IN THE SUPREME COURT OF THE STATE OF ALASKA

THOMAS OLSON, Appellant, vs. CITY OF HOOPER BAY, OFFICER CHARLES SIMON, and OFFICER NATHAN JOSEPH, Appellees.	)	Supreme Court Case **S-14920**

Trial Court Case **4BE-07-00026 CI**

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

AMICUS CURIAE BRIEF OF THE ACLU OF ALASKA FOUNDATION

THOMAS STENSON
AK Bar No. 0808054
ACLU of Alaska Foundation
1057 W Fireweed Lane, Ste. 207
Anchorage, AK 99503
Telephone: (907) 258-0044
Facsimile: (907) 258-0228
tstenson@akclu.org
Attorney for Amicus Curiae ACLU of Alaska Foundation

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Marilyn May, Clerk

By: _____
Deputy Clerk

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

Alaska Constitution

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The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

JURISDICTIONAL STATEMENT

The Alaska Supreme Court has jurisdiction to decide the issues raised on appeal pursuant to AS 22.05.010 and Alaska Rule of Appellate Procedure 202. Following a jury verdict for Mr. Olson on April 20, 2012, the Superior Court entered judgment notwithstanding the verdict in favor of the appellees (collectively "Hooper Bay") on September 14, 2012. The Superior Court's ruling in Hooper Bay's favor was memorialized in an amended final judgment on September 19, 2012. The amended final judgment was final with regard to all matters going to the substance of the case; to the best knowledge of the *amicus*, the attorney's fees and costs ruling of the Superior Court has not yet been reduced to a final judgment. Mr. Olson filed a timely Notice of Appeal and Statement of Points on Appeal on October 15, 2012.

ISSUES PRESENTED FOR REVIEW

The *amicus curiae* will address only two of Mr. Olson's issues presented by his Statement of Points on Appeal. While the *amicus* does not disagree with Mr. Olson's other points, the *amicus curiae* wishes to focus its brief those claims sounding in constitutional law.

1. When the Superior Court granted judgment notwithstanding the verdict on qualified immunity grounds against Mr. Olson, did it err by failing to consider the evidence and jury verdict in the light most favorable to the non-moving party?

2. When the Superior Court granted judgment notwithstanding the verdict on qualified immunity grounds against Mr. Olson, did it err by finding that the officers had no notice that they were using excessive force

    A. From the egregious and excessive nature of the officers' conduct itself?

    B. From existing Hooper Bay policy?

STATEMENT OF THE CASE

I. Statement of Facts

Around 4:00 AM on December 26, 2006, Hooper Bay Police Officers Nathan Joseph and Dmitri Oaks arrived at Mr. Olson's home in the town of Hooper Bay, Alaska to conduct a welfare check. [Tr. 493]; [Tr. 797-98]. They discovered Thomas Olson and Peter Olson inside, asleep. The officers also discovered several of Thomas Olson's young children awake in the house. Believing the men to be intoxicated, the officers placed both men in handcuffs with their hands behind their backs. [Tr. 807-809]. The two officers called for a third officer, Charles Simon, to come to the scene. He arrived after Officer Joseph and Officer Oaks had handcuffed both men.

After Officer Simon arrived, the three officers decided to arrest Thomas Olson and remove him from the house. They began leaving the house, with Officer Oaks and Officer Simon on either side of Mr. Olson, holding him by the elbows. [Tr. 712]. As they headed for the door, the three men slipped and fell to the floor in a heap. [Tr. 510]. After falling to the floor, Mr. Olson began to resist efforts to take him out the door by kicking

at the officers while in sitting or lying down. Mr. Olson also attempted to bite at least one of the officers at least once.

Mr. Olson testified at trial that Officers Joseph and Simon then tasered him roughly 16 to 18 times. [Tr. 506]. Mr. Olson further stated that he received roughly 15 tasings within about a minute or a minute and a half. [Tr. 506-507].

Officers Simon and Joseph testified to repeatedly tasing Thomas Olson. Officer Simon testified that he administered two two-second drive stuns to Mr. Olson's back. [Tr. 715]. Officer Simon testified that he then tased Mr. Olson three times in the area of Mr. Olson's collarbone. [Tr. 717]. Officer Simon testified that he then tased Mr. Olson at least two times on the inside of Mr. Olson's thigh. [Tr. 718].

After Officer Simon used his taser on Mr. Olson, Officer Joseph testified that he also used his taser on Mr. Olson. Officer Joseph testified that he began by shooting the prongs of his taser at Mr. Olson's right shoulder and discharged the taser for 5 seconds. [Tr. 813]. He discharged his taser from a distance two more times. [Tr. 814]. He then applied the taser directly to Mr. Olson at least two or three more times on his back. [Tr. 815-17].

The testimony of the three witnesses to the incident—Mr. Olson, Officer Joseph, and Officer Simon—differed on several points. Mr. Olson and the officers testified to very different circumstances regarding the nature of the tasing and Mr. Olson's resistance. Mr. Olson admitted to kicking "in the beginning" but testified that the officers "continued to tase [him] after [he] stopped resisting and became compliant." [Tr. 646]; [Tr. 652-53]. Officer Joseph, however, testified that Mr. Olson was not tased after he

ceased resisting. [Tr. 905]. The witnesses also disagreed somewhat on the number of tasings: Mr. Olson testified that he was tasered 16 to18 times in total, while Officer Joseph and Officer Simon admitted to 12-13 tasings between them. [Tr. 469];[Tr. 715-718]; [Tr. 815-16]. The witnesses also disagreed on how many tasings were effective. Mr. Olson indicated that essentially all of the tasings during the concentrated minute or minute and a half of tasings were effective and rated the pain caused by them as a seven on a scale of one to ten. [Tr. 512]. Officer Joseph testified only that the "the very last" tasing was effective. [Tr. 878].

II. Statement of the Proceedings

Mr. Olson filed a complaint for relief in this matter in 2007. In 2008, Hooper Bay filed a motion for summary judgment on qualified immunity grounds which the Superior Court granted. Mr. Olson filed an appeal to this Court; this Court remanded the case for further consideration on qualified immunity.[1] The Superior Court, following remand, found that the question of qualified immunity required the resolution of material disputed facts. The matter proceeded to trial.

