No. ________

In The
Supreme Court of the United States

OFC. JEFF SHELTON and CITY OF SNOHOMISH,

Petitioners,

v.

DONALD GRAVELET-BLONDIN and
KRISTI GRAVELET-BLONDIN,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While police were wrestling a suicidal man with a reported firearm, Respondent, Donald Gravelet-Blondin interjected himself. After several warnings to get back, Petitioner, Jeff Shelton tased Blondin – a decision that five police officers, from three jurisdictions, found necessary to address a dangerous distraction and ensure a safe outcome for all involved. Yet a divided Ninth Circuit panel concluded that Shelton was *not* entitled to qualified immunity because nontrivial force was applied in the context of purportedly passive resistance. Two questions are presented:

1. Whether it is – or should be – clearly established that police officers *per se* violate the United States Constitution when they use nontrivial force in the context of passive resistance, regardless of the surrounding circumstances.

2. Whether the Ninth Circuit's unique treatment of tasers – "intermediate force as a matter of law," which "must" be justified by the government interest involved – is inconsistent with this Court's holdings in *Graham*, *Saucier*, and *Scott*, or in the best interest of society.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Officer Jeffrey Shelton and the City of Snohomish. They were defendants in the original action and appellees at the Court of Appeals for the Ninth Circuit. Carl Whalen was also a defendant in the original action, but subsequently dismissed by stipulation of the parties.

Respondents are Donald and Kristi Gravelet-Blondin. They were plaintiffs in the original action and appellants at the Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 728 F.3d 1086 (9th Cir. 2013), and is reprinted in Petitioners' Appendix ("App.") at 1. The district court's order on the parties' cross-motions for summary judgment is unreported (2012 WL 395428) and reprinted at App. 47.

JURISDICTION

The Ninth Circuit entered its decision on September 6, 2013. App. 1. Petitioners filed this petition for certiorari on December 5, 2013, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."

42 U.S.C. § 1983, provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof

to the deprivations of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

A. Multiple Departments Respond To An Unpredictable "Suicide-in-Progress"

> *. . . suicide can turn to homicide in the blink of an eye because when people don't care whether or not they live or die, they may take it out on other people as well. That's just a fact.*

App. 85 (Ofc. Wellington Dep. Tr.).

On the evening of May 4, 2008, Shelton and four other police officers responded to a 911 call reporting a suicide-in-progress. Among other things, the officers were advised by the caller that the suicidal man, Jack Hawes, had a firearm that he kept with him "at all times." App. 116.

When the officers arrived, they observed Mr. Hawes in his vehicle, in the side yard of his property, with a blue hose running from the exhaust pipe into one of the windows. App. 116-17. His firearm was not visible. App. 117-18.

Police officers know, based upon their training, that an individual taking concrete steps to kill himself presents a markedly more imminent threat. App.

117; App. 85. They also recognize that suicidal suspects can, and many times do, become "homicidal." *Id.* ("when people don't care whether they live or die, they may take it out on other people as well"); App. 117 (noting danger of "suicide-by-cop" or "going out in a blaze of glory").

The officers ordered Hawes out of his vehicle, and he complied. App. 118. But when ordered to show his hands, Hawes refused and suddenly attempted to get back into his vehicle. *Id.* Recognizing the danger of him barricading himself or getting to his firearm, one of the officers deployed his taser from a distance away. *Id.* But by the time they reached him, Hawes had recovered and began putting up a fight. *Id.*; App. 97-98. When the officers brought him the ground, Hawes forced his hands underneath his body – as if trying to access his belt line. App. 118.

B. After Interposing Himself Into A Dangerous Situation, And Ignoring Multiple Commands To "Get Back," Blondin Is Tased

Enter Blondin. Leaving his house and quickly crossing the yard, he approached the scuffle and demanded to know, "What are you doing to Jack?" App. 107-08. Though Blondin estimated himself to be 37 feet away, none of the officers had a remotely similar perception. Indeed, they vividly testified that Blondin's rush to the scene and presence created a dangerous distraction while they wrestled with Hawes:

- "I didn't know what his motives were or why he was there or why he wasn't leaving." App. 106.
- "I have no idea who Mr. Blondin is, no idea what his training is, no idea if he has a weapon or a firearm." App. 80.
- "He's near us. We have a weapon. I have no idea what his intentions were." App. 93.
- " . . . I turned to see what [Officer Whalen] was yelling at, and there was plaintiff standing right over us." App. 86.
- " . . . the yelling behind me was a concern to me. And the reason was, I had my hands full. We were dealing with a very dangerous, fluid situation, suicidal subject with a gun. I had a gun that I barely had control of. I was in no position to defend myself; [Shelton] was extremely concerned." App. 97.

At the time, Blondin's motives were at best unknown – and at worst, adverse. The officers certainly did not know why he was involving himself. They only knew the following: (1) Blondin had precipitously left his home to involve himself; (2) Blondin's beltline was not visible; (3) Blondin took issue with what the officers were doing; (4) Blondin was noncompliant; and (5) when forcefully told to "get back," repeatedly, Blondin gave the officers a "blank stare." There was, in turn, nothing suggesting that Blondin had benevolent, or even benign, motivations.

Context is critical. Everybody agrees that, as a general matter, suicide calls are exceptionally dangerous. And particularly here, where the officers were wrestling with a combative, potentially armed suspect, it was quite literally life-and-death. Had Blondin been hostile, he could have been on them before they could react. And even ignoring motives, the officers were now required – because of Blondin – to dangerously split their attention between a combative man and an unknown, noncompliant man. The only police practices expert to offer an opinion found Blondin to be obstructing. App. 99-103.

Virtually all of the officers yelled at Blondin to "get back." App. 88 (yelled "get back" at Blondin "at the top of my lungs"); App. 108; 111 (admitting that Shelton shouted "Get back or I'll tase you" loudly and rapidly). Blondin did not, continuing to stare at the officers for upwards of 15 seconds. App. 113.

The Court of Appeals suggested that Blondin was attempting to comply with a "contradictory" order to "stop." App. 11. This misapprehends the record. According to Blondin, he was told *only* to "get back":

Q. What did you say?

A. I said, "What are you doing to Jack?"

Q. And did you get any response from the police officers?

A. Yes.

Q. What did they say?

A. One of them yelled to ***get back*** . . .

(objections omitted). Even if somebody did actually say "stop," Blondin did not claim to have heard it, reacted to it, or been confused by it. *See generally* App. 108-14.[1]

C. Shelton Deploys His Taser

After numerous warnings and considerable time to "get back," the officers had no other choice but to take action. Though the circumstances would have supported more severe uses of force – such as a baton or OC spray – Shelton chose the taser. App. 78. This was, in his judgment, appropriate because it would "temporarily incapacitate Blondin and allow him to gain custody immediately and alleviate the safety concerns caused by [Blondin's] presence," rather than just hurt him. App. 119-20.

In dart mode, Blondin was tased for approximately 2 seconds of a standard 5-second cycle. *Id.* That is, Shelton purposely cut the charge short to *avoid* inflicting unnecessary pain. The officers immediately called for medical care, which Blondin declined at the scene. App. 114-15. Blondin was later arrested for obstruction. App. 120.

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[1] Indeed, we know from this testimony that Blondin was *not* confused. As he explained, he *knew* he should retreat and *wanted* to do so, but was frozen with fear.

Upon investigation, the officers found Hawes's Glock handgun under the passenger side seat of his vehicle. *Id.*; App. 95-96.

D. Proceedings Below

Following extensive discovery and motions practice, both parties moved for summary judgment. The Honorable Robert Lasnik issued a memorandum opinion dismissing Blondin's claims. App. 47-71. Blondin appealed, and following argument, a divided Ninth Circuit panel reversed on all counts. Judge Nguyen issued a lengthy dissent, pointing out – among other things – that the majority's decision contravened this Court's instruction and precedent. App. 38.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Has Read All Flexibility Out Of *Graham* In The Context Of "Passive Resistance," Leaving Police Officers With A Dangerous, Judge-Made Rule

The Ninth Circuit erred in both substance and outcome. In finding a categorical "right to be free from the application of non-trivial force for engaging in mere passive resistance," regardless of the circumstance, App. 13-14; 16, the Court of Appeals defined qualified immunity at an exceedingly general level – contrary to precedent specifically admonishing this circuit for this analysis. But more importantly, dangerous law has been generated. In divorcing the

inquiry from surrounding context, the panel majority put both officers and the public in harm's way. Certiorari should be granted.

A. By Design, Excessive Force Allegations Are Subject To A Flexible, Fact-Sensitive Inquiry

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . its proper application requires careful attention to the facts and circumstances of each particular case . . .

Graham v. Connor, 490 U.S. 386, 396 (1989) (internal citations omitted). Easy-to-follow tests and per se rules are attractive, to be sure. But they are not appropriate here. The Fourth Amendment requires the district court to "slosh [its] way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007). The Ninth Circuit acknowledged as much, *see Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) ("the [Supreme] Court has emphasized that there are no *per se* rules in the Fourth Amendment excessive force context"), but failed to apply the principle to this case. The panel majority found, in no uncertain terms, a *per se* "right to be free from application of non-trivial force for engaging in mere passive resistance," App. 13-14, with no apparent regard for "the facts and circumstances of each particular case." *See Graham*, *supra*.

The holding subverts the very test it purports to apply. The *Graham* inquiry turns on the perspective of the police officer, in the context of "circumstances that are tense, uncertain, and rapidly evolving." *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (citing *Graham v. Connor,* 490 U.S. 386, 396-97 (1989)). This of course requires a view of the moment's entirety; not pieces of it, dissected in the abstract. *Graham*, 490 U.S. at 397.

Only last year, this Court reaffirmed the principle in *Ryburn v. Huff*, 132 S. Ct. 987, 988 (2012). There, police officers arrived at the home of a boy who was rumored to have written a threatening letter. They spoke to the mother, who refused to let the officers in. *Id.* When they asked about guns, she attempted to retreat into the house. The officer quickly followed her in, without a warrant. *Id.* at 989. After the threat turned out to be unfounded, the family brought suit. The district court granted summary judgment. But the Ninth Circuit reversed, parsing out the conduct of the mother from its broader context, i.e., "[the plaintiff] merely asserted her right to end her conversation with the officers and returned to her home." *Id.* at 989-90. In a per curiam holding, this Court vacated the Court of Appeals decision, flatly rejecting its "dissection" of the situation. *Id.* at 991. The Court of Appeals' analysis erred by "look[ing] at each separate event in isolation and conclud[ing] that each, in itself, did not give cause for concern," *id.*, notwithstanding their lawfulness or

innocuousness. *Id.* Expressed more succinctly, circumstances matter.

Here, the surrounding circumstances were all but ignored. The Ninth Circuit found a constitutional violation because: (1) *Blondin* did not commit a "severe" crime, (2) *Blondin* did not personally pose a threat, and (3) *Blondin* did not resist arrest in a "particularly bellicose" way. App. 9-11. The undisputed testimony of the five police officers – explaining the exigency and rationale – was dismissed in one short sentence: "it strains logic to attribute any of the dangers involved in responding to suicide calls to [Blondin]," because he was a "bystander." App. 11-12.[2] In short, Blondin's supposed passivity rendered everything else immaterial.

But more problematically, the panel majority codified this untenable analysis with an untenable rule. It held, unequivocally, that nontrivial force can *never* be appropriate in response to "mere passive resistance." App. 13-14; 16. Under this novel rule, the "unique facts of each particular case" and "tense, uncertain, and rapidly evolving circumstances," *Graham*, 490 U.S. at 396; *Ryburn*, 132 S. Ct. at 992, are made irrelevant by purported "passive resistance."

[2] Subsequently, in a short footnote, the panel majority repeated, "[w]e fail to grasp the attribution of any part of th[e] threat to Blondin." App. 12.

This newly-minted rule has several consequences, but perhaps the most apparent is the violation of recent precedent. In *Scott v. Harris*, 550 U.S. 372 (2007), this Court examined an excessive force claim arising out of the police ramming a suspect's car to end a chase. The suspect argued that, because this was "deadly force," there were additional preconditions beyond "objective reasonableness" that were not met (e.g., a warning requirement). *Id*. at 381-82. This Court squarely rejected such an interpretation of *Graham*, explaining that deadly force "did not establish a magical on/off switch that triggers rigid preconditions." *Id.* at 381. And though an easy-to-apply test is perhaps tempting, the Fourth Amendment ultimately requires a consideration of *all* of the circumstances bearing on reasonableness, because "all that matters is whether Scott's actions were reasonable." *Id.* at 381-82.

The *Scott* court was right. The inquiry *should* be flexible, because a rigid test cannot possibly account for the endless diversity of scenarios a police officer may be confronted with. And in practice, bright lines lead to contrived results – as they would have in *Scott* if the *Garner* test[3] were mechanically applied to its unique facts. *See id.* at 381-82.

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[3] In *Tennessee v. Garner*, 471 U.S. 1, 9-12 (1985), the court cited crimes involving the infliction of serious harm, necessity of preventing escape, and a warning if feasible, as considerations informing the use of deadly force.

The Ninth Circuit, however, went much further than the Eleventh Circuit *ever* did in *Scott*. In *Scott*, the "deadly force preconditions" still permitted a modicum of flexibility and discretion to find reasonableness if supported by the circumstances. Warnings, for example, were not mandatory when "not feasible." *Id.* In contrast, under the Ninth Circuit's new rule, nontrivial force can *never* be constitutional in the context of passive resistance – irrespective of the circumstances. This is a "rigid precondition" of the first order, as it divests both police officers and district courts of *all* discretion to evaluate unique scenarios.

The consequences flowing from this rule are more fully examined in the following section. But suffice it to say, as a legal matter, it is impossible to square the panel majority's holding with *Graham* or *Scott*. This, standing by itself, supports certiorari.

B. No Circuit Has Ever Articulated A Categorical Prohibition On Nontrivial Force In The Context Of Passive Resistance – And Several Have Rejected Such A Prohibition – For Good Reason

The unstated but faulty premise of the Ninth Circuit's holding is that nontrivial force can *never* be reasonable in the context of passive resistance. This is simply not true. There are any number of scenarios that fully support deployment of nontrivial force against a passively resisting suspect – and would probably save lives. For example:

- The police arrive at a residence on a report of violent child abuse. A large male – who may or may not be the perpetrator – answers the door, but refuses to move out of the doorway. He is standing perfectly still, but ignoring commands to move. The police cannot get in to determine whether anybody is injured or dead, nor whether there is a present threat of harm.

- The police stop an erratically-driving vehicle on the side of a busy freeway. The officer sees empty beer cans rolling around on the passenger seat. The suspect refuses to roll down the window or exit. The driver is ignoring commands, has a vacant stare, and may at any moment take off.

- A police officer catches a group of ten young adults vandalizing a building. They are all ordered to the ground and comply, except for one, who refuses. He stares at the officer and continues to ignore commands to get on the ground. The other men begin to become emboldened, and also start to get up. The officer knows that if the situation escalates, he or she will be overpowered.

- And our case. The police come upon a suicidal man who, according to his son, has a firearm. While trying to apprehend the man, he becomes aggressive and they all go to the ground wrestling. All of the

> officers have firearms and must protect them from grasp. They are in no position to protect themselves when a third party enters the fray. The man ignores repeated warnings to get back. The officers must now dangerously split their attention between the aggressive man and the noncompliant man.[4]

None of these scenarios can be dismissed as implausible, which is why a *per se* rule – lumping together any and all circumstances a law enforcement officer might confront for identical treatment – makes little sense. *See Parker v. City of S. Portland*, CIV 06-129-P-S, 2007 WL 1468658 (D. Me. May 18, 2007), *aff'd*, 2007 WL 2071815 (D. Me. July 18, 2007) (refusing to find policy permitting taser use against passively resisting suspect "unconstitutional on its face" because "the Fourth Amendment is more nuanced than that.") (Cohen, J.).

The Petitioners would readily concede that tasing a suspect who is not resisting or already subdued may often be unreasonable. And several courts have so found. *See Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009) (tasing non-violent passenger during traffic stop for failure to hang up from 911 call

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[4] The Ninth Circuit afforded weight to the distance Blondin claimed to be from the officers, 37 feet. Notably, the panel majority's categorical rule would render this fact irrelevant. There would be a constitutional violation – by virtue of the nontrivial force used – whether Blondin was passively resisting 20, 10, or 3 feet from the officers.

was unreasonable); *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 729 (7th Cir. 2013) (assuming first application of taser on excited suspect was reasonable, but second application – while the suspect was on the ground and helpless – was unreasonable); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1280 (10th Cir. 2007) (tasing non-resistant suspect multiple times, without warning, for minor offense was unreasonable); *Shekleton v. Eichenberger*, 677 F.3d 361, 366 (8th Cir. 2012) (tasing compliant, nonviolent suspect, in the absence of exigent circumstances, was unreasonable).

But, until now, *no circuit* had purported to impose an absolute rule against nontrivial force in the context of passive resistance – and at least two have outright rejected it. *See Austin v. Redford Twp. Police Dep't*, 690 F.3d 490, 498 (6th Cir. 2012) (noting that the use of a taser against a non-resistant person may be justified in circumstances "such as the potential escape of a dangerous criminal or the threat of immediate harm") (quoting *Kijowski v. City of Niles*, 372 Fed. Appx. 595, 600 (6th Cir. 2010)); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) ("we do not rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate").[5] The Ninth

[5] Surprisingly, the panel majority relied upon *Casey* for the opposite proposition: a "clearly established" right to be free of taser use while engaging in passive resistance. *See* App. 19-20.

(Continued on following page)

Circuit *did* impose that rule in our case, when the other circuits would not.

This is where our case departs from abstract legal debate and enters the realm of dangerousness. As illustrated above, passive resistance may very well carry with it danger. And in those circumstances, police officers now face a Hobson's Choice; one which forces them to choose between putting themselves and others in harm's way, or enduring personal liability.

In addition to these substantive problems, the complete unworkability of the Ninth Circuit's new test bears emphasis. Its first adjective – "nontrivial" force – has little meaning in the context of the circuit's own precedent. In our case, the court deemed a 2-second taser charge to be "nontrivial," despite medical care being declined and no long-term injury. But this same circuit *upheld* the use of nonchakus against antiabortion protesters, which caused pinched nerves and broken wrists. *See Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994). It is unclear what the Ninth Circuit's measure of "trivial" is; it certainly is not a question of the injury itself.

The second part in the new *Blondin* test – "passive resistance" – is equally opaque. Indeed, the

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The Tenth Circuit not only never declared that right; it unambiguously rejected it.

Ninth Circuit acknowledged as much only three years ago in *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), where it emphasized:

> Resistance . . . should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer. We must eschew ultimately unhelpful blanket labels and evaluate the nature of any resistance in light of the actual facts of the case.

Id. The panel majority in our case not only disregarded the admonition, it created a binary rule *entirely* turning on "passivity."

And this has already necessitated a revisionist view of circuit precedent. In *Brooks v. City of Seattle*, a pregnant woman refused to exit her vehicle. The officers eventually opened her door and twisted her arm behind her, causing the woman to reflexively stiffen her body and clutch the steering wheel. *Mattos v. Agarano*, 661 F.3d 433, 437 (9th Cir. 2011) (consolidated case). The *en banc* majority characterized the pregnant woman's conduct as "active resistance," justifying the taser. In *Mattos v. Agarano*, a domestic violence victim inadvertently found herself between the suspect and the officer. *Id.* at 439. When the officer moved in to arrest the suspect, he pushed up against the wife's chest and she "extended [her] arm to stop [her] breasts from being smashed against [the

officer's] body." The officer tased her. *Id.* The *Mattos* court plainly stated, "we cannot say that [the wife] was culpable in this situation." *Id.* at 451. Yet her conduct was re-characterized by the *Blondin* panel majority as taking "an affirmative step to contravene officer orders." App. 16-17. And finally, in *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010), the suspect was stopped for a seatbelt violation. He exited the car shouting gibberish and pounding his thigh. *Id.* at 816-17. After commanding him to get back into his car, the officer tased him. *Id.* The court held that the suspect's "conduct [did] not constitute resistance at all." *Id.* at 830. The *Blondin* panel majority re-characterized this as "behavior that posed some threat to officer safety." App. 15-16.

