

COA No. 298124

**IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

**FILED**

**DEC 19 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

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DANIEL BRIAN STRANGE

Appellant,

v.

SPOKANE COUNTY, and SPOKANE COUNTY SHERIFF'S DEPUTY  
JEFFREY WELTON, in his official and individual capacity,

Respondents.

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**APPELLANT'S OPENING BRIEF**

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## **I. ASSIGNMENT OF ERROR.**

1. Mr. Strange was entitled to the application of *Bryan v. MacPherson*, 630 F.3d 805 (9<sup>th</sup> Cir. 2010), during his trial. The trial court erred in refusing him the benefit of that law.

2. The trial court erred in dismissing defendant Spokane County from this action.

3. The trial court abused its discretion in repetitively prohibiting Mr. Strange from introducing probative and relevant evidence, and from properly cross-examining witnesses.

4. The trial court abused its discretion by failing to remedy prejudicial misconduct of Defendant Spokane County.

5. The trial court improperly instructed the jury that no limitations applied to a deputy's use of force, and that no specific intent was required to be evident for an arrest.

## **II. SUMMARY OF ARGUMENT.**

Prior to this trial, the Ninth Circuit held that the use of a Taser under the same circumstances as existed here was excessive force as a matter of law. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9<sup>th</sup> Cir. 2010). The trial court refused to apply this federal precedent.

The use of a Taser as occurred here is also prohibited under

state law. RCW 10.31.050. The trial court refused to apply this state law.

Instead, the trial court dismissed Spokane County as a defendant and went on to systematically cripple any semblance of the fair trial to which Mr. Strange was entitled.

Mr. Strange asks for Appellate relief from the inevitable and improper results of this proceeding.

### **III. STATEMENT OF THE CASE.**

Defendant Spokane County Dept. Jeffrey Welton conducted a traffic stop of a vehicle driven by Plaintiff Brian Strange's then-girlfriend/now wife, Kelly Garber, in the early morning hours of January 22, 2006. *See e.g. P-119*. Mr. Strange was the passenger in his own vehicle. *Id.* Ms. Garber was cooperative and helpful with Dpt. Welton. *Report of Proceedings, hereafter "RP," 914: 23 – RP 915: 6.*

Dpt. Welton was able to obtain all the information he needed—the driver's license and the car registration, and Mr. Strange's license. *RP 789: 5-10*. He then slammed Ms. Strange's car door with enough

force to crack the windshield on the car, and began walking back to his patrol car. *RP 789: 5-13; RP 1153: 19 – RP 1155.*<sup>1</sup>

By the time Dpt. Welton got to the left front corner of his patrol car, Mr. Strange had exited the passenger side of the vehicle. *RP 805-6: 15-17.* Mr. Strange took two steps, and stopped. *RP 819: 9-11.* Mr. Strange never left the swing path of his door. *RP 1158: 13-24; RP 966: 25 – RP 967: 14.*<sup>2</sup> Mr. Strange was fifteen to twenty feet away from Dept. Welton. *RP 1157: 15-20.*

Dpt. Welton drew his firearm. *RP 807: 1.* Dpt. Welton recognized that Mr. Strange had no weapon; he was not armed. *RP 820: 1-5; RP 820: 17-19.* Dpt. Welton requested emergency backup, and “six or seven deputies did start to respond to me...” *RP 820: 8-14.* Dpt. Welton holstered his firearm and pulled out his Taser. *RP 820: 15-16.*

Dpt. Welton heard Mr. Strange saying: “Don’t slam my door!” *RP 819: 12-14; RP 821: 15-19.* Mr. Strange did not come any closer

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<sup>1</sup> Kelly Garber testified that it was a forceful slam. *RP 964: 22-23.* Dpt. Welton’s ride-along, Matthew Keetch, testified, “...yes, it shut hard, it slammed.” *RP 495: 2-5.*

<sup>2</sup> Mr. Strange was facing Dpt. Welton’s patrol car, with its lit spotlight and headlights shining in his direction. *RP 811: 10 – RP 812: 2.*

to Dpt. Welton. *RP 825: 1.* <sup>3</sup>

Dpt. Welton ordered Mr. Strange repeatedly to get back into his car. *RP 820-821.* His “final order” to Mr. Strange was to get back into his car or be arrested. *RP 825: 18-24; RP 927: 9-15.* Dpt. Welton’s incident report also reflects his telling Mr. Strange that if Mr. Strange did *not* get back into the vehicle, he would be arrested for obstructing a public servant. *P-119, narrative report, p. 2; RP 826: 6-13; RP 826: 22-25; RP 828: 5-7.* <sup>4</sup>

Dpt. Welton heard Mr. Strange say something. <sup>5</sup> He took Mr. Strange’s words as a challenge and “defiance.” <sup>6</sup> Dpt. Welton told Mr.

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<sup>3</sup> Dpt. Welton’s ride-along Matthew Keetch testified that Mr. Strange was not being aggressive at any time, never threatened Dpt. Welton in any way, and at no time said he was not going to do what Dpt. Welton told him to do. *RP 515: 11 – RP 516: 2.*

<sup>4</sup> Mr. Strange was told “consistently” that, “to avoid arrest, get back in the car.” *RP 834: 2-4.*

<sup>5</sup> Dpt. Welton testified he heard Mr. Strange say, “[G]o ahead and arrest me.” *RP 834: 25 – RP 835: 1.* His report reflects Mr. Strange saying: “I don’t have to. You can’t make me—go ahead and arrest me.” *RP 828: 8-12.* Mr. Strange however testified that Dpt. Welton told him, “Get back in your car, or I will shoot you with my Taser.” *RP 1160: 14-18.* He started to comply. *RP 1161: 6-10.* As he turned to get in his car, he said, “For what? I am not approaching you.” *RP 1161: 24-25.* He then said, “Wearing that badge doesn’t make you right.” *RP 1162: 1-2.* Kelly Garber testified she never heard Mr. Strange say anything like, “Go ahead and arrest me,” or “You can’t make me.” *RP 968: 7-12.* Matthew Keetch, Dpt. Welton’s ride-along, also never heard Brian Strange say any such thing. *RP 507: 2-11.* Mr. Keetch never heard Mr. Strange say he would not comply with commands. *RP 515: 21 – RP 516: 2.*

<sup>6</sup> Mr. Strange was “defiant” and “challenging” Welton to arrest him, Welton testified. *RP 829: 6-9.*

Strange he was under arrest. *RP 835: 2-5; RP 836.* “Turn around and put your hands behind your back.” *RP 927: 16-22.* Dpt. Welton didn’t do anything to ensure that Mr. Strange heard his arrest command. *RP 835: 6-25; RP 835: 23-25.* He observed Mr. Strange turn around to re-enter his vehicle. *RP 836: 5-12.*<sup>7</sup>

Mr. Strange was approximately 6’6,” and Dpt. Welton observed that he had to crouch down to get into the car. *RP 846: 1-9.* He believed that Mr. Strange was attempting to sit down in the passenger seat. *RP 841: 3-7; RP 841: 11-15; RP 836: 16-24; RP 846: 12-22.* Dpt. Welton waited until Mr. Strange had his back to him, and was actually starting to sit down in the car. Dpt. Welton then discharged his Taser into Mr. Strange’s back. *RP 845: 22 – RP 846: 25.*<sup>8</sup>

At the time he tasered Mr. Strange, Dpt. Welton was neither afraid of Mr. Strange, nor did he perceive any imminent threat of harm. *RP 847: 22 – RP 848: 21.*

Dpt. Welton acknowledged that he does not have to effect a custodial arrest for a misdemeanor. *RP 843: 6-8.* He could have

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<sup>7</sup> Mr. Keetch, did not hear Mr. Strange ever refuse to comply with commands. *RP 515: 21 – RP 516: 2.* Mr. Keetch at no time heard Dpt. Welton tell Mr. Strange to either stop, or to *not* get back in the car. *RP 511: 4-12.*

<sup>8</sup> He observed a “good reaction” from Mr. Strange. *RP 868: 25.* He observed Mr. Strange to stiffen up and fall to his right. *RP 869: 1-2.*

issued a citation, or sent a report to the prosecutor for charging. *RP 843*. He could have waited for back-up. *Nault, RP 132*. But Dpt. Welton testified that his training requires him to prevent a person under arrest from re-entering a motor vehicle. *RP 840:1-6*. This rule was absolute: “Again, based on my training, my experience, once a person has been placed under arrest, we absolutely do not let them, within our ability-keep them out of the car for several reasons.” *RP 843: 2-5*.

Dpt. Welton testified: “I can use whatever means reasonable and necessary to effect that.” *RP 844: 11-15; RP 845: 3-21*. He could use his Taser for “compliance.” *RP 861: 19-23; RP 868: 15-20*. This was his Spokane County training. *RP 847: 5-8*. He could use a Taser on a person simply walking away from him to gain compliance with his orders. *RP 868: 2-8*. He did not even have to ensure that the person *heard* that they were under arrest before using force. *RP 905: 24 – RP 906: 3; RP 907: 5-9*.

Responding deputies were on the scene within fourteen (14) seconds of the Taser discharge.<sup>9</sup>

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<sup>9</sup> The stop took five minutes. It was initiated at 1:51 a.m. *Line P-123 (CAD) showing stop at 1:51*. At 1:55:46 a.m., Mr. Strange was tased. *P-146, ln. 320 (Taser dataport recording), at Appendix A-34*. Mr. Strange’s Taser was triggered at 1:56 a.m., and the first back-up deputy was on the scene. *P-123, at 1:56, citing unit B-503 on scene*. Another deputy arrived at 1:57. *P-123, at 1:57, unit B-508*.

Dpt. Welton booked Mr. Strange into jail, and cited him for obstructing and resisting arrest. *RP 134: 11-15*. Ms. Garber was not cited for any traffic offense. *RP 871: 17 – RP 872: 10*. Dpt. Welton’s criminal charges against Mr. Strange would later be dismissed by the prosecutor. *RP 877: 19-25*.