At the close of evidence, Hooper Bay filed a motion for a directed verdict under Rule 50(a), which the Superior Court denied, on the grounds that too many material facts were in dispute. [Tr. 1100]. At trial, the jury found for the plaintiff, judged Mr. Olson to be 30% responsible for his injuries, and awarded $250,000 in past compensatory damages and $250,000 in future compensatory damages. [Exc. 140-42]. Hooper Bay filed a

[1] *Olson v. City of Hooper Bay*, 251 P.3d 1024 (Alaska 2011).

motion for a mistrial and a supplemental memorandum on the issue of qualified immunity; however, to the best of the *amicus*'s knowledge, Hooper Bay never filed a motion for a judgment notwithstanding the verdict citing Civil Rule 50(b). Nevertheless, the Superior Court granted judgment notwithstanding the verdict a few months later, finding that, in light of the trial evidence and the assignment of partial responsibility to Mr. Olson by the jury, the defense of qualified immunity attached to Hooper Bay. The Superior Court entered a modified final judgment in favor of Hooper Bay.

III. Standard of Review

In reviewing the grant of judgment notwithstanding the verdict, the "substantive legal question is whether the evidence, and all reasonable inferences which may be drawn from the evidence, viewed in the light most favorable to the non-moving party, permits room for diversity of opinion among reasonable jurors."[2] Such judgments "should be scrutinized under a principle of minimum intrusion into the right to jury trial guaranteed under the Alaska Constitution.... If there is any doubt, questions of fact should be submitted to the jury."[3] "[T]o the extent that a ruling on a motion for [JNOV] involves questions of law, those questions will be reviewed de novo."[4] "When a qualified

[2] *Cameron v. Chang-Craft*, 251 P.3d 1008, 1017-18 (Alaska 2011) (internal quotations and citations omitted).

[3] *Id.* at 1018.

[4] *Alaska Interstate Const., LLC v. Pac. Diversified Investments, Inc*., 279 P.3d 1156, 1162 (Alaska 2012) (formatting in the original; internal citations omitted).

immunity defense is pressed after a jury verdict, the evidence must be construed in the light most hospitable to the party that prevailed at trial."[5]

IV. Argument

a. The Superior Court Erred by Failing to View the Evidence and the Verdict in the Light Most Favorable to Mr. Olson

Like a motion for summary judgment, judgment notwithstanding the verdict may only be granted if, viewing the facts in the light most favorable to the non-moving party, "reasonable persons could not differ in their judgment of the facts."[6] Since Superior Court reversed the jury's verdict in Mr. Olson's favor, all facts should have been construed in the light most favorable to Mr. Olson.

1. The Superior Court Erred in Construing the Facts in the Officers' Favor, Rather Than Mr. Olson's Favor

The Superior Court instead discussed the facts of the case in its post-verdict decision by "beginning with the officers' perspectives and perceptions at trial." [Exc. 342]. The Superior Court's opinion then exhaustively discussed the *officers'* testimony for *three pages.* [Exc. 342-45]. The Superior Court briefly disposed of Mr. Olson's testimony in a few sentences, stating that his testimony varied on "whether Plaintiff continued physical resistance after the initial deployments of the taser, or ceased physical resistance and remained passive though verbally non-compliant while handcuffed on the floor." [Exc. 345].

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[5] *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999).
[6] *Alaska Interstate Const.*, 279 P.3d at 1162.

The Superior Court's review of the evidence represents exactly what a Superior Court should *not* do in evaluating evidence for the purposes of entering judgment notwithstanding a verdict. Only three fact witnesses testified who observed the use of force by the officers on Mr. Olson: Officer Joseph, Officer Simon, and Mr. Olson. As recited above, the officers' "perspectives and perceptions" were dramatically different from Mr. Olson's testimony. Perhaps most importantly, Mr. Olson testified that the officers continued to tase him after he ceased resisting. [Tr. 652-53]. However, the Superior Court instead took notice of the fact that Officer Joseph testified that Mr. Olson continued to resist until the last tasing. [Exc. 345]. The Superior Court stated that "parts of Mr. Olson's testimony conflict with that of the officers on" that issue. [Exc. 346].

The law provides a clear answer as to what a court should do with conflicting testimony when judgment notwithstanding the verdict is under consideration: "conflicting evidence is not to be weighed and witness credibility is not to be judged on appeal."[7] Once the Superior Court determined that the officers' evidence conflicted with Mr. Olson's testimony, the law dictates that the evidence less favorable to Mr. Olson's case (here, the officers' testimony) must be ignored.[8] However, the Superior Court erred by crediting the officers' testimony over that of Mr. Olson.

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[7] *Cameron,* 251 P.3d at 1017-18.

[8] *Priester v. City of Riviera Beach,* 208 F.3d 919, 925 (11th Cir. 2000) (vacating trial court's judgment as a matter of law, since "the district court mistakenly relied upon Defendants' version of the facts, rather than Plaintiff's version of the facts, as it was required to do").

The Superior Court went further in discarding all narratives other than those of the officers:

> [I]t is the officer's perceptions that are so important to this inquiry. They had come through this struggle, and only they had the opportunity to perceive what they thought to be plaintiff's decision to stop resisting. Some might say the resistance ended sooner. Those 'some' were either not present nor were there perceiving the event from the officer's perspective.

[Exc. 350]. The Superior Court's contention—that *only* police officers' testimony "from the officer's perspective" should be credited or considered in excessive force cases—would effectively put an end to all liability for all police officers, except those who admitted that they violated the law. The witness in question who was "not present" was presumably Mr. Olson's expert witness, Dr. Lyman; the witness who was present but not "perceiving the event from the officer's perspective" could only be Mr. Olson. The Superior Court explicitly acknowledges that it chose not to credit or consider the evidence from Mr. Olson and his expert. In doing so, the Superior Court ignored its obligation to consider evidence "in the light most favorable to the non-moving party."[9]

2. The Superior Court Erred by Failing to Consider the Jury Verdict in the Light Most Favorable to Mr. Olson

The Superior Court claimed it must reconcile the evidence with the jury finding that Mr. Olson was 30 percent responsible for his injuries. [Exc. 346]. When considering the meaning of a jury verdict for the purposes of a judgment notwithstanding the verdict,

[9] *Cameron*, 251 P.3d at 1017.

the court should construe "evidence in the light most favorable to the jury verdict."[10] However, the jury's apportionment of fault was not a conclusive determination that Mr. Olson continued to resist until the last tasing. The Superior Court could have ordered the jury to make a special finding regarding whether or not Mr. Olson continued to resist until the final tasing; it declined to do so. Neither did the Superior Court instruct the jury that *any* finding of fault on Mr. Olson's part could *only* be granted if the jury found that he resisted until the last tasing.