The issue, ultimately, is not Ninth Circuit precedent (confusing as it may now be). The issue is the propriety of a bright line in the first place. A good test gets the right result all of the time; if it does not – and facts need to be finessed – there is a problem with the test. Experience has shown, in the context of the Fourth Amendment, that *per se* rules and bright line tests do not work. *Graham* is, by design, flexible. *See Graham*, 490 U.S. at 396 ("the question is whether *the totality of the circumstances* justifies a particular sort of . . . seizure.") (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (emphasis added).

The Ninth Circuit has lost sight of this, to the detriment of its law enforcement officers and those they protect. Certiorari should be granted to reaffirm these otherwise-settled principles.

II. Shelton Was Not "Plainly Incompetent" For Failing To Interpret Contradictory Extra-Circuit Authority And Unpublished District Court Opinions When Making A Split-Second Decision In Exigent Circumstances

Qualified immunity shields federal and state officials from money damages unless a plaintiff establishes (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Liability only inures for violating "clearly established law," such that "every reasonable official" would perceive the constitutional violation. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). While a case directly on point is not always required, existing precedent must place the question "beyond debate." *Id.* at 2083. Properly applied, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 2085.

Central to this principle is need for specificity. Something can only be *clearly established* for purposes of qualified immunity if the principle is resolved "in the particularized sense." *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam). So, while it is true that unreasonable seizures violate the constitution, this generalized statement provides no guidance; by its logic, every error implicates a "clearly established" right. To ensure then that the doctrine retains meaning, this Court has repeatedly reminded

the lower courts – and the Ninth Circuit in particular – "not to define clearly established law at a high level of generality." *al-Kidd*, 131 S. Ct. at 2084.

The Ninth Circuit misapplied qualified immunity in two ways. ***First***, as discussed above, it defined "clearly established" at an exceedingly high level of generality. As the dissent rightly pointed out, "the qualified immunity inquiry be undertaken in light of the specific context of the case, not as a broad general proposition." App. 38 (Nguyen, J., dissenting) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). This rule is evident in the case law, which uniformly grounds the "right" in the specific facts of the case. *See al-Kidd*, 131 S. Ct. at 2084 (knowledge that "pretextual use of the material-witness statute rendered the arrest unconstitutional"); *Brosseau*, 543 U.S. at 200 ("whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."); *Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) (" . . . clearly established that a reasonable officer would have been on notice that the use of pepperball projectiles directed towards [the plaintiff] and his friends was unreasonable under the circumstances."); *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) ("it would be clear to a reasonable officer that using pepper spray against the protestors was excessive under the circumstances"). In our case, by contrast, the "clearly established" right articulated by the divided panel was entirely divorced from any specific fact: "the right to be free

from the application of [all] non-trivial force for engaging in [any kind of] passive resistance." App. 13-14; 16. This is a full-scale departure from *Saucier*.

And ***second***, the cases cited by the majority panel hardly placed the wrongfulness of Shelton's decision to tase "beyond debate." The first case cited, *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), was actually decided four years *after* our incident. It involved an officer who shot a college student in the eye with a pepperball projectile, without warning, causing him permanent eye injuries. The student did not even disobey an order, but rather, was part of a large party the police were trying to break up. *Id*. at 873-74, 881. *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), involved an officer who – again, without warning – fired a lead-filled beanbag round into the face of an unarmed man while he was complying with orders. The man lost his left eye. *Id.* at 1285-86. In *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), officers sprayed peaceful protestors in the face with pepper spray from a few feet away before forcibly prying their eyes open and sticking in pepper spray-covered Q-tips. There were no exigent circumstances to speak of. *Id*. at 1128-29. And lastly, in *Casey v. City of Fed. Heights*, 509 F.3d 1278 (10th Cir. 2007), an extra-circuit case cited by the panel majority, the court (unremarkably) found a constitutional violation when a man who was returning to the courthouse with a file he should not have removed "had his shirt torn, and then [was] tackled, tasered, knocked to the ground by a bevy of

police officers, beaten, and tasered again," all without warning. Ultimately, it is difficult to know how these somewhat obvious cases would put "every reasonable police officer" on notice that a 2-second tasing of a non-compliant individual interjecting himself into an armed struggle with a suicidal suspect was a clearly established constitutional violation.[6]

The debate within the circuit drives this point home. Starting approximately two years *after* Shelton deployed his taser, learned appellate judges would spend years debating and "settling" taser law – in far closer calls than this one. In *Bryan v. MacPherson*, 590 F.3d 767 (9th Cir. 2009), a "noticeably unarmed" man who was engaging in "no resistance" 20-25 feet away was tased. *Id.* at 618. The Ninth Circuit found a violation, but the opinion was superseded *sub nom.*, 608 F.3d 614 (9th Cir. 2010), and replaced by a new holding in the course of denying *en banc* review, 630 F.3d 805 (9th Cir. 2010). The ultimate conclusion was that tasers constitute a new, "intermediate" level of force, but the law was not "clearly established" at the time of the incident. Qualified immunity was upheld. Judges Tallman, Callahan, and Smith dissented –

[6] Judge Nguyen rightly drew a distinction between "tasing someone for two seconds in dart mode" and "firing a lead-filled beanbag round into someone's face with enough force to gouge out their eye, fracture their cranium, and leave a lead shot embedded in their skull." App. 40 (citing *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001)). It is anything but clear that all reasonable officers would find a prohibition on the former to establish a prohibition on the latter "beyond debate."

arguing that use of the taser was objectively reasonable. The following year, in *Mattos v. Agarano*, a domestic violence victim was in the way, and tased without warning. 661 F.3d 433, 439 (9th Cir. 2011). Chief Judge Kozinski found no constitutional violation. But the Court of Appeals accepted *en banc* review, 625 F.3d 1132 (9th Cir. 2010), and reversed. The panel found a violation but upheld qualified immunity because the law was not "clearly established." 661 F.3d 433 (9th Cir. 2011). The new decision drew a concurrence and two dissents. *Id.* And, in *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010), a pregnant woman was stopped for speeding and tased three times when she refused to sign the citation and exit the car. *Mattos v. Agarano*, 661 F.3d 433, 436-37 (9th Cir. 2011). The Court of Appeals originally found no constitutional violation, with Judge Berzon dissenting. An *en banc* panel vacated the decision and found a violation – but, again, upheld qualified immunity because the law surrounding taser use was so unsettled.

It strains credulity that taser use could be so hotly debated amongst some of the country's brightest legal minds – in the peacefulness of chambers – while at the same time we expect those same questions to be "clearly established" to a line-level police officer in one exigent moment. If the law was not clearly established with respect to (a) repeatedly tasing a pregnant woman in a traffic stop; (b) tasing a domestic violence victim who inadvertently ended up between an officer and a suspect; and (c) tasing a man who was "obviously and noticeably unarmed, made no

threatening statements or gestures, [and was] standing inert," it is difficult to know why it would be *settled* in a far more dangerous circumstance.

The panel majority bolstered its holding with two district court holdings as well, citing *Sorrels v. McKee*, 290 F.3d 965 (9th Cir. 2002), for the proposition that the "unpublished decisions of district courts may inform our qualified immunity analysis." Op. at 17. But it omitted the next part of the opinion:

> [I]t will be a rare instance in which, absent any published opinions on point or overwhelming obviousness of illegality, we can conclude that the law was clearly established on the basis of unpublished decisions only. Indeed, common to cases in which qualified immunity is unavailable is that the issue has been litigated extensively and courts have consistently recognized the right at issue.

Id. at 971.[7] In *Sorrels* itself, qualified immunity was upheld because the district court holdings did not render the law "clearly established."

But perhaps more importantly, the two cases cited by the majority panel – *Beaver v. City of Fed. Way*, 507 F. Supp. 2d 1137, 1144 (W.D. Wash. 2007), and *Harris v. Cnty. of King*, 2006 WL 2711769, at *3

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[7] In *Sorrels*, the court want on to explain that unpublished district court holdings may be germane when a party repeatedly litigates the same issue, and repeatedly loses, but does not appeal in hopes of avoiding adverse appellate law. *Id.* at 971. That is not our case.

(W.D. Wash. Sept. 21, 2006) – actually support Shelton. In *Beaver*, the district court found *three* shocks from a taser in dart mode to be objectively reasonable. It was the fourth and fifth, applied while the suspect was on the ground in the prone position, that were problematic. Similarly, in *Harris*, the suspect was tased once, and then put his hands up. There were no exigent circumstances, no threats, and the suspect was complying with orders. He was nonetheless tased again, in the back. Qualified immunity was denied based upon the "intuitively gratuitous nature" of the officer's conduct.[8] If Shelton were to rely on *Beaver*, he could have reasonably believed that his 2-second deployment of the taser (and doing so twice more) would be appropriate. And if he were to rely on *Harris*, a taser might be questionable if Blondin was complying with orders (which he was not). Neither case prohibited what Shelton did; and certainly not in any "particularized" way. *See Brosseau*, 543 U.S. at 198-99 (2004).

Nor did the extra-circuit authority relied upon by the majority speak to Shelton's conduct. As a general rule, proving a clearly established right requires "cases of controlling authority" or a "consensus," *Wilson v. Layne*, 526 U.S. 603, 617 (1999), and here, there was neither. The Court of Appeals only identified *Casey v. City of Fed. Heights*, 509 F.3d 1278 (10th Cir. 2007), which certainly prohibits police officers

[8] The district court's analysis of whether the right at issue was "clearly established" was approximately two paragraphs, and prior to this case, never cited in the circuit.

from dog-piling and repeatedly tasing individuals who accidently walk away with court files, *id.* at 1285, but *Casey* cannot bear the broad reading the panel majority gave it. In fact, the *Casey* court expressly rejected such a categorical rule, emphasizing that "we do not rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate." *Id.* at 1285.

What's more, extra-circuit authority is a two-way street. Even assuming that *Casey* said what the panel majority thought it did – though, it does not – the underlying premise would require Shelton to consider other circuits as well. If he had looked to the Eighth Circuit or Eleventh Circuit, he would have concluded that taser use was appropriate because it caused no permanent injury. *See Cook v. City of Bella Villa*, 582 F.3d 840, 851 (8th Cir. 2009) (use of a taser reasonable where the plaintiff did not allege injuries beyond shock, scrapes, and puncture marks) (citing *Draper v. Reynolds*, 369 F.3d 1270, 1278 (11th Cir. 2004) ("being struck by a taser gun is an unpleasant experience . . . [but] a single use of the taser gun causing a one-time shocking . . . did not inflict any serious injury.")). Or, looking to the Sixth Circuit, Shelton would have seen *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992), which involved a psychiatric patient who was tased "repeatedly," including once as he lay at the bottom of the stairs while "pos[ing] no immediate threat to the officers." *Id*. at 1045. And if Shelton had considered *Hinton v. City of Elwood*, 997 F.2d 774,

777-82 (10th Cir. 1993), he could have justified his conduct by comparison to the three-fold tasing of a man who "lightly shoved" an officer in the course of attempting to get his five children out of the vicinity. *See also Schumacher v. Halverson*, 467 F. Supp. 2d 939, 951 (D. Minn. 2006) ("Where a suspect repeatedly refuses to comply with an officer's lawful command, use of a taser has been found reasonable.") (citing *Draper* and *Russo*); *cf. Chambers v. Pennycook*, 641 F.3d 898, 908 (8th Cir. 2011) ("a reasonable officer could have believed that as long as he did not cause more than *de minimus* injury to an arrestee, his actions would not run afoul of the Fourth Amendment."). Extra-circuit authority is relevant, or it is not. But it cannot be cherry-picked. *Cf. al-Kidd*, 131 S. Ct. at 2085 (disallowing Court of Appeals' effort "to have cherry-picked the aspects of our opinions that gave colorable support" to question of "clearly established"). "If judges disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618. A fair reading of the breadth of holdings supports Shelton – or at a minimum, illustrates that the law was unsettled in 2008.

It is, in any event, unfair to expect a level of constitutional understanding and interpretation that many experienced lawyers would lack – especially in the context of an armed struggle. Neither the Ninth Circuit's holdings, nor holdings elsewhere, establish a "particularized right" against use of a taser in a context remotely similar to this case. If qualified

immunity means anything, it means that Shelton should not be subject to liability for conduct in a very gray, undeveloped area.

The very reasons that qualified immunity exists support certiorari. This doctrine is more about the public than any one person. *Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (" . . . avoiding unwarranted timidity on the part of those engaged in the public's business . . . [e]nsuring that those who serve the government do so with the decisiveness and the judgment required by the public good"); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (to avoid "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."); *Butz v. Economou,* 438 U.S. 478, 506 (1978) ("to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority"). Police officers need room to make difficult decisions, under difficult circumstances, and when necessary, not err on the side of caution. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). And if qualified immunity cannot be relied upon when it is needed most, good people will be deterred from public service, leaving communities with only the "most resolute or the most irresponsible." *Crawford-El v. Britton*, 523 U.S. 574, 590 n. 12 (1998).

III. The Ninth Circuit's Declaration That "Tasers Constitute Intermediate Force" – Subject To Their Own Analysis – Contravenes *Scott v. Harris* And Will Lead To Increased Officer-Related Injuries

In 2010, in dicta,[9] the Ninth Circuit held that tasers – as a matter of law – constitute an "intermediate, significant level of force," that "must" be justified by the government interest involved. *Bryan v. MacPherson*, 630 F.3d 805, 809 (9th Cir. 2010). Citing *Bryan*, the majority panel in this case concluded that the *Graham* factors "revealed the unreasonableness of the use of intermediate force against Blondin." Op. at 8. This was a bad premise for two principal reasons. One, it fundamentally contravenes this Court's holding in *Scott*, where "magical on/off switches" – dependent on the nature of the force – were rejected. And two, "intermediate force" is predicated upon appellate court fact finding, performed in the context of resolving summary judgment appeals. Not only has this led to conflicted law, but dangerous law as well – which overlooks the virtually indisputable fact that tasers reduce injuries.

Not only is the law among the circuits unsettled, but in the Ninth Circuit it is developing in the wrong direction. Certiorari should be granted.

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[9] As noted above, the officer in *Bryan* was afforded qualified immunity. But rather than concluding its work, the panel went on to make sweeping findings that effectively re-wrote police use-of-force policies across the circuit.

A. This Court Rejected The "Magical On/Off Switch" To Avoid Precisely The Problems Posed By The Ninth Circuit's Holdings

In *Scott v. Harris* – decided approximately three years before *Bryan v. MacPherson* – this Court explicitly rejected the notion that specific types of force can trigger preconditions that supplant, or add to, objective reasonableness. *Scott*, 550 U.S. at 382. The concern, generally speaking, was that additional gloss upon the flexible *Graham* inquiry would unhinge it from the specific facts of a given case. *See id*. (" . . . such 'preconditions' have scant applicability to this case, which has vastly different facts.").

That same concern applies perforce to our case. Based upon the circuit's intermediate force doctrine, the panel majority mechanically required increased justification with respect to each *Graham* factor, for no other reason than the involvement of a taser. *See* Op. at 8. But more problematically, assuming it ruled consistent with its precedent, the taser "must" have been necessary – otherwise, it was unreasonable. *Bryan*, 630 F.3d at 805.[10] This does far more violence

[10] The panel majority repeatedly cited and relied upon *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001), a case which stated the following: "To put it in terms of the test we apply: the degree of force used by Rutherford is permissible only when a strong governmental interest *compels* the employment of such force." (Emphasis added). This is such a plain contravention of *Saucier* and *Graham* that the Ninth Circuit amended *Bryan v. MacPherson* to avoid reliance upon *Deorle* – while, paradoxically,

(Continued on following page)

to *Graham* than the discrete preconditions dealt with in *Scott*. Requiring that the force "must" be justified is a global inversion of the reasonableness standard, which otherwise allows for mistaken but reasonable decisions. *See, e.g., Saucier*, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."); *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (" . . . a creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of police might have been accomplished."). *Bryan* and *Deorle*, however, do not permit that leeway for reasonable mistakes, because they hold that force "must" be justified or "compelled" by the governmental interest.

Nor could the panel majority consider the force itself (i.e., a 2-second charge with no long-term physical damage), because the force was predetermined as a matter of law to be "intermediate." This disregard of the record, in favor of a legal shortcut, is precisely what the *Scott* court foreclosed:

> Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we

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insisting that *Deorle* remains good law. 630 F.3d at 813 ("*Deorle* in fact remains good law. . . . but the amended opinion no longer relies upon the language to which [the dissent] objects.").

> must still slosh our way through the fact-bound morass of "reasonableness." Whether or not [the officer]'s actions constituted application of "deadly force," all that matters is whether [the officer]'s actions were reasonable.

Scott, 550 U.S. at 383. A taser may constitute one type of force in one case, and another in another case. This cannot be ignored in the name of easy labeling.

B. Appellate "Fact Finding," Rendered In The Context Of Unopposed Summary Judgment Records, Is Not The Stuff Of Cogent Legal Principles

More fundamentally problematic than the conflict with precedent is the manner in which the Ninth Circuit got to "intermediate force." It engaged in fact-finding, in the course of reviewing summary judgment records. Accordingly, as a matter of law in this circuit, the legal and factual record marshaled by Officer MacPherson and Mr. Bryan bind future litigants.

Notably, *Bryan* was a case in which the suspect fell face-first on asphalt, shattering four teeth and suffering facial contusions; he also needed emergency surgery to remove the taser barbs with a scalpel. *Bryan v. MacPherson*, 608 F.3d 614, 621, *opinion withdrawn and superseded on denial of reh'g*, 630 F.3d 805 (9th Cir. 2010). Our case, in contrast, involved two seconds of pain, a safe fall onto a grassy

yard, and declination of medical services at the scene. App. App. 114-15. The majority panel did not – and indeed, could not – consider the quantum of force *actually* used, because that question had been answered as a "matter of law" in the circuit. *See* Op. at 8.

The Ninth Circuit also referenced a handful of studies in *Bryan*. They were largely cited for the proposition that tasers do not constitute *de minimus* force. But this is the wrong premise. The better question – and the one more consistent with the Fourth Amendment – is what approach will lead to minimal harm, and minimal intrusion. And on this question, virtually all of the studies are in agreement: tasers almost always result in less injury to both the suspect and officer than other force options, and thus, a marked reduction in the Fourth Amendment invasion. *See, e.g.,* Bozeman, William, et al., *Safety and Injury Profile of Conducted Electrical Weapons Used by Law Enforcement Officers Against Criminal Suspects*, Annals of Emergency Medicine (2009) (36 month study of over 1200 taser uses found "[m]ild or no injuries were observed after [taser] use in 1,198 subjects (99.75%. . . .). Of mild injuries, 83% were superficial puncture wounds from [taser] probes. . . . Two subjects died in police custody; medical examiners did not find [taser] use to be causal or contributory in either case."); MacDonald, John, et al., *The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events*, American Journal of Public Health (2009) ("Using administrative data from 12

local police departments including more than 12,000 use-of-force cases, we found that the use of physical force by police increased the odds of injury to suspects and officers. Conversely, the use of less-lethal weapons (OC spray and [tasers]) decreased the odds of injury to suspects.").

The fact-patterns vividly bear out the findings of the studies. In our case, for example, neither the panel majority, nor Blondin, could cite *any* "low force" alternative to Shelton's actions. Though they repeatedly condemn him for doing the "wrong" thing, no police practices expert or study has been put forward explaining what the "right" thing would have been. The same was true in *Bryan*. There, the panel was unable to articulate any tangible alternatives to the taser – only that "there were clear, reasonable, and less intrusive alternatives" because "Officer MacPherson . . . should have been aware that the arrival of [additional] officers would change the tactical calculus confronting him, likely opening up additional ways to resolve the situation without the need for an intermediate level of force." *Bryan*, 630 F.3d at 831. It is unclear what this means, let alone, what lower level use of force the changed "tactical calculus" would yield. Conversely, the only "low force weapon" *endorsed* by the Ninth Circuit – nonchakus – breaks bones and pinches nerves. *See Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994). These anecdotal examples support the studies. Simply put, restricting tasers increases – not decreases – Fourth Amendment intrusions.