Under Spokane County Taser policy, “active resistance” is required for a deputy to use a Taser. *P-8, Policy 1.11.3*. But Dpt. Welton’s supervising sergeant, Sgt. Golman, approved his use of force. *RP 263: 14-15*. Lt. Earl Howerton was the lieutenant and patrol shift commander on the night of January 22, 2006. *See RP 561: 15-20*. Lt. Howerton also approved the use of force. *RP 622:9-11*.<sup>10</sup>

Lt. Howerton confirmed that Spokane County trains its deputies that they may use a Taser to “gain control of the situation.” *RP 612: 23 – RP 613: 20*. They may the use of a Taser on someone who is verbally uncooperative. *RP 613: 14-24*.

The person being tased need not have actual knowledge of the arrest command. Even if Mr. Strange didn’t *hear* that he was under arrest, Mr. Strange was required to follow the deputy’s command. *RP*

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<sup>10</sup> Spokane County’s Master Taser Instructor, Deputy Eric Johnson, also testified that Dpt. Welton’s use of the Taser was proper. *RP 1509: 2-3; 14-17*.

680: 14-20.

The trial Court dismissed all municipal liability claims against defendant Spokane County following the Plaintiff's case in chief. *RP 1484: 9-15 (policy); RP 1485: 10-14 and RP 1486: 8-19 (failure to train); RP 1490: 23-24 (ratification).*

At the close of trial, Plaintiff moved for a directed verdict as to excessive force and false arrest for both charges of obstructing and resisting. *RP 1610 – RP 1622; see CP 1392-1399.* The trial court denied the motion. *RP 1630 – RP 1634.*

The jury then entered a verdict in favor of Dpt. Welton. *CP 1439-1440.*

#### IV. ARGUMENT.

##### A. Mr. Strange was entitled to directed verdicts against Dpt. Welton and the Spokane County Sheriff's office.

Mr. Strange was entitled to directed verdict if he established liability as a matter of law. *CR 50(a); see Worthington v. Caldwell*, 65 Wn.2d 269, 277, 396 P.2d 797 (1965); *Berry v. Dumdai*, 6 Wn.App. 861, 865, 496 P.2d 975 (1972). The standard of review for failure to grant a directed verdict is de novo. The reviewing court applies that same standard as the trial court. *Sing v. John L. Scott*, 134 Wn.2d 24,

29-30, 948 P.2d 816 (1997). The question of whether a particular conduct gives rise to a law violation is a question of law. *Id.*

1. The trial court improperly refused to apply existing federal law for any purpose during trial.

Excessive force to accomplish an arrest, even where supported by probable cause and/or a warrant, violates the Fourth Amendment of the United States Constitution. *Staats v. Brown*, 139 Wn.2d 757, 774, 991 P.2d 615 (2000), *citing* 42 U.S.C. § 1983.

In circumstances nearly identical to those before this trial court, the Ninth Circuit held that the use of a Taser in “dart mode” is excessive force as a matter of law. *Bryan*, 630 F.3d at 826. Plaintiff requested application of *Bryan v. MacPherson* to the facts here. CP 1002-1003; CP 1018-1024 (*Plaintiff's trial brief*); CP 1325 – CP 1329 (*Plaintiff's proposed jury instructions*). The trial court refused to apply the *Bryan v. MacPherson* holding for any purpose, including rulings on requests for directed verdicts, testimony and jury instructions. E.g., RP 1633 – RP 1634 (*directed verdict*); RP 1405 – RP 1407 (*Plaintiff precluded from questioning County's police practices expert on holding*); RP 1690 – RP 1693, *Jury Instructions*.

The trial court held that this determinative law would not be

applied “retroactively” to this use of a Taser by Dpt. Welton in 2006. *RP 1633 – RP 1634*. This is error. Appellate court rulings apply retroactively to any case pending, even if the incident in those cases occurred before the decision, if the appellate decision applies its own holding retroactively to the parties in that case. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 340, 160 P.3d 1089 (2007) *aff’d*, 166 Wn. 2d 264, 208 P.3d 1092 (2009), citing *Robinson v. City of Seattle*, 119 Wn.2d 34, 67-68, 830 P.2d 318 (1992). The *Bryan v. MacPherson* appellate court applied its November 2010 holding retroactively to its July 24, 2005 taser incident. *Bryan*, 630 F.3d at 809. Its holding applied here. *Lunsford*, 139 Wn. App. 334.

The trial court’s refusal to apply *Bryan v. MacPherson* on grounds of non-retroactivity is error of law.

2. Mr. Strange was entitled to a directed verdict against Dpt. Welton as a matter of both state and federal law.

In *Bryan v. MacPherson*, 630 F.3d at 805, the facts of the Taser discharge are nearly identical to those here. The situation in *Bryan*, as here, arose from a seat belt infraction at a traffic stop. As here, the individual tased had left the vehicle, was clearly unarmed and was standing, without advancing in any direction, next to his vehicle (but

engaged in a “stationary bizarre tantrum,” which did not occur here). As here, the officer was standing fifteen to twenty five feet away, with Taser drawn and charged. *Bryan*, 630 F.3d at 832. As here, the Taser was used by the officer in dart mode from a distance away, with the victim turned away from the officer, for the purpose of arresting for the misdemeanor offenses of obstructing and resisting arrest. *Id.* at 828.<sup>11</sup>

Such use of a Taser in dart mode is excessive force.<sup>12</sup> *Id.*, at 826, 832; and see *Ciampi v. City of Palo Alto*, WL 1793349, 15 -16 (N.D. Cal., May 2011).

The result is reached because a government's interest in the use of force requires examination of three core factors: “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.” *Id.* at 826, citing *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989), and *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9<sup>th</sup> Cir.

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<sup>11</sup> Failure to follow commands is actually a misdemeanor crime in California. *Bryan*, 630 F. 3d at 828 at Ftn 11.

<sup>12</sup> The M-26 used by Dpt. Welton here shoots the Taser darts at a higher velocity than the X-26 in *Bryan*, i.e., 180 feet per second versus the X-26's 160 feet per second. See *Plaintiff's Ex. P-91, Spokane County Sheriffs Officer Taser Training Manual, p. 3 “Cartridge,” and P-86, Taser International's Advanced Taser M-series Operating Manual. P-91. The weapon operates at 50,000 volts. P-91, “Specifications.”*

2001). The “most important” factor is whether the suspect posed an “immediate threat to the safety of the officers or others.” *Id.* at 826, citing *Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005) (en banc).

The misdemeanor offenses identified by Dpt. Welton here are not inherently dangerous or violent. *Bryan*, 630 F.3d at 828-829. Failure to follow commands provides little support for a use of a Taser. *Id.* at 830, citing *Smith*, 394 F.3d at 703.

In *Bryan*, other officers were also en route to the scene. *Id.* at 831. As in *Bryan*, Mr. Strange was neither a flight risk, a dangerous felon, nor an immediate threat—there was simply ‘no immediate need to subdue [Bryan]’ before (Officer MacPherson's) fellow officers arrived or less-invasive means were attempted.” *Id.* at 831, citing *Deorle*, 272 F.3d at 1282, and *Blankenhorn v. City of Orange*, 485 F.3d 463, 480 (9<sup>th</sup> Cir. 2007).

The *Bryan* suspect was also not facing the officer when he was tased. *Id.* at 827.

The use of a Taser is *not* proper to globally “gain compliance with commands” on a misdemeanor arrest. Any such use of force is condemned, not just in *Bryan*, 630 F.3d at 830 (where failure to follow

commands is actually classified as a misdemeanor crime in California, 828 at fine 11), and *Smith*, 394 F.3d at 703, but by subsequent federal courts which have consistently reaffirmed the holding in *Bryan*. See, e.g., *Jackson v. Johnson*, 2011 WL 2783830 (D. Mont. July 18, 2011); *Ciampi v. City of Palo Alto*, WL 1793349 at 15 - 16 (N.D. Cal., May 2011).

Under no construction of existing law may a deputy use a Taser in dart mode to prevent a passenger from sitting back down in the passenger seat of a car on a misdemeanor arrest.

Even viewing the facts from the officer's perspective, the use of a Taser under such conditions is excessive. *Bryan*, 630 F.3d at 832. Mr. Strange was entitled to a directed verdict against Dpt. Welton on his claim of excessive force.

The same directed verdict was mandated under state law. A law enforcement officer's authority to arrest is limited by statute and by the constitution. *See State v. Walker*, 157 Wn.2d 307, 314-315, 138 P.3d 113 (2006). Force in making an arrest is allowed "whenever necessarily used by a public officer in the performance of a legal duty," or "whenever necessarily used by a person arresting one who has committed a felony." *RCW 9A.16.020*.

Mr. Strange was not accused of a felony. A seat belt violation is an infraction, and obstructing a law enforcement officer and resisting arrest are both misdemeanor crimes. *RCW 46.61.688(3), (5); RCW 9A.76.020; RCW 9A.76.040.*

And force is not “necessarily” used in the performance of a legal duty for a misdemeanor. *RCW 9A.16.020(1)*. No legal duty exists to effect a *custodial* arrest for a misdemeanor crime. *RCW 10.31.100, at Appendix (“A”) A-1 – A-3; CrRLJ 2.1(b)(1); and see also State v. Pulfrey*, 120 Wn.App. 270, 275, 86 P.3d 790 (2004). A custodial arrest is only a legal duty in domestic violence and restraining order violations. *RCW 10.31.100(2), at A-1*. *RCW 9A.16.020* thus provides no statutory authority for this deputy’s use of a Taser to effect a misdemeanor arrest.

The only remaining statutory authority allowing for force to be used to effect a discretionary misdemeanor arrest is the general arrest authority of *RCW 10.31.050; A-4*. But *RCW 10.31.050* limits an officer’s general arrest power as follows: 1) actual notice of intent to arrest must be given; and 2) the person given that notice then either “flees” or “forcibly resists” that arrest. *RCW 10.31.050*.

