again, I'll say the same thing at the beginning, we're here on Thomas Olson versus City of Hooper Bay, Officer Dimitri Oaks, Officer Charles Simon, Officer Nathan Joseph, case number 4BE-07-26 CI. My name is Sean Brown. I'm plaintiff's attorney but I'm also a notary for the State of Alaska so I can issue an oath to you. If you'd raise your right hand and state your name?</p> <p>MR. JOSEPH: Nathan Joseph.</p> <p>(Oath administered)</p> <p>MR. JOSEPH: Yes.</p> <p>MR. BROWN: Thank you. All right. And I think everyone pretty much knows who's here by now so we'll just -- oh, good. All right. Okay.</p> <p>NATHAN JOSEPH</p> <p>called as a witness here in on behalf of the Plaintiff, having been duly sworn upon oath by Mr. Sean E. Brown, Notary Public, was examined and testified as follows:</p> <p>EXAMINATION</p> <p>BY MR. BROWN:</p>																																																		

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

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

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

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

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1 Q Could it....
 2 A ... and you had to keep your balance just to walk on the
 3 floor.
 4 Q Could it have been from the snow on your shoe?
 5 A No.
 6 Q All right. Now, you were seated most of the time with
 7 , isn't that right?
 8 A Yes.
 9 Q And in your report, there's reference by Mr. Oaks that
 10 there was a garbage bag with garbage in it and I believe
 11 Mr. Simon says the same thing. Neither one of them
 12 mentioned this slime on the floor and they're the ones
 13 that were standing up most of the time, right?
 14 A They weren't the only ones standing. I was standing up
 15 also.
 16 Q Okay. Well, now, Mr. Oaks stated that you were actually
 17 seated holding . Is that inaccurate?
 18 A Yes.
 19 Q Okay. Where were you standing?
 20 A I was standing next to at the couch.
 21 Q And how far was that from the action going on?
 22 A I'd say about six feet.
 23 Q Out of kicking distance though?
 24 A Yes.
 25 Q And out of biting distance.

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

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

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

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

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

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

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

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

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

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

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

Page 22

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

Page 23

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

Page 24

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

Page 25

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

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

Page 27

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

Page 28

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

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

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

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

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

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

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

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

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

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

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

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

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

Page 40

1 TRANSCRIBER'S CERTIFICATE
 2 I, Linda S. Foley, hereby certify that the foregoing
 3 pages numbered 2 through 40 are a true, accurate, and complete
 4 transcript of videotaped deposition of Nathan Joseph (Vol. D)
 5 in Case No. 4BE-07-00026 CI, Thomas J. Olson v. City of Hooper
 6 Bay, Officer Dimitri Oaks, Officer Charles Simon, Officer Nathan
 7 Joseph, transcribed by me from a copy of the electronic sound
 8 recording to the best of my knowledge and ability.
 9
 10 May 20, 2008
 11
 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,)
)
)
)
CITY OF HOOPER BAY,)
OFFICER DIMITRI PAKS,)
OFFICER CHARLES SIMON and)
OFFICER NATHAN JOSEPH,)
)
)
Defendants.)

No. 4BE-07-00026 CI

VOLUME II

TELEPHONIC DEPOSITION OF NATHAN JOSEPH

Pages 41 through 52, inclusive

May 15, 2008

Bethel, Alaska

Page 42

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

1 THOMAS J. OLSON,)
2)
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4)
5 Plaintiff,)
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25)

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

No. 4BE-07-00026 CI

TELEPHONIC DEPOSITION OF NATHAN JOSEPH

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

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Mr. Widmer	51
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WILLIAM H. INGALDSON (telephonically)
INGALDSON, MAASSEN & FITZGERALD, PC
813 West Third Avenue
Anchorage, Alaska 99501
(907) 258-8750

Page 45

Bethel, Alaska, May 15, 2008

MR. BROWN: Okay. Are you actually talking into the
phone or are you talking into a speaker phone?

MR. JOSEPH: Speaking into the phone.