Thus far, only the Seventh Circuit has adopted "intermediate force," in a case involving a woman who was tased repeatedly while on the ground and subdued. *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 726 (7th Cir. 2013). The Eighth Circuit declined it, despite one concurring judge's invitation. *McKenney v. Harrison*, 635 F.3d 354, 364 (8th Cir. 2011) (Murphy, J., concurring). And the Tenth Circuit, while citing *Bryan*, declined to make any determinations about the quantum of force used – other than to reject the distinction between passive and active resistance. *See Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1252 (10th Cir. 2013). The circuits need guidance, particularly, as taser use increases across the country.

Shelton appreciates the responsibility of the judiciary to enforce the Fourth Amendment. But, as this Court has emphasized, this must take into account the professional judgment of the police. *See Ryburn v. Huff*, 132 S. Ct. 987, 991 (2012) ("judges should be cautious about second-guessing a police officer's assessment") (citing *Graham*); *Bryan v. MacPherson*, 630 F.3d 805, 821 (9th Cir. 2010) (Tallman, J., dissenting) ("Courts are ill-equipped to tell law enforcement officers how they must respond when faced with unpredictable and evolving tactical situations."); *Fisher v. City of San Jose*, 558 F.3d 1069, 1080 (9th Cir. 2009) (*en banc*) (explaining that telling the police confronted with a developing situation involving an armed suspect "what tactics are permissible" is not "a reasonable role for a judicial officer").

The Ninth's Circuit's treatment of tasers makes officers, suspects, and the public as a whole, less safe. It is not advancing the objectives of *Graham*, but hindering them. And it is all but foreclosing consideration of new circumstances and developments. Certiorari should be granted.

IV. The Court Should Consider Consolidating This Case With *Plumhoff v. Rickard*, 12-1117, Where Certiorari Was Recently Accepted On Similar Bases

This Court recently agreed to review a Sixth Circuit decision in which police officers were denied qualified immunity after firing a gun to stop a suspect from fleeing in his vehicle. *Estate of Allen v. City of W. Memphis*, 509 Fed. Appx. 388, 389 (6th Cir. 2012), *cert. granted*, 12-1117, 2013 WL 1091089 (U.S. Nov. 15, 2013). In analyzing the case, the Court of Appeals contrasted the facts with *Scott v. Harris*, concluding that the driver "was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made" and the officers' assertion that they were in personal danger "was not resolved by the video recordings." The officers appealed to this Court, arguing that qualified immunity was misapplied under *Scott* and their significant governmental interest in eliminating the risk to the general public was not considered.

Shelton would submit that the issues are very similar to this case, and, though this case stands on its own merits, the parties may benefit from consolidation.

CONCLUSION

For all of the foregoing reasons, Petitioners Jeff Shelton and the City of Snohomish respectfully request that the Court grant their Petition for Certiorari.

Respectfully submitted,

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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DONALD GRAVELET-BLONDIN; KRISTI GRAVELET-BLONDIN, *Plaintiffs-Appellants*, v. SGT. JEFF SHELTON; CITY OF SNOHOMISH, *Defendants-Appellees*.	No. 12-35121 D.C. No. 2:09-cv-01487-RSL OPINION

Appeal from the United States District Court
for the Western District of Washington,
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
May 10, 2013 – Seattle, Washington

Filed September 6, 2013

Before: Michael Daly Hawkins and
Jacqueline H. Nguyen, Circuit Judges,
and James V. Selna, District Judge.*

Opinion by Judge Hawkins;
Dissent by Judge Nguyen

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* The Honorable James V. Selna, District Judge for the U.S. District Court for the Central District of California, sitting by designation.

SUMMARY**

Civil Rights

The panel reversed the district court's summary judgment and remanded in an action brought pursuant to 42 U.S.C. § 1983 and state law alleging that police officers used excessive force by tasing a passive bystander in dart mode and then arresting him for obstruction of justice.

Plaintiff Donald Gravelet-Blondin was tased and arrested after he allegedly failed to comply immediately with an officer order to move away from the scene where his neighbor was being arrested. The panel first determined that, taking the evidence in the light most favorable to Donald and his co-plaintiff wife, the discharge of a taser in dart mode was unreasonable given that Donald's alleged crime was minor and there was no reason to believe, based on his behavior, demeanor, and distance from the officers, that he posed an immediate threat to anyone's safety. The panel further held that the police officer who tased Donald was not entitled to qualified immunity because it was well known as of 2008 that a taser in dart mode constituted more than trivial force.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel also reversed the district court's summary judgment on plaintiffs' excessive force claim against the City and remanded. The panel further held that a genuine issue of fact remained as to whether there was probable cause to arrest Donald for obstructing a police officer. The panel instructed the district court on remand to consider whether qualified immunity or *Monell* liability applied to the unlawful arrest claim. Finally, the panel reversed the district court's summary judgment on plaintiffs' common law claims for malicious prosecution and outrage.

Dissenting, Judge Nguyen stated that the majority went badly astray because it lost sight of the specific context of this case and employed hindsight rather than viewing the scene through the eyes of a reasonable officer.

COUNSEL

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Richard B. Jolley (argued) and Adam Rosenberg, Keating, Bucklin & McCormack, Inc., Seattle, Washington, for Defendants-Appellees.

OPINION

HAWKINS, Senior Circuit Judge:

We must decide whether it was clearly established as of 2008 that the use of a taser in dart mode against a passive bystander amounts to unconstitutionally excessive force within the meaning of the Fourth Amendment.[1] Because we determine that it was, we reverse the contrary conclusion of the district court and remand.[2]

I. BACKGROUND

In the early evening of May 4, 2008, Sergeant Jeff Shelton and four other officers from the Snohomish, Washington Police Department were dispatched to respond to a 911 call of a suicide in progress made by family members of an elderly suspect, Jack. When the officers arrived at Jack's home he was sitting in his car, which was parked in the side yard of his house, with a hose running from the exhaust pipe into one of the car's windows. The

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[1] We proceed by answering this question in two parts, considering first whether it was clearly established that it is unconstitutionally excessive to use non-trivial force in response to mere passive resistance, and second, whether it was clearly established that a taser in dart mode constitutes non-trivial force. We disagree with the dissent's concern that we are undertaking this constitutional inquiry at too high a level of generality.

[2] We reverse the court's grant of summary judgment on a number of related claims, as well.

officers had been warned that Jack owned a gun and would have it with him. Sgt. Shelton took precautions to ensure officer safety and then asked Jack to get out of the car.

After several requests Jack finally complied, turning his car off and stepping out with his hands at his sides. When Jack refused multiple commands to show his hands, Sgt. Shelton – concerned that Jack might gain access to a gun – instructed another officer to tase Jack in dart mode.[3] Jack fell to the ground and, as officers attempted to restrain and handcuff him, he pulled his arms underneath him. He was then tased a second time.

Donald and Kristi Gravelet-Blondin ("the Blondins"), Jack's neighbors, were watching TV at home when the police arrived at the scene. They heard noise coming from the direction of Jack's house

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[3] In "dart mode," a taser:

> uses compressed nitrogen to propel a pair of "probes" – aluminum darts tipped with stainless steel barbs connected to the [taser] by insulated wires – toward the target at a rate of over 160 feet per second. Upon striking a person, the [taser] delivers a 1200 volt, low ampere electrical charge . . . The electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless.

Mattos v. Agarano, 661 F.3d 433, 443 (9th Cir. 2011) (en banc) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 824 (9th Cir. 2010)) (internal quotation marks omitted), *cert. denied*, 132 S. Ct. 2681 (2012), *and cert. denied*, 132 S. Ct. 2682 (2012), *and cert. denied*, 132 S.Ct. 2684 (2012).

and went outside – Donald Blondin ("Blondin") in shorts, a t-shirt, and slippers – to investigate and make sure their neighbor was all right. When they stepped into the yard between Jack's house and their own, the Blondins heard Jack moaning in pain, and Blondin saw officers holding Jack on the ground.

Blondin called out, "what are you doing to Jack?" He was standing some thirty-seven feet from Jack and the officers at the time, with Jack's car positioned in between.[4] At least two of the officers holding Jack yelled commands at Blondin: one instructed him to "get back," while another told him to "stop." According to a bystander watching the scene unfold, Blondin took one or two steps back and then stopped. Blondin recalls that he simply stopped. Sgt. Shelton then ran towards Blondin, pointing a taser at him and yelling at him to "get back." Blondin froze. The bystander testified that Blondin "appeared frozen with fear," and Defendants have conceded that he made no threatening gestures.

Sgt. Shelton began to warn Blondin that he would be tased if he did not leave, but fired his taser before he had finished giving that warning. Sgt. Shelton tased Blondin in dart mode, knocking him down and causing excruciating pain, paralysis, and

[4] Blondin's calculation is based on measurements he took the day after the incident; officers on the scene took no measurements and have given varying estimates as to how far away Blondin was standing, ranging from ten to twenty-five feet.

loss of muscle control. Blondin, disoriented and weak, began to hyperventilate. Sgt. Shelton asked Blondin if he "want[ed] it again" before turning to Ms. Blondin and warning, "You're next." Sgt. Shelton then ordered another officer to handcuff Blondin. Paramedics called to the scene removed the taser's barbs from Blondin's body and tried to keep him from hyperventilating. Blondin was arrested and charged with obstructing a police officer, a charge that was ultimately dropped.

The Blondins then initiated this action, suing the City of Snohomish ("the City") and Sgt. Shelton for excessive force and unlawful arrest in violation of 42 U.S.C. § 1983, and malicious prosecution in violation of Washington law, for the tasing and arrest of Blondin. Ms. Blondin also sued for outrage under state law for the harm she suffered watching her husband's tasing and being threatened with tasing herself. After considering cross-motions for summary judgment, the district court granted summary judgment to Defendants on all claims.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). In determining whether genuine issues of material fact remain, we are required to view all evidence and draw all inferences "in the light most favorable to the nonmoving party," here, the Blondins. *Id.*

III. DISCUSSION

A. Excessive Force

We begin with the district court's grant of summary judgment to Defendants on the Blondins' excessive force claim. We agree that the Blondins have shown a constitutional violation but disagree that neither Sgt. Shelton nor the City may be held liable for it.

1. Constitutional Violation

The Fourth Amendment, which protects against excessive force in the course of an arrest, requires that we examine the objective reasonableness of a particular use of force to determine whether it was indeed excessive. *Graham v. Connor*, 490 U.S. 386, 394-95, 398 (1989); *see also Maxwell v. Cnty. of San Diego*, 697 F.3d 941, 951 (9th Cir. 2012). To assess objective reasonableness, we weigh "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (citation and internal quotation marks omitted).

Here, the intrusion on Blondin's Fourth Amendment interests – the discharge of a taser in dart mode upon him – involved an intermediate level of force with "physiological effects, [ ] high levels of pain, and foreseeable risk of physical injury." *Bryan*, 630 F.3d at 825.

Graham provides a non-exhaustive list of factors to consider in determining the governmental interests at stake, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Each factor reveals the unreasonableness of the use of intermediate force against Blondin.

First, as we explain below, a fact question remains as to whether there was sufficient probable cause to arrest Blondin for obstruction. Even if he committed a crime, though, that crime – failing to immediately comply with an officer order to get back from the scene of an arrest, when he was already standing thirty-seven feet away – was far from severe. *See Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007) (trespassing and obstructing a police officer were not "serious offenses"); *see also Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc) (domestic violence suspect was not "particularly dangerous," and his offense was not "especially egregious").

Second, there was no reason to believe, based on Blondin's behavior, demeanor, and distance from the officers, that he posed an immediate threat to anyone's safety. In urging that officers reasonably could have thought Blondin posed such a threat, Defendants rely primarily on the officers' perception that Blondin was standing too close to them, between six and twenty feet away, and that he "never manifested

a benign motive." The argument that Blondin was less than twenty-one feet from officers – which Defendants identify as "the threshold for danger" – improperly resolves a fact question in their own favor. Construing the facts in Blondin's favor, as we must, he was standing thirty-seven feet away. Blondin's failure to affirmatively exhibit a "benign motive" is likewise insufficient to demonstrate that he reasonably could have been perceived as posing an immediate threat, especially in light of witness testimony that he was perceptibly frozen with fear.

Defendants also urge us to consider Jack's then-unlocated gun as a basis for the officers' belief that Blondin posed a threat. As the district court observed, the officers' purported fear that Blondin might have a gun was "based on nothing more than the reality that any civilian could be armed, speculation that fails to distinguish [Blondin] from any bystander at a crime scene." *See Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001) ("[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern."), *cert. denied*, 536 U.S. 958 (2002).

Finally, Blondin did not resist arrest or attempt to escape. While "purely passive resistance can support the use of some force, [ ] the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance." *Bryan*, 630 F.3d at 830. In *City of Hemet*, for example, we addressed the nature of resistance exhibited by "an individual who continually ignored

officer commands to remove his hands from his pockets and to not re-enter his home," and who "physically resisted" for a brief time. *Id.* (quoting *City of Hemet*, 394 F.3d at 703) (internal quotation marks omitted). Though the individual "was not perfectly passive," *id.*, we emphasized that his resistance was not "particularly bellicose" and as a result concluded that the third *Graham* factor offered little support for the use of significant force against him. *City of Hemet*, 394 F.3d at 703.

Here, Blondin stood still for approximately fifteen seconds after receiving the first order to "get back," which was given simultaneously with a contradictory order to "stop." Even less time passed, then, between Sgt. Shelton's subsequent, unequivocal "get back" command and the tasing. Though Blondin did not retreat during this brief period, he was perfectly passive, engaged in no resistance, and did nothing that could be deemed "particularly bellicose."

In evaluating objective reasonableness, we often must look beyond *Graham*'s enumerated factors and consider other elements relevant to the totality of the circumstances. *Bryan*, 630 F.3d at 826. As we have noted in the domestic violence context, the "danger that the overall situation pose[s] to the officers' safety and what effect that has on the reasonableness of the officers' actions" may be an appropriate consideration. *Mattos*, 661 F.3d at 450. Here, officers testified that suicide calls present unique risks. Suicidal individuals can quickly turn homicidal and may engage police officers in an effort to commit "suicide by cop." But

unlike in *Mattos*, where the individual who resisted officer orders and was ultimately tased was the suspected victim in the domestic violence call, and therefore integrally involved in the volatile situation to which officers were responding, Blondin was a bystander thirty-seven feet away without any perceptible connection to the underlying crime – Jack's attempted suicide. It strains logic to attribute any of the dangers involved in responding to suicide calls to him.[5]

Finally, as we have recognized before, the absence of a warning of the imminent use of force, when giving such a warning is plausible, weighs in favor of finding a constitutional violation. *See Mattos*, 661 F.3d at 451; *Deorle*, 272 F.3d at 1283-84. Here, though Sgt. Shelton gave such a warning, he did so as he fired his taser, leaving Blondin no time to react and rendering the warning meaningless.

Taking the evidence in the light most favorable to the Blondins, a reasonable factfinder could conclude that Sgt. Shelton's use of force was unreasonable and excessive, in violation of the Fourth Amendment.

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[5] We agree with the dissent that officers responding to suicide calls face a risk that the suspect may attempt to "go out in a blaze of glory," and we accept that Jack potentially posed such a threat. We fail to grasp the attribution of any part of that threat to Blondin.

2. Qualified Immunity

Even so, Sgt. Shelton is entitled to qualified immunity if his conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Having concluded that Sgt. Shelton may indeed have used excessive force in violation of the Fourth Amendment, we now consider whether the right to be free from such force was clearly established at the time of the incident. *See Mattos*, 661 F.3d at 446.

"For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citation and internal quotation marks omitted). We bear in mind, however, that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. We are "particularly mindful of this principle in the context of Fourth Amendment cases, where the constitutional standard – reasonableness – is always a very fact-specific inquiry." *Mattos*, 661 F.3d at 442. But while there need not be a "case directly on point, [ ] existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

The right to be free from the application of non-trivial force for engaging in mere passive resistance

was clearly established prior to 2008. *See Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012) (cases dating back to 2001 have established that "[a] failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force"). In *Deorle*, for example, we held that shooting a beanbag projectile at a suicidal, irrational individual who was walking directly towards an officer was excessive, given that the crime he committed was minor, the danger to the officer and others was minimal, there was no immediate need to subdue him, and he was not given any warning that he would be shot if he continued to approach the officer. 272 F.3d at 1282. We also denied qualified immunity, concluding that every police officer should have known that it was objectively unreasonable to use such force under those circumstances. *Id.* at 1285. In *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), we considered the use of pepper spray to subdue, remove, or arrest nonviolent protesters and held that "[t]he law regarding a police officer's use of force against a passive individual was sufficiently clear" in 1997 to put officers on notice that such force was excessive. *Id.* at 1131.

Though these cases do not concern tasers, they need not. As we explained in *Deorle*, "[i]t does not matter that no case of this court directly addresses the use of [a particular weapon]; we have held that '[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established

every time a novel method is used to inflict injury.' " 272 F.3d at 1286 (quoting *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994)). Indeed, even absent taser-specific case law, three of our sister circuits have held that the law was clearly established, prior to 2008, that the use of a taser can in some instances constitute excessive force.[6]

Still, relying on our grants of qualified immunity in *Bryan* and *Mattos*, Defendants argue that the law was insufficiently clear before 2010 – when we first

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[6] *See Shekleton v. Eichenberger*, 677 F.3d 361, 366-67 (8th Cir. 2012) (clearly established as of 2008 that tasing "an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him" was excessive); *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 667 (10th Cir. 2010) (clearly established as of 2006 that a police officer could not tase "a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning"); *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009) (clearly established as of 2005 that tasing an individual who "posed at most a minimal safety threat . . . and was not actively resisting arrest or attempting to flee" was unconstitutional); *Oliver v. Fiorino*, 586 F.3d 898, 906-08 (11th Cir. 2009) (clearly established as of 2004 that it was excessive to tase multiple times an individual who had engaged in a brief physical struggle with a police officer, because, after the first tasing, the individual was immobilized). These cases are not at odds with our own prior opinions granting qualified immunity because the law regarding tasers was insufficiently clear – namely, *Bryan*, 630 F.3d 805, and *Mattos*, 661 F.3d 433. The extent to which the law is "clearly established" in the Fourth Amendment reasonableness context is fact-specific, and none of these out-of-circuit cases are factually analogous to *Bryan* or *Mattos*.

identified tasers in dart mode as an intermediate level of force, *Bryan*, 630 F.3d at 826 – to put Sgt. Shelton on notice that his use of a taser against Blondin was excessive. But this case is factually distinguishable from *Bryan* and *Mattos* in one critical respect: Blondin engaged in no behavior that could have been perceived by Sgt. Shelton as threatening or resisting. As a result, the use of non-trivial force of any kind was unreasonable.

Though none of the plaintiffs in *Bryan* and *Mattos* engaged in serious resistance, each either took an affirmative step to contravene officer orders or engaged in behavior that posed some threat to officer safety. In *Bryan*, after being pulled over for a seatbelt infraction and ordered to stay in the car, Bryan exited his car, acted belligerent, and ignored repeated orders to get back in the car. 630 F.3d at 822. We interpreted even this behavior as "passive" or "minor" resistance, rather than "truly active resistance." *Id.* at 830.

Like Bryan, Brooks, the first of two plaintiffs addressed in *Mattos*, was pulled over for a traffic violation after which she refused to comply with officer orders. 661 F.3d at 443. Brooks then physically resisted officers' attempts to remove her from the car by keeping her hands on the steering wheel. *Id.* at 443, 445 (noting that "Brooks engaged in some resistance to arrest").

Finally, Mattos, a suspected domestic violence victim, was physically blocking officer access to the suspect, her husband, and put her hands on an officer

when he tried to pass by her to arrest her husband. *Id.* at 439. When the officer asked Mattos if she was "touching an officer," she did not respond, did not move aside, and, ignoring the officer, urged another officer to move the confrontation outside. *Id.*

Here, evaluating the situation from Sgt. Shelton's perspective, Blondin – who, unlike Bryan, Brooks, and Mattos, had no connection to the underlying crime – committed no act of resistance. He took no affirmative step to violate an officer order (Bryan), did not physically resist officers (Brooks), and neither made physical contact with an officer nor tried to interfere with efforts to arrest a suspect (Mattos). His momentary failure to move farther than thirty-seven feet away from officers arresting his neighbor,[7] after merely inquiring into what those officers were doing, can hardly be considered resistance. This is especially so given evidence that Blondin was visibly frozen with fear.