Functional “notice” must be notice sufficient to “apprise

interested citizens of the nature and purpose of the [act for which notice is required] so they can participate effectively.” *See Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 386, 868 P.2d 861 (1994). Here, Spokane County trains its deputies that they need not provide functional or actual notice. No effort need to be made to ensure the suspect knows they are under arrest. *RP 905: 24 – RP 906: 3; RP 907: 5-9.*

Even with proper notice, “force” is defined as a physical act to overcome resistance. *See, e.g., RCW 9A.44.10 (where “forcible compulsion” means physical force which overcomes resistance).* This requisite force is the equivalent of an assault. *State v. Aguirre*, 168 Wn.2d 350, 357, 229 P.3d 669 (2010). No evidence exists of any use of physical force by Mr. Strange to overcome resistance. And Dpt. Welton admittedly did not consider “forcible resistance” or “flight” in any event. He simply placed Mr. Strange under arrest, and tased him for trying to sit down in his car because he had placed him under arrest. “Flight” does not occur by Mr. Strange moving from a standing position outside a car to a sitting position in the passenger seat—“flight” is defined as an intent to depart from the scene of the crime. *State v. Pettit*, 77 Wash. 67, 68-69, 137 P. 335, 336 (1913); *State v.*

*Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965)(defining flight as leaving the scene of a crime); *State v. Gellerman*, 42 Wn.2d 742, 749, 259 P.2d 371 (1953)(the accused fled and concealed himself as if to elude justice or endeavor to avoid arrest); *State v. Deatherage*, 35 Wash. 326, 335, 77 P. 504 (1904)(the defendant “fled the country”); *State v. Jefferson*, 11 Wn.App. 566, 571, 524 P.2d 248, 251 (1974)(flight is an effort to depart the scene of the crime). Flight implies consciousness of guilt. *Bruton*, 66 Wn.2d at 112-113.

No evidence existed here of flight as a matter of law. Dept. Welton understood Mr. Strange was just trying to sit back down. *RP 846: 12-22*. Any claim that Mr. Strange was trying to “flee” to a passenger seat is, at best, entirely speculative and “fanciful.” *Bruton*, 66 Wn.2d at 113.<sup>13</sup>

Dpt. Welton’s use of the Taser on Mr. Strange was unlawful under state law. *RCW 10.31.050*.

Mr. Strange was entitled to a directed verdict on his claim of unlawful and excessive force under state law. It was error for the trial

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<sup>13</sup> Dpt. Welton’s counsel argued in closing that Mr. Strange was tasered before his intent was evident. She argued that, “No one is ever going to know what Brian Strange intended to do once he got to the car.” *RP 1813: 9-13*. She argued: “You don’t have to get in your car and drive off. That could have been the purpose. It could not have been... we don’t know.” *RP 1813: 17-20*.

court to refuse Plaintiff that verdict.

3. Mr. Strange was entitled to a directed verdict against Defendant Spokane County.

Where official policy is responsible for a deprivation of rights protected by the Constitution, then municipal liability is implicated. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690-691, 98 S.Ct. 2018 (1978). Governmental “custom” which visits constitutional deprivations on others gives rise to liability, even where such has not received formal approval through the body's official decision-making channels. *Id.* Mr. Strange was thus required to demonstrate that the government's official policy or custom was the “moving force” responsible for infliction of his injuries. *Monell*, 436 U.S. at 694. He did so.

All Spokane County witnesses agreed—Dept. Welton tased Mr. Strange because that is Spokane Sheriff Department’s policy. *RP 840: 1-6*. A deputy is not to let any person under arrest get back in their car. *Id.* The policy does not require actual notice, consideration of the severity of the crime, imminent threat, active resistance, forcible resistance, or flight. *RP 840:1-6; RP 841: 19-20; RP 843: 2-5; RP 847: 1- RP 848: 21*. It just requires a statement of arrest. The Taser is

then used to gain compliance. *RP 861: 19-23; RP 612: 23 – RP 613: 20*. The policy allows Tasers to be used with lack of *cooperation* by any particular person. *RP 613: 14-24, emphasis added*. This is excessive force unlawful under state and federal law. *Bryan*, 630 F.3d at 832; RCW 10.31.050.

All three forms of “practice or custom” municipal liability were thus evidenced here:

1) A Spokane County policy or custom which amounted to deliberate indifference to Mr. Strange’s constitutional right was the ‘moving force’ behind the constitutional violation. “Deliberate indifference” occurs when the need for more or different action is so obvious, and the inadequacy of current procedure so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need. *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1477 - 1478 (9<sup>th</sup> Cir., 1992), citing *City of Canton v. Harris*, 489 U.S. 378, 389-91, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)); and see *Anderson v. Warner*, 451 F.3d 1063, 1070 (9<sup>th</sup> Cir.). Here, Spokane County trains its deputies to use Tasers to gain compliance with orders, without requiring actual notice, imminent threat, requisite severity of the crime,

forcible resistance or flight. This is patently unlawful, and is a procedure so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need. *Oviatt*, 954 F.2d at 1477 -1478.

2) Spokane County fails to train or supervise in a manner sufficient to impose liability on the County. *WPI 341.02; Anderson, supra*, citing *City of Canton*, 489 U.S. at 389-90; *Gurno v. Town of LaConner*, 65 Wn. App. 218, 229, 828 P.2d 49 (1992). Again, Spokane County's training of its deputies to use Tasers on people absent actual notice, imminent threat, requisite severity of the crime, forcible resistance, or flight is patently unlawful, and equates to failure to train.

3) Spokane County ratified this act of excessive force. Ratification as a policy or custom may be inferred if, after a constitutional violation, officials took no steps to reprimand, or discharge the subordinate, or if they otherwise failed to admit the subordinate's conduct was in error. *Larez v. City of Los Angeles*, 946 F.2d 630, 645 (9th Cir. 1991); *McRorie v. Shimoda*, 795 F.2d 780, 784 (9<sup>th</sup> Cir. 1986) (custom inferred from failure to reprimand or discharge). Here, Spokane County took no steps to reprimand Dpt.

Welton, approved his use of force, and was still defending that use of force through trial.

Ratification may also be evidenced by showing that an official with final policy-making authority delegated that authority to, or ratified the decision of, a subordinate. *Ciampi*, 2011 WL 1793349, at 18, citing *Price*, 513 F.3d, 966, citing *Monell*, 436 U.S. 658. If authorized policymakers approve a subordinate's decision, that ratification is chargeable to the municipality because their decision is final. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). This use of force was ratified by all of Dept. Welton's superiors, who had the authority to so approve it. Lt. Howerton had been "delegated" the discretion to make the final decision approving this unlawful use of force, and did so. *RP 568: 1-15*. Ratification exists per *City of St. Louis*, 485 U.S. at 127.

Plaintiff thus presented *uncontroverted* evidence through Spokane County's witnesses of all three theories of municipal liability. Mr. Strange was entitled to a directed verdict against Spokane County on the three forms of municipal liability pled. This trial court instead improperly dismissed Spokane County following Mr. Strange's case in chief, and prevented this entitlement from being granted. This was

error. The matter should be reversed, and judgment entered on municipal liability.

**B. Abuses of discretion throughout trial deprived Mr. Strange of a fair trial.**

This trial involved ongoing abuses of discretion, all of which unfairly prejudiced Mr. Strange.

1. The trial court abused its discretion in improperly dismissing Spokane County.

This appellate court reviews the trial court's directing a verdict in favor of Spokane County de novo. *Harris v. Groth*, 31 Wn.App. 876, 879, 645 P.2d 1104 (1982), *aff'd*, 99 Wn.2d 438, 663 P.2d 113 (1983). Mr. Strange's evidence is to be accepted as true, and all permissible favorable inferences on that evidence granted him. *Id.* A directed verdict is proper only if the court can say, as a matter of law, that no evidence or no reasonable inferences from that evidence would support a verdict. *Id.*

The same evidence presented above in Section A, which supports a directed verdict against both Dpt. Welton and Defendant Spokane County, also rendered judicial dismissal of Spokane County at the end of Mr. Strange's case improper. The dismissal should be

reversed.

In addition to the Section A evidence supporting a directed verdict, other uncontroverted evidence also demonstrated municipal liability sufficient to avoid dismissal.

Deliberate indifference is established by evidence that the need for more or different action is so obvious, and the inadequacy of current procedure so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need. *Oviatt By & Through Waugh*, 954 F.2d at 1477.

Mr. Strange's police practices expert Michael Nault attested that a law enforcement's failure to enforce written policies created circumstances where conformance to department policies was optional. Such practices "communicate that conformance and accountability is not required necessarily," and this "could well provide an atmosphere of illegitimate application of police powers," which can then constitute a "very definite danger" to a community. *RP excerpt, Jan. 4 & 5, 119:6-23.*<sup>14</sup> Mr. Nault testified that Spokane County did not comply

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<sup>14</sup> Mr. Nault was prohibited from using phrases such as "deliberate indifference" to constitutional rights." See CP 776, *Order on Motion to Exclude, lns. 10-15, see Section B, infra.*

with its own written policies in or after uses of force. *RP 118: 7 – RP 119: 6.*

Mr. Strange evidenced the truth of this testimony. Spokane County witnesses ultimately testified that conformance to written policies was optional. As examples only:

- The Spokane County Sheriff’s Taser Training Manual instructs a deputy that each five-second cycle of the Taser is generally sufficient to exhaust the muscles beyond immediate recovery, and that recovery is necessary. *P-91, Sec. 2.A.2, “Firing the Darts,” second section C; RP 864; RP 862: 22 – RP 865.* But Dept. Welton testified that he was trained that the Taser can be deployed more than once in succession, with a person able to immediately respond after each five-second cycle. *RP 864: 15-19; RP 861: 5-18.* Dept. Welton testified that he could “continue to pull the trigger again and again and again, all day long, and there would be no recovery period on the part of the suspect.” *RP 860: 20 – RP 861: 1-4.*<sup>15</sup>