Instead, the Superior Court asserted that the apportionment of fault meant that the "the jury found that Plaintiff continued to actively resist arrest during the later phases of the contact" because of the following passage in closing argument from Mr. Olson's counsel:

> And then you decide how much money gives Mr. Olson justice in this case and then one thing that you can do is at the end, you can even decide if you wanted to that Mr. Olson was somewhat at fault himself and you can reduce the amount of money that you write on line three and give him some of the fault. If you think he was still struggling but that the force was still excessive, maybe you find him somewhat at fault and he takes some of the fault. It's up to you to decide as the jury.

[Tr. 1215]; [Exc. 346]. The section of argument highlighted by the Superior Court cannot sustain the weight the Superior Court puts on it, that of completely setting aside the verdict. Mr. Olson's counsel properly acknowledged that if Mr. Olson was "somewhat at fault," the jury could assign partial responsibility to him. Among the ways listed that Mr. Olson could be "somewhat at fault" was if he was "still struggling." Nowhere does the

[10] *Jennings v. Jones*, 499 F.3d 2, 4 (1st Cir. 2007).

highlighted argument state that the *only* way fault could be partially attributed to Mr. Olson was if he was "still struggling," nor does the highlighted argument clearly define the timeframe of a finding that Mr. Olson was "still struggling" as meaning finding that Mr. Olson continued to struggle up to and until the final tasing.

In light of "the deference that we must give to juries," courts may not render judgment notwithstanding the verdict on qualified immunity grounds if the jury *could have possibly* determined facts inconsistent with the qualified immunity defense.[11] The jury's apportionment of fault *could have* meant that Mr. Olson was resisting until the final tasing and that the use of force was still excessive. The jury's apportionment of fault *could have* meant that Mr. Olson resisted through the first 9 tasings but not the last several tasings. The jury's apportionment of fault *could have* meant that Mr. Olson was partially at fault for not going quietly with the officers from the outset. No one can know for certain why the jury apportioned fault in the way it did, because the Superior Court did not require a special verdict on how long Mr. Olson continued his resistance.

Having failed to seek such a special verdict, the Superior Court could not draw adverse inferences from the partially-apportioned verdict in Mr. Olson's favor.[12] The Superior Court was obliged to construe the evidence by granting all reasonable inferences in favor of Mr. Olson and also obliged to construe the jury verdict in his favor. In the absence of a clear and definitive finding of fact from the jury that Mr. Olson was resisting

[11] *Jennings*, 499 F.3d at 10.

[12] *Borges Colon v. Roman-Abreu*, 438 F.3d 1, 19 (1st Cir. 2006) (rejecting a claim of qualified immunity following a jury trial because "a jury easily *could have found* that this [proposed fact pattern] was not so") (emphasis added).

until the final tasing, the Superior Court was not entitled to construe the apportionment of fault against Mr. Olson's interests.

Moreover, the sincerity of the Superior Court's claim that this vague reference to apportionment in closing argument meant that "reasonable persons could not differ in their judgment of the facts," muddles the question of whether the Superior Court was relying exclusively on the apportioned verdict, or on the Superior Court's rejection of Mr. Olson's testimony as described above.[13] The Superior Court's opinion even puts the police officers in the traditionally heroic role of the football quarterback:

> These officers decided to use their tasers. Monday morning quarter-backing is an easy thing to do; we are not the one the lineman is after; we are not the one releasing the ball too quickly because of the throbbing pain from that last hit.

[Exc. 350]. The Superior Court clearly sympathized with the officers in this case, treating them in its metaphor like heroes. However, the role of the Superior Court in this case is not to substitute its judgment of the facts for the jury's, nor to re-construe the facts. The specter of a judge in a rural community overturning a jury verdict against law enforcement agents because of judicial sympathies with the officers is exactly the scenario that the jury trial right should protect against.

To anticipate an objection, the *amicus* acknowledges that the law on qualified immunity *does* require that a court consider the "officers' perspectives and perceptions, as it is what *reasonable officers in their position could have thought* that is dispositive of

[13] *Alaska Interstate Const.*, 279 P.3d at 1162.

this issue."[14] Reconciling the obligation to take facts in the light most favorable to the plaintiff and the obligation to consider what reasonable officers in the officers' position would have believed is a difficult needle for a judge to thread. However, the proper statement of the law is to take the facts in the light most favorable to the plaintiff and consider how those facts, so construed, would have appeared to a reasonable officer.

Mr. Olson testified that he was no longer resisting at the time of the last shocks, while Officer Joseph flatly stated that his resistance continued until the last shock. [Tr. 652-53]; [Tr. 904-05]. Absent from the argument of defense counsel is a theory in which Mr. Olson may have moved his body in a way that the officers reasonably *mistook* for continued resistance. In fact, Hooper Bay actively sought to debunk any such theory. [Exc. 217] (obtaining denial from plaintiff's expert that involuntary muscle movements were a consequence of tasing). Instead, Hooper Bay pursued a theory of liability in which either the officers were telling the truth and Mr. Olson was lying, which the Superior Court could not entertain taking evidence in the "light most favorable to the movant"; alternately, Hooper Bay elsewhere suggested both the officers and Mr. Olson agreed he continued to resist until the final tasing, which was not clearly supported by the record and contradicted by some of Mr. Olson's testimony, as previously described.[15] Nor did

[14] *Olson*, 251 P.3d at 1030 (emphasis added).

[15] *Contrast* [Tr. 1193] ("[T]here is a difference of fact between their side and our side and the difference of fact is whether or not he was still actively resisting. Actively resisting. If he was actively resisting, we were entitled to use a taser on him. If he was not actively resisting, we were not entitled to use the taser.") *with* [Tr. 1275] ("We did have the testimony of Mr. Olson who admitted on the stand that he resisted to the end. . . .").

the Superior Court rest its ruling on a construction of facts consistent with Mr. Olson's testimony and then construe how the conduct described in that testimony would have appeared to the officers; the Superior Court simply rejected Mr. Olson's testimony that he was tased after he stopped resisting and credited Officer Joseph's testimony that the resistance continued until the final tasing.[16]

The admonition to consider the perceptions of the reasonable officer surely does not mean that, in every case, the testimony of excessive force plaintiffs should be discarded in favor of the testimony of the officer-defendant. The jury's verdict and the testimony, construed in the light most favorable to the plaintiff and through the lens of the reasonable officer perceiving the actions described in those facts, supports the notion that the officers continued to tase Mr. Olson after he stopped resisting.

3. The Rules Regarding the Jury's Role as Sole Arbiter of Fact Are Grounded in the Alaska Constitution

The construction of the facts at trial is the exclusive province of the jury. Judges may determine the law, but they may not intrude on the jury's determination of the facts.[17] Allowing judges to set aside verdicts casually would demolish the right of the individual to a trial by jury. Alaska Const., Art. I, Sec. 16. Under the analogous federal

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[16] *Priester*, 208 F.3d at 924 (holding, while acknowledging that the question of qualified immunity must be resolved "from the perspective of a reasonable officer on the scene," the clearly contradictory testimony of the officer and the plaintiff precluded judgment as a matter of law for the officer).