MR. BROWN: Okay. I just need you to speak up. I
can hear Bill really well but you are not coming through very
well so I need you to speak up. Okay?

MR. JOSEPH: Okay.

MR. BROWN: Okay. That's much better so if you
could just talk like that, that would be great. We are
recording this here in our office at Power and Brown and we
will proceed forward. If we could start, Sergeant Joseph, the
last time that you and I were together there in Hooper Bay, I
put you under oath. If you could just raise your right hand
and we'll put you under oath again.

MR. JOSEPH: Okay.
(Oath administered)

MR. JOSEPH: Yes.

MR. BROWN: You may put your hand down. If each
participant could tell their name? My name is Sean Brown and
I am representing the plaintiff in this matter, Thomas Olson.

MR. WIDMER: My name is Matthew Widmer. I'm with
Angstman Law Office and represent Sergeant Joseph and Sergeant
Simon as well as Officer Oaks in this matter.

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1 MR. INGALDSON: And Bill Ingaldson on behalf of
 2 Hooper Bay.
 3 MR. BROWN: Okay.
 4
 5 NATHAN JOSEPH
 6 called as a witness herein on behalf of the
 7 Plaintiff, having been duly sworn upon oath
 8 by Mr. Sean E. Brown, Notary Public, was
 9 examined and testified as follows:
 10
 11 EXAMINATION CONTINUED
 12 BY MR. BROWN:
 13 Q And, Sergeant Joseph, I'm talking loud just so you can
 14 hear me. If I'm talking too loud, please tell me and if
 15 I'm not talking loud enough, please tell me and I will
 16 try to adjust that as well. Okay?
 17 A Yes.
 18 Q All right. Sergeant Joseph, do you have in front of you
 19 your use of force report?
 20 A Yes, I have it.
 21 Q Okay. If you could take a look at that, I'm going to
 22 mark that as deposition exhibit -- I believe that it's
 23 exhibit 9. Knowing that all of these are running
 24 together, I believe this is exhibit 9 and if you could
 25 take a look at that exhibit, did you complete this

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1 document or who completed this document?
 2 A I suppose I did.
 3 Q And when did you complete this document?
 4 A On the day the incident happened.
 5 Q And how many times does this document indicate that you
 6 drove stunned Thomas Olson?
 7 A It says several times.
 8 Q Was that five or six?
 9 A That -- yes.
 10 Q Okay. And during this time, you had actually walked over
 11 to where Thomas was on the -- sitting on the floor or
 12 were you doing it from the position where you were with
 13 his brother?
 14 A I deployed from the -- where I was with the brother but
 15 that didn't work. He stood up. Hello?
 16 Q Yup. We're here. I'm just going to hit the mute. I
 17 don't know if it'll help you come through better or what.
 18 There may be feedback but you need to speak up. Okay.
 19 So go on, where did you deploy it from?
 20 A I deployed from standing by his brother. I was laying on
 21 the ground. He had others -- other officers.
 22 Q Were you standing or sitting?
 23 A I was standing.
 24 Q At the time you deployed the taser, were all three
 25 officers standing?

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1 A Oaks was just standing up.
 2 Q At the time you deployed the taser, were all three
 3 officers standing?
 4 A Two of us were standing, one was standing up.
 5 Q So that is yes, all three were standing then when these
 6 were being deployed?
 7 A It was deployed when one of the officers was standing up
 8 from the floor.
 9 Q Okay. So walk me through this now. Oaks did tell us
 10 during his deposition that he fell once and he said that
 11 he got right back up. So your testimony today is that
 12 you started deploying the officer -- you just started
 13 deploying the drive stun right after the officers fell.
 14 Is that your statement today?
 15 A I deployed -- I deployed the cartridge, not the drive
 16 stun.
 17 Q Okay. You deployed the actu -- you deployed the what?
 18 A The actual cartridge.
 19 Q Okay. You deployed the actual cartridge first?
 20 A Yes. Yes.
 21 Q Okay. And when you deploy the actual cartridge, is that
 22 what has the prongs on it? Is that what you're talking
 23 about?
 24 A Yes, that's the one with the....
 25 Q How many cartridge -- how many cartridges do you have on