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<sup>15</sup> Following dismissal of Spokane County, Spokane County Master Taser Instructor Eric Johnson testified he disagreed with the Sheriff’s Taser training manual. *RP 1544: 1-22.* Dpt. Johnson trains Spokane County deputies that a person can recover immediately from a Taser cycle. *RP 1541: 24 – RP 1542: 1 – RP 1543: 2.* Deputies are trained that they do not have to wait between cycles. *RP 1542: 22-24.* There are no limitations on how often deputies can pull a Taser trigger. *RP 1577: 3-23.* A deputy can, and should, hold the trigger down for up to 30 seconds, cycle after cycle, if that is what it takes. *RP 1577: 7-19.*

- Spokane County Sheriff's written patrol policy requires patrol deputies to make every effort to identify and interview witnesses. *RP 874: 11-19; P-12, POL 21.6.4*. All such information is to be placed into a written report. *RP 874: 24 – RP 875: 3*. Dept. Welton did not identify his rider, Matthew Keetch, in his report, even though Mr. Keetch was a direct witness to the use-of-force event. *RP 873: 23 – RP 874: 10*. The “practice” is that deputies don't identify citizen riders. *RP874:9-10, 875: 11-13; 876: 9-14*. Sgt. Golman confirmed that the identification of such a witness by the deputy was discretionary. *RP 278: 18-25; RP 279: 14-20*. Sgt. Golman himself did not identify the presence of his ride-along in his administrative report. *RP 282: 5-25*. He did not interview the ride-along. *Id.*

- Spokane County's written Taser policy requires that the shift sergeant, here, Sgt. Golman, complete a Taser report form for a deputy's use of a Taser. *P- 8, Policy 1.11, TSK 1.11.3(f); RP 225: 6-10*. Sgt. Golman had never seen a Taser report form. *RP 242: 23 – RP 243: 3*.

- Sgt. Golman was required to collect the Taser's digital data from its dataport following a Taser discharge. *P-8, TSK 1.11.3(d)*. He did not do so. *RP 272: 9-10*.

- Sgt. Golman testified that he had the discretion to deviate from written policy if he justified it. *RP 341 – RP 342*. Practice and procedure allowed him to comply or *not* comply with written policy. *RP 342: 16-21*. This is how he was trained as a supervisor as far back as he could remember. *Id.*

- Spokane County Sheriff’s Internal Affairs policy 26.3.3, entitled “*Use of Force*,” requires that members involved in use-of-force situations “will be investigated and reviewed by the Internal Affairs Unit in accordance with the existing use-of-force policy and procedure.” *P-15, Sec. 26.3.3; RP 739: 3-6*. This policy was not followed here.<sup>16</sup>

- When this use-of-force incident turned into a tort claim and then a lawsuit, Spokane County Policy 26.3.4 requires that the Internal Affairs department ensure that all complaints against members are recorded, monitored, and reviewed. *P-15, Sec. 26.3.4(c); RP 750: 24 – RP 751: 3*. “Complaints” include actual civil litigation. *POL 26.3.4(c)7; RP 751: 8-18*. Lt. Howerton testified that a lawsuit is not

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<sup>16</sup> Lt. Howerton testified that the supervising Sergeant and the Lieutenant themselves may determine that the use of force is proper, and the review ends. *RP 568: 1-15*. The Sheriff has delegated the authority to these subordinates to determine if the use of force is proper. *Id.*

considered a complaint, nor investigated as one. *RP 630: 8-21.*

- Once the Internal Affairs investigation of a complaint is complete, thorough, and accurate, a representative from Internal Affairs is to attach a Case Finding Notice, and forward the entire investigative file to the Sheriff for his review. *RP 747: 2-23.* The Sheriff is the one who ultimately decides what to do with the complaint. *RP 747: 24 – RP 750: 4.* This wasn't done here either. *RP 753: 5-8.*

- All complaints or instances of misconduct be forwarded to Internal Affairs, and then on to and through the Sheriff; *P-15, Policy 26.3.4; RP 631 – RP 632.* Lt. Howerton testified that this entire policy process can be avoided by a subordinate in the chain deciding not to assign a complaint for investigation. *RP 633: 7-14; RP 565: 23 – RP 566: 1.* Anyone from the officer's own division commander, up to and including the Sheriff, can make this decision. *RP 564: 16-25; RP 565: 23 – RP 566: 1.* None of the depositions, or information in this civil litigation were ever reviewed by the Spokane County Internal Affairs Unit. *RP 754: 11-22.*<sup>17</sup>

- Spokane County written policy also requires an

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<sup>17</sup> At the time he was deposed in the course of this lawsuit, Connor would likely have known that there was a lawsuit going on. *RP 752: 19-23.*

administrative review panel on a complaint. *P-15, 26.3.4.d.* That wasn't done here either. The Sheriff has never used that policy. *RP 753: 17-25.*

Under *Harris v. Groth*, 31 Wn.App. at 879, this evidence and reasonable inferences therefrom was sufficient to establish that Spokane County policy is that there *is* no policy. A policy of “optional policies” is sufficient to support a verdict under all three prongs of municipal liability—deliberate indifference, failure to train and ratification.

The trial court's dismissal of Spokane County should be reversed.

2. The trial court erred by continually excluding proper and probative evidence.
  - a. *The trial court improperly excluded evidence of ongoing notice to Spokane County of the need to retrain its deputy.*

Mr. Strange's theory of this case was that this improperly trained deputy escalated a traffic stop to the level of excessive force, and that Spokane County knew of Dpt. Welton's propensity to escalate

situations to this level of force, but did nothing about it.<sup>18</sup> A veritable volume of Dpt. Welton's documented uses of force existed, along with an unrelenting stream of citizen complaints lodged against him year after year by a varying stream of citizens, all claiming the same dynamic. *CP 1014: 10-15; (Plaintiff's trial brief); CP 662-682 (Plaintiff's trial exhibit list of all complaints and uses of force from 6/23/99 – 2/08); offer of proof at pretrial motions, PT Motion RP 20:2 – RP 21: 14; RP 40: 11 – RP 46: 13.*

Police practices expert Michael Nault intended to testify that the sheer frequency and the volume of these complaints, regardless of their merit, was so disproportionate for any one deputy that this in and of itself mandated discipline, retraining, or termination, and that failure to train was reckless disregard and deliberate indifference to citizens' rights. *P-149 (rejected and not retained by the Clerk, but in the*

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<sup>18</sup> Dpt. Welton escalated this stop. As Dpt. Welton had begun to talk to Ms. Garber about the reasons for the stop, Mr. Strange became belligerent. *RP 188: 13-16.* But Dpt. Welton thereupon demanded that Mr. Strange produce his identification, telling Mr. Strange that Mr. Strange was not wearing a seatbelt. *RP 354: 23-24.* Mr. Strange began arguing with the deputy about whether he was wearing a seatbelt when the deputy stopped the vehicle. *RP 354: 25 – RP 355: 2.* Ms. Garber testified that between Dpt. Welton and Mr. Strange, "it went round and round.....they were just going round and round...they were saying the same things over and over again." *RP 954: 6 – RP 955: 9.* Ms. Garber testified, "[H]onestly, it felt like I was sitting in the middle of a couple of toddlers arguing back and forth." *RP 955: 13-14.* Dpt. Welton then slammed Ms. Strange's car door and cracked the windshield. *RP 1153: 19 – RP 1155.* Plaintiff's expert Nault testified that Dpt. Welton chose to engage in contentious and unnecessary dialogue with the passenger. *See RP 100-104, generally.*

*record at CP 352-394; see CP 360-364*). The County had no protocol for even considering such a repetitive and significant history. *CP 388 (Nault report); RP, pretrial motions, 31-32, preceded by offered proof at RP 24 – RP 25; RP 30 – RP 31*.

The trial court excluded all of this evidence under ER 404(b). *CP 730-736, CP 737; CP 711: 10-14*. The exclusion was error under the plain language of ER 404(b)(4).

Interpretation of a court rule is a question of law, subject to de novo review. *Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185, 1187 - 1188 (Wash., 2006). The court applies the same principles used to determine the meaning of a statute. *Id.* The court considers the plain language of the rule. It then construes the rule in accord with the intent of the drafting body. If the rule's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Id.*

The plain language of ER 404(b) permits the use of this evidence against Spokane County. ER 404 is a *character* evidence rule. The rule excludes evidence of acts “to prove the character of a person in order to show action and conformity therewith.” *ER 404(b)*. A county does not have a “character.” The rule is misapplied to

exclude this evidence against a County under ER 404(b).

But even if applicable, ER 404(b) may not be used to exclude evidence of even prior established misconduct where there's "some additional relevancy beyond mere propensity." *State v. Holmes*, 43 Wn.App. 397, 400-01, 717 P.2d 766 (1986). Where such evidence is offered for a legitimate purpose, then the exclusion provision of ER 404(b) does not apply. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). One permitted "legitimate" use of such evidence is use to prove knowledge. *ER 404(b)*.