[17] *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) (stating that judges should resolve excessive force cases by summary judgment, directed verdict, or JNOV only "sparingly" because "police misconduct cases almost always turn on a jury's credibility determinations").

civil jury trial right, the justice system "distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."[18]

The obligation of the trial court, in considering judgment notwithstanding the verdict, to construe facts in the light most favorable to the non-movant is not merely a doctrine of judicial prudence; it is a doctrine of constitutional dimension. The Superior Court was not entitled to resolve conflicting testimony or to construe facts based on the court's own preferences and sympathies. Mr. Olson has an absolute right to a trial by jury, which may not be abrogated by the court's re-weighing of the facts.

4. The Superior Court's Erroneous Finding of Fact Was Determinative of the Question of Qualified Immunity

The Superior Court's decsopm, despite conflicting evidence, that Mr. Olson continued to resist throughout the entire incident until the final tasing determined the whole issue of qualified immunity. The Superior Court conceded that, if Mr. Olson's testimony that he ceased active resistance prior to the final tasing was truthful, that the qualified immunity issue was easy to resolve.

> [The Plaintiff's testimony] varied on whether Plaintiff continued physical resistance after the initial deployments of the taser, or ceased physical resistance and remained passive though verbally non-compliant while handcuffed on the floor. *Any deployment of the taser for the latter would be objectively unreasonable*.

[Exc. 345] (emphasis added). Had the Superior Court followed the law and construed the evidence in the light most favorable to Mr. Olson, the Superior Court would have found

[18] *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 537 (1958).

that Mr. Olson's testimony established that the officers "continued to tase [him] after [he] stopped resisting and became compliant." [Tr. 652-53]. The use of force against an individual who has stopped resisting is clearly unconstitutional.[19]

The evidence, viewed in the light most favorable to Mr. Olson and the verdict in his favor, supports the notion that officers continued to tase Mr. Olson after he became compliant. The Court need not wade into a thicket of qualified immunity analysis regarding taser usage, since no party could or would insist that a reasonable police officer would believe that he could legally use continue to use force, including a taser, against a person who "stopped resisting and became compliant." [Tr. 652-53]. Since the jury could have reached its verdict by finding that Mr. Olson truthfully testified that the officers continued to tase him after he ceased resisting, the court erred in granting judgment notwithstanding the verdict on the basis of Hooper Bay's qualified immunity defense.

b. Even Assuming that Mr. Olson's Resistance Continued Until the Final Tasing, the Egregious Nature of the Officers' Own Conduct Gave Notice That Tasing Mr. Olson 16 to 18 Times Violated the Law

1. The Law of Qualified Immunity Must Be Carefully Construed in Cases Presenting Mixed Questions of Fact and Law, Such as Excessive Force Cases

Qualified immunity is a broad legal concept that covers a wide variety of

[19] *Jennings*, 499 F.3d at 10 (holding that, where the factual record could be construed as showing that officers continued to twist the plaintiff's ankle after he stopped resisting, qualified immunity did not attach); *Oliver v. Fiorino*, 586 F.3d 898, 906 (11th Cir. 2009) (holding that, while first tasing was permissible use of force on a fleeing, non-resisting subject, subsequent tasings after subject stopped resisting were excessive force).

constitutional claims for damages. The *amicus* suggests that the way in which the defense of qualified immunity is interpreted should vary depending on the case. In pure cases of law, broad interpretation of the doctrine of qualified immunity makes a certain amount of sense. One must be sympathetic to an officer held liable for not anticipating wholesale changes in constitutional law.

For instance, it would in many ways be unfair to allow damages against a police officer who, in 2008, searched a suspect's curbside trash can for evidence, relying on prior case law permitting such searches.[20] That hypothetical officer would have little means to guess in 2008 that this Court would reverse itself and alter the constitutional analysis of such searches a year later.[21] In such cases, where the facts are clear and not in dispute, the overruling of a basic legal standard or the creation of a new one should arguably not result in damages to police officers relying in good faith on existing law.

In cases where the qualified immunity rule does not confront any wholesale change in the law, but mere application of existing law to a unique set of facts, courts should only cautiously apply the qualified immunity defense. Every police officer knows the basic constitutional rule relating to the use of force: officers may use an objectively reasonable amount of force under the circumstances.[22] Police officers are not entitled to a

[20] *Smith v. State*, 510 P.2d 793(Alaska 1973).
[21] *Beltz v. State*, 221 P.3d 328 (Alaska 2009).
[22] *Sheldon v. City of Ambler*, 178 P.3d 459, 463 (Alaska 2008).

defense of qualified immunity so long as the "contours" of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[23]

2. The Contours of the Right Against Excessive Force

In excessive force cases, analysis of the qualified immunity question depends on applying the firm, though flexible, rules of reasonableness to the specific facts of an individual case. Each use of force case will differ from those that came before in some identifiable way.[24] Hewing too closely to a standard requiring precise notice that the use of force under the exact circumstances presented in a particular case would effectively preclude all excessive force litigation. The articulation of the *Hope v. Pelzer*[25] standard that the nature of an officer's conduct can itself provide notice of its unreasonableness has significantly improved the analysis of fact-specific cases on use of force.[26]

The proper question is not whether the use of force was clearly prohibited by case law exactly on point with the facts of prior cases, but whether the *contours of the right* were known to the officers. Among those factors relating to the basic contours of the right are: the nature of the offense, if any, for which the individual is being investigated; any resistance brought by the individual; the likely harm associated with the use of force

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[23] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

[24] *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (noting the difficulties of "a test which must accommodate limitless factual circumstances") *overruled on other grounds, Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

[25] 536 U.S. 730 (2002).

[26] *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (noting that *Hope v. Pelzer* "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional.").

chosen; alternative means of defusing the situation or controlling the individual; whether and to what extent the individual is already controlled by the officers; what the posture of the individual is; and how many officers are present at the scene.[27] None of those criteria are absolutely dispositive in all cases, nor could any criterion be absolutely dispositive.

All those factors should, however, be considered by the officer in his original internal considerations of what force to use and can properly be considered by a court reviewing whether the officer's conduct is "sufficiently egregious and excessive" to give the officer notice of its unreasonable nature.[28] These factors, previously identified by courts, track the intuitive moral calculus in the use of force. Officers may reasonably use more force in subduing a homicide suspect than a shoplifter. They may reasonably use more force in subduing an actively resisting arrestee than a compliant one. They may reasonably use more force in subduing a resistant standing person than one who is lying down. They may reasonably use more force in subduing an unrestrained suspect than one in handcuffs. How those factors are *balanced* may depend on the individual circumstances of each case, but the factors themselves describe the broad "contours of the

[27] *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989) (listing factors); *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994) (holding excessive force inquiry not limited to *Graham* factors); *see also Luchtel v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010) (listing other non-*Graham* factors).