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1 one taser?
 2 A One.
 3 Q And when you deployed that taser on Thomas Olson, did you
 4 think it made contact or did not make contact?
 5 A It wasn't being -- the first deployment wasn't effective.
 6 I then ran a second cycle. I saw that -- that wasn't
 7 effective so I had to go up and make a second contact
 8 with him.
 9 Q And when you say it wasn't effective, was that because
 10 one of the prongs did not stick in him so it did not make
 11 a complete circuit? Is that your understanding or why
 12 was -- why do you think it was not effective?
 13 A Because it -- the -- it didn't make any contact with the
 14 -- with him.
 15 Q So if only one prong goes in, then the individual --
 16 there's no circuit so the individual doesn't feel the
 17 full shock, is that correct?
 18 MR. WIDMER: I'm going to object to that. I think
 19 that calls for expert testimony. I don't know if Mr. Joseph
 20 is familiar enough with the way -- I don't know if he's
 21 qualified as an expert in taser operation.
 22 Q Just say if you know. You can still answer, Mr. Joseph.
 23 Do you know whether if just one prong goes in, does it
 24 shock the person fully or not?
 25 A With one prong inside, it doesn't give a full effect.

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1 Q Okay. So after you tried to do two drive stun -- or two
 2 cartridges, then you go back and you do the -- is that
 3 when you approach and you start drive stunning him?
 4 A The first gun that -- I could not deploy two cartridges
 5 so I deployed one. I made two cycles. After the second
 6 cycle wasn't working. I walked up to the suspect and
 7 started doing the drive stun.
 8 Q Okay. You say that you deployed -- you cycled twice
 9 Help me understand what that means. Tell me
 10 A It's when -- it's when you let it cycle some -- for about
 11 four or five seconds.
 12 Q And you do that with -- and the cycle is done with the
 13 benefit of the prongs being -- after the prongs are
 14 deployed, is that correct?
 15 A Yes.
 16 Q And so it has nothing to do with drive stunning. The
 17 cycle has nothing to do with drive stunning, is that
 18 right?
 19 A Yes.
 20 Q Okay. So then when you went and you drove stun him, you
 21 did that approximately five or six times, that was after
 22 the two cycles, is that correct?
 23 A The drive stuns were done after the cycle.
 24 Q And I believe the last time that we talked, you said some
 25 of those drive stuns were done while he was down on his

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1 testimony?
 2 A Yes.
 3 Q And you were responsible -- you were dealing with -- I
 4 believe his name was _____ at that time, is that
 5 correct?
 6 A Yes.
 7 Q Did you ever deploy a cartridge or attempt to drive stun
 8 _____ that night?
 9 A No.
 10 Q And could you tell -- say why you did not do any of those
 11 things to _____?
 12 A I had -- reason I wanted.
 13 Q I'm sorry, could you repeat that one more time, Sergeant
 14 Joseph?
 15 A I had him in the position I wanted him where he wouldn't
 16 be kicking at me or any other officer.
 17 Q Okay. I don't think I have any more questions for you at
 18 this time, Sergeant Joseph. Thank you.
 19 MR. INGALDSON: I don't have any questions. Thanks.
 20 MR. BROWN: Okay. We'll just wrap this up now.
 21 Thank you.
 22 MR. WIDMER: Thank you, Sergeant Joseph.
 23 A Thank you.
 24 (Off record)
 25

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1 stomach with a -- and they were done on his back, is that
 2 correct?
 3 A At least one of my drive....
 4 Q Did you say at least one was or what did you say? Did
 5 you say at least one was or what did you say?
 6 A I had at least one drive stun when he was down on his
 7 stomach and that was the last one. That....
 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
 11 the same time.
 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
 15 up here. This won't go as long just because, you know,
 16 we're on the phone but we'll just kind of wrap up. Mr.
 17 Widner and Mr. Ingaldson might have some -- may have some
 18 questions as well.
 19
 20 EXAMINATION
 21 BY MR. WIDMER
 22 Q Mr. Joseph, I -- Sergeant Joseph, I'll go first. My
 23 understanding is that we heard testimony that Officer
 24 Oaks and Sergeant Simon, they were struggling with Thomas
 25 Olson during this matter. Do you remember that