Here, Mr. Strange intended to use this evidence for exactly that permissible use. Mr. Strange was required to show that Spokane County had knowledge of circumstances that required retraining or further review. It is only upon such knowledge that Mr. Strange could show knowledge of the need for more or different action, and knowledge that the inadequacy of the County's current procedures with this deputy was likely to result in a violation of constitutional rights if not remedied. See *Oviatt By & Through Waugh*, 954 F.2d at 1477-78; and see *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9<sup>th</sup> Cir. 1991)(*failure to train and deliberate indifference occur in situations where the Sheriff would deny the need for training or discipline in a*

*situation which would obviously warrant it).* It thus matters not whether the complaints are substantively true, nor misconduct established. What matters is the continued reporting of the deputy's escalating behavior, and the sheer disproportionate number and frequency of complaints.<sup>19</sup>

The court misapplied the rule ER 404(b) to exclude this proper evidence. Reversal is warranted.

b) *The trial court improperly struck the Sheriff as a witness.*

CR 43 allows a party to compel the attendance of the adverse party for testimony. Mr. Strange gave notice prior to trial of his intent to call Sheriff Ozzie Knezovich as a witness, *CP 508*. His counsel made an extensive offer of proof as to the purposes for Sheriff Knezovich's testimony. *RP 74 – RP 75; RP 85, RP 87 – RP 88; RP 99 – RP 105*. Spokane County made *no* offer of any prejudice, much less "unfair prejudice," to the presentation of Sheriff Knezovich's

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<sup>19</sup> The motion court occasionally also referenced ER 403, i.e., that the danger of prejudice of this history outweighed its probative value, see, e.g., *CP 737*. But the trial court necessarily misapplied even that balance, because it misunderstood the probative value. It held that to have probative value, Mr. Strange had to prove that all of the prior events were excessive force. *See, e.g., CP 737 conclusion*. This was not the probative value of the evidence. The evidence was not to show that Dpt. Welton continually *used* excessive force, but that Spokane County was on notice that he was generating a litany of complaints and uses of force against citizens for *some reason*, and that alone necessitated review.

testimony. *PT Motions, RP 71: 9-25.*<sup>20</sup> The trial court prohibited Mr. Strange from calling the Sheriff as a witness. *PT motions RP 86: 14-19.* It held that the Sheriff's participation was "remote" and "duplicative." *Id., RP 85: 15-19; RP 87:11-12; RP 113: 8, 18-21.* The court directed Mr. Strange's counsel to obtain the testimony he needed some other way, suggesting that counsel could, e.g., ask Dpt. Welton if he was disciplined. *Id., RP 113: 6-17.* At the close of plaintiff's case in chief, the Court then dismissed Defendant Spokane County from at least one municipal liability claim on the grounds that Dpt. Welton wasn't a "policy maker." *RP 1484: 9-15.*

The exclusion of the Sheriff was abuse of discretion.

The admissibility of evidence under ER 403 does not depend on the purpose for which it is offered. *Carson v Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). The relevance of the evidence sought to be admitted is assumed. *Id.* The only question is whether the probative value of the evidence is outweighed by its prejudicial effect. *Id.* at 222. Only "unfair prejudice" will result in exclusion. *Id.* at 223.

The testimony of a Sheriff is often essential to municipal

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<sup>20</sup> *RP 69: 24-70: 1; RP 71: 9-25 (arguing that Sheriff Knezovich was simply not the Sheriff at the time this incident occurred).*

liability in a 42 U.S.C. § 1983 case. Municipal liability attaches only where “the decision-maker possesses final authority to establish municipal policy with respect to the action ordered.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

The trial court’s exclusion of the Sheriff as a witness was abuse of discretion.<sup>21</sup> Retrial should be required.

c. *The trial court improperly quashed Plaintiff’s trial subpoena for the weapons used at the incident in question.*

Dpt. Welton variously referred to Mr. Strange’s physical size as support for an unequal power imbalance at the scene. *See RP 1827: 6-21 (where the defense argued in closing, “Six (foot) seven, 22l; five-ten”)*. Such a size difference would be visible in the courtroom. Mr. Strange addressed this by serving a Subpoena Duces Tecum on Spokane County requiring Dpt. Welton to produce for the jury’s

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<sup>21</sup> As to this Sheriff being “remote” in time as a policymaker—Sheriff Knezovich took office three months after this January 2006 tasing incident with Mr. Strange. *RP 71: 10*. He reaffirmed Dpt. Welton’s use of force through the ensuing tort claim and lawsuit; he retained the same policies attested to by Spokane County witnesses; and, safe from being called as a witness, he continued to ratify Dpt. Welton’s behavior through trial to local news reporters. *RP Vol. I, 49: 21-24; Id. RP 52: 3-16*.<sup>21</sup> Any issues regarding that Sheriff Knezovich not being office on the precise date of this Taser incident was an issue for cross-examination or jury instruction, not exclusion. See *Carson*, 123 Wn.2d at 224.

viewing the entire array of weapons the deputy was carrying the night of the incident. This would conversely show the veritable armed fortress that was 5'10" Dpt. Welton. *CP 884-891; PT motions RP 39: 6-16; Id., RP 52: 15-25.*<sup>22</sup>

The trial court quashed Mr. Strange's SDT. It concluded that the "average citizen" would be "well aware" of what law enforcement officers typically wear on a day-to-day basis. *RP 52: 15-18.* Plaintiff was left to present the jury with a photograph of an example of, e.g., a Tanto knife. *RP 364: 19-365: 19; Plaintiff's Exhibit 148.*

The ruling was abuse of discretion.

Under ER 403, Mr. Strange had no burden of demonstrating the relevance of wanting to show the jury this evidence; the burden was on Spokane County to show unfair prejudice. *Carson*, 123 Wn. 2d at 222-223. It did not. *CP 888-891.* The County argued only "undue burden" by Dpt. Welton having to "march into the courthouse armed with firearms." *CP 889: 3-5.* It asserted that the viewing proposed would confuse, mislead or "frighten" the jury. *CP 890-891.* None of this is

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<sup>22</sup> The evening of this incident, Dpt. Welton was carrying a Glock-45 semiautomatic handgun with 13 rounds in the clip, two additional 13-round clips, a loaded .38 Special revolver on his left ankle, an M-26 Taser, and a metal flashlight on his hip, handcuffs, and a Tanto knife—which is like a box cutter blade—strapped across his chest in a necklace-type carrier, so he could unzip his uniform and access the knife. *RP 362-365.*

couched as unfair prejudice to either Spokane County or Dpt. Welton. It was error to exclude this evidence under ER 403.<sup>23</sup>

Mr. Strange was denied the right to show the real balance of power on that occasion.

d. *The trial court improperly restricted proper expert evidence.*

The trial court improperly precluded Plaintiff's expert, Michael Nault, from testifying to his expert opinions in this case. The trial court excluded opinions Mr. Nault might have regarding "reckless disregard" or "deliberate indifference," or as to "ratification." *CP 776: 10-15*. It excluded expert opinions as to probable cause, *CP 776: 19-22*, and even testimony about whether the deputy violated internal policies of Spokane County. *CP 777: 5-9*.

During trial, the trial court continually interfered with Mr. Strange's counsel's questioning of Mr. Strange's expert, and thereby

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<sup>23</sup> If the court's quashing of the subpoena was meant to invoke "judicial notice" of what the average citizen knows, then the ruling was error of law. A court's taking judicial notice of a matter raises a question of law reviewed de novo. *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn.App. 762, 771-772, 970 P.2d 774 (1999). A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *ER 201; CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996). The court's conclusion was based on an "average citizen's" knowledge. No "average citizen" exists, and the knowledge quotient of any such citizen of "what law enforcement officers typically wear on a day-to-day basis" is not a fact for judicial notice.

further restricted expert testimony. *RP Jan. 4 & 5, Nault, 96: 23 – RP 97: 22 (interfering with expert’s opinion as to the arrest for obstructing); RP 103: 6-18 (interfering with expert’s opinion as to what hindering and delaying might constitute); RP 104-106 (sustaining generally Spokane County’s objection to “questions which call for a legal conclusion ... calling for an opinion on an ultimate issue of fact,” and preventing use of the terms “hinder” or “delay”); RP 108: 16-20 (precluding expert’s conclusion as to obstructing as ultimate issue); RP 112: 3 – RP 113: 5 (precluding testimony as to opinion on resisting arrest as ultimate issue, and directing counsel to ask only what “standard good police practices” would “require him to do in this situation”, then precluding the answer to even that line of questioning.); RP 113: 6 – RP 116 (precluding expert discussion of probable cause for an arrest for resisting as ultimate issue). Mr. Nault was precluded even from testifying as to the underlying evidentiary basis for what opinions he was allowed to offer. *RP 109: 21 – RP 111: 20 (precluding expert from starting to testify as to what evidence he used to support his opinion, based on “hearsay.”)*.*

The basis for all of these exclusions was either “hearsay,” e.g., *RP 110: 3 – RP 111:20*, or “ultimate issues of facts or conclusions.” *See, e.g., Nault RP 104 – RP 106*. The purpose of expert testimony is

to allow the jury to understand the evidence presented. See *In re Detention of Coe*, 160 Wn.App. 809, 824-826, 250 P.3d 1056, 1063-64, *review granted*, 172 Wn. 2d 1001 (2011). Experts are allowed to testify as to the ultimate issues to be decided by the jury under ER 704. *State v. Hayward*, 152 Wn.App. 632, 651, 217 P.3d 354 (2009). Police practice experts are commonly permitted to testify to the ultimate facts and conclusions of police practices—in part because they themselves apply the very same concepts in police work. *Larez*, 946 F.2d at 635; *Davis v. Mason County*, 927 F.2d 1473, 1484 (9<sup>th</sup> Cir., 1991)<sup>24</sup>; *Bates v. King County*, 2007 WL 1412889, 1, 2-4 (W.D. Wash., May 9, 2007). The reasonableness of the involved deputies' actions, the reasonableness of the internal investigations performed, whether a particular officer exerted excessive force, and the proper response of a police department to complaints about excessive force—all of these areas are not common knowledge, and are a proper subject for expert testimony.

In *Davis v. Mason County*, 927 F.2d at 1484, the Ninth

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<sup>24</sup> Superseded on other grounds (attorney fee issues) by statute in *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1556 (9<sup>th</sup> Cir., 1992).

Circuit Court held that any argument against admitting expert testimony as to, e.g., how a Sheriff was reckless in his failure to adequately train his deputies, or causal links, or industry standards, was “without merit.” In *Larez*, 946 F.2d 630, an expert properly opined on whether ratification existed under the specific facts of the case, based on continuing complaints against the officer. 946 F.2d at 635. In *Turngren v. King County*, 33 Wn.App. 78, 95, 649 P.2d 153 (1982), a former Police Commissioner properly testified that an affidavit for a search warrant mischaracterized the reliability of the informant, that the police inadequately investigated the background of the defendants prior to the raid, that lack of supervision by higher-ranking officials permitted lower-ranking personnel to “usurp” authority and responsibility for checking the accuracy of the information received, and that the police displayed reckless disregard for the Turngrens’ rights in obtaining and serving the warrant.<sup>25</sup>

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<sup>25</sup> Under Washington law, testimony about practices of certain cultures is also admissible via expert testimony. *State v. Yates*, 161 Wn. 2d 714, 764-65, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008). “Practical experience is sufficient to qualify a witness as an expert.” *State v. Ortiz*, 119 Wn. 2d 294, 310, 831 P.2d 1060 (1992), citing *State v. Smith*, 88 Wn.2d 639, 647, 564 P.2d 1154 (1977).