[28] *Olson*, 251 P.3d at 1040.

right" against unreasonable use of force. They are factors featuring in any reasonability determination, and an ordinary police officer should be aware of these factors.[29]

3. Tasers Are Less-Lethal Weapons, But Present Specific Injury Risks and Impose Substantial Pain

The taser is a weapon that can be used in two ways. The taser can be applied at a distance in "dart" mode, where a cartridge of electrified probes are shot at a subject while the prongs remain attached to the taser by wire. Successfully deployed, the taser can cause total muscular incapacitation in the subject in dart mode, often resulting in temporary immobility. [Tr. 938-39]. The taser can also be deployed in "drive stun" mode, where the taser itself is pushed into direct contact with the skin or clothing; the taser will generally not cause total muscular incapacitation, unless the direct contact with the subject completes the circuit in a previously unsuccessful dart mode deployment. [Tr. 916-17].

A taser is a "weapon that subjects the subject to 50,000 volts, and it's one that incapacitates the person." [Exc. 212].[30] It "has the potential to cause physical problems with the person, depending upon where they are Tased." *Id.* "There are different

[29] *Green v. New Jersey State Police*, 246 F. App'x 158, 163 (3d Cir. 2007) (holding that the excessive force factors identified in *Graham* and other cases "'are well-recognized,' and that when an officer applies them in 'an unreasonable manner, he is not entitled to qualified immunity'") (citations omitted).

[30] This portion of the excerpt is a transcript of the video deposition of the plaintiff's expert, Dr. Lyman. The video of the deposition was played in court for the jury in lieu of live testimony. *See* [Tr. 375-76].

levels of pain. And, you know, it's just generally accepted that the Taser is a mid- to higher-range rather than lower range." [Exc. 213]. The electrical heat associated with the taser deployment typically causes a first- or second-degree burn. [Tr. 968-69]. The 25 taser burns on Mr. Olson were "second and possibly at the very core, third degree burns or full thickness burns." [Tr. 404, 406].

A taser can cause more serious injury or even death under particular circumstances, such as when used on an individual standing in water or at a great height.[31] "[N]umerous decisions agree[] that the use of tasers is at least an intermediate, if nonlethal, level of force."[32] Although the plaintiff did not produce evidence of the defendants' awareness of these hazards, multiple fatal incidents suggest that the repeated use of a taser in a short period of time can lead to a deadly condition.

TASER International warned its customers in 2005 that "repeated ... exposures to the Taser electrical discharge may cause strong muscle contractions that may impair breathing and respiration ... [U]sers should avoid ... extensive multiple discharges whenever practicable in order to minimize the potential for over-exertion of the subject or potential impairment of full ability to breathe over a protracted time period."[33] While evidence relating to the warning was not produced on the trial record, the *amicus* brought this information to the attention of the Superior Court in its briefing and wishes to bring

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[31] *Bryan v. MacPherson*, 630 F.3d 805, 813-14 (9th Cir. 2010) (*en banc*) (listing possible injuries resulting from taser use).

[32] *Id.* at 810-11.

[33] *Lee v. Metro. Gov't of Nashville & Davidson County*, 596 F. Supp. 2d 1101, 1125 (M.D. Tenn. 2009) *aff'd on other grounds*, 432 F. App'x 435 (6th Cir. 2011).

this warning to the Court's attention. The *amicus* would also bring to this Court's attention the sadly increasing number of wrongful death cases relating to multiple tasings.[34] The Court's opinion in this case may provide guidance to future taser uses and municipal police policies on force.

4. A Reasonable Officer Would Know That Less Force May Be Used Against a Handcuffed Man

One of the factors courts have often looked to in use-of-force cases, especially involving tasers, is whether the subject is handcuffed or otherwise restrained. An officer

[34] *See, e.g.*, *Marquez v. City of Phoenix*, 693 F.3d 1167, 1172 (9th Cir. 2012) (subject died after 22 discharges of taser), *as amended on denial of reh'g* (Oct. 4, 2012), *cert. denied*, 12-821, 2013 WL 56045 (U.S. Feb. 25, 2013); *Rosa v. Taser Int'l, Inc*., 684 F.3d 941, 944 (9th Cir. 2012) (subject died following 8-9 tasings); *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 507 (6th Cir. 2012) (subject died following 4-6 tasings); *Oliver*, 586 F.3d at 903 (subject died following eight tasings); *Landis v. Baker*, 297 Fed. Appx. 453, 464 (6th Cir. 2008) (subject died after five cycles of electricity); *Abston v. City of Merced*, 11-16500, 2013 WL 364214 (9th Cir. Jan. 31, 2013) (subject died after four tasings); *Lee*, 596 F.Supp.2d at 1111 (subject died after 19 tasings); *Sanders v. City of Fresno*, 551 F.Supp.2d 1149, 1168-79 (E.D. Cal. 2008) (subject died following 14 cycles of electricity from tasers); *Fontenot v. TASER Int'l, Inc.*, 3:10CV125-RJC-DCK, 2011 WL 2535016, at *2 (W.D.N.C. June 27, 2011) (subject died after 37 seconds of continuous tasing); *Hollman v. County of Suffolk*, 06-CV-3589 JFB ARL, 2011 WL 280927, at *9 (E.D.N.Y. Jan. 27, 2011) (subject died following five tasings); *Carroll v. Harris* County, CIV.A. H-08-2970, 2011 WL 2457935, at *1 (S.D. Tex. May 25, 2011) *report and recommendation adopted*, 2011 WL 2457517 (S.D. Tex. June 16, 2011) (subject died following 32 tasings by officers); *Glowczenski v. Taser Int'l Inc*., CV04-4052(WDW), 2010 WL 1957289 (E.D.N.Y. May 13, 2010) (death following "several" tasings in drive-stun mode); *Estate of Mathis ex rel. Babb v. Kingston*, 2009 WL 1033771, at *2 (D. Colo 2009) (subject died after three "dart" strikes and a "drive-stun" of unclear duration); *Gonzales v. Kelley*, 01-10-00109-CV, 2010 WL 2650615, at *8 (Tex. App. July 1, 2010) (subject died after seven tasings).

should intuitively understand that he should be more hesitant to use serious force against a handcuffed man. No officer needs a case or rule to tell him of the importance of considering whether an individual is restrained in deciding what level of force to use.