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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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TRANSCRIPTION SUPPORT SERVICES

May 15, 2008

Exc. 125

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

THOMAS J. OLSON,)
)
 Plaintiff,)
 vs.)
)
 CITY OF HOOPER BAY,)
 OFFICER DIMITRI OAKS,)
 OFFICER CHARLES SIMON, and)
 OFFICER NATHAN JOSEPH,)
)
 Defendants.)

Case No. 4BE-07-26 CI

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Exhibit 4

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

THOMAS J. OLSON,)
)

Plaintiff,)
)

CITY OF HOOPER BAY,)
)

OFFICER DIMITRI OAKS,)
)

OFFICERS CHARLES SIMON and)
)

OFFICER NATHAN JOSEPH,)
)

Defendants.)
)

No. 4BE-07-00026 CI

VIDEOTAPED DEPOSITION OF DIMITRI OAKS

Pages 2 through 76, inclusive

April 23, 2008

Hooper Bay, Alaska

Page 2

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

THOMAS L. 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

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

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 (907) 258-8750

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Hooper Bay, Alaska, April 23, 2008

MR. BROWN: My name is Sean Brown and I am the attorney representing Thomas Olson in this matter but I'm also a notary for the State of Alaska and the first thing we want to do is to swear you in and then we'll go around and intro -- let everyone introduce themselves. Okay?

MR. OAKS: Yeah.

MR. BROWN: If you could raise your right hand and if you could state your name?

MR. OAKS: Dimitri Oaks.

MR. BROWN: Dimitri Oaks.... (Oath administered)

MR. OAKS: Yes.

MR. BROWN: Okay. Thank you. Introduce yourself.

MR. WIDMER: My name is Matthew Widmer. I'm from Angstman Law Office. We represent Officer Oaks in this matter. We also represent Officers -- Corporal Simons and Sergeant Joseph.

OFFICER SIMON: I'm Sergeant Charles Simon. I was a corporal.

MR. BROWN: Okay. Thank you.

MR. INGALDSON: Bill Ingaldson representing the City of Hooper Bay.

SERGEANT: I'm a sergeant in HPD, sir.

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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?

Page 7

1 A In King Salmon.
 2 Q And what -- tell me a little bit about that. What does
 3 that mean?
 4 A Oh, you mean the police academy?
 5 Q Yeah.
 6 A Well, let's see, the police academy, they teach you how
 7 to -- how to arrest people without trying to hurt them
 8 and how to do paper work and they teach you how -- how to
 9 make them policemen to where you can -- that'll help you
 10 along the way when you make an arrest so you don't hurt
 11 -- hurt -- get hurt or an -- hurt anybody.
 12 Q How many days was that camp?
 13 A It was two weeks.
 14 Q Okay. And I called it a camp. Was it a -- is it a
 15 normal course that they have or what?
 16 A I have it all right here. That's -- all I know is that's
 17 where they were -- the police academy was.
 18 Q How many years ago was that?
 19 A Oh, something like six to eight years ago, something like
 20 that.
 21 Q And did you get any training on the taser use then?
 22 A Yes.
 23 Q All right. And are you certified to use a taser
 24 yourself?
 25 A Yes, sir.