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[7] The dissent takes issue with our characterization of Blondin's failure to respond to the "get back" order as "momentary," urging that Blondin "refus[ed] to comply with officers' orders" for fifteen seconds. As we have explained, though, fifteen seconds passed between the simultaneous conflicting commands to "get back" and to "stop" – orders with which Blondin at least partially complied – and the tasing. After Blondin complied with the initial orders, either by simply stopping or by stepping back and then stopping, Sgt. Shelton ran at him, taser pointed, yelling at him to "get back." It is the time from this *unequivocal* "get back" command to the tasing, less than fifteen seconds, that matters.

Having determined that the right to be free from the application of non-trivial force for engaging in passive resistance was clearly established prior to 2008, we proceed to the second part of our constitutional inquiry,[8] considering a question that was not before us in *Bryan* or *Mattos* : whether it was clear in 2008 that using a taser in dart mode was *non-trivial*.[9]

In 2005 we acknowledged that tasers, like stunbag shotguns, are one of a "variety of non-lethal

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[8] The dissent's concern that we frame our inquiry in terms of "non-trivial force" broadly, treating all "non-trivial force" alike, ignores this taser-specific portion of our constitutional inquiry entirely.

[9] Even had the facts of *Bryan* or *Mattos* called for such an inquiry, the answer in those cases might well have been "no." The dearth of case law regarding this "relatively new implement of force," *Bryan*, 630 F.3d at 833 (citation and internal quotation marks omitted), animated our grants of qualified immunity in those cases. In *Bryan*, for example, we emphasized that as of 2005 "there was no Supreme Court decision or decision of our court addressing" the force involved in using a taser in dart mode. *Id.*

In *Mattos*, reviewing two taser cases involving unrelated incidents in 2004 and 2006, we noted that there were only three circuit court opinions concerning taser use at the time of those incidents – *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992), *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir.1993), and *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004) – and each "reject[ed] claims that the use of a taser constituted excessive force." 661 F.3d at 446-48. Underscoring the absence of a single circuit case finding a Fourth Amendment violation, we could not conclude "that *every* reasonable officer would have understood . . . *beyond debate* " that tasing the plaintiffs, Brooks and Mattos, constituted excessive force. *Id.* at 448 (citation and internal quotation marks omitted).

'pain compliance' weapons used by police forces." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 969 (9th Cir. 2005). By 2008, the Tenth Circuit and a number of district courts had found taser use unconstitutionally excessive in some circumstances. Because "[a]bsent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether [a] right was clearly established," *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007) (citation and internal quotation marks omitted), those decisions are relevant here. *See Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002) ("[U]npublished decisions of district courts may inform our qualified immunity analysis.").

In 2007, the Tenth Circuit held that using a taser immediately and without warning against a misdemeanant who did not "present[ ] an immediate threat of death or serious injury to himself or others" was unconstitutionally excessive. *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1286 (10th Cir. 2007) (internal quotation marks omitted). The court distinguished prior taser cases in which no Fourth Amendment violation was found, explaining that what had justified taser use in the Tenth Circuit's own earlier case, *Hinton v. City of Elwood*, was "active resistance to arrest." *Id.* (citing *Hinton*, 997 F.2d at 776-77, 781). As to the Eleventh Circuit's previous taser case, *Draper v. Reynolds*, the court explained that, though it might have decided that case differently, the plaintiff there had been "belligerent and

hostile," and had refused five officer commands. *Id.* (citing *Draper*, 369 F.3d at 1276-77). The court in *Casey* ultimately denied qualified immunity because the tasing so clearly failed the *Graham* reasonableness test – there were "no substantial grounds for a reasonable officer to conclude that there was a legitimate justification" for tasing the plaintiff – that it violated clearly established law. *Id.* at 1286 (citation and internal quotation marks omitted).

Also in 2007, a district court in the Western District of Washington, within which Defendants operate, held that tasers constitute "significant force." *Beaver v. City of Fed. Way*, 507 F. Supp. 2d 1137, 1144 (W.D. Wash. 2007), *aff'd*, 301 F. App'x 704 (9th Cir. 2008). Examining whether such force was objectively reasonable against a suspected felon who, after fleeing the scene, had already been tased by another officer three times, the court held that a fourth tasing was excessive in light of the absence of active resistance. *Id.* at 1144-46. In reaching that conclusion, the court noted that, "[a]lthough infliction of pain as a motivator is not the primary function of a properly deployed [t]aser, pain is a necessary byproduct of its use." *Id.* at 1143. The court granted qualified immunity, however, finding that the law in 2004 was not sufficiently well-established to have alerted officers that this use of force was unconstitutional.

Another decision from the Western District of Washington in 2006 likewise found taser use to be excessive, observing that the tasing was unnecessary to effectuate the arrest or to protect officers' safety.

Harris v. Cnty. of King, C05-1121C, 2006 WL 2711769, at *3 (W.D. Wash. Sept. 21, 2006). In denying qualified immunity, the district court noted "the intuitively gratuitous nature of administering painful electric shocks to an arrestee who is passively complying with an officer's orders." *Id.* at *4.

We do not look to these cases to establish Blondin's right to be free from non-trivial force in response to his total lack of resistance – as discussed above, that right was established within our own circuit as early as 2001, such that, by 2008, it was "beyond debate" that using non-trivial force in response to such passive bystander behavior would be unconstitutionally excessive. *al-Kidd*, 131 S. Ct. at 2083. Instead, they support our determination that, though the specific level of force involved in using a taser was not clear until 2010, it was well known as of 2008 that a taser in dart mode constitutes more than trivial force. Sgt. Shelton is therefore not entitled to qualified immunity.

3. Municipal Liability

While local governments may be sued under § 1983, they cannot be held vicariously liable for their employees' constitutional violations. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 694 (1978). Instead, a municipality is subject to suit under § 1983 only "if it is alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's

officers.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (quoting *Monell*, 436 U.S. at 690).

A plaintiff seeking to establish municipal liability must demonstrate, moreover, that the government "had a deliberate policy, custom, or practice that was the 'moving force' behind the constitutional violation he suffered." *Galen v. County of L.A.*, 477 F.3d 652, 667 (9th Cir. 2007) (quoting *Monell*, 436 U.S. at 694-95). To meet this requirement, the plaintiff must show both causation-in-fact and proximate causation. *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir.2008). The Blondins' excessive force claim against the City is based on both the City's policy regarding tasers generally, and its ratification of Sgt. Shelton's use of a taser in this case.

We turn first to the City's policy, no longer in effect, defining tasers as a low level of force – lower than any other hands-on force, including a firm grip. Sgt. Shelton, at one time a taser instructor for the Snohomish Police Department, described the policy as classifying tasers as a "low," "very low," or "very, very low" level of force. He also explained that, pursuant to the City's taser policy, "I don't need to be threatened to use a taser." The City concedes that its former policy was unconstitutional but contends the policy did not cause Sgt. Shelton's use of unconstitutionally excessive force in this case.

At first blush, the City's evidence seems to support its argument: Sgt. Shelton has testified that he did not tase Blondin because of any particular City

policy, and that he believes he could have used even greater force on Blondin. But a year after the incident in this case, in response to a performance evaluation regarding a different incident that reprimanded Sgt. Shelton for being "too quick to apply the taser when basic hands on defensive tactics would have brought the subject into compliance," Sgt. Shelton wrote that he had "never [t]asered anyone inappropriately or *out of policy*" (emphasis added). This statement reflects Sgt. Shelton's belief that all of his taser deployments, including, of course, the one at issue here, were consistent with City policy. As one of Defendants' experts acknowledged, police department policy "tends to affect officer behavior."

Given this evidence, Sgt. Shelton's testimony that he did not tase Blondin *because of* a specific City policy means little. No one contends the City had a policy *requiring* officers to tase non-threatening suspects such that Blondin's tasing could have occurred because a specific policy directed it. Instead, the City's policy told Sgt. Shelton that tasing nonresisting individuals in circumstances like this one was acceptable. It informed him that even a firm grip entails more force than a taser and deputized him with the power to tase an individual who presents no threat at all. A reasonable factfinder could look at this incident, in which Sgt. Shelton acted in accordance with a policy he claims never to have departed from, and conclude that such policy was the moving force behind his use of the taser in this case.

The Blondins alternatively allege that the City should be held liable for ratifying Sgt. Shelton's unconstitutional conduct. "[A] local government may be held liable under § 1983 when 'the individual who committed the constitutional tort was an official with final policy-making authority' or such an official 'ratified a subordinate's unconstitutional decision or action and the basis for it.'" *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010) (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992)); *see also Praprotnik*, 485 U.S. at 127 ("If [ ] authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.").

In a footnote, the district court found it unnecessary to reach the Blondins' ratification-based *Monell* claim "because the City readily admits that its policy classifies the taser as a low level of force." It is unclear why the district court thought this admission would impact the ratification argument, which is not based on the City's taser policy. Because the two theories of liability are different, after rejecting the first the court should have proceeded to consider the second. Both remain available to the Blondins on remand.

B. Unlawful Arrest

"A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment,

provided the arrest was without probable cause or other justification." *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 918 (9th Cir. 2012) (en banc) (citation and internal quotation marks omitted). "Probable cause exists if the arresting officers 'had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime.'" *Maxwell v. Cnty. of San Diego*, 697 F.3d 941, 951 (9th Cir. 2012) (quoting *United States v. Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990)).

Blondin was arrested under the following provision of Washington law: "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." Wash. Rev. Code § 9A.76.020(1). The district court concluded that Sgt. Shelton had probable cause to arrest Blondin because he failed to back away when ordered to do so.

Defendants' motion for summary judgment before the district court addressed the Blondins' unlawful arrest claim only in a footnote, urging that the same qualified immunity arguments offered with regard to excessive force should apply to the unlawful arrest claim, as well. In granting Defendants' motion, the district court erroneously treated the Blondins' unlawful arrest claim as a common law "false arrest" claim. Within that framework, and applying state law, it determined that there was probable cause for the arrest. We disagree.

The obstruction statute under which Blondin was arrested has four elements: "(1) an action or inaction that hinders, delays, or obstructs the officers; (2) while the officers are in the midst of their official duties; (3) the defendant knows the officers are discharging a public duty; (4) the action or inaction is done knowingly." *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1053 (9th Cir. 2009) (citing Wash. Rev. Code § 9A.76.020). The dispute here centers on the first element – namely, whether officers had probable cause to believe Blondin had engaged in an action or inaction that hindered, delayed, or obstructed the officers.[10]

In *Lassiter*, we considered an obstruction arrest made by officers responding to a domestic violence call with information that the suspect had threatened to cut his wife's throat. *Id.* When officers asked the suspect to sit down so that they could keep him away from possible weapons and ensure the alleged victim's safety, he refused to sit and then grabbed the arm of an officer who tried to guide him to a chair, at which point the officer "pushed him to the floor and handcuffed him." *Id.* at 1051. Because the suspect's behavior

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[10] The Blondins also contend that Sgt. Shelton lacked probable cause as to the fourth element, urging that a 1994 amendment to the obstruction statute added a specific intent requirement and there was no basis for suspecting Blondin had such specific intent. But the Washington Supreme Court foreclosed this argument when it held that the 1994 amendment did not change the statute's mens rea requirement. *Bishop v. City of Spokane*, 173 P.3d 318, 321 (Wash. 2007).

involved "[m]ore than just a momentary noncompliance with police orders," "made it impossible for the police to carry out their duty," and "had the practical effect of precluding the officers from securing the scene and investigating a possible assault," we determined there was probable cause to arrest him for obstruction. *Id.* at 1053.

In reaching that conclusion, we found it helpful to distinguish a prior case, *Mackinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995). *See Lassiter*, 556 F.3d at 1053. In *Mackinney*, the plaintiff was writing messages critical of the police on a public sidewalk using sidewalk chalk when an officer ordered him to stop writing. 69 F.3d at 1004. Before stopping, he proceeded to underline the last phrase of his message. *Id.* We held there was no probable cause to arrest MacKinney for obstruction for that momentary noncompliance. *Id.*

The district court's finding of probable cause in this case relies heavily on *State v. Lalonde*, 35 Wash. App. 54, 665 P.2d 421 (1983).[11] There, officers responding to a complaint of a loud party became involved in physical altercations with underage partygoers. *Id.* at 423. Lalonde approached an officer to "try to talk to him and calm things down." *Id.*

[11] Beyond key factual differences, *Lalonde* involved a criminal appeal from an obstruction conviction, so the Washington Supreme Court was interpreting the evidence in the light most favorable to the government, contrary to our review here. *Lalonde*, 665 P.2d at 425.

Though Lalonde "was told several times to get back, and was physically forced back when he approached the officers, he continued to reapproach and persisted in his attempt to 'keep things calm.'" *Id.* He was then arrested for obstruction. *Id.* Affirming Lalonde's conviction, the Washington Supreme Court held that a person's knowledge that an officer was attempting to arrest someone, and their subsequent act of "reapproaching and conversing with the officer," could be considered obstruction. *Id.* at 426. The court emphasized that Lalonde had admitted he was attempting to get the officers to stop what they were doing and made clear that his obstruction was in "the acts which accompanied his words." *Id.*

Here, in contrast, Blondin did not continue to reapproach after he was ordered to stop and get back. He did not persist in inquiring after his neighbor, and there is no evidence that he was attempting to get the officers to stop what they were doing. He engaged in none of the acts *Lalonde* found obstructionist; instead, like the plaintiff in *Mackinney*, Blondin failed to comply "for only a few seconds." *Mackinney*, 69 F.3d at 1006. A genuine issue of fact therefore remains as to whether there was probable cause to arrest Blondin for obstruction, and, as a result, whether doing so violated his constitutional rights.

Because the district court analyzed unlawful arrest as a state law claim, it failed to consider qualified immunity or *Monell* liability and should do so on remand. *See Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010) (declining to reach qualified

immunity because it was not addressed by the district court); *Burke v. Cnty. of Alameda*, 586 F.3d 725, 734 (9th Cir. 2009) (remanding for district court to examine *Monell* liability in the first instance).

C. Common Law Claims

We turn now to the Blondins' common law claims for malicious prosecution and outrage. A malicious prosecution claim has five elements under Washington law: (1) the defendant instituted or continued a prosecution against the plaintiff; (2) without probable cause; (3) with malice; (4) the prosecution terminated in the plaintiff's favor; and (5) the plaintiff was injured or damaged as a result of the prosecution. *Lassiter*, 556 F.3d at 1054 (citing *Clark v. Baines*, 84 P.3d 245, 248-49 (Wash. 2004)). The parties dispute only the second element – the basis on which the district court granted summary judgment. *See Hanson v. City of Snohomish*, 852 P.2d 295, 298 (Wash. 1993) (probable cause is a defense to the tort of malicious prosecution). Having concluded that Sgt. Shelton may have lacked probable cause to arrest Blondin, we reverse the grant of summary judgment in favor of Defendants on the malicious prosecution claim.

Washington's "outrage" tort provides a cause of action for conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kloepfel*

v. Bokor, 66 P.3d 630, 632 (Wash. 2003) (quoting *Grimsby v. Samson*, 530 P.2d 291, 295 (Wash. 1975)) (internal quotation marks omitted). To prove outrage, a plaintiff must establish "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Id.* "Although the three elements are fact questions for the jury, th[e] first element of the test goes to the jury only after the court 'determine[s] if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.'" *Robel v. Roundup Corp.*, 59 P.3d 611, 619 (Wash. 2002) (quoting *Dicomes v. State*, 782 P.2d 1002, 1013 (Wash. 1989)).

The district court granted summary judgment to Defendants because Ms. Blondin failed to show that (1) she was particularly susceptible to emotional distress and that Sgt. Shelton knew as much, and (2) Sgt. Shelton knew she could observe him tasing her husband. These conclusions are incorrect.

The Washington Supreme Court addressed "unique susceptibility" as a relevant inquiry in *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173 (Wash. 1977), an outrage case based on racial discrimination, slurs, and comments. *Id.* at 1174. *Contreras* explained that the defendants "knew or should have known that by reason of [the plaintiff's] Mexican nationality and background he was particularly susceptible to emotional distress as a result of [their] conduct." *Id.* at 1177. The plaintiff was not required to show any particular susceptibility, beyond his

status as a racial minority, to establish that defendants should have known that racially derogatory behavior would cause him emotional distress. Here, Ms. Blondin was uniquely susceptible to emotional distress in observing the tasing of her husband by virtue of being his wife. There are sufficient facts – including Sgt. Shelton's threat to Ms. Blondin after tasing her husband, which indicates an awareness on his part that the two were a pair – to establish that Sgt. Shelton knew or should have known that Ms. Blondin was susceptible to emotional distress as a result of observing the tasing of her husband.

In determining that the Blondins failed to establish that Sgt. Shelton knew Ms. Blondin was in the vicinity and could observe her husband's tasing, the district court improperly resolved a fact question in Sgt. Shelton's favor. It explained that "[o]ne of the officers testified during his deposition that [Ms. Blondin] was still on her own property when the officers handcuffed [Blondin]." This statement falls far short of establishing whether Ms. Blondin was close enough to see the tasing, or whether Sgt. Shelton knew as much. That after threatening Blondin with further tasing Sgt. Shelton turned to Ms. Blondin, warning that she was "next," certainly suggests she was close enough to observe the incident, and that Sgt. Shelton knew exactly where she was. Whether this incident was "extreme and outrageous" is for a factfinder to determine.

IV. CONCLUSION

In light of the foregoing, we reverse the grant of qualified immunity to Sgt. Shelton and the grant of summary judgment to the City on the Blondins' excessive force claim. We also reverse the district court's grant of summary judgment based on the determination that probable cause existed for Blondin's arrest, and we remand for further proceedings on the unlawful arrest claim. Finally, we reverse the grant of summary judgment on the Blondins' common law claims.

REVERSED AND REMANDED.

NGUYEN, Circuit Judge, dissenting:

The majority goes badly astray because it loses sight of the specific context of this case and employs hindsight rather than viewing the scene through the eyes of a reasonable officer. Blondin interjected himself into a rapidly-evolving, highly volatile scene: officers struggling to restrain a combative, armed man in the process of trying to take his own life. At the time Blondin was tased, two loaded firearms were unsecured. Yet, at every turn, the majority attempts to minimize the precariousness of the situation, thinly splicing the facts to assess Blondin's conduct – and the reasonableness of the officers' response – in a vacuum. It is one thing to resolve disputed facts and inferences in Blondin's favor. But the majority goes well beyond this by choosing to ignore *undisputed*

facts which do not favor Blondin's case. By discounting the danger and abstracting the qualified immunity inquiry, the majority's approach fails to accord appropriate deference to an officer's reasonable judgment exercised under exigent circumstances. Because the majority fails to follow the Supreme Court's dictate to assess the use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight[,]" *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), I respectfully dissent.

I.

A.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2085 (2011). The doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In evaluating whether a constitutional right was clearly established at the time of the conduct, the Supreme Court has instructed us to ask whether its contours were " 'sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.' " *al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640

(1987)). While "[w]e do not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

In applying the "clearly established" rule, we must be careful to "faithfully guard[ ] 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (en banc) (quoting *Harlow*, 457 U.S. at 807). "We must also allow 'for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'" *Id.* (quoting *Graham*, 490 U.S. at 396-97).

B.

Was the law sufficiently clear on the evening of May 4, 2008 such that any reasonable officer would have known that tasing Blondin for two seconds was an excessive use of force in light of the specific circumstances? I think not.

For starters, consider the undisputed facts. Officers responded to a 911 call regarding a suicide-in-progress. Suicide calls are dangerous, as a suicidal suspect can quickly become homicidal. Any officer attempting to stop someone in the process of committing suicide faces a risk that the suspect will try to

take out others along with him, or choose to "go out in a blaze of glory" and open fire in the hope that he will be gunned down by return fire (known colloquially as "suicide-by-cop"). Here, moreover, the officers had been specifically warned by the person who called 911 (a family member of the suicidal man, Jack Hawes) that Hawes owned a gun and would have it with him.

When the officers arrived, they observed Hawes sitting in his vehicle, running an exhaust pipe into one of the windows. They couldn't see his weapon. Hawes complied with their orders to step out of the vehicle, but refused to obey orders to show his hands. A scuffle ensued as the officers attempted to restrain, locate his weapon, and secure him.