Precluding such testimony on grounds of “hearsay” is also plain error. *RP, Jan. 4 & 5, p. 109: 21 – RP 111: 20 (precluding expert from testifying as “hearsay” when asked)*. ER 703 specifically permits experts to base their opinion testimony on hearsay. *Allen v. Asbestos Corp., Ltd.*, 138 Wn.App. 564, 579, 157 P.3d 406 (2007), and, e.g., *State v. Eaton*, 30 Wn.App. 288, 294, 633 P.2d 921 (1981). *Id.*

The court’s interference with, and ultimate exclusion of, proper expert evidence under ER 703 and 704 was abuse of discretion. These rulings prevented Mr. Strange the proper use of his police practices expert.

- e. *The trial court abused its discretion in improperly restricting Mr. Strange’s cross examination of the County’s expert witness.*

The due process of law clauses in the Fifth and Fourteenth Amendments give a party the opportunity to cross-examine in civil proceedings as a matter of constitutional right. *Little v. Rhay*, 8 Wn.App. 725, 729-730, 509 P.2d 92 (1973), *overruled on other grounds by State v. Hammond*, 121 Wn.2d 787, 791, 854 P.2d 637 (1993), citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

While precluding Mr. Strange's expert from properly testifying, the trial court improperly restricted him from proper cross-examination of Spokane County's expert.

Specifically, Defendants chose to call patrol officer Kirk Wiper as their police practices expert. Mr. Wiper is used by the defense counsel for the various municipalities who together formed a risk management pool for the defense of their counties. *RP 1425: 9-24*. In his deposition, Officer Wiper referred to this entity as "our" risk management pool. *Id., lns. 13-14*. Such language signified alignment with, use by, profit from, and thus bias toward, his defending municipalities. *RP 1426: 24 – RP 1427: 1*. But the trial court prohibited Plaintiff's counsel from inquiring of Mr. Wiper as to why he might refer to a pool of municipalities as "our" pool. *RP 1426-1427*. This was improper.

The court's initial reasoning for this restriction was that such inquiry might implicate "insurance" in violation of ER 411. *RP 1426: 15-23; RP, Jan. 20, 2011 excerpt by Jennifer Boyd; RP 12: 4-8*. But the question of why Mr. Wiper might refer to a Risk Management pool as "our" pool does not elicit reference to insurance. It asks the witness to explain why he aligns himself with a defense pool, i.e., bias.

Even if the question directly elicited a response from the witness which necessarily included the word “insurance,” ER 411 does not require the exclusion of evidence of insurance when the evidence is offered for another purpose, such as proof of the bias or prejudice of a witness.” *ER 411*. Here, Defendants *chose* to use an expert who expressed his role as affiliated with a risk management pool. *RP 1427: 7-12*. That bias could be properly exposed. *ER 411*. Any fact which diminishes the personal worthiness of a witness may be elicited if it is material and germane to the issue. *State v. Robideau*, 70 Wn.2d 994, 998, 425 P.2d 880 (1967). Cross-examining counsel is permitted to delve into the witness's story to test the witness's perceptions and memory, and to impeach and discredit the witness. *Id.* Jurors are entitled to have the benefit of a party’s proffered theory before them so that they can make an informed judgment as to the weight to place on (a witness’s) testimony. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105 (1974), citing *Douglas v. Alabama*, 380 U.S., 415, 419, 85 S.Ct. 1074 (1965).

Ultimately, the trial court’s abuse of discretion was not based on ER 411, but on its own theory of “scripted” cross-examination. It held that Mr. Strange’s counsel would be allowed to impeach only within

the confines of a “traditional script” or “traditional practice” of a “hired gun kind of impeachment questions....” *Jan. 20, 2011 Boyd excerpt, RP 12: 4-14*. Once Plaintiff’s counsel “deviated” from the script, the court would step in. *RP Jan 20, 2011, Boyd, p. 12: 15-21*. This is without precedent under evidentiary rules. The trial court’s restriction upon Plaintiff’s counsel is error of constitutional import requiring reversal. *Little*, 8 Wn.App. at 729-730.

**C. The trial court refused to instruct the jury on limitations in the use of force, or on the necessary intent requirements which must be evident for probable cause.**

The trial court affirmatively authorized this deputy’s use of force through its jury instruction. *CP 1421 – CP 1425 (A-26 – A-30)*. Not a single instruction given advised the jury of any *limitation* on an officer’s use of force. *Id.* All instructions affirmatively permitted force. *Id.*

An appellate court is to review jury instructions de novo. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010)(*holding that instructions which failed to specify the proper duty of an institution in a negligence claim constitute reversible error*). Instructions are sufficient if they allow the parties to argue their

theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Id.* The instructions cannot be misleading to the ordinary mind. *State v. Dana*, 73 Wn. 2d 533, 537, 439 P.2d 403 (1968).

Here, the trial court's five brief instructions regarding force *authorize* the use of force. *CP 1421-1425 (A-26 – A-30)*. The trial court instructed the jury that that an officer *may* arrest for a misdemeanor. *CP 1422 (A-27)*; that the use of force is *not* unlawful when it is “necessarily used by an officer in the performance of a legal duty,” *CP 1424 (A-29)*; and that after notice of the intention to arrest, the “defendant” either flees or forcibly resists, then the officer *may* use all necessary means to effect the arrest. *CP 1423 (A-28)*. It instructed the jury that a reasonably prudent officer's view of the circumstances in using force controls, but provided none of the factors limiting that judgment. *CP 1425 (A-30)*. Nothing here limits the use of force. And the trial court specifically declined to instruct the jury as to limitations on the use of force. *RP 1644: 22 – RP 1645: 1-14*. It failed to define “excessive force,” or to list the factors to consider which place limitations on the use of force. *RP 1680: 8 – RP 1681: 6; 1683: 6-19*. It rejected Plaintiff's proposed instruction P-25, which lists the factors

to be considered in determining the reasonableness of a use of force, including severity of the crime, immediate threat, actively resisting arrest, or attempting to evade arrest by flight. *CP 1323 (A-15); RP 1690: 15-20*. It rejected all of Plaintiff's proposed instructions on restrictions regarding using Taser force at a traffic stop, patterned on *Bryan*, 630 F.3d 805. *CP 1320 – CP 1329 (A-12 – A-20); CP 1353, CP 1358 (A-24 – A-25); and see RP 1690: 21-23; RP 1691: 4-5; RP 1691 – RP 1693; RP 1698*. It rejected Plaintiff's proposed instructions on the limitations of an officer at a traffic stop, and even on the limited duties of the participants in the vehicle. *CP 1306, 1307 (A-5 – A-6)*.

It refused even to define the terms of its own permissive instructions. In the permissibly phrased Instruction 10 authorizing force, the terms “notice,” “flight,” and “forcible resistance” are not defined. *CP 1423 (A-25)*. The court rejected instructions applying legal definitions of these terms as requested by Mr. Strange. *CP 1332, 1333 (A-21 – A-22); RP 1694: 25 – RP 1695: 11*. It held that both terms were “terms of common understanding that need not have a definition.” *RP 1695: 14-16*.

A trial court's refusal to give a requested instruction is reviewed only for abuse of discretion. *In re Detention of Pouncy*, 168 Wn.2d

382, 390, 229 P.3d 678 (2010). A plaintiff is entitled to have their theories of the case presented to the jury by proper instructions, if evidence exists to support the theories. *Dabroe v. Rhodes Co.* 64 Wn.2d 431, 435, 392 P.2d 317 (1964). *Id.* The instructions must not simply set forth the law in a general way—they must relate principles of law to the evidence. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 283-284, 686 P.2d 1102 (1984) *aff'd*, 104 Wn. 2d 613, 707 P.2d 685 (1985), and see *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

And while a trial court need not define words and expressions that are of ordinary understanding or self-explanatory, it must define in jury instructions any technical words and expressions used. *In re Detention of Pouncy*, 168 Wn.2d at 390. A word's designation as technical hinges on whether “it has a meaning that differs from common usage.” *Id.* at 391. This trial Court understood that what was encompassed in the concept of “flight” was determinative of excessive force and probable cause for arrest. *RP 1632: 12-17*. The County was arguing that Mr. Strange was “fleeing” by sitting down in the passenger

seat of his car with its ignition off.”<sup>26</sup> This is not common usage of such a term. “Flight” has specific legal meaning, i.e., it is an effort to depart from the scene of the crime. *See Bruton*, 66 Wn. 2d at 112-113. And “forcible resistance” is not, as testified to and argued by Spokane County and its witnesses, a “failure to follow verbal arrest commands” as a matter of law.

Mr. Strange’s request for appropriate instructions defining these terms and thereby relating the principles of law involved to his specific factual issues was rejected. This rejection is reversible error under *Dabroe*, 64 Wn. 2d at 435; *Gammon*, 38 Wn. App. at 283-284.

The court also rejected Mr. Strange’s instructions on the proper standard for probable cause for the misdemeanor arrests made. Probable cause for obstructing requires that Dpt. Welton have cause to believe that Mr. Strange had specific intent—i.e., willful intent to hinder Dpt. Welton’s investigation. *CP 1313*, *CP 1314 (A-7 – A-8)*; *RP 1686: 1-16*. The investigation must also actually be hindered or obstructed. *Id.* The court refused the instructions, and instead gave one instruction obfuscates the intent requirement. *CP 1430 (A-31)*. It did

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<sup>26</sup> Dpt. Welton testified that Mr. Strange was implicitly “fleeing or evading or escaping into a vehicle”...” *RP 847: 1-21*. His Spokane County training mandated that he keep a person from fleeing, evading, or “escaping into a vehicle.” *RP 847: 5-8*.

the same with resisting arrest. *Compare Plaintiff's P-19, CP 1316 and CP 1317 ( A-9 – A-10) with the court's 17, CP 1431 (A-32).* The court defined only general intent: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” *CP 1431 (A-32).*

Because of the dispute over Mr. Strange's visible intent—i.e., was he visibly trying to respond to instructions or ignoring instructions at the time of his arrest?—it was error to refuse Mr. Strange proper instructions on the visible intent required. *Dabroe*, 64 Wn.2d at 435, *Gammon*, 38 Wn.App. at 283-284.