Page 7

A Igingig.
 2 Q Okay. And your wife was originally from here in Hooper?
 3 A Yes, sir.
 4 Q All right. And then when you moved up to Hooper Bay, how
 5 soon after that did you become a police officer?
 6 A Somewhere in '96, I think, 1996.
 7 Q What led to that decision?
 8 A We have VPSO Clinton O'Malley here and I used to rent out
 9 videos and he used to come and rent videos and he came
 10 over and kept constantly asking me to become a police
 11 officer because he was -- we became very good friends and
 12 he was -- it got -- it got to the point where he was
 13 being stuck in the jail almost 24 hours a day.
 14 Q And so did you finally give in to that or....
 15 A Yeah. Well, it took me about three, four weeks and I
 16 finally gave in to it.
 17 Q All right. And so when you become an officer, what do
 18 you have to do?
 19 A Oh, answer calls and go out and do patrols and watch
 20 traffic.
 21 Q Do you have to go through any training?
 22 A Back when I joined, there was no training.
 23 Q Okay. Have you -- since then, have you had any training?
 24 A Yes, sir, I went to a police academy.
 25 Q Where was that?

Page 8

1 Q Okay. So about six or eight years ago is when you
 2 received training on the taser?
 3 A No, No.
 4 Q I mean, at that police academy, did you then receive
 5 training on the taser?
 6 A Not that I recall. We....
 7 Q Were they just -- they may not have been used then. I
 8 don't know. Do you remember?
 9 A I don't think they were being used.
 10 Q Yeah, I -- that's probably right. So back then when you
 11 took that police training, what type of techniques did
 12 they tell you to use to restrain someone who is -- who
 13 was kicking?
 14 A Someone who was kicking?
 15 Q Yup.
 16 A Well, we were taught to use force if we have to and to
 17 tase them if we thought our lives were in danger.
 18 Q Okay. But now, if your life was in danger but, I mean,
 19 let's back up a little bit here and talk about even
 20 before the tasers were used, back when you went to the
 21 academy or back when you went to the police academy, that
 22 two weeks of training that you had
 23 A Yes.
 24 Q Okay. Now, back then, you said that tasers weren't used,
 25 right?

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1 A Yes.

2 Q And so how did they show you how 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 off the ground or

25 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 EMF 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

Page 14

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

Page 15

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
 25 didn't get no answers.

Page 16

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

Page 17

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

Page 18

1 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 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 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 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 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

Page 22

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.

1 A About six or seven.

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

3 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.

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

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

6 Q Okay. But nothing else was on the floor?

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

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

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

10 Q What?

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

12 Q So the lights were on?

13 A What's that?

14 Q The lights were on in the place?

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

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

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

Page 23

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 chief's 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, and 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?

Page 25

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

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

3 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?

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

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

6 A Oh, that's right.

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

8 A What you mean?

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

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

11 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.

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

13 Q So the lights were on?

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

Page 26

1 Boya and then Yeah, the lights were on in the
 2 outside. They were on because I could -- from clean
 3 across from where I was with Boya, I could see U'gga
 4 struggling with
 5 Q You could see who struggling with ?
 6 A On the bed, yeah, trying to -- U'gga was trying to pin him
 7 down to the bed.
 8 Q Okay. But now, that didn't happen for a little while,
 9 did it?
 10 A What do you mean by that?
 11 Q Well, I mean, you -- first you walk in, you see them
 12 laying there, is that right?
 13 A Yes.
 14 Q I'm just trying to get the timing down.
 15 A Mm-hmm.
 16 Q Okay? And 4:00 in the morning, they're laying there what
 17 looks like asleep. You walk over to them, is that right?
 18 A Yes, we walked over to Boya.
 19 Q Okay. You wake him up, is that right?
 20 A Yes.
 21 Q You handcuff him, is that right?
 22 A Yeah.
 23 Q And then you start to escort him out, you on one side,
 24 Joseph on the other side, is that right?
 25 A No, Simon.