Enter Blondin. Wearing shorts and slippers, Blondin suddenly approached the scene, yelling "What are you doing to Jack?" (Note the accusatory phrasing of this question: not "What's going on here?" or "Is everything alright, officers?" but "What are *you doing* to Jack?") Blondin's presence and question signaled to the officers that (1) Blondin was not a random passerby, but someone who had come out of his house to see what was going on; (2) Blondin knew the suspect on a first name basis; and (3) Blondin was concerned that the officers were "doing" something to his friend/neighbor.

The parties dispute how far Blondin was standing from the fray, but accepting Blondin's view (as we must), he was thirty-seven feet away from where Hawes was struggling with the officers. This is not

terribly far; to put it in perspective, thirty-seven feet is little more than half the distance between the pitcher's mound and home plate.[1] During his deposition (and again in a declaration) Blondin recounted how, in response to his question about what they were doing to Jack, an officer yelled at him to "get back.[2] According to a passerby who testified on Blondin's behalf, officers ordered Blondin to get back five or six separate times. Yet, for approximately fifteen seconds, Blondin stood inexplicably "frozen," refusing to comply with officers' orders. The majority dismisses this as a mere "momentary failure to move [,]" slip op. at 15, but fifteen seconds is a long time to remain motionless when multiple police officers are yelling at you to retreat. (Try counting to fifteen one-thousand out loud, and see for yourself.)

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[1] *See* Major League Baseball, http://mlb.mlb.com/mlb/official_info/ baseball_basics/on_the_field.jsp# (last visited Aug. 15, 2013) (distance between the pitcher's mound and home plate is 60 feet, 6 inches).

[2] Although there is some evidence in the record indicating that one officer also yelled at Blondin to stop, nothing in Blondin's deposition testimony or declaration indicates that he heard this order and tried to comply, or even that he was confused about whether to stop or get back. Rather, Blondin concedes that he knew he was ordered to "get back" but explained that he failed to comply because: "I don't know why. . . . I tried to make my feet move. I tried to get out of there, it just didn't work." Moreover, it is undisputed that Blondin was ordered to "get back" multiple times *after* the purportedly contradictory command to stop.

Although the majority makes much of a passerby's testimony that, in his opinion, Blondin was frozen "with fear," slip op. at 9, Blondin did nothing that would objectively convey to the officers why he was refusing to back away. View the scene from a reasonable officer's perspective, as the Supreme Court tells us we must: officers were in the midst of tense, rapidly-evolving circumstances, trying to restrain a combative suicidal man with an unsecured firearm. One of the officers, Deputy Bowman, had his back facing the direction in which Blondin was approaching, with a loaded, unsecured rifle slung on his back. Suddenly, a man who knew the suspect purposely interjected himself into the scene, demanded to know what was going on, and refused to comply with repeated commands to retreat – even when warned that he would be tased if he didn't do so.

Even if we assume that Sgt. Shelton's use of force was excessive, why wasn't his mistake reasonable? What precedent existed in May 2008 such that every reasonable officer would have understood that it was unlawful to tase Blondin for two seconds under these circumstances? Which case placed this constitutional question "beyond debate" in 2008? *al-Kidd*, 131 S. Ct. at 2083. I don't know. Nor is it evident from the majority's opinion, which, rather than squarely addressing these questions, re-frames the inquiry instead.

The issue here, the majority says, is whether "the right to be free from non-trivial force for engaging in mere passive resistance was clearly established prior

to 2008." Slip Op. at 12; *see also* slip op. at 3 ("We must decide whether it was clearly established as of 2008 that the use of a taser in dart mode against a passive bystander amounts to unconstitutionally excessive force within the meaning of the Fourth Amendment."). This formulation is wrong in two respects. First, it contravenes the Supreme Court's instruction that the qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Indeed, the Court has expressly taken us to task for failing in this regard. *See al-Kidd*, 131 S. Ct. at 2084 ("We have repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality.") (internal citations omitted).[3] I recognize that the inquiry need not be so narrowly defined as to allow the officers to "define away all potential claims." *Nelson v. City of Davis*, 685 F.3d 867, 883-84 (9th Cir. 2012) (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)). However, by analyzing whether Blondin's right was clearly established without reference to the

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[3] There may be an exception to this rule: When "the defendant's conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001) (citation, internal quotation marks, and alteration omitted). However, the majority does not appear to contend that this case is so patently egregious such that officers required no specific guidance from caselaw.

specific factual context, the majority not only brushes off the Supreme Court's instructions, it departs from the same cases upon which it goes on to rely. *See*, *e.g.*, *See Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) ("All that remains is to determine whether the law was sufficiently clearly established that a reasonable officer would have been on notice that the use of pepperball projectiles directed towards [the plaintiff] and his friends was unreasonable under the circumstances."); *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) (concluding that "it would be clear to a reasonable officer that using pepper spray against the protestors was excessive under the circumstances").

Second, as I've already suggested, the majority's factual characterization is somewhat misleading. Blondin, for example, was not a simply a "passive bystander[,]" slip op. at 3 – he came out of his house in slippers, demanding to know what the officers were "doing to Jack." Likewise, describing Blondin's conduct as a "total lack of resistance," slip op. at 18, obscures the undisputed fact that Blondin repeatedly failed to comply with officers' orders to retreat. While the majority emphasizes that Blondin was initially given a "contradictory" order to stop, slip op. at 10; *see also* slip op. at 15, Blondin's own testimony refutes the majority's supposition that he froze in an effort to comply, or out of confusion. Dismissing Blondin's non-compliance as "mere passive resistance" also unfairly imports the benefit of hindsight; in the heat of the moment, Sgt. Shelton *didn't*

know whether Blondin's resistance was going to be "merely" passive, or whether Blondin was going to suddenly bolt in Hawes's direction. In this sense, the majority's post-hoc confidence in Blondin's passivity undercuts the very point of the inquiry: whether, under the circumstances, an officer could have reasonably interpreted Blondin's inexplicable non-compliance as a threat.

Lastly, even if the majority is correct that we may look to cases which do not involve tasers, slip op. at 13, framing our inquiry in terms of "non-trivial force" still paints with too broad a brush. All "non-trivial force" is not created alike. Here, specifically, the majority employs "non-trivial force" to mean tasing someone for two seconds in dart mode. But "non-trivial force" also covers, among other things, firing a lead-filled beanbag round into someone's face with enough force to gouge out their eye, fracture their cranium, and leave a lead shot embedded in their skull. *See Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001). Any reasonable officer might know that the constitution would prohibit firing a lead-filled beanbag round into Blondin's face from short range. But tasing him for two seconds? That's a much closer call. Thus, in my view, asking whether law regarding the use of "non-trivial force" was clearly established is not a fair benchmark by which to gauge an reasonable officer's understanding of the legality of his actions.

Moreover, I fail to see how the cases relied upon by the majority made the "contours [of Blondin's

right] sufficiently clear that every reasonable official would have understood that what [Sgt. Shelton did] violated that right." *Mattos*, 661 F.3d at 442 (citation and internal quotation marks omitted). While precedent need not be squarely on all fours, *see al-Kidd*, 131 S. Ct. at 2083, we nevertheless require "*closely analogous* pre-existing case law" to show that the law is clearly established. *Deorle*, 272 F.3d at 1275 (emphasis added).

Here, the cases which the majority concludes set forth clearly established law are far from closely analogous. To wit, it relies upon: (1) *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), in which an officer shot a college student in the eye with a pepperball projectile without any warning, causing him multiple surgeries, permanent eye injuries, and ultimately the loss of his college scholarship, where the student did not disobey police orders (which weren't even given until after the projectile was shot), but was merely part of a large party that police were trying to break up, *id.* at 873-74, 881; (2) *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), which involved an officer who – again, without warning – fired a lead-filled beanbag round into the face of an unarmed suicidal man who had complied with officers' instructions, resulting in the loss of the man's left eye and other serious injuries, *id.* at 1285-86; (3) *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), in which officers sprayed peaceful protestors in the face with pepper spray from a few feet away, forcibly pried open protesters' eyes,

and stuck in Q-tips containing pepper spray, *id.* at 1128-29; and (4) *Casey v. City of Fed. Heights*, 509 F.3d 1278 (10th Cir. 2007), a Tenth Circuit case in which a plaintiff who was peacefully returning to the courthouse (where he had unsuccessfully challenged a traffic ticket) with a file he should not have removed "had his shirt torn, and then [was] tackled, Tasered, knocked to the ground by a bevy of police officers, beaten, and Tasered again, all without warning or explanation[,]" *id.* at 1285.[4] I strongly disagree with the majority's conclusion that, in light of this precedent, every reasonable officer would know that tasing Blondin for two seconds under the circumstances presented constituted excessive force. *See Mattos*, 661 F.3d at 448.

One final point. In three recent cases involving the use of tasers in dart mode, we granted officers qualified immunity upon concluding that the law was not sufficiently clear as of 2005 and 2006 to render the alleged constitutional violations clearly established. *See Mattos v. Agarano*, 661 F.3d 433, 452 (9th Cir. 2011) (en banc); *Brooks v. City of Seattle*, reviewed jointly with *Mattos*, 661 F.3d at 443-48; *Bryan v. MacPherson*, 630 F.3d 805, 833 (9th Cir. 2010). And, as the district court correctly recognized, "[b]y

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[4] The majority also mentions other out-of-circuit taser cases in a footnote, slip op. at 13-14, n.6, for purposes of distinguishing them from taser cases in our circuit. It does not, however, appear to rely on these cases as support for its conclusion that the law was clearly established.

May 2008, the state of the law in this circuit was no clearer; no Supreme Court or Ninth Circuit opinion was issued in the interim." The majority nevertheless asserts that *Mattos, Brooks*, and *Bryan* are distinguishable in "one critical respect: Blondin engaged in no behavior that could have been perceived by Sgt. Shelton as threatening or resisting." Slip Op. at 14. This assertion, however, is not only shaded with the benefit of hindsight, it is inconsistent with undisputed facts in the record. Blondin *did* engage in behavior that could have objectively been perceived as resisting, if not threatening: for fifteen seconds he refused to comply with officers' repeated orders to back away from a dangerous, volatile scene. Accordingly, Blondin's purported lack of resistance cannot justify departing from the holdings in *Mattos, Brooks*, and *Bryan.*

* * *

In sum, I believe that the law did not clearly establish that Sgt. Shelton's conduct violated Blondin's constitutional rights. I therefore would affirm the district court's holding that the officers are entitled to qualified immunity on Blondin's excessive force claim.

II.

The same errors which permeate the majority's analysis of Blondin's excessive force claim also taint its discussion of Blondin's claims for unlawful arrest and malicious prosecution. To succeed on both of these claims, Blondin must establish the absence of probable cause. *See Lacey v. Maricopa Cnty.*, 693 F.3d

896, 918 (9th Cir. 2012) (en banc) ("A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was *without probable cause* or other justification.") (citation omitted) (emphasis added); *id.* at 919 ("To claim malicious prosecution, a petitioner must allege that the defendants prosecuted her with malice and *without probable cause*, and that they did so for the purpose of denying her equal protection or another specific constitutional right.") (citation and internal quotation marks omitted) (emphasis added).

Blondin was arrested for obstruction under a Washington statute providing that "a person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020. Whether there was probable cause to arrest Blondin for violating this statute is a far easier hurdle to clear than the majority suggests.

In my view, the undisputed facts show that Sgt. Shelton had probable cause to arrest Blondin for obstruction. As the Supreme Court has explained, "it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (citation omitted). Under the totality of circumstances, there was at least a reasonable probability that Blondin's knowing refusal to comply with officers' repeated orders to back away from an active crime scene diverted their attention from performance

of their official duties and created a potential safety hazard. A reasonable officer therefore had at least probable cause to believe that Blondin was obstructing the officers' efforts to restrain Hawes and secure his firearm.

Accordingly, I would affirm the grant of summary judgment on both the unlawful arrest and malicious prosecution claims.

III.

Nor do I agree with the majority that Kristi Gravelet-Blondin's state-law outrage claim should survive summary judgment. To succeed on this claim, the alleged misconduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kloepfel v. Bokor*, 66 P.3d 630, 632 (Wash. 2003) (citation omitted). Factors that courts may consider in conducting this analysis include "the position occupied by the defendant, whether the plaintiff was peculiarly susceptible to emotional distress, the defendant's knowledge of such fact and whether defendant's conduct may have been privileged under the circumstances." *Grimsby v. Samson*, 530 P.2d 291, 295 (Wash. 1975); *see also Spurrell v. Bloch*, 701 P.2d 529, 535 (Wash. 1985).

Taking its cue from the district court, the majority hones in on whether Ms. Blondin was particularly susceptible to emotional distress, and if the defendants

knew this fact. Slip Op. at 26-28. But even accepting that, as Blondin's wife, Ms. Blondin was "particularly susceptible" to distress upon seeing him tased (and that Sgt. Shelton knew as much), this is still not enough to create a triable issue of fact as to whether the conduct was sufficiently extreme. It is undisputed that Sgt. Shelton tased Blondin for only two seconds following Blondin's refusal to comply with repeated orders. It is also undisputed that immediately after Blondin was tased, officers summoned paramedics to remove the barbs and check his vital signs.[5]

Under the totality of circumstances I believe that no reasonable juror could conclude that Sgt. Shelton's conduct was atrocious, extreme, or beyond all possible bounds of decency. *Grimsby*, 530 P.2d at 295. Accordingly, I would affirm the district court's grant of summary judgment on Ms. Blondin's common law outrage claim.

IV.

In sum, I would hold that the officers are entitled to qualified immunity, and that the Blondins' unlawful arrest and common law claims fail as a matter of law. I therefore respectfully dissent.

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[5] Blondin declined further medical attention.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD & KRISTI GRAVELET-BLONDIN, Plaintiffs, v. SGT. JEFF SHELTON, *et al.*, Defendants.	Case No. C09-1487RSL ORDER REGARDING CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on the parties' cross motions for summary judgment. Plaintiffs Donald and Kristi Gravelet-Blondin, a married couple, move for partial summary judgment on the issue of liability against defendants Sergeant Jeff Shelton and the City of Snohomish.[1] They allege that Sgt. Shelton unlawfully arrested Mr. Gravelet-Blondin, used excessive force, and maliciously prosecuted him in violation of 42 U.S.C. § 1983. They also argue that the City's policy on the use of tasers caused the excessive force. Ms. Gravelet-Blondin asserts a claim for outrage.

Defendants move for summary judgment on all claims, arguing that they had probable cause for Mr.

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[1] Plaintiffs dismissed their claims against the third defendant, Officer Carl Whalen, in November 2010. (Dkt. #76).

Gravelet-Blondin's[2] arrest and that they did not violate his constitutional rights. They contend that even if a constitutional violation occurred, it was not caused by any City policy, and Sgt. Shelton is entitled to qualified immunity. At plaintiffs' request, the Court heard oral argument in this matter on February 2, 2012.

For the reasons set forth below, the Court grants defendants' motion and denies plaintiffs' motion.

II. DISCUSSION

A. Background Facts.

On the evening of May 4, 2008, Sergeant Shelton was one of five officers dispatched in response to a 911 call regarding a suicidal male. The officers were told that the man, Jack Hawes, had a firearm and kept it with him "at all times," but they were initially unable to locate the weapon at the scene. Declaration of Sergeant Jeffrey Shelton Mkt. #16) ("Shelton Decl.") at ¶2.

When the officers arrived, they observed Mr. Hawes' vehicle parked in the side yard of his property between his house and plaintiffs' house and a blue hose running from the exhaust pipe of the vehicle into one of its windows. At that point, the officers

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[2] Because Mr. Gravelet-Blondin is asserting the vast majority of claims in this action, he will hereinafter be referred to as "plaintiff."

perceived "a greater level of urgency" and "a more imminent threat of harm" because it was clear that Mr. Hawes was "actively trying to kill himself at that time." Wellington Dep. at p. 20. Based on his experience and training, one of the officers perceived a threat to others as well as to Mr. Hawes: "And we also know that suicide can turn to homicide in the blink of an eye because when people don't care whether they live or die, they may take it out on other people as well." *Id.* at pp. 20-21. As they cautiously approached the vehicle, the officers observed that the hose had fallen away from the exhaust pipe, but they had not yet secured Mr. Hawes or his weapon. *Id.* at p. 23.

The officers ordered Mr. Hawes to step out of his vehicle, which he did, but he refused to show his hands as the officers ordered. Because Mr. Hawes refused to show his hands, did not comply with the officers' commands, and attempted to return to the vehicle where the firearm may have been located, one of the officers tased him. Declaration of Richard Jolley, (Dkt. #72) ("Jolley Decl."), Ex. A at p. 5. Despite the use of the taser, Mr. Hawes continued to struggle with the officers. Although Mr. Hawes was 79-years-old at the time, he was surprisingly strong in resisting the officers' efforts to secure him, and three officers had to attempt to secure him. Bowman Dep. at pp. 42-43. As Mr. Hawes was struggling and resisting, he placed his hands underneath him. Fearing that he might try to access a weapon located around his belt line, one of the officers deployed the

taser a second time. Wellington Dep. at p. 32. The officers then handcuffed Mr. Hawes.

At some point, Mr. Gravelet-Blondin, dressed in a t-shirt, shorts, and slippers, walked quickly from his property onto Mr. Hawes' property, approaching the group and calling out, "What are you doing to Jack?" Plaintiff's Dep. at p. 45; Declaration of Donald Gravelet-Blondin, (Dkt. #80-17) ("D. Gravelet-Blondin Decl.") at ¶¶ 5-6. Officer Wellington testified that after Mr. Hawes was handcuffed, he heard another officer shout, "Get back." Wellington Dep. at p. 34. He looked up to see plaintiff "standing right over" him, approximately six to ten feet away. *Id.* at pp. 34-35. At that point, he yelled at plaintiff "at the top of [his] lungs," "'Get back. Police. Get back.'" *Id.* at p. 36. Although individuals typically retreat after hearing a command like that, plaintiff did not do so. *Id.* Sgt. Shelton did not know whether Mr. Hawes was handcuffed when Mr. Blondin arrived on the scene. Shelton Dep. at p. 74. Two other officers testified that Mr. Hawes was not yet in handcuffs when plaintiff arrived. Scott Dep. at pp. 30, 34; Whalen Dep. p.7. The officers testified that plaintiff approached to within ten to twenty feet of them. Scott Dep. at p. 31; Shelton Dep. at p. 25. According to plaintiff, Sgt. Shelton ran towards him yelling, "'Get back or I'll tase you' loudly and rapidly." D. Gravelet-Blondin Decl. at ¶ 7. He then "froze" in place 37 feet from Mr. Hawes. *Id.* (explaining that he measured the distance by tape measure the day after the incident); Plaintiff Dep. at

pp. 49-50. By all accounts, plaintiff had approached onto Mr. Hawes' property.

Plaintiff's arrival created a distraction while the officers were trying to secure Mr. Hawes. Wellington Dep. at p. 54. "Because when he showed up on the scene, I had to take my attention off of Hawes of [sic] what I was doing. I didn't know what his motives were or why he was there or why he wasn't leaving. So I had to take my attention off of Hawes for the moment to look at him and worry about what he is about to do." Scott Dep. at p. 38. Another officer, who had his back to plaintiff, became worried when he heard the shouting behind him: "We were dealing with a very dangerous, fluid situation, suicidal subject with a gun. I had a gun that I barely had control of. I was in no position to defend myself." Bowman Dep. at p. 95; Shelton Dep. at p. 75 (explaining that plaintiff's presence created a threat to officer safety in part because plaintiff was behind Officer Bowman, who had "his rifle slung with his back turned to me"). The officers did not know plaintiff's intentions as he approached the scene and he contributed to a "volatile" scene. Whalen Dep. at p. 23-25. The officers feared that plaintiff could access Mr. Hawes' weapon, which they had not yet located or secured. *Id.* at p. 24; Scott Dep. at p. 71. For those reasons, they perceived plaintiff to be a threat to their safety. Whalen Dep. at p. 24; Scott Dep. p. 71; Shelton Dep. at pp. 16-17, 23; *see also* Turner Dep. pp. 74-78.