A person who has been placed in handcuffs has been substantially restrained. The hazard such a person could pose to an officer is very limited.[35] A long line of cases support the notion that the use of force against a person in handcuffs is a substantial factor weighing in favor of finding excessive force.[36] To that extent, while the case at bar

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[35] *Hendricks v. City of Bella Villa*, 4:08-CV-1836 (CEJ), 2010 WL 3024102, at *5 (E.D. Mo. Aug. 2, 2010) ("In handcuffs, she posed little threat to anyone's safety.").

[36] *Bender v. Township of Monroe*, 289 Fed. Appx. 526, 527-28 (3d Cir. 2008) (holding that there was a fact dispute precluding summary judgment on excessive force claim where plaintiff stated officers had struck him in the face after he was placed in handcuffs, even where plaintiff had pled guilty to kicking the officer while handcuffed); *Sallenger v. Oakes*, 473 F.3d 731, 740 (7th Cir. 2007) (citing the repeated use of closed-fist blows "*after* [the subject] was handcuffed" as one factor in rejecting claim of qualified immunity for excessive force) (emphasis added); *Champion v. Outlook Nashville, Inc*., 380 F.3d 893, 902 (6th Cir. 2004) (noting circuit had continually "held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right"); *Frazell v. Flanigan*, 102 F.3d 877, 884 (7th Cir. 1996) *overruled on other grounds by McNair v. Coffey*, 279 F.3d 463 (7th Cir. 2002); *Lewis v. Downs*, 774 F.2d 711,714-15 (6th Cir. 1985) (holding that force used before handcuffing was appropriate, but force used after handcuffing was "excessive") *overruled on other grounds*, *Graham*, 490 U.S. at 394; *Phelps v. Coy*, 164 F. Supp. 2d 961, 973 (S.D. Ohio 2000) (denying summary judgment on qualified immunity grounds in excessive force case for tackling handcuffed prisoner perceived to be kicking at fellow officer); *Zempel v. Cygan*, 916 F.Supp. 889, 896 (E.D. Wisc. 1996) (holding summary judgment on qualified immunity grounds was inappropriate where plaintiff claimed he had been beaten while handcuffed by police officers); *Kerr v. Valle*, 903 F. Supp. 595, 599 (S.D.N.Y. 1995) (allegation that officers beat man after he was handcuffed defeated summary judgment on qualified immunity grounds); *Martin v. Luckett*, 07 C 2800, 2011 WL 1231024, at *6 (N.D. Ill. Mar. 30, 2011) (holding that "after restraining Plaintiff with

involves the new technology of the taser, this case substantially invokes many of the same considerations and intuitive judgments courts apply to *all* uses of force by police officers.

General case law and common sense establish that the use of substantial force on handcuffed individual, in the absence of a substantial exigency, is manifestly unreasonable. It does not require a specific, factually similar case to defeat a qualified immunity defense.[37] A general rule derived from these cases that disfavors substantial use of force against a handcuffed person does not mean that such force is always unconstitutional, such as when a person flees from police while still in handcuffs, or

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handcuffs, the danger of flight would have been substantially eliminated"); *Odom v. Borough of Taylor,* CIVA 3:05CV0341, 2006 WL 3042974, at *8-*10 (M.D. Pa. Oct. 24, 2006) (claims that plaintiff was sprayed with pepper spray and stomped while handcuffed precluded summary judgment or qualified immunity finding).

[37] *Pigram ex rel. Pigram v. Chaudoin*, 199 Fed. Appx. 509, 513-14 (6th Cir. 2006) (alleged slapping of handcuffed juvenile precluded summary judgment on excessive force claim, even where police officer alleged he was "bucking" and pulling away); *Bultema v. Benzie County*, 146 Fed. Appx. 28, 37-38 (6th Cir. 2005) (no qualified immunity where officers pepper-sprayed "struggling" suspect in handcuffs); *id.* at 35 (collecting cases on excessive force against handcuffed subjects); *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002) (rejecting qualified immunity defense where restrained protesters were sprayed with pepper spray); *Mayard v. Hopwood*, 105 F.3d 1226, 1228 (8th Cir. 1997); *see also Jimenez v. City of Costa Mesa*, 174 Fed. Appx. 399, 403 (9th Cir. 2006) (contrasting case at bar, where arrestee was punched *before* being handcuffed and excessive force was not found, with another published case where arrestee was punched *after* being handcuffed and excessive force was found); *Stone v. Watkins*, 1:04-CV-259, 2005 WL 3088352 (E.D. Tenn. Nov. 15, 2005) ("A specific case is not necessary for an officer to know that excessive force has been used when a deputy sics a canine on a defendant who has fully surrendered or on a handcuffed defendant who has fully surrendered and is completely under control.").

presents a serious hazard to the police despite their handcuffs, as by spitting blood at the officers.[38] Courts have had little difficulty finding as a general proposition that "it was clearly established in November 1999 that the use of force on a subdued arrestee was unreasonable."[39] Thus, the fact that Mr. Olson was clearly restrained at the time he was tasered 16 to 18 times, in the absence of uncontested fact or a conclusive finding by the jury that Mr. Olson was engaged in more than struggling conduct, precludes a finding of qualified immunity post-trial. A reasonable officer would have known, based on the nature of the act of tasing a handcuffed man 16-18 times, that such an act was unreasonable.[40]

5. A Reasonable Officer Would Know That Repeated Tasings in Quick Succession Left Little Time for Mr. Olson to Comply

The sheer number of tasings in a short period of time would have informed the officers that the continued tasing of Mr. Olson was excessive and unreasonable.[41] The whole purpose for the use of force on a subject is to coerce the compliance of the subject and to prevent further struggle. Repeatedly using force—of any kind, not limited to tasings—without giving the subject an opportunity to comply before using force again

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[38] *Zivojinovich* v. *Barner*, 525 F.3d 1059, 1072 (11th Cir. 2004).

[39] *Read v. Begbie*, 68 Fed. Appx. 36, 37 (9th Cir. 2003).

[40] *Willenbring v. City of Breezy Point*, CIV. 08-4760, 2010 WL 3724361, at *6 (D. Minn. Sept. 16, 2010) (holding reasonable officer would have notice from the nature of the facts that "repeated use of his taser was gratuitous and unlawful, especially once his suspect was fully restrained").

[41] *Beaver v. City of Federal Way*, 507 F. Supp. 2d 1137, 1147 (W.D. Wash. 2007) (defendant's supervising officer called five tasings "unusually high").

tends to show that the use of force was punitive and not reasonably related to the legitimate law enforcement purposes of safely conducting an arrest.