Page 27

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
 3 five minutes, something like that.
 4 Q So now there's three officers in the house, is that
 5 right?
 6 A Yes.
 7 Q And Joseph is with
 8 A Yes.
 9 Q and he's detained him. Is that your belief?
 10 A Yes.
 11 Q And you have Boya on one shoulder and Simon has Boya on
 12 the other shoulder, is that right?
 13 A Yes.
 14 Q And you're walking out with him, is that right?
 15 A We were -- we -- we were walking out with him....
 16 Q Okay.
 17 Aand then he starts....
 18 Q And the lights are on?
 19 A Yes.
 20 Q And you slip on a trash bag or something on the floor, is
 21 that right?
 22 A Yes.
 23 Q Okay. And when you slip, who falls to the ground?
 24 A Oh, both of us. All of us. In fact, I think all of us
 25 went down. Yeah, we all went down and he went -- he came

Page 27

1 Q Okay. So Simon's on the other side and then -- where's
 2 Joseph during this time?
 3 A Oh, he was on the bed with was -- he was
 4 struggling with on the bed.
 5 Q When did Simon come?
 6 A Oh, when the -- when the sergeant called for assistance.
 7 Q How long did that take?
 8 A Oh, maybe coming around three to five minutes, something
 9 like that.
 10 Q Okay. Let's back up. Who went over to the bed to wake
 11 up Boya?
 12 A Sergeant Joseph.
 13 Q Okay. Who was there when Boya was handcuffed?
 14 A Just me and Sergeant Joseph and
 15 Q Okay. And at what point -- so you're walking out with
 16 Boya. You're on one side, Joseph's on the other side?
 17 A No, Simon.
 18 Q Okay. So what's going on while you're waiting for Simon
 19 to get there?
 20 A The sergeant had -- he was detaining on the -- on
 21 the bed and I was watching Boya.
 22 Q Just sitting there watching him?
 23 A Yeah, just standing there
 24 Q Were you talking to him?
 25 A No.

Page 29

1 down on a sitting position.
 2 Q Okay. So all three of you fell. Do you think that you
 3 fell first because of the trash bag or who do you think
 4 fell first?
 5 A I don't know, it's hard to tell. Everybody was going
 6 down.
 7 Q Everybody went down?
 8 A Yeah.
 9 Q Yeah. All right. So you now have three off -- three
 10 people on the floor, the two officers and Boya. Now,
 11 Boya was handcuffed now, is that right?
 12 A Yes.
 13 Q His hands are behind his back?
 14 A Yes.
 15 Q Anything keep you from standing up?
 16 A No, we were -- we were going to -- we were trying to
 17 stand back up and bring him back out -- bring him to the
 18 police department after we..
 19 Q So you stand up?
 20 A Yes, and we were trying to get -- and he starts -- he
 21 starts kicking -- starts kicking and he kicked me several
 22 times on the leg and then I observed him to have bitten
 23 Simon several times on the jacket with his teeth.
 24 Q So hit the jacket, not Simon?
 25 A I don't know if he got to -- to the meat or not, he was

Page 30

1 biting down.
 2 Q Who stood up first, you or Simon?
 3 A What's that?
 4 Q Who stood up first, you or Simon?
 5 A About all at the same time.
 6 Q But now, you were there and you were actually watching
 7 him bite a jacket? Now, where were you....
 8 A All getting up.
 9 Q I mean -- and what view did you have? Were you above
 10 that or below that?
 11 A Oh, I was just going -- getting up when I seen it.
 12 Q Okay. So what were you looking at when you stood up?
 13 A I was watching his feet because I didn't want to get
 14 kicked anymore
 15 Q Were you watching his feet or his mouth?
 16 A His feet.
 17 Q Okay. But I thought you just said that you were looking
 18 at his mouth.
 19 A No.
 20 Q Which were you looking at?
 21 A I was looking at his feet because I didn't want to get
 22 kicked anymore.
 23 Q So you didn't see him bite Simon's jacket.
 24 A I did on my right as I was getting up, yes.
 25 Q Okay. All right. So you stand up. So Simon's still

Page 31

1 would they have said okay, well, if somebody's doing
 2 that, you just better leave?
 3 A No.
 4 Q Would they have said you better shoot them?
 5 A No.
 6 Q What would they have said?
 7 A Well, we -- we could have peppered him but we couldn't
 8 pepper him then -- though because there was kids in the
 9 house and a baby.
 10 Q But in -- so in the police training you took years ago,
 11 what would they have said to do?
 12 A I don't know.
 13 Q You don't know?
 14 A Oh, I can't remember.
 15 Q So if there would have been another officer there without
 16 their taser, if all two -- the other two officers showed
 17 up without their taser, what would you have done?
 18 A What would I have done?
 19 Q Yeah.
 20 A I had no -- like I told you, I didn't have a taser.
 21 Q I know you didn't but the other officers did but if no
 22 one would have had one, what would you have done?
 23 A What would I have done? Well, I would have tried to pin
 24 him to the floor so he -- pin his feet to the floor so he
 25 can -- wouldn't kick anymore.