After another officer unsuccessfully instructed plaintiff to leave the area, Sgt. Shelton left his post,

where he was overseeing the situation with Mr. Hawes, and loudly and authoritatively demanded that plaintiff leave the scene. Whalen Dep. at p. 10. Sgt. Shelton commanded plaintiff to leave the crime scene several times, explained that the officers were involved in a police matter, and warned him that he would be tased and arrested if he refused to leave. *Id.*; Jolley Decl., Ex. A at p. 5; Shelton Dep. at pp. 77-78. After plaintiff refused to retreat, Sgt. Shelton tased him with a Taser X26 in dart mode for approximately two seconds. Jolley Decl., Ex. A at p. 6. In his report, Sgt. Shelton notes that the "usual" length of the taser is five seconds. *Id.* The barbs of the taser hit plaintiff in the abdomen. Plaintiff Dep. at p. 65. As a result, plaintiff fell down and temporarily lost consciousness. *Id.* at p. 66. Mrs. Gravelet-Blondin observed Sgt. Shelton tase her husband and when she protested, Sgt. Shelton threatened to tase her too if she did not get back. *Id.* at pp. 70-71; Whalen Dep. at pp. 18-19. The paramedics arrived and removed the taser barbs from plaintiff's abdomen. Plaintiff did not request or receive additional medical attention. Plaintiff Dep. at p. 72. The police later recovered a loaded handgun from Mr. Hawes' vehicle. Jolley Decl., Ex. A at p. 6.

Sgt. Shelton issued plaintiff a criminal citation for obstruction. Plaintiffs contend that they incurred attorney's fees and costs before the action was dismissed with prejudice.

Plaintiffs filed their complaint in this Court in October 2009. Mr. Gravelet-Blondin alleges claims

under 42 U.S.C. § 1983 for excessive force, arrest without probable cause, and malicious prosecution. Ms. Gravelet-Blondin asserts a claim for outrage. Complaint at § 6.3 ("Defendant City of Snohomish is liable for the intentional infliction of emotional distress on plaintiff Kristi Gravelet-Blondin by shooting her husband with a Taser, arrested him [sic], and taking him away; all in her presence, and when one of them threatened to shoot her with a Taser as well.").

B. Summary Judgment Standard.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, the records show that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

All reasonable inferences supported by the evidence are to be drawn in favor of the nonmoving party. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). "[I]f a rational trier of fact might resolve the issues in favor of the nonmoving party, summary judgment must be denied." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809

F.2d 626, 631 (9th Cir. 1987). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). "[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Id.* at 1221.

On cross motions for summary judgment, the Court "must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Fair Housing Council of Riverside County. Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001). The duty to review all evidence submitted by both parties arises from the obligation to determine whether any disputed issues of material fact exist. *Id.* at 1136. The Court must also analyze each motion separately on its own merits. *Id.*

C. Excessive Force Claim.

1. Qualified Immunity.

In March 2010, the Court denied plaintiffs' motion for partial summary judgment on the defense of qualified immunity. (Dkt. #29). Since then, the parties have conducted additional discovery, and the factual record is more developed. In addition, the Ninth Circuit has issued an *en banc* decision clarifying the law in this circuit regarding police use of

tasers. *Mattos v. Aragano*, 661 F.3d 433 (9th Cir. 2011). With the benefit of that guidance and an augmented record, the Court again considers the issue of qualified immunity.

The Court analyzes plaintiff's excessive force claim under the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The analysis is focused on "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* at 397. We must balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). "Stated another way, we must balance the amount of force applied against the need for that force." *Bryan v. MacPherson*, 630 F.3d 805, 823-24 (9th Cir. 2010) (internal citation and quotation omitted).

The Court first considers the nature and amount of force Sgt. Shelton used against plaintiff. As the Ninth Circuit has explained,

> The X26 uses compressed nitrogen to propel a pair of "probes' – aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires – toward the target at a rate of over 160 feet per second. Upon striking a person, the X26 delivers a 1200 volt, low ampere electrical charge through the wires and probes and into his muscles. The impact is as powerful as it is swift. The

> electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless. The tasered person also experiences an excruciating pain that radiates throughout the body.

Bryan, 630 F.3d at 824 (internal citations omitted). As a result of the taser, plaintiff experienced "excruciating pain," temporary paralysis, and brief loss of consciousness. D. Gravelet-Blondin Decl. at ¶ 8. Unlike the plaintiff in *Bryan*, plaintiff did not suffer an additional injury when he fell to the ground, although Sgt. Shelton has not stated that he considered the fact that plaintiff was standing in grass when he tased him. The Ninth Circuit has held, "The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted." *Bryan*, 630 F.3d at 825. Therefore, "tasers like the X26 constitute an intermediate or medium, though not insignificant, quantum of force" that "must be justified by the governmental interest involved." *Id.* at 826.

Under *Graham*, the Court evaluates the government's interest in the use of force by examining three core factors, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "These factors,

however, are not exclusive." *Bryan*, 630 F.3d at 826. Instead, the Court must consider the "totality of the circumstances" and "whatever specific factors may be appropriate in a particular case," regardless of whether they are listed in *Graham. Id.* (internal citation and quotation omitted).

The "most important" *Graham* factor is whether the suspect posed an "immediate threat to the safety of the officers or others." *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005). Sgt. Shelton testified that he believed that plaintiff was "dangerous" because of the presence of the unsecured weapon. Shelton Dep. at pp. 12-13. However, "[a] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001). In this case, construing the facts in the light most favorable to plaintiff, he was standing thirty-seven feet away from the officers, and he was not moving. Rather than physically or verbally threatening the officers, plaintiff's only comment was to ask what they were doing to his neighbor. Although the officers feared that he might be armed, their fear was based on nothing more than the reality that any civilian could be armed, speculation that fails to distinguish plaintiff from any bystander at a crime scene.

Defendants stress that the scene was not yet secure, and Mr. Hawes' gun had not yet been located. Certainly, the presence of the unsecured weapon made the scene more dangerous and volatile than the

scenes confronting the officers in the *Bryan, Mattos*, and *Brooks* cases where the Ninth Circuit found constitutional violations. However, the key inquiry is whether *plaintiff* posed an immediate threat. *Mattos*, 61 F.3d at 449. Although plaintiff could have attempted to access the unsecured weapon or one of the officers' weapons, he made no move to do so and did not threaten the officers. Nor is there any evidence that the officers believed that the weapon was lying in the grass near plaintiff or was otherwise readily accessible to him. Sgt. Shelton's desire to gain immediate control of plaintiff was understandable because his attention was needed elsewhere: to assist with Mr. Hawes and locate his weapon. However, that exigency alone is insufficient to justify the use of force here. *Deorle*, 272 F.3d at 1281 ("A desire to resolve quickly a potentially dangerous situation is not the type of government interest that, standing alone, justifies the use of force that may cause serious injury.").

The officers testified that plaintiff posed a threat primarily because of his continued presence near the dangerous, volatile crime scene. However, there were four other officers at the scene, and viewed in the light most favorable to plaintiff, Mr. Hawes was already in handcuffs. Wellington Dep. at p. 34. At that point, Sgt. Shelton, who was supervising, was neither actively assisting nor attempting to locate the weapon when plaintiff arrived at the scene. Shelton Dep. at pp. 74-75. Therefore, Sgt. Shelton could have remained prepared to use the Laser in the event that

the circumstances changed. *Bryan*, 630 F.3d at 827 (explaining that "while confronting Bryan, Officer MacPherson had upholstered and charged his X26, placing him in a position to respond immediately to any change in circumstances."). Under the circumstances and construed in the light most favorable to plaintiff, plaintiff did not pose an *immediate* threat.

Moreover, the Ninth Circuit has explained that obstruction, the crime with which plaintiff was charged, is not a serious crime. *Mattos*, 661 F.3d at 444 (noting that obstructing a police officer is not a serious crime) (citing *Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir. 2007)). As for the third factor, the Ninth Circuit has explained that the "crux" of the inquiry is "compliance with the officers' requests, or refusal to comply." *Mattos*, 661 F.3d at 450. Although plaintiff refused to comply with repeated and clear commands to back up, his resistance was not "particularly bellicose." *Bryan*, 630 F.3d at 830. After being ordered to stop, he did not advance, threaten the officers, attempt to flee, or physically resist the officers. Therefore, these factors weigh against a finding that the level of force used was reasonable. *Bryan*, 630 F.3d at 832 (finding that plaintiff alleged a constitutional violation where he was tased in dart mode even thought he "was neither a flight risk, a dangerous felon, nor an immediate threat.").

The Court also considers additional relevant factors. Under plaintiff's version of events, only fifteen seconds elapsed between when he was first

ordered to back up and when he was tased. Plaintiff Dep. at p. 58. Although Sgt. Shelton warned plaintiff that he would be tased if he did not back up, according to plaintiff, that warning was issued while Sgt. Shelton was tasing plaintiff. *Id.* at pp. 56-57. Assuming those facts to be true, he was offered no time to comply with the warning, which supports a finding of a constitutional violation. *Mattos*, 661 F.3d at 451. The Court also considers the "danger the overall situation posed to the officers' safety and what effect that has on the reasonableness of the officers' actions." *Id.* at 451. While the presence of an unsecured weapon created a potentially dangerous situation, with Mr. Hawes in handcuffs, less force could have been used to prevent plaintiff from accessing the unsecured weapon. For all of these reasons, the Court finds that under the facts construed in a light most favorable to plaintiff, employing the taser against plaintiff constituted excessive force.

Having found that Sgt. Shelton used excessive force, the Court considers whether he is nevertheless entitled to qualified immunity. To resolve that question, the Court must determine, as of the time Sgt. Shelton tased plaintiff, whether it was "sufficiently clear that every reasonable official would have understood that what he was doing violated" plaintiff's constitutional rights. *Mattos*, 661 F.3d at 446 (internal citations and quotations omitted). If his use of force was "premised on a *reasonable* belief that such force was lawful," he is entitled to qualified immunity

even if the force used was excessive. *Deorle*, 272 F.3d at 1285 (emphasis in original).

In *Mattos*, the Ninth Circuit found that as of August 2006, there was no Supreme Court or Ninth Circuit case addressing the use of tasers in dart mode. *Mattos*, 661 F.3d at 452. By May 2008, the state of the law in this circuit was no clearer; no Supreme Court or Ninth Circuit opinion was issued in the interim. As set forth in *Mattos* and *Bryan*, the few circuit court cases that existed at the time were dissimilar. *Id.* at 446-48;[3] *Bryan*, 630 F.3d at 833. Even though the facts of this case are distinguishable from those earlier, out of circuit cases where no constitutional violation was found, a reasonable officer in Sgt. Shelton's position "could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances" confronted. *Bryan*, 630 F.3d at 833.

Plaintiff argues that Sgt. Shelton is not entitled to qualified immunity because the law was clear in 2008 that no force was justified under these circumstances. However, even though the Court has found that the risk was not immediate, the evidence shows that plaintiffs continued presence and refusal to leave the volatile scene created a safety risk. Ovens Dep. at

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[3] The Court in *Mattos* distinguished three earlier cases from other circuits. *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992); *Hinton v. City of Elwood*, 997 F.2d 774 (10th Cir. 1993); *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004).

p. 26 (explaining that the officers would have perceived plaintiff as a threat); Shelton Dep. at pp. 1213, 74-75 (explaining why plaintiff created a threat to the officers' safety); Turner Dep. at pp. 75-78. The officers did not know whether plaintiff was armed or why he was refusing to comply with their commands, which was unusual and very concerning. Turner Dep. at p. 77. During oral argument, plaintiffs' counsel criticized defendants' evidence, and in particular the expert opinion of Thomas Ovens, but they offered no contrary expert opinion. Even if Mr. Hawes was restrained by the time Sgt. Shelton tased plaintiff, the officers had not yet secured his weapon or the crime scene. The scene was "tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 296-97. Therefore, even if the quantum of force used was excessive, Sgt. Shelton could have reasonably believed that some force was permissible.

In sum, although plaintiff has alleged an excessive force claim, the law was not sufficiently clear in May 2008 to render the alleged violation clearly established. Therefore, Sgt. Shelton is entitled to qualified immunity regarding plaintiff's excessive force claim.

2. Municipal Liability.

The Court's finding that Sgt. Shelton is entitled to qualified immunity does not absolve the City of liability because the doctrine does not apply to municipalities. *See*, *e.g.*, *Owen v. City of Independence*, 445

U.S. 622, 639, 650-51, 657 (1980) (explaining that municipalities are not entitled to qualified immunity). Therefore, the Court must separately determine whether the City is liable. As announced by the Supreme Court, a government entity can be responsible for a constitutional violation committed by an employee if the "execution of a government's policy or custom . . . inflicts the injury." *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978).

Despite the contrary suggestion in plaintiffs' briefing, they are not required to prove that the City's policy was unconstitutional. *See*, *e.g.*, *Chew v. Gates*, 27 F.3d 1432, 1444 n.12 (9th Cir. 1994). Rather, plaintiffs must prove that the specific use of force violated the Constitution, and that City policy caused the unconstitutional application of force in this instance. *Id.* at 1444. In light of those elements, and in light of the fact that qualified immunity is unavailable to the City, defendants' argument that the *Bryan, Mattos* and *Brooks* cases were decided after the events underlying this case is irrelevant.

To prove the causation element, plaintiffs must show that the policy was the "proximate cause of the injuries suffered." *Van Oft v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996). Stated another way, plaintiffs must show that the policy was the "moving force" behind the constitutional violation. *Id.* at 835 (internal citation and quotation omitted).

In this case, plaintiffs contend that the City's policy caused the use of excessive force because the

policy classifies the use of a taser as a low level of force, on par with the use of pepper spray.[4] Declaration of Joseph Shaeffer, (Dkt. #74) ("Schaeffer Decl."), Ex. 1. Even assuming that the use of force was unconstitutional, plaintiffs have not shown that the City's policy was the moving force behind the violation. During his deposition, Sgt. Shelton testified that he did not tase plaintiff because of the City's policy. Shelton Dep. at p. 211. There is no evidence that Sgt. Shelton would have used a lower level of force if the policy had been different.[5] In fact, the evidence belies that theory. Sgt. Shelton testified that he believed that he was entitled to use even more force against plaintiff because of the threat he posed. Shelton Dep. at pp. 61-63 (explaining that he would have been justified in kicking and punching plaintiff or using his baton). The policy also states that the degree of force used should be "in direct relationship to the

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[4] Alternatively, "the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). In this case, plaintiffs' assertion of a ratification theory is unnecessary because the City readily admits that its policy classifies the taser as a low level of force.

[5] Plaintiffs also argue that in 2009, Sgt. Shelton responded to an allegation that he had overused the taser in another case by noting that the City's policy designated it as the same level of force as "hands on." Shaeffer Decl., Ex. 7. Plaintiffs, however, have offered no testimony or other evidence to link that 2009 statement to the conduct that occurred in 2008. At most, Sgt. Shelton's statement shows that he was aware of the City's policy, which is undisputed.

amount of resistence used by the person, or the immediate threat the person poses to the member or others." Shaeffer Decl., Ex. 1; Ovens Dep. at p. 31 (explaining that "irregardless of how good or bad an agency or individual officer's idea of force continuum is, they still have to use reasonable force. You don't get to go, "Well, my force continuum said this, so I get to do that.'"). In his declaration, Sgt. Shelton explained that he chose to use the taser "so Plaintiff would be temporarily incapacitated and [he] could gain custody of him immediately and alleviate the safety concerns' caused by his presence." Shelton Decl. at ¶ 14. In light of that evidence, it is clear that Sgt. Shelton deployed his taser because he believed it was not only justified but necessary under the factual circumstances. Even if his judgment was ultimately incorrect, the policy was not the moving factor. Therefore, the City cannot be held liable for the constitutional violation.

D. Claims for False Arrest and Malicious Prosecution

Probable cause is a complete defense to claims for false arrest and malicious prosecution. *See*, *e.g.*, *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563 (1993). In Washington, "probable cause exists when the facts and circumstances known to an arresting officer are sufficient to convince a reasonable person that a crime has been committed and that the person to be arrested committed that crime." *Jamison v. Storm*, 426 F. Supp. 2d 1144, 1161 (W.D. Wash. 2006).

The obstruction statute provides that "a person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020. "The statute's essential elements are (1) that the action or inaction in fact hinders, delays, or obstructs; (2) that the hindrance, delay, or obstruction be of a public servant in the midst of discharging his official powers or duties; (3) knowledge by the defendant that the public servant is discharging his duties; and (4) that the action or inaction be done knowingly by the obstructor." *State v. Ware*, 111 Wn. App. 738, 742-43 (2002) (internal citation and quotation omitted).

Plaintiffs argue that a statute cannot criminalize the failure to obey a police order, but the case they cite in support relates to a portion of the obstruction statute not at issue here. *State v. White*, 97 Wn.2d 92, 95 (1982) (finding statute unconstitutionally vague when it criminalized the failure "without lawful excuse" to provide true information "lawfully required" of an individual by a "public servant"). In contrast, the obstruction statute at issue in this case has been ruled constitutional. *State v. Lalonde*, 35 Wn. App. 54 (1983); *State v. Grant*, 89 Wn.2d 678 (1978) (upholding the constitutionality of a prior version of the statute).[6]

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[6] Plaintiffs are not alleging that the statute is facially unconstitutional. Rather, they contend that if the statute

(Continued on following page)

In this case, plaintiff attempts to define his conduct as protected speech by contending that he was arrested simply for asking what the officers were doing to his neighbor. He argues that he created a "verbal distraction," which the Supreme Court held cannot be criminalized in *Houston v. Hill*, 482 U.S. 451 (1987). In that case, however, the Court drew a distinction between "contentious speech," which cannot be criminalized, and physically obstructing a police investigation, which can be. *Id.* at 463. In this case, there is no evidence that plaintiff was arrested because of his speech.

Instead, plaintiff obstructed the officers through his conduct. He knowingly placed himself in a volatile, active crime scene, diverted the officers' attention from the performance of their official duties, created at least a potential safety hazard for the officers, and refused to leave the scene after being clearly instructed to do so by at least two officers. Wellington Dep. at p. 54; Scott Dep. at p. 38; Whalen Dep. at p. 10 (explaining that Sgt. Shelton had to leave his position to deal with plaintiff). In an analogous case, the court explained, "Lalonde had knowledge that a uniformed police officer was attempting to arrest

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criminalizes a mere failure to obey a police command, then it would be unconstitutional. Plaintiff's Motion at p. 13. Defendants are not making that assertion, which Washington courts have already addressed. For those reasons, the Court has not invited the Attorney General to weigh in on the constitutionality of the statute.

another [person]. The trial judge found his conduct in reapproaching and conversing with the officer in this situation hindered, delayed, and obstructed the officer and interfered with the officer's discharge of his duties." *Lalonde* 35 Wn. App. at 61. Although the factual circumstances in this case are not identical, they are analogous. As in that case, plaintiff's "arrest did not arise from his speech, but from the acts which accompanied his words." *Id.*

Plaintiff argues that he did not knowingly interfere. Instead, plaintiff contends that he knew he should retreat but he "froze" and was therefore physically unable to move away. However, the officers did not know why he was refusing to comply. Moreover, the officers were in uniform, plaintiff knew they were officers when they ordered him to step back, and it was obvious that the officers were engaging in their official duties. Plaintiff Dep. at pp. 54-58. Plaintiff refused to (or was unable to) comply with the command to move back even after he saw Sgt. Shelton leave his position to deal with him. Under the circumstances, a reasonable person could have concluded that plaintiff was obstructing the officers. *Id.*; *State v. Ware*, 111 Wn. App. at 743-44. Accordingly, the Court grants defendants' motion for summary judgment regarding plaintiff's claims for false arrest and malicious prosecution.

E. Plaintiff Kristi Gravelet-Blondin's Claim for Outrage

In order to prove her claim for outrage, Ms. Gravelet-Blondin must prove: "(1) extreme and outrageous conduct; (2) the intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of emotional distress." *Rice v. Janovich*, 109 Wn.2d 48, 61 (1987). The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Phillips v. Hardwick*, 29 Wn. App. 382, 387 (1981).