When such tasing occurs numerous times in rapid succession, an officer cannot determine whether an arrestee continues to resist or menace the officers.[42] If the officer cannot determine whether the arrestee continues to resist or menace others, it cannot be reasonable to taser the individual again. An officer is objectively unreasonable to tase a person who has ceased resisting. Federal courts have repeatedly disapproved of tasings in rapid succession and rejected the reasonability of brief breaks of a few seconds to allow a subject to comply.[43] While the specific fact-pattern does not arise often, it is an outgrowth of the common principle that it is never permissible to use substantial force

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[42] The Department of Justice recommends that officers using tasers should "stop to assess the situation" after each cycle of electricity. U.S. Dep't of Justice, Letter to Orange County Sherriff's Office, August 20, 2008, at 11 *available at* http://www.justice.gov/crt/about/spl/documents/orangecty_ta_ltr.pdf ["DOJ letter"]. The Department of Justice also notes that: "As subjects are often unable to hear or respond to commands during the cycling of the ECW [Electronic Control Weapon], it is ineffective to give commands while deploying the ECW, as deputies may mistakenly interpret the subject's failure to respond to commands as active physical resistance." *Id.*

[43] *Kijowski v. City of Niles*, 372 Fed. App'x 595, 600 (6th Cir. 2010) (holding that plaintiff's account of a near instantaneous second tasing precluded any possibility of intervening resistance and that qualified immunity could not raised as a defense); *Towsley v. Frank*, 5:09-CV-23, 2010 WL 5394837, at *10-*12 (D. Vt. Dec. 28, 2010) (two-second window between first, constitutional tasing and second tasing gave rise, among other factors, to issue of law and fact preventing summary judgment and precluding finding of qualified immunity, even in the absence of similar case law); *Beaver*, 507 F. Supp. 2d at 1145 ("[T]he period between the second and third tasing was only two seconds. During such a brief time period, it is difficult to see how Mr. Beaver even had the opportunity to comply with Officer Laird's commands.").

against a person who has stopped resisting; in the absence of *continued* resistance, any tasing is unreasonable. Without a window of rest between tasings, the officers cannot assess whether resistance continues and thus cannot continue to use force.[44] Indeed, like other concepts around use of force discussed in this brief, granting an individual an opportunity to comply before using force is not a concept unique to tasing, but one that pertains to all uses of force and arises from basic common sense.[45]

The officers in the present case virtually continuously tased Mr. Olson for a minute or more without allowing him any meaningful opportunity to comply. Even Hooper Bay conceded that all the tasings in question took place within "less than two minutes." [Tr. 985:2-9]. Mr. Olson stated he was tased 15 times within about a minute or a minute and a half. [Tr. 506-507]. Taking the evidence in the light most favorable to Mr. Olson, Mr. Olson was tased 15 times in 60 to 90 seconds, or roughly four to six seconds

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[44] "[I]t is not necessary that the plaintiffs point to a case that holds that the *repeated, quick succession,* gratuitous use of a shocking, incapacitating device on a cornered, unarmed, non-violent, naked suspect who committed no serious crime is a violation of a clearly established constitutional right." *Lee*, 596 F. Supp. 2d at 1118 (emphasis added).

[45] "The Court finds that both common sense and decency dictate that the continued application of physical force on a disoriented and unresisting subject, who has been subdued, handcuffed, and placed in a police car, without providing him adequate time to comply is clearly a violation of the suspect's right to be free from excessive force." *Austin v. Redford Twp. Police Dept.*, 859 F. Supp. 2d 883, 890-91 (E.D. Mich. 2011) *aff'd*, 690 F.3d 490 (6th Cir. 2012); *see also McCaig v. Raber*, 1:10-CV-1298, 2012 WL 1032699 (W.D. Mich. Mar. 27, 2012) *aff'd*, 12-1393, 2013 WL 628420 (6th Cir. Feb. 21, 2013) ("If Defendant did not give Plaintiff ample opportunity or ability to comply with his verbal command prior to engaging in the takedown maneuver, his actions could be viewed as objectively unreasonable."); *id.* (collecting similar cases).

between the initiation of one tase and another on average. A full cycle of tasing runs five seconds, while Officer Simon testified that he used the taser five times in two-second bursts and two more times without specifying how long the taser was shocking Mr. Olson. [Tr. 883]; [Tr. 715-17]. Officer Joseph testified that he used his taser in full five-second bursts. [Tr. 814]. The jury could have reasonably inferred that Mr. Olson was subjected to five two-second shocks and ten five-second shocks, which would constitute 60 seconds of direct electric shock.

Even if those shocks were administered over 90 seconds, that would, on average, leave *two seconds between each shock* for Mr. Olson to recover and attempt to comply with the officers' shouted instructions. Reasonable review of the evidence in the light most favorable to the plaintiff shows that the officers tased Mr. Olson virtually continuously for 60-90 seconds without taking more than a couple seconds between each tase to see if he had become compliant. Officer Simon admitted that he knew that a tasered subject could feel dazed for several seconds or even minutes following a tasing. [Tr. 742]. No reasonable officer could think that such virtually continuous tasing, offering Mr. Olson only a few seconds of opportunity to recover and comply between each tasing, was constitutionally appropriate.

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6. A Reasonable Officer Would Limit the Use of Force Where Three Officers Surround a Single Subject

Less force will be authorized to subdue a subject when he is significantly outnumbered by other officers.[46] The principle applies equally in cases involving tasers and cases involving the conventional use of force.[47] The plaintiff's expert testified to the fact that three officers would ordinarily be able to maintain control over a single arrestee, without using a single taser blast. [Exc. 210]. A reasonable officer would know both from general case law and common sense that, when three officers confront a single, handcuffed, unarmed suspect, the degree of force to be used is limited.

7. A Reasonable Officer Would Limit the Use of Force Against a Subject Who Is Lying Down

Basic common sense informs an officer that a person who is standing up has more freedom to move, and thus to flee or fight with the officers, than one who is lying down. Courts have traditionally scrutinized the use of force against subjects who are lying down more than those standing up.[48] Indeed, the individual's posture is an aspect of the

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[46] *Robinson v. Solano County*, 278 F.3d 1007, 1014 (9th Cir. 2002) (considering, among other factors rendering the use of force unreasonable, the fact that officers outnumbered the suspect); *Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2000) (noting, among factors making the use of force unreasonable the "the large number of police officers present" at the time of the use of force).

[47] *Beaver*, 507 F. Supp. 2d at 1147 (noting that the fact that officer was alone for first three tasings rendered them reasonable; fourth and fifth tasings became unreasonable in large part because another officer was present).