**D. The trial court abused its discretion in failing to remedy the misconduct of Spokane County in producing new material evidence during trial.**

Discovery rules require a fair contest with the basic issues and facts disclosed to the fullest practicable extent. *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn.App. 828, 835, 696 P.2d 28 (1985).<sup>27</sup> A court must fashion effective sanctions for discovery abuse. *Roberson v. Perez*, 123 Wn.App. 320, 332-333, 96 P.3d 420 (2004), citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299,

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<sup>27</sup> The Court implemented no sanctions whatsoever against Spokane County.

339, 858 P.2d 1054 (1993). Imposition of unduly light sanctions will only encourage litigants to employ tactics of evasion and delay, in contravention of the spirit and letter of the discovery rules. *Taylor*, 39 Wn. App. at 836, citing *Gammon v. Clark Equip. Co.*, 38 Wn.App. 274, 282; *Lampard v. Roth*, 38 Wn.App. 198, 202, 684 P.2d 1353 (1984).

Here, Spokane County produced new evidence during trial that went directly to the heart of the case. Both pieces of evidence were information recording the very events in question the night of January 22, 2006. No sanctions were applied; instead, Spokane County profited from the misconduct. This was error requiring retrial.

i) The Jan. 22, 2006 “Use-of-force” report.

Mr. Strange argued in opening that Defendant Spokane County failed to follow its written processes of review as required by Sheriff’s policy, including failing to create a “use-of-force report.” *RP 24: 6*. Defense counsel argued in opening that a use-of-force report *was* done, and written policy thus followed. *RP 38: 11-15*. During trial, Spokane County counsel suddenly produced this use-of-force report. *RP 393: 3-5, P-145 (marked at RP 403: 5-8)*. Plaintiff requested a mistrial. *RP 393: 12-398; RP 400 – RP 403; RP 408 – RP 411; RP 418 – RP 419*.

The trial court concluded that the document should have been produced in response to Plaintiff's interrogatories earlier on. *RP 406: 21 – RP 407: 7*. But it refused to grant a mistrial. *RP 407: 23 – RP 408: 10*. It refused to sanction Spokane County. *RP 418: 14 – RP 419: 25*. Mr. Strange, said the court, could work his way out of this himself—he could simply examine witnesses and argue what the document represented. *RP 407: 25 – RP 408: 1-3*.

ii) The Taser dataport information.

In Dpt. Welton's incident report, he offered no information about how many times, or for how long, he engaged the Taser trigger when he tasered Mr. Strange. *P-119; RP 247: 7-10*.<sup>28</sup> The Taser uses an electronic "dataport" to record 585 consecutive triggering events.<sup>29</sup>

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<sup>28</sup> A deputy has discretion to determine how many times they will Taser someone. *RP 1578: 1-7*. Dpt. Johnson trains deputies that there are no limitations on how often a deputy can pull a Taser trigger. *RP 1577: 3-23*. The trigger can be depressed for up to 30 seconds, and impliedly beyond, if the deputy deems it necessary. *RP 1577: 7-19*. Mr. Keetch observed Dpt. Welton holding onto the weapon, still pointed in Mr. Strange's direction, with the probes still in Mr. Strange's back, after he initially tasered Mr. Strange, until another deputy arrived. *RP 514: 2-23*.

<sup>29</sup> The Taser dataport records "triggering events" in five-second cycles. *RP 1514: 4 – RP 1515: 7*. If someone is tased, the darts remain in the target, and the deputy can keep the trigger down. *RP 232 – RP 233*. The electrical current will continue to cycle through the darts as long as the trigger is depressed. *Id., and RP 1515 – RP 1516*. This will show on the dataport recorder. *RP 233: 13-23; RP 1514: 14-19*. If a deputy keeps the trigger down, e.g., for 127 continuous seconds, the Taser will continue to repetitively cycle, and the dataport recorder will show a new triggering event, i.e., a new five-second cycle, every five seconds as if there was a new trigger pull. *RP 1515 – RP 1516*. The dataport records 585 triggering events in a row before it begins recording over itself. *RP 1569: 19 – RP 1570: 6*. Sheriff's policy requires the weapon's electronic information to

Spokane County never produced this dataport recording. *RP 247: 15-24; RP 379: 6 – RP 380: 22.* During trial, and following his lunch break, Sgt. Golman then spontaneously produced, from the witness stand, the Taser dataport recording alleged to be from the incident in question. *RP 247: 7-20 (answering Plaintiff's counsel's question with, "No, because that data looks like this," and producing what became the new P-146).* The exhibit was proffered openly in front of the jury. *Id.* It was marked as P-146. *RP 248( A-34 – A-35).* Sgt. Golman testified that his new document showed that Dpt. Welton only cycled his Taser once. *RP 321: 3-4.*<sup>30</sup>

The P-146 dataport recording produced by Sgt. Golman is materially incomplete. On January 22, 2006 at 1:55 a.m., on line 320 of the report, a discharge is evidenced consistent with the discharge into Brian Strange. *P-146 (A-35).* But the report does not identify the duration of the cycle. *RP 252: 23-25 – RP 253: 1-2.* After the line 320 1:55 a.m. discharge on January 22, 2006, no further triggering

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be downloaded into a network drive after any use of a Taser, and prior to the end of the duty shift. *RP 234: 13-25; RP 317: 4-18; Plaintiff's Exhibit (P-8), Policy 1.11.6.a.* The shift supervisor is to download the digital data, label the file, and place it in a network drive folder. *RP 238: 9-20; RP 235: 1-3; P-8, 1.11.6.a.*

<sup>30</sup> Sgt. Golman had never seen the dataport document before his testimony. *RP 249: 2-4.*

events are shown. *P-146; RP 253: 3-7*. A continued recording would show the next discharge.<sup>31</sup> Other facially obvious problems with authenticity existed.<sup>32</sup>

Mr. Strange's counsel requested sanctions, and remedies. *RP 379-380*. The Court denied both. *RP 381: 10-23*. Mr. Strange's counsel engaged in self-help and subpoenaed the complete document, demanding the entire recording cycle from line 1 through the end of the weapon's recording cycle, i.e., lines 1-585. *P-183; RP 421: 15 – RP 423: 2*.

Spokane County now appeared with what was marked as P-146a. *A-36 – A-43; RP 422: 8 – RP 424: 2; RP 430: 12 – RP 431: 15; RP 1573*. P-146a consisted of lines 001-320. The new recording still did not show the specifically requested next triggering event, line 321. *Compare P-146 at A-35 versus P-146a at A-43*. The new

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<sup>31</sup> The receipt form showed that the weapon had not been reset. *P-146: 1*.

<sup>32</sup> The document signature sections are blank. *App. 34; P-146, first page*. The document consists of a typed receipt form stapled to only "page 6" of a ptx. file. *Id., A-35*. Pages preceding this page "6" and following are missing. *Id* The document also represented that several nights before the incident with Mr. Strange, Dpt. Welton had discharged his Taser *twice* within the course of a very few minutes. *See P-146(A-35), discharges on 01/16/06, lns. 315-316 (two discharges within 6 seconds)*. But an already rejected use-of-force report, P-117, showed that Dpt. Welton had actually fired his Taser *three* times into the back of the suspect on that occasion. *See P-117, rejected*.

document was also more inconsistent than the prior one.<sup>33</sup>

Plaintiff's counsel objected to Spokane County witnesses testifying from an incomplete document. *RP 1513: 3-8*. The Court overruled the objection. *RP 1513: 9-11*. Dpt. Eric Johnson, Spokane County's Master Taser instructor, went on to testify that everything after line 320 was missing because the Taser would have been downloaded at the end of the shift, and since the Taser was only triggered once, then that would be the last triggering event before the download. *RP 1568: 18 – RP 1569: 9*.<sup>34</sup>

Plaintiff's counsel requested that the court enforce Plaintiff's Subpoena Duces Tecum to require the Spokane County to produce the complete Taser dataport recorder for the cycle in question, and made an offer as to why this was material. *RP 1588 – RP 1596*. The court

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<sup>33</sup> Page numbers were now missing altogether. Compare *P-146*, showing "page 6" on *A-35* vs. *P-146a*, with no page numbers on *A-37 – A-43*. The line numbers were off at the top of the relevant page. Compare line 315 at the top of "page 6" in *P-146*, versus line 312 at the top of the page in *P146(a)*. Dates and discharges were out of chronology on the new exhibit. See *P-146a*, lines 117-122 on *A-39*; and see lines 166-169 on *A-40* vs. 117-122, showing discharges on March 28, 2005 before and during discharges on March 27, 2005. The document now showed a myriad of Taser discharges by Dpt. Welton from November 2005 through January 22, 2006. *Id.*, lines 268-320( *A-42*). Yet the document pointedly omitted the requested weapon's next triggering event after 1:55:44 am on January 22, 2006. *P-146a*, lines 320-321 (*A-43*).

<sup>34</sup> Dpt. Johnson had no idea whether this document had been downloaded at the end of the shift. *RP 1566 – RP 1567*. He did not download it, and had no idea who gave it to Sgt. Golman over the lunch hour. *RP 1566: 17 – RP 1567: 5*.

refused. It found no “discovery violation,” required no compliance with the subpoena, nor production of the complete document. *RP 1594: 13 – RP 1596.*<sup>35</sup>

Defense would thereupon argue in closing that this P-146a document proved that Dpt. Welton only triggered his Taser once. *RP 1829: 17 – RP 1830: 11.*

The trial court’s reward of the County’s misconduct is abuse of discretion requiring retrial.