The Court must consider whether the conduct at issue is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wn.2d 52, 59 (1975). In conducting its analysis, the Court must consider: (1) a defendant's position; (2) whether the plaintiff was particularly susceptible to emotional distress, and if the defendants knew this fact; (3) whether the defendant's conduct may have been privileged under the circumstances; (4) whether the degree of emotional distress caused by a party was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and (5) whether the actor was aware that there was a high probability that his or her conduct would cause severe emotional distress and proceeded in a

conscious disregard of it. *Spurrell v. Block*, 40 Wn. App. 854, 862 (1985).

In this case, plaintiffs have not shown that Ms. Gravelet-Blondin was particularly susceptible to emotional distress, that defendant knew she was susceptible, or that Sgt. Shelton knew she was in the vicinity and could observe him tasing her husband. One of the officers testified during his deposition that Ms. Gravelet-Blondin was still on her own property when the officers handcuffed plaintiff. Whalen Dep. at p. 18. Furthermore, even though watching her husband tased and fall to the grass was likely upsetting, and she has sought medical treatment, the conduct is well below the type of conduct that has been deemed actionable. For example, in *Grimsby*, the Washington Supreme Court found that a husband could proceed with his outrage claim alleging that he "was required to witness the terrifying agony and explicit pain and suffering of his wife while she proceeded to die right in front of his eyes and at all times remaining helpless because of his inability to secure any medical care or treatment for his wife at all." 85 Wn.2d at 60 (italics removed); *see also Anderson v. Kitsap County*, 2010 U.S. Dist. LEXIS 53679 at *19 (W.D. Wash. June 1, 2010) (dismissing outrage claim brought by wife who observed her husband "being treated shamefully, humiliated and arrested" and called a "Fucking Nigger" by a Sergeant). Therefore, because the conduct Ms. Gravelet-Blondin alleges is not extreme and outrageous, her outrage claim fails as a matter of law.

III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS defendants' motion for summary judgment (Dkt. #71) and DENIES plaintiffs' motion for partial summary judgment (Dkt. #73). The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiffs.

DATED this 6th day of February, 2012.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD GRAVELET-BLONDIN and KRISTI GRAVELET BLONDIN, Plaintiffs, vs SGT. JEFF SHELTON and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	)	NO. C09-1487 RSL

DEPOSITION UPON ORAL EXAMINATION OF
JEFFREY SHELTON

9:00 o'clock a.m.
October 12, 2010
800 Fifth Avenue, #4141
Seattle, Washington

* * *

[12] MR. SHAEFFER: So next why don't you tell me why you tased my client.

MR. SHELTON: Because he was breaking the law.

Q How was he breaking the law?

A He was obstructing.

Q How?

[13] A He was hindering, delaying, caused our divided attention, and he was dangerous to our scene.

Q Okay. So back to the original answer, breaking the law. Does simply breaking the law justify use of a taser?

A Can you expand on that a little bit?

Q Yes. I asked why you tased Mr. Blondin and you said because he broke the law, he was breaking the law. And I'm asking, does every instance in which somebody is breaking the law justify use of taser?

A The totality of the circumstance, and I gave you I believe four answers. He refused commands, refused to leave. He was asked several times to leave; he resisted. We had an unsecured scene.

Q So when you said he resisted, how did he resist?

A He actively resisted by refusing to leave.

Q He actively resisted?

A When I asked him to leave more than three, four times and the other officers asked him to leave more than three or four times, to me he actively resisted.

Q Can you define active resistance to me?

A Sure. I ask you to do something, you tell me, or you don't answer, I ask you to do something, you

tell me no. I tell you to leave, you refuse to leave. To me you are actively resisting me.

Q What is passive resistance?

[14] A Basically the same thing.

Q So in your mind active and passive resistance are the same?

A Pretty close. Passive to me could be I ask you to leave, you don't leave. I tell you to leave, you don't leave. Just along those same lines.

Q When do we cross over from passive to active then?

A Well, I have an incident, a crisis scene going on, and I have an unsecured scene and I've asked you several times or you've been told several times that you need to leave and you refuse to leave. To me you are actively resisting.

Q Okay, But I guess what my question is, is there a time when passive resistance becomes active resistance? Is there a defining moment?

A I think it depends on the totality of the scene.

Q What about, and just to take it away from this fact scenario, where someone is in a protest situation and they go limp, that's kind of the classic form of resistance, what is that, active or passive?

A That would be passive.

Q And so does active resistance require any physical contact?

MR. JOLLEY: Object to the form.

A No.

[15] Q Any other reason why you tased my client than what we've discussed?

A No.

Q What was he doing that hindered your ability to perform your job duties?

A We were attempting to take Mr. Hawes down into handcuffs. By him, Mr. Blondin, approaching, it caused divided attention for us.

Q And who did he hinder?

A He hindered Officer Wellington, he hindered, Deputy Bowman, and he hindered myself.

Q Just the three of you?

A Those, that's the only three that I can recall at this time.

Q Okay. So did he hinder Officer Scott?

A I don't recall.

Q Did he hinder Officer Whalen?

A I don't recall.

Q What threat did Mr. Blondin pose to officer safety?

A We had an unsecured crisis scene. We had a gentleman that was actively resisting. We had an open car door. We had a gun call, a gun scene.

* * *

[60] Q And what is your primary objective when you arrive on the scene?

A Can you –

Q Well, you are responding to a suicide call; what's your primary objective?

A Well, my primary objective is to bring this to a peaceful resolution.

Q And what do you mean by "a peaceful resolution"?

A Well, hopefully that Mr. Hawes, we can safely remove him without him or anybody else being hurt.

Q Okay. And what happens, once the hose has come off the tailpipe, what happens if you wait?

MR. JOLLEY: Object to the form.

A If we wait for what?

Q If you instead of doing the next action, what if you just wait, wait there?

A I don't understand the question. Wait for what?

Q I mean, you said there's no time, and I'm trying to understand, well, what happens if you simply wait instead of doing something?

MR. JOLLEY: Object to the form.

A Well, it wasn't the fact – we did – we went to the next [61] step –

Q Okay.

A – which –

Q But I'm saying what happens if you take no action at that point once the hose is off?

A Well, I can't answer that. Maybe Mr. Hawes blows his brains out.

Q All right. So what did you do after the hose was off?

A We got back in behind our cover. I took the PA mike. We had originally talked about – some police cars, patrol cars have a different way to communicate. We can put it on a certain channel on the radio and it would broadcast through the PA system through a car. Officer Wellington's car was not equipped with that. You push a button and the radio talks outside the car so you can hear it when you are pumping gas or doing something. Therefore, I had to manually use the PA system to talk on.

MR. JOLLEY: You know, maybe before we get – I need to use the restroom. Why don't we take a break before we get into the next subject.

MR. SHAEFFER: Yeah, no problem

(Recess in proceedings from 10:27 until 10:35.)

BY MR. SHAEFFER:

Q All right. We're back on the record after a short break. Would you have been justified in using more force than [62] taser on Mr. Blondin?

A Yes.

Q And what more force could you have used?

A Oh, I could have used OC. I could have used a stick. I could have used an ASP. I could have used, I could have pushed him, punched him, kicked him.

Q You said a stick, what is a stick?

A A wood baton that we carry.

Q The same thing as a baton or is it something different?

A An ASP is a, like a kaleidoscope (sic) type thing that comes out; it has sections.

Q Metal?

A Most of them are.

Q Okay. So you could have struck him with a baton?

A Yes.

Q You would have been justified in doing so?

A Yes. I believe so; yes.

Q Under the circumstances with him standing there and not getting back to your commands to get back?

A Yes.

Q And you could have hit him with an ASP?

A Yes.

Q And you could have punched him, kicked him, all those things?

A Yes.

[63] Q Any other uses of force that you could have used?

A I could have went hands-on with him.

Q And hands-on in your mind is above or below timer?

A Yes.

Q Above?

A It depends on what the circumstance is. In that circumstance it would have been above the taser.

Q Okay. And so by going hands-on, what do you mean by that?

A Grabbing him, shoving him, pushing him, getting him in some type of counter technique, some kind of pain compliance holds.

Q And these things that you are describing now, are they above taser?

A Normally.

Q And would there have been lesser uses of force that would have been available to you?

A I tried that.

Q How about just taking his arm and escorting him to the sidewalk?

A No.

Q Why not?

A I have – I think I answered this earlier. I have no idea who Mr. Blondin is, no idea what his training is, no idea if he has a weapon or a firearm. He could have had it concealed.

* * *

[208] Q Is there any abrupt change in behavior that you noticed that would indicate aggression?

A Well, the fact that he came out, the fact that he was told to leave, the fact that he answered that that was his friend and he was told to leave again and told to leave again and told to leave again, and he refused to leave, his actions told me that he wasn't going to do what he was asked to do.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD GRAVELET-BLONDIN and KRISTI BLONDIN, Plaintiffs, vs SGT. JEFF SHELTON and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	)))))))))))	NO. C09-1487 RSL

DEPOSITION UPON ORAL EXAMINATION OF
JAMES WELLINGTON

9:00 o'clock a.m.
August 12, 2010
800 Fifth Avenue, #4141
Seattle, Washington

* * *

[17] MR. SHAEFFER: So how was it that you first were called to the scene or got involved with that incident?

[18] MR. WELLINGTON: The City of Snohomish asked for additional units for assistance with the suicide weapon call. My Sergeant sent me.

Q So what is it that you heard or where were you at the time?

A I was on duty in the City of Lake Stevens in the downtown area on routine patrol.

Q What was your shift at that time?

A It was six p.m. until six a.m.

Q And is that considered a graveyard shift?

A Yes.

Q So what did you hear or what was told to you?

A I don't recall the exact radio traffic. I mean, I know that they had a suicide weapon call and they requested additional units. And my Sergeant got on the radio and told me to go, and I responded.

Q And how far is Lake Stevens away from Snohomish?

A I think by Highway 9 probably three or four miles. It's not far.

Q And so tell me, so you arrived in Snohomish?

A Uh-huh.

Q Is that a yes?

A Yes. I'm sorry.

Q And then what did you do next?

A Well, I proceeded to their location and I talked to [19] Shelton, Officer Shelton about the situation. He briefed me on the situation that there was possibly a weapon involved and we began to formulate a plan to confront the subject.

Q So when you first arrived, who was there?

A Looking at my narrative, let's see here, I spoke with Sergeant Shelton, who was gathering information from family members who had reported the suicide threats. Officers Whalen and Scott and Deputy Bowman were present.

Q And if we could, for the purpose of these questions like to find out what you recall today.

A Okay.

Q And then we'll refer back to your report later.

A Okay.

Q So those people were already present when you arrived?

A Yes.

Q What did you learn upon approaching this group of people?

A That there was an elderly male at the house who had made suicidal threats to family members and that he had weapons, access to weapons at the house, firearms.

Q When you say "suicidal threats to family members", are you saying suicide threats about himself or was he threatening to kill others?

A Suicide means to kill one's self, so he told family members that he was going to kill himself.

[20] Q Okay. I just wanted to clarify that that didn't mean a threat to another person.

A Right.

Q Okay. So what was the plan that was formulated at that point?

A Well, Sergeant Shelton was in the process of gathering information and actually making notes on an incident response board that he had in the trunk of his vehicle when a neighbor approached us and told us that there's a man in his backyard in a vehicle with it running with a hose from the exhaust pipe leading into the interior of the vehicle.

Q Okay.

A So that kind of upped the ante, that kind of, there was a greater level of urgency at that time. I mean, the individual was in a more imminent threat of harm at that time.

Q Why?

A He was actively trying to kill himself at that time.

Q What was the report that you had before that was different?

A They were suicidal threats. And we know a couple of things from our training and experience as police officers. Suicidal threats are sometimes done for attention. Not everybody that says, "I'm going to kill [21] myself", does it. Okay, And we also know that suicide can turn to homicide in the blink of an eye because when people don't care whether or not they live or die, they may take it out on other people as well. That's just a fact.

So at that point, it had gone from verbal threats to active steps to kill himself.

Q Okay.

A And that would be an increase in urgency at that time.

Q And at that time it was active steps to kill himself by car exhaust; is that right?

A Yes, uh-huh.

Q And so did you personally speak to the neighbor?

A The one that approached us?

Q Yes.

A I do not recall if I did. I know that it was Snohomish's scene and there was a Sergeant on duty and –

Q So did you listen to the conversation?

A Yes.

Q And do you know who that person was?

A I have no idea.

Q Did you take any notes about that conversation?

A No. No. No, I don't stop to take notes in an urgent, rapidly-evolving situation like that.

* * *

[34] Q Okay. And then what happened?

A Then I heard, I believe, it was Officer Whalen, it could have been the other one, Scott, I heard him shout, "Get back." And I looked at him and he was looking over, and I turned to see what he was yelling at, and there was plaintiff standing right over us.

Q Plaintiff?

A Whatever his name is, the guy that's suing.

Q Mr. Gravelet-Blondin, does that name mean anything to you?

A Blondin?

Q Yeah.

A Yeah.

Q What do you mean by "standing right over"?

[35] A He was hovered over us watching our activities.

Q How close?

A Probably me to you.

Q So we're sitting at a table that's about –

A Five, six to ten feet. Not even ten feet; six to eight feet.

Q Okay. So this table is maybe about four feet wide. So wider than that?

A Yeah.

Q So you estimate six to ten feet between Mr. Blondin and where you were?

A Yes.

Q Now, at this point, Mr. Hawes is on the ground?

A Uh-huh.

Q And where are you in relation to his body? Like are you standing at his head, at his feet, left arm, right arm?

A Probably his right arm. Yeah, his right arm.

Q Right arm? So are you in between –

A I'm sorry. Left.

Q Left arm?

A Yeah.

Q So your back is to the alley; is that right?

A Right.

Q And so where was Mr. Blondin in relation to the car?

A He was in front of it. The car was here (indicating), the [36] fight was taking place here (indicating), and Blondin was –

Q So "in front" you mean in front of where the vehicle was facing?

A Right.

Q Was the vehicle facing toward the alley or away from the alley?

A Away from it.

Q And so Mr. Blondin was somewhere in front of vehicle; is that right?

A Yes.

Q Then what happened next?

A After the initial officer yelled at him and I looked up to see him, I shouted at him at the top of my lungs.

Q What did you shout?

A "Get back. Police. Get back."

Q What happened next?

A Usually when I yell at people that loud, it startles them, but not this guy. He just kind of looked up at me with this blank look on his face and looked back down at the activities on the ground, and that's when Sergeant Shelton acted.

Q What did he do?

A He also shouted, "Get back."

Q Okay.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD GRAVELET-BLONDIN and KRISTI GRAVELET BLONDIN, Plaintiffs,	)	
vs	)	NO. C09-1487 RSL
SGT. JEFF SHELTON and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	)	

DEPOSITION UPON ORAL EXAMINATION OF
CARL WHALEN

10:04 o'clock a.m.
September 24, 2010
800 Fifth Avenue, #4141
Seattle, Washington

*   *   *

[22] MR. SHAEFFER: So why don't you tell me each and every fact that supports your conclusion that Mr. Blondin was obstructing.

MR. ROSENBERG: Object to form.

MR. WHALEN: We had an unsecured – we were responding to the suicide weapon call. We hadn't had Mr. Hawes secured, Mr. Blondin approached us

and I didn't know who he was. I didn't know If he was a neighbor or not. It took me away from Mr. Hawes, trying to secure him, to assist Sergeant Shelton. And he failed to listen to our commands to get back and stay away.

Q From a distance of 20 to 25 feet; correct?

A Approximately.

Q As you had said, there's no facts to indicate that Mr. Blondin was aggressive or intended to do you any harm; right?

MR. ROSENBERG: Objection to form; mischaracterizes.

A He was approaching us.

[23] Q But when he heard a command, he remained stationary; correct?

A At one point; yes.

Q And there's nothing else about him that suggested to you that he was going to come attack you; right?

A Not from what I saw then. I don't know what his intentions were, though.

Q Okay. But there's nothing that you can point to that you observed that you said, "Wow, that's something that I'm worried about"?

A I was worried.

Q About what? What about it?

A That he was approaching us.

Q Okay. But once he stopped, was there anything from that point?

A I was still concerned that he was there.

Q Why?

A I don't know what he was doing.

Q But again, besides you not knowing something, was there anything that you can say, "I saw this. I knew this", that you were concerned about once he stopped?

MR. ROSENBERG: Object to form.

A I was still concerned that he was there, but otherwise, no.

Q At that point when he stopped, did Mr. Blondin pose an [24] immediate threat to officer safety?

MR. ROSENBERG: Object to the form.

A That we were pulling – it took away our attention from dealing with Mr. Hawes that was supposedly armed.

Q So this is a really important question so I need, it is a yes or no question. At the time that he stopped, did Mr. Blondin pose an immediate threat to officer safety?

MR. ROSENBERG: Object to the form. And you can use as many words as you need to to answer under oath.

MR. SHAEFFER: That's coaching, Adam. You can object to the form, you can't tell him how to answer it.

MR. ROSENBERG: He's under oath.

A Can you repeat the question?

(Requested portion was read back.)

A I believe so.

Q So your answer is yes?

A I believe so.

Q Okay. Now explain how.

A He's near us. We have a weapon. I have no idea what his intentions were. We have an unsecure gun somewhere. I don't know who, or what he's doing.

Q But did Mr. Blondin pose an immediate threat to officer safety at the time that he stopped?

A I still believe so.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD GRAVELET-BLONDIN and KRISTI GRAVELET BLONDIN, Plaintiffs, vs SGT. JEFF SHELTON and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	)	NO. C09-1487 RSL

DEPOSITION UPON ORAL EXAMINATION OF
DAVID BOWMAN

9:10 o'clock a.m.
August 11, 2010
3000 Rockefeller Avenue, 7th Floor
Everett, Washington

*   *   *

[45] MR. SHAEFFER: So what happened next?

MR. BOWMAN: So I turned back around and we were still continuing. I want to say that the two officers were making some progress getting one hand out behind to start handcuffing and I heard a pop of a taser from behind me, that kind of, I don't know, the sound it makes when the darts go off, and

realized that there was taser sister going off over there, but we continued with what we were doing with this guy, with Mr. Hawes.

Q And so what happened next?

A Got him in custody. In custody, I mean his hands secured. And the two officers searched him, didn't find a gun, so in my mind we still had an unsecured scene, so I went looking for the gun, searched the car.

Q So were you involved in the search of his person?

A No. I was there.

Q Did you see them do that?

A Yes.

Q And what, if anything, did they find on him?

[46] A I don't recall what, if any, specific property items. At that point my only concern was I want to make sure whatever gun may have been involved is found and secured.

Q Even if you don't recall what was found, do you recall that there were items found on him?

A I don't know.

Q Okay. So you said that you then turned your attention to the gun; what happened?

A I turned my attention to looking for the gun in the car. The other officers were dealing with the subject. An aid car had been called in to get him tended to. He had just been tased. He had just been wrestled with. Plus there was the issue that he was in a suicidal state.

So I went to look and see if I could find the gun sitting in the car.

Q Okay.

A And found it underneath the passenger seat, the front passenger seat of the car.

Q You did?

A I did.

Q Describe how you saw it or found it.

A I found it by, I don't recall if I looked or reached, but I reached in and there was something heavy and it was loosely wrapped in a plastic garbage bag or plastic grocery bag and it was a Glock handgun.

* * *

[95] Q And what did you discuss about whatever was happening behind you, as we've referred to?

A What are you asking?

Q The situation with Sergeant Shelton that was occurring behind you while you were taking care of

Mr. Hawes, what did you discuss with Mr. Jolley about that?

A I expressed to him why the yelling behind me was a concern to me. And the reason was, I had my hands full. We were dealing with a very dangerous, fluid situation, suicidal subject with a gun. I had a gun that I barely had control of. I was in no position to defend myself; he was extremely concerned. And when I saw that somebody was there that had my back, I was no longer concerned. You know, still maybe keeping an ear out if things went, you [96] know, if I heard the sounds were approaching me or something, but I was able to – it actually distracted me from the task at hand, the yelling, but then when I realized there was someone there, I was able to refocus to complete the task at hand, that was the discussion I had with him about it.

Q How long would you say you were distracted?