[48] *King v. Taylor*, 694 F.3d 650, 663 (6th Cir. 2012) *cert. denied*, 12-886, 2013 WL 210700 (U.S. Feb. 25, 2013); *Gulley v. Elizabeth City Police Dept.*, 340 F. App'x 108, 110 (3d Cir. 2009); *Lloyd v. Van Tassell*, 318 F. App'x 755, 759 (11th Cir. 2009);

Graham factors regarding "whether the suspect poses an immediate threat to the safety of the officers or others and whether he is . . . attempting to evade arrest by flight."[49] Mr. Olson clearly posed no risk of flight while handcuffed and lying down on the floor and posed reduced risk to the officers' safety in that posture. A reasonable officer would thus have significantly limited the use of force in that circumstance.

c. Even Assuming that Mr. Olson's Resistance Continued Until the Final Tasing, Hooper Bay's Policy Gave Notice That Tasing Mr. Olson 16 to 18 Times Violated the Law

The City of Hooper Bay has a use of force policy specifically restricting the use of the taser on individuals who are "restrained or controlled." [Exc. 122]. The policy was produced and introduced as an exhibit at trial. [Tr. 927-28]. The policy specifically states that the taser "shall not be used on a restrained or controlled subject unless the actions of the subject present an immediate risk of death or great bodily harm or substantial physical struggle that could result in injury to themselves or any other person including the deploying officer." [Exc. 122].

Green, 246 F. App'x at 163 (holding a reasonable officer would know not to "kick [a subject] when he is already restrained and on the ground"); *Diaz v. City of Brownfield*, 3 F.3d 440 (5th Cir. 1993) (allegation officers beat a plaintiff who "was lying on the ground in handcuffs" survived motion to dismiss); *Tafler v. Dist. of Columbia*, 539 F. Supp. 2d 385, 391 (D.D.C. 2008) (rejecting claims of qualified immunity in excessive force case because defendants failed to "adequately address why it was that the level of force employed was needed *after* Tafler was handcuffed and lying on the ground") (emphasis in the original).

[49] *Graham*, 490 U.S. at 396.

No party claims that Mr. Olson was not restrained at the time of the tasing. No party claims that an immediate risk of death or great bodily harm was present. Thus, the question before the Court is whether the language about a "substantial physical struggle" helped give the officers notice of when the use of a taser against a handcuffed man was permitted.

The *amicus* would first point the Court to consider another provision in the policy as evidence of what the policy means. The Hooper Bay use of force policy similarly prohibits, using virtually verbatim language, the use of the taser against "minors or the elderly" except where the risk of death, serious bodily injury, or "substantial physical struggle" would ensue. [Exc. 122]. The ordinary officer would thus learn from the policy that force was permitted against handcuffed or otherwise restrained adults to the same extent that such force was permitted against the elderly or a minor child; the same kind of "substantial physical struggle" that would allow the use of a taser against a child would allow the use of a taser against a restrained adult, like Mr. Olson. Any officer reading the use of force policy would thus think that a "substantial physical struggle" would mean something reasonably extraordinary, as one might reasonably assume that the use of the taser against the elderly or children would require something more than ordinary kicking or resistance.

Whatever the policy means, it surely should not be read to mean what the defendants' expert proposed: namely, that all struggles are substantial ones. [Tr. 932]. If the City of Hooper Bay meant in their use of force policy that all struggles are "substantial," they simply would have written "any struggle" and omitted the word

"substantial." Generally, courts should construe statutes and contracts in a manner which avoids treating words as extraneous or surplusage.[50] A court should interpret a municipal use of force policy similarly, without assuming that the drafters intended some words to be meaningless. If given Hooper Bay's expert's construction, the policy would not really articulate a different standard than that for the use of tasers against *unrestrained* people, since the use of force generally must be "in direct relationship to the amount of resistance employed by the person." [R. 114]. An unrestrained arrestee who actively resists arrest poses real risk of some kind of struggle; by singling out restrained individuals, the city clearly meant to create a heightened standard for use of force against people already in handcuffs.

In any event, Hooper Bay's policy specifically articulated a unique and higher standard regarding the appropriate use of tasers on restrained people, virtually identical in its terms to those suitable for use of tasers on the elderly and on minors. This policy provided clear notice to the officers that special, heightened concern should be shown before tasing restrained individuals. In the case of Mr. Olson, that heightened standard should have provided further notice of the unconstitutionality of the use of force, along with the notice inherent in the act of repeatedly tasing a handcuffed man lying on the ground without giving him adequate time to recover and comply with orders.

V. Conclusion

Mr. Olson has the undisputed right against the application of unreasonable

[50] *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999); *Jameson v. Mut. Life Ins. Co. of New York*, 415 F.2d 1017, 1020 (5th Cir. 1969).

force against his person, a right violated when officers from Hooper Bay shocked him 16 to 18 times in the space of less than two minutes. He also has the undisputed right to have his claims heard by a jury of his peers, a right violated when a Superior Court judge set aside the jury verdict based on his preference for the officers' testimony.

Construing the evidence in the light most favorable to Mr. Olson, the Superior Court should not have granted judgment notwithstanding the verdict to Hooper Bay. The Superior Court should have relied upon the testimony heard at trial and found that the jury could have found that Mr. Olson ceased his resistance prior to the final tasing.

Moreover, regardless of whether the jury harbored concerns about whether Mr. Olson continued to resist until the final tasing, the evidence, taken in the light most favorable to Mr. Olson, establishes that Mr. Olson was handcuffed throughout the tasing; that he was lying down for the bulk of the tasing; that Mr. Olson was surrounded by three officers; and that the officers afforded him roughly two seconds between each tasing to for him to comply. The Court can also note existing Hooper Bay policy that strictly limits the use of tasers against restrained people and provides a standard comparable to that for the elderly and minors. The Court need not find a particular case on tasers factually similar to the present case to find that these factors would strongly indicate to a reasonable officer that his conduct violates the law. A reasonable officer needs no case on point to know that such conduct reflects gratuitous and excessive use of force and violates long recognized legal principles on the use of force.

In light of these arguments, the *amicus* urges this court to vacate the judgment notwithstanding the verdict and remand the case to the Superior Court with instructions to reinstate the jury verdict.

DATED this 6th day of March, 2013,

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THOMAS STENSON
AK Bar No. 0808054
ACLU of Alaska Foundation
1057 W Fireweed Lane, Ste. 207
Anchorage, AK 99503
Telephone: (907) 258-0044
Facsimile: (907) 258-0228
tstenson@akclu.org

Attorney for Amicus Curiae ACLU of Alaska Foundation