Page 31

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
 5 wrapped around the pole.
 6 Q Okay. Now, on that police training that you had years
 7 ago, not the taser training, not any training you've had
 8 since then, nothing that Hoelscher's told you but in the
 9 training you had years ago, what do they tell you to do
 10 if somebody did something like that?
 11 A They didn't tell us what to do.
 12 Q They didn't tell you what to do?
 13 A No.
 14 Q If somebody was resisting arrest, they didn't tell you
 15 what to do?
 16 A Well, to use a -- to use some force to try to get them to
 17 stop resisting.
 18 Q What kind of force were you supposed to use?
 19 A What do you mean by that?
 20 Q Well, what were you taught back in that police training
 21 you went to years ago?
 22 A Well, there was nothing we could do, any kind of force we
 23 could use, because he was kicking. Every time we tried
 24 to get close to him, he started kicking some more.
 25 Q But now, in that police training you took years ago,

Page 33

1 Q Okay. All right. Now, instead of pinning his feet to
 2 the floor so he wouldn't kick anymore, what did you see
 3 happen when an officer -- well, what did you see happen?
 4 A At what point?
 5 Q Well, you're standing up now.
 6 A Okay.
 7 Q Okay? And -- right, you stood up. Simon stood up and
 8 Boya's on the floor, is that right?
 9 A Yes.
 10 Q Okay. And what do you see happen?
 11 A Well, he was kicking and -- like I told you, he was
 12 kicking away, trying to kick away and then....
 13 Q On the floor?
 14 A Yes.
 15 Q Okay.
 16 A He was kicking Sergeant Simon and myself while he was on
 17 the floor while we were trying to get him up to bring him
 18 to the PD and then I -- and then Sergeant Joseph tased
 19 him.
 20 Q Okay. Joseph tased him? Now, Joseph -- so Joseph walks
 21 over from -- so....
 22 A No, he's -- he was holding -- he was wrestling with
 23 in the bed trying to hold -- down and he -- he just
 24 aimed and -- not aimed and shot out point and shot.
 25 Q So he's wrestling with another arrestee....

Page 34

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

Page 36

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

Page 37

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?

10 (Pages 34 to 37)

Page 38

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

Page 39

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.

Page 40

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,

Page 41

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

Page 16

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?

A Yes.

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

A Yes.

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

A Oh...

MR. INGALDSON: Object to the form.

Q You can still answer.

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.

Q So you would have probably tased him too?

A If I had a taser.

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

MR. WIDMER: Objection.

MR. INGALDSON: Object to the form.

Page 17

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

MR. INGALDSON: Object to the form.

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....

Q Okay.

Awhile he was kicking us.

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

A No, it just happened so fast.

Q How fast?

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

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

A Yes.

MR. INGALDSON: Object to the form.

Q Is that right?

A (No audible response).

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

Page 18

1 so -- 10 minutes. Let's put in another tape. This will be
 2 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
 7 now. We are back on record and we were talking and we
 8 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
 10 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,
 16 I'll come along, I'll come along so he came along.

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

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

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

Page 19

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

3 A Okay.

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

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

8 Q Okay. That's one. What else? There's one, two, three,
 9 four, five, six, seven, eight, nine on the sheet that he
 10 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
 14 that one?

15 A Just that one.

16 Q Okay. Do you have any memory that a person may yell or
 17 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,
 20 right?

21 A Yes. He was yelling, yes.

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

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

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