A Seconds; five, ten seconds. I started becoming aware of yelling, I heard it, after some short period of time I looked, saw there was an officer facing whatever direction, you know, the direction was coming from where the officer was standing. So I said, "Okay, somebody's got that", and I went back to my task. So I couldn't tell you exactly, but it wasn't a minute or two minutes; it was seconds.

Q Okay. And at that time, did you know that Mr. Hawes did not have a gun on his person?

A No.

Q Is that when –

A I did not know that.

Q So the search was occurring, is that –

A No, that was before – the yelling, the turn, the seeing Shelton occurred during the active physical resistance before Hawes' hands were secured.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD GRAVELET-BLONDIN and KRISTI GRAVELET BLONDIN, Plaintiffs, vs SGT. JEFF SHELTON and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	)	NO. C09-1487 RSL

DEPOSITION UPON ORAL EXAMINATION OF
THOMAS OVENS

1:29 o'clock p.m.
October 14, 2010
800 Fifth Avenue, #4141
Seattle, Washington

* * *

[4] MR. SHAEFFER: Sergeant Ovens, you've opined that in your opinion the reasonable officer would have believed that they had probable cause to arrest Don Blondin for obstructing a police officer. Would you please expand all the articulable facts to support probable cause that support that opinion?

MR. OVENS: Sure. The officers involved in this incident had responded to Mr. Blondin's neighbors's house for a call of a suicidal subject. They had ultimately located that subject inside a vehicle. The vehicle was running and it had a hose initially running from the exhaust pipe to the window. The car was revving, so they had a fear that the person was actually, not just threatening suicide, but suicidal, trying to kill himself.

[5] They located Mr., I guess it's Hawes in the vehicle. It was also reported by the family that Mr. Hawes was supposed to be armed, that he had a pistol or a firearm of some type and that he would have it with him at that time.

They ultimately gained a position of, I guess, cover. They called to Mr. Hawes. Mr. Hawes exited his vehicle. As they moved up to take this potentially, or suicidal subject into custody to detain him, they moved up in formation. They had a ballistic shield. There was a cover officer. There was a nonlethal, or less lethal force officer. There was a team leader. They also had another patrol officer there. They gave him verbal commands. He ultimately didn't comply with that. They ended up using force on him. And while they were attempting to take him into custody without the firearm being secured, that's when Mr. Blondin decided to go see what was going on with his neighbor, Jack Hawes, and caused I guess multiple officers to stop what they were doing, look up at him. And when given commands to step back and move away, this is a police matter, he didn't do so.

Q Okay. Anything else?

A And that his failure, or his willingness to interject himself into the situation caused the officers to stop, at least one, Sergeant Shelton, to stop doing what he was [6] doing which was supervising the taking into custody of Mr. Hawes and deal with him.

Q Anything else?

A That's all I can think of right now.

Q Who did Mr. Blondin hinder?

A I just said, Officer Shelton –

Q Okay.

A – and several of the other officers.

Q That's what I'm getting at, Officer Shelton or who?

A I said Officer Shelton. And I know Deputy Bowman was concerned; he was dealing with Mr. Hawes. He also had a long rifle that he was trying to control, and he ended up looking up. I believe Officer Scott also testified that he stopped doing what he was doing and took his eyes from Mr. Hawes and put them on Mr. Blondin.

Q Anyone else?

A That's all I can recall right now.

Q And how was Sergeant Shelton hindered?

A Well, initially he was there, he was acting as the Sergeant, he was running this team of officers that were dealing with Mr. Hawes. And he had to stop doing that and instead divert his attention to Mr. Blondin.

Q Was Officer Shelton hands-on at that point?

A I do not believe he was.

Q And who was delayed?

[7] A I think they all were, or the ones that I just mentioned.

Q So that includes Shelton, who else?

A I said Bowman. I believe Scott diverted his attention, and I know ultimately Officer Whalen had to leave Mr. Hawes and go over and take Mr. Blondin into custody.

Q After Mr. Blondin had been tased by Sergeant Shelton; correct?

A Correct.

Q And how were all of them delayed?

A I think I've –

Q The ones that you've listed?

A I've already answered that. They were dealing with Mr. Hawes and now Officer, Sergeant, Officer Shelton and Officer Whalen were now dealing with Mr. Blondin.

Q How long was Deputy Bowman delayed for?

A You know, I don't have the exact, I don't think there was an exact tints frame given.

Q How long was Officer Whalen delayed?

A Well, I would say from the time he stopped dealing with Mr. Hawes for the rest of the call.

Q And who was obstructed?

A Well, I've already answered that. I said Sergeant Shelton, Officer Whalen, Deputy Bowman, and Officer Scott.

Q So not Officer Wellington?

A I don't recall his exact testimony about that. I know he [8] was concerned for his safety based on Mr. Blondin interjecting himself.

Q Now, you would agree, wouldn't you, that in terms of probable cause for obstructing or hindering or delaying, that proximity is important, wouldn't you?

MR. JOLLEY: Object to the form.

A Not necessarily. It will depend on the facts and circumstances.

Q Why not? In what case wouldn't it be?

A Well, I've actually dealt with an individual that was inside his house and I wanted to go in the house to do a welfare check, and even though he was

inside of a residence, his behavior physically I guess hindered or delayed our welfare check and he was convicted of that crime. So we were not in close proximity because he said he had a firearm.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DONALD GRAVELET-BLONDIN and KRISTI GRAVELET BLONDIN, Plaintiffs, vs SGT. JEFF SHELTON and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	)))))))))))	NO. C09-1487 RSL

DEPOSITION UPON ORAL EXAMINATION OF
ALEXANDER SCOTT

10:12 o'clock a.m.
September 22, 2010
800 Fifth Avenue, #4141
Seattle, Washington

* * *

[38] MR. SHAEFFER: Did Mr. Blondin ever contact any of the officers on the scene physically?

MR. SCOTT: No.

Q Did he ever interfere with your ability to handcuff Mr. Hawes?

A Yes.

Q How?

A Because when he showed up on scene, I had to take my attention off of Hawes of what I was doing. I didn't know what his motives were or why he was there or why he wasn't leaving. So I had to take my attention off of Hawes for the moment to look at him and worry about what is he about to do.

Q And –

A So that's how he interfered with me at the scene.

Q At this point, did you have any weapon on Hawes?

[39] A I don't know yet. I didn't know yet.

Q You hadn't seen one?

A Not yet.

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DONALD GRAVELET-BLONDIN and KRISTI GRAVELET BLONDIN, Plaintiffs, vs SGT. JEFF SHELTON and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	NO. C09-1487 RSL

DEPOSITION UPON ORAL EXAMINATION OF
DONALD GRAVELET-BLONDIN

Taken at 700 Stewart Street, Room 15128
Seattle, Washington

* * *

[53] MR. JOLLEY: Now, how fast were you moving from the time you exited your house until you reached position 2?

MR. GRAVELET-BLONDIN: A quick walk. It's hard to walk in slippers or run in slippers.

Q And once you exited the house, do you have any idea where your wife was?

A I just assumed she was right near me.

Q Now, once you reached position 2, what did you see?

A I saw two officers holding Jack down on the shoulders and [54] another one holding a gun to him.

Q And what actions did you take at that point –

A I –

Q – once you observed the two officers that were holding Mr. Hawes down and then the one, as you say, "holding the gun on him"?

MR. SHAEFFER: Objection; vague.

Q (By Mr. Jolley) What did you say?

A I said, "What are you doing to Jack?"

Q And did you get any response from the police officers?

A Yes.

Q What did they say?

A One of them yelled, "Get back." But it wasn't those ones.

Q Now, you indicate that a police officer yelled to get back, but that it wasn't one of the officers in close proximity to Mr. Hawes?

A That's right.

Q Where did the command come from to get back?

A From right in front of his vehicle.

Q And did you actually see the person who was telling you to get back?

A Yes.

Q And was that person wearing a police uniform?

A Yes

[55] Q Was there any confusion in your mind that the person telling you get back was a police officer?

A No.

Q When you heard the police officer tell you to get back, what did you do?

A I froze.

Q Were you still at position 2 when you froze?

A Yes.

Q And what did the police officer look like who told you to get back?

MR. SHAEFFER: Objection: vague and ambiguous.

Q (By Mr. Jolley) I'll rephrase. Do you understand what I mean when I ask you, what did the police officer look like who told you to get back?

A You want a physical description?

Q Yeah, what did he look like?

A Dark hair, glasses

Q Is it –

A No.

Q – either –

A Sorry, go ahead.

Q Is it either of the gentlemen that are sitting here at the table today?

A No.

Q Do you know if he worked for the Snohomish Police [56] Department or some other entity?

MR. SHAEFFER: Objection; temporally vague.

MR. JOLLEY: What does "temporally vague" mean?

MR. SHAEFFER: Are you asking if he knew at the time or if he knows now?

Q (By Mr. Jolley) Was the police officer, who told you to get back, wearing a police uniform?

A Yes.

Q What color was it?

A Blue, I guess.

Q And since that time, have you found out who that particular police officer was?

A No

Q Now, describe for me what happened from the time you heard the command to get back until you were actually Tased.

A This guy in front of the . . .

MR. JOLLEY: We can take a break.

THE WITNESS: No, no, no. Let's get through this.

Q (By Mr. Jolley) Okay.

A This guy yelled at me, "Get back." I turned back to look at Jack. And somebody else yelled at me. And I'm still looking at Jack. And then one of the officers came at me and he said, "Get back or I'm going to Tase you," and [57] before he even finished telling me that, I was feeling the shock.

Q So all total, prior to you being Tased, how many times did you actually hear someone tell you to get back?

A Two, three times maybe.

Q And at any point, from the time you were told to get back until you were Tased, did you ever retreat?

A No.

Q Why not?

A I don't know why. I tried. I wanted to. I just didn't know what to do.

Q Now, when you say you "tried," describe for me what you mean.

A I tried to make my feet move. I tried to get out of there. It just didn't work.

Q Now, correct me if I'm wrong, but it seems that you're saying that you were told two, maybe three times, according to your recollection, to get back before you were Tased; is that accurate?

MR. SHAEFFER: Asked and answered.

THE WITNESS: Yes.

Q (By Mr. Jolley) Is it possible that you were told more than three times to get back before you were Tased?

MR. SHAEFFER: Objection; calls for speculation.

[58] THE WITNESS: Possible.

Q (By Mr. Jolley) Do you know if you were told to get back by more than one police officer?

A Yes.

Q Can you tell me how many police officers actually told you to get back before you were Tased?

A Two.

Q And can you give me a physical description of the second police officer who told you to get back?

A He was big.

Q And as of today, do you know who that was that told you to get back? The second police officer, I should say.

A Yes.

Q Who was it?

A Officer Shelton.

Q Now, how much time elapsed from the time you were told to get back the first time until you were actually Tased?

MR. SHAEFFER: Objection; calls for speculation.

THE WITNESS: 15 seconds.

Q (By Mr. Jolley) How much time elapsed from the time you were told the first time to get back until you were given an additional command to get back, prior to being Tased?

MR. SHAEFFER: Same objection.

THE WITNESS: A matter of seconds. Less than 5 [59] seconds, 5 seconds maybe. I don't know.

Q (By Mr. Jolley) Now, at any time when you were told to get back, did you actually physically retreat?

A No.

Q Did you say anything to any – or let's just back up. Did you say anything, period, after you were told to get back, prior to being Tased?

A No.

* * *

[71] Do you recall anything about what happened during that time frame?

A The paramedics arrived.

Q And what happened when the paramedics arrived?

A They tried to get the barbs out of me.

Q And were they able to do so?

A Yes.

[72] Q And besides taking the barbs out of you, did anything else happen with the paramedics?

A No, they tried to keep me from hyperventilating.

Q And what actions did they take to keep you from hyperventilating?

A Told me to breathe.

Q Were you actually placed inside the aid car or ambulance at any time?

A No.

Q Were you ever placed on a stretcher?

A No.

Q Were you asked if you needed medical attention?

A No.

Q Did you request medical attention?

A No.

* * *

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD GRAVELET-BLONDIN, and KRISTI GRAVELET-BLONDIN, Plaintiffs, v. SGT. JEFF SHELTON, and OFFICER CARL WHALEN; CITY OF SNOHOMISH, Defendants.	No. C09-1487RSL DECLARATION OF SERGEANT JEFF SHELTON IN OPPOSITION TO PLAINTIFFS" MOTION FOR SUMMARY JUDGMENT NOTED FOR: JANUARY 29, 2010

I, Jeff Shelton, hereby declare:

1. I am a sergeant with the City of Snohomish Police Department.

2. On May 4, 2008, I was dispatched to a report of a suicidal male at 322 Avenue D in Snohomish. Dispatch provided additional information that the suicidal subject, Jack Hawes, owned a firearm and kept it with him at all times. Dispatch further advised that the suicidal subject would have the firearm with him as we responded to the call.

3. We arrived at the scene and were informed that the suicidal subject was now in a running vehicle

with a hose attached to the exhaust and the other end of the hose running into the car window.

4. There are always heightened officer safety concerns when responding to a suicidal subject because the potential exists that the subject may attempt to harm police officers to commit "suicide by cop". Suicide by cop occurs when a subject threatens police with a deadly weapon so that police are left no alternative but to use deadly force to alleviate that threat. Additionally, there are concerns that a suicidal subject may seek to "go out in a blaze of glory" and desire to injure or kill police officers while attempting to commit suicide.

5. Upon spotting the suicidal subject in his car, we approached but took extreme precautionary measures to insure officer safety. We used a ballistic shield as cover to approach the vehicle. Our intent in approaching was to remove the hose running from the exhaust into the vehicle interior. The suicidal subject was revving the motor up and down as we approached. As we neared the vehicle, we could see that the hose had fallen off of the exhaust pipe. Because of the considerable officer safety concerns presented, we retreated to a nearby alley to reformulate our plan.

6. Because of the information about the firearm, and concerned that the suicidal subject could use the still running vehicle as a weapon, we decided to use a patrol car as a position of cover. Officer Wellington of the Lake Stevens Police Department retrieved his patrol car and positioned it at an angle and a safe

distance from the suicidal subject's vehicle. I then used the PA system to address the suicidal subject. After several requests were made to the subject asking him to turn off the vehicle, step out and talk with us, the subject complied. Mr. Hawes turned the vehicle off and stepped out with his hands at his sides.

7. I gave multiple commands to Mr. Hawes to step away from the car and show his hands. He repeatedly refused and at one point waived us off and told us to go away. Concerned that Hawes could possibly get back into his vehicle or produce the firearm we had been warned about, I instructed Officer Wellington to deploy his taser to gain Hawes' compliance.

8. Officer Wellington fired his taser at Hawes and he instantly fell to the ground. When we attempted to restrain him and get him handcuffed, he resisted by pulling his arms underneath him. Still concerned that Mr. Hawes may have a firearm or some other weapon on his person, Mr. Hawes was tased a second time in an effort to gain compliance.

9. While we were struggling with Mr. Hawes, and before he was handcuffed, a male now known to be Plaintiff approached the scene. I did not see Plaintiff initially as I was attempting to get Mr. Hawes handcuffed, One of the other officers wrestling with Mr. Hawes spotted Plaintiff and yelled for him to "stop", or "get away", or words to that effect. I then looked up and saw Plaintiff continuing to approach and observed him ignore additional commands to leave the area.

10. As the other officers were trying to get the suicidal subject handcuffed, and as Plaintiff refused to comply with commands to leave the scene, I left my position where I had been struggling with Mr. Hawes to deal with Plaintiff.

11. As Plaintiff approached the scene, we were very concerned that a reported firearm was still unaccounted for and that Mr. Hawes was not yet handcuffed. As Plaintiff approached, he was ordered away by other officers and myself because we were concerned about the safety issues created by the presence of another person in close proximity to Mr. Hawes.

12. We could not afford divided attention between Plaintiff and Mr. Hawes as Mr. Hawes was not yet handcuffed. Officer safety as well as the safety of Plaintiff and the suicidal subject were all compromised as Plaintiff neared where we were struggling with Mr. Hawes.

13. Plaintiff was warned repeatedly by both myself and other officers to leave the area or he would be tased. Ultimately, Plaintiff was within a car length (approximately 15 feet) of Mr. Hawes when I warned him one last time that I would deploy my taser if he did not leave the area. Plaintiff failed to comply once again.

14. I decided to deploy my taser so Plaintiff would be temporarily incapacitated and I could gain custody of him immediately and alleviate the safety concerns caused by his presence. Plaintiff was tased

for approximately two seconds. He was then taken into custody by Officer Whalen of the Snohomish Police Department and we then secured the scene.

15. After Plaintiff was tased and the suicidal subject was placed in handcuffs, we found a large knife on Mr. Hawes. We also located a loaded 9 mm pistol behind the passenger seat in the vehicle he exited.

16. Meanwhile, Plaintiff was advised he was under arrest for obstruction and an aid car was requested to check Plaintiff's vital signs. The aid car arrived, checked on Plaintiff and Plaintiff declined further medical treatment. Officer Whalen transported Plaintiff to the Snohomish Police Station where he was issued a citation for Obstructing and released.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON AND THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 21 day of January, 2010 at Snohomish, Washington.

/s/ Jeff Shelton
JEFF SHELTON

Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD GRAVELET-BLONDIN, and KRISTI GRAVELET-BLONDIN, Plaintiffs, v. SGT. JEFF SHELTON, and OFFICER CARL WHALEN, CITY OF SNOHOMISH, Defendants.	No. C09-1487 RSL DECLARATION OF DONALD GRAVELET-BLONDIN IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON QUALIFIED IMMUNITY NOTED ON MOTION CALENDAR: FRIDAY, JANUARY 29, 2010

I, DONALD GRAVELET-BLONDIN, declare as follows:

1. I am over the age of 18 and am competent to testify.

2. I live with my wife, Kristi Gravelet-Blondin at 320 Avenue B in the City of Snohomish, Washington. We live next door to Mr. Jack Hawes, who is in his 80s.

3. On the evening of May 4, 2008, I was with my wife relaxing in our family room watching television. It was still light out.

4. We heard a noise outside, we didn't know what it was, but it was coming from Jack Hawes' place. We went outside and heard Jack's name being called so we went to his place to make sure he was okay.

5. I was wearing shorts and a white T-shirt, with slippers on my feet, and I was unarmed.

6. As we stepped into the yard between our house and that of Mr. Hawes, I could hear Mr. Hawes moaning in pain. I saw Mr. Hawes' purple mini-SUV "Tracker" in the side yard between our houses. Beyond the purple Tracker, I could see three or four police officers with Mr. Hawes on the ground. I called out "What are you doing to Jack?" Shortly after this incident, I measured the distance between where Jack was and where I stood. I was standing 37 feet away from where the officers were restraining Mr. Hawes, and the Tracker was between me and the officers.

7. A police officer, who I later learned was Sgt. Shelton, then ran toward me, yelling "Get back or I'll Tase you!" loudly and rapidly. I stopped dead in my tracks; I literally froze. At no time did I threaten Sgt. Shelton, either verbally or physically. My hands were down at my sides. I did not hinder, delay, or obstruct any aspect of the police's arrest of Mr. Hawes. I did not advance after being told to stop. I did not say anything to the officer who ran at me, let alone argue with him.

8. Sgt. Shelton then shot me with his Taser. I instantly felt excruciating pain throughout my entire body. I experienced paralysis, lost muscular control, and fell uncontrolled to the ground. Someone told me to put my hands behind my back, and asked "do you want to get it again?" I was then handcuffed with my hands behind my back, face down on the ground. I did not resist. I began to hyperventilate. I also experienced disorientation, loss of balance, and weakness for at least 30 minutes after I was Tased. A medic then removed the barbed probes, which had lodged in my flesh.

9. The police then placed me under arrest for "obstructing," and took me to the station for booking. The City Prosecutor subsequently dropped the charge against me.

10. *Exhibit A* to this declaration is a diagram of the scene. Though it is not to scale, the diagram does show the Tracker and the relative positions of Mr. Hawes and myself when we were Tased. *Exhibit B* is the same diagram with the following notations: "A" is the approximate position of the Tracker; "B" is the approximate position of Mr. Hawes; and "C" is approximately where I was Tased.

I declare under penalty of perjury of the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 7th day of January, 2010, at Snohomish, Washington.

/s/ Donald Gravelet-Blondin
Donald Gravelet-Blondin

[Certificate Of Service Omitted In Printing]