Surprise is no longer a basis to exclude relevant evidence under ER 403, except for circumstances which amount to prejudice. But where such evidence appears, the trial court errs unless it takes some corrective action during the trial. *Lockwood v. AC&S, Inc.*, 44 Wn.App. 330, 364, 722 P.2d 826 (1986), *aff’d*, 109 Wn.2d 235 (1987). Misconduct can be so flagrant that even in the absence of an objection, no instruction of the court or admonition to disregard could suffice to remove the harm caused. *Carabba v. Anacortes Sch. Dist. 103*, 72 Wn.2d 939, 954, 435 P.2d 936 (1967).

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<sup>35</sup> Spokane County’s own expert on police practices, however, Dpt. Kirk Wiper, could not explain why the P-146 document provided ended at the single triggering event on January 22, 2006. *RP 1370: 3-21*. Wiper has earlier agreed that the dataport recorder was stored, able to be downloaded, and should be available showing all information through line 585. *RP 1369: 14 – RP 1370: 21*.

The existence of this evidence was critical—if provided in its *complete* form. The trial court not only failed to remedy the “surprise,” or sanction the County, it exacerbated the misconduct. The court refused to allow even Mr. Strange’s self help—it would not enforce even his trial subpoena requiring the complete recording. *RP 1589 – RP 1596*.

From surprise production to refusal to comply with a subpoena for the complete evidence, this was flagrant County misconduct. A prevailing party's misconduct does not require a showing that the new evidence would have materially affected the outcome of the first trial. *Roberson v. Perez* at 336, citing *Taylor* at 836. Refusing a party the right to evidence leading to lack of authenticity or credibility of a document is grounds for a new trial. *State v. Cannon*, 130 Wn. 2d 313, 328-329, 922 P.2d 1293 (1996), citing *Davis v. Alaska*, 415 U.S. at 316-18. It is not for the trial court to decide whether production of the relevant documents would have made a difference. “It is precisely because we cannot know what impact full compliance would have had, that we must grant a new trial.” *Gammon*, 38 Wn. App., 282. Whether evidence sought is immaterial to the issues litigated, or would not have affected the outcome of the trial is unknown. “A party cannot litigate

issues the party does not know existed.” *Taylor v. Cessna*, 39 Wn.App. at 836-837.

The trial court’s failure to remedy this flagrant misconduct, or enforce Plaintiff’s subpoena duces tecum, was error requiring a new trial.

**E. The trial court erred and abused its discretion in failing to grant Plaintiff a new trial based on material misconduct.**

A party may be relieved from a final judgment for misconduct of an adverse party. *Roberson*, 123 Wn.App. at 332-333. In the case of a failure to produce evidence, the ordering of a new trial based upon a prevailing party's misconduct does not require a showing that the new evidence would have materially affected the outcome of the first trial. *Roberson*, 123 Wn. at 336, citing *Taylor* 39 Wn.App.at 836; and see *Lockwood v. AC & S, Inc.*, 44 Wn.App. at 363.

Plaintiff brought a motion for a new trial. *CP 1525-1562; RP March 4, 2011, p. 3; CP 1491-1524*. Plaintiff produced declarations from Taser International, and from a Chief of Police in Fort Lauderdale, Florida. *CP 1441-1444; CP 1445-1490*. Both witnesses testified that Spokane County could produce all subpoenaed discharges of the Taser from lines 1-585 retrospectively, including line 321’s

discharge. *CP 1442, paras. 6-24 (Taser International); 1447: 7-25 (Scott)*. The very purpose of having the dataport recorder is to allow for such recall for agency, court and law enforcement proceedings. *CP 1443: 6-10 (Taser Int'l); CP 1447, paras. 7-11, para. 14 (Scott)*. Any suggestion that such was not able to be produced was false. *Id.*

This evidence was uncontroverted by the County.

The court denied the motion for the new trial. *RP, March 4, 2011, pp. 14-17*. It denied any sanctions. *Id., pp. 17-18*. It denied a request that Spokane County produce the complete document, including for this appellate review. *Id., pp. 18-23 – p. 19 (holding that the complete document “has been produced.”)*

The trial court’s actions violate any and all authority requiring that it insure a fair trial to *both* parties. *Taylor, 39 Wn.App. at 835; Roberson, 123 Wn. App. at 332*. The court’s refusal to grant a mistrial should be reversed, and a new trial granted.

## **V. RAP 18.1**

RAP 18.1 permits recovery of reasonable attorney fees or expenses on review if applicable law grants to that party the right to so recover. Interim fees should be awarded here.

Attorney fees are recoverable when there is a statutory basis for such an award. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342 (1976). In a civil rights action under 42 U.S.C.A. § 1983, a plaintiff who succeeds on significant issues in an appeal, even on an interim basis, is entitled to attorney's fees under 42 U.S.C. section 1988. *Larez*, 946 F.2d at 649, referencing *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 791-92, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). If Mr. Strange prevails on appeal, he is entitled to an interim award of his full fees and costs.

## VI. CONCLUSION

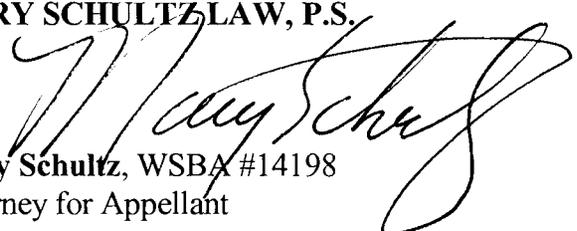
This trial was an extended egregious violation of the concept of a fair trial. This trial court refused to apply existing and determinative federal law, it engaged in constant, ongoing, and cumulative abuses of discretion all in favor of the defendants, it dismissed a defendant without cause, and it instructed the jury to exonerate the remaining defendant by misleading instructions permitting the use of force. The judgment in favor of Defendant Spokane County entered upon dismissal should be reversed. Judgment in favor of Defendant entered on the jury's verdict after improper instruction should be reversed. The trial court should be directed to enter verdicts against Defendant Welton on Plaintiff's claims

of excessive force; with such verdicts necessarily compelling a similar directed verdict against Defendant Spokane County for municipal liability. The trial court should be directed to award the Plaintiff fees and costs accrued through the initial trial for the demonstration of these rights' violations as a matter of law; with the matter remanded for retrial on the false arrest claims, damages, and punitive damages under proper instructions.

Fees and costs should be awarded to the Plaintiff on appeal.

**DATED** this 19 day of Dec., 2011.

**MARY SCHULTZ**LAW, P.S.

  
**Mary Schultz**, WSBA #14198  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

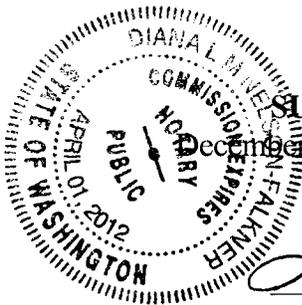
That on the 19<sup>th</sup> day of December, 2011, she served a copy of the **Appellant's Opening Brief** to the person hereinafter named at the place of address stated below which is the last known address via hand delivery.

**ATTORNEY FOR RESPONDENTS:**

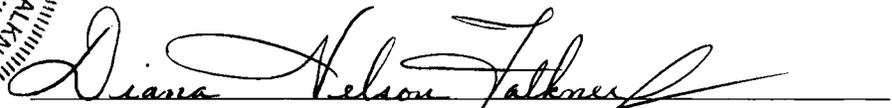
**Ms. Heather Yakely  
Evans, Craven & Lackie, P.S.  
818 W. Riverside Avenue, Suite 250  
Spokane, WA 99201**

Dated this 19<sup>th</sup> day of December, 2011.

  
\_\_\_\_\_  
TINA REHM



SUBSCRIBED and SWORN to before me this 19<sup>th</sup> day of December, 2011.

  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of Washington,  
residing in Spokane. Commission Expires: 04/01/12

## **APPENDIX**

### **RCW 10.31.100. Arrest without warrant**

A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

(c) The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or

household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.

(3) Any police officer having probable cause to believe that a person has committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person:

(a) RCW 46.52.010, relating to duty on striking an unattended car or other property;

(b) RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;

(d) RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;

(e) RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;

(f) RCW 46.61.5249, relating to operating a motor vehicle in a negligent manner.

(4) A law enforcement officer investigating at the scene of a motor vehicle accident may arrest the driver of a motor vehicle involved in the accident if the officer has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation.

(5) Any police officer having probable cause to believe that a person has committed or is committing a violation of RCW 79A.60.040 shall have the authority to arrest the person.

(6) An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington.

(7) Any police officer having probable cause to believe that a person has committed or is committing any act of indecent exposure, as defined in RCW 9A.88.010, may arrest the person.

(8) A police officer may arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to

believe that an order has been issued of which the person has knowledge under chapter 10.14 RCW and the person has violated the terms of that order.

(9) Any police officer having probable cause to believe that a person has, within twenty-four hours of the alleged violation, committed a violation of RCW 9A.50.020 may arrest such person.

(10) A police officer having probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises shall have the authority to arrest the person.

For purposes of this subsection, the term "firearm" has the meaning defined in RCW 9.41.010 and the term "dangerous weapon" has the meaning defined in RCW 9.41.250 and 9.41.280(1) (c) through (e).

(11) Except as specifically provided in subsections (2), (3), (4), and (6) of this section, nothing in this section extends or otherwise affects the powers of arrest prescribed in Title 46 RCW.

(12) No police officer may be held criminally or civilly liable for making an arrest pursuant to subsection (2) or (8) of this section if the police officer acts in good faith and without malice.

CREDIT(S)

[2010 c 274 § 201, eff. June 10, 2010; 2006 c 138 § 23, eff. June 7, 2006; 2000 c 119 § 4; 1999 c 184 § 14; 1997 c 66 § 10; 1996 c 248 § 4. Prior: 1995 c 246 § 20; 1995 c 184 § 1; 1995 c 93 § 1; prior: 1993 c 209 § 1; 1993 c 128 § 5; 1988 c 190 § 1; prior: 1987 c 280 § 20; 1987 c 277 § 2; 1987 c 154 § 1; 1987 c 66 § 1; prior: 1985 c 303 § 9; 1985 c 267 § 3; 1984 c 263 § 19; 1981 c 106 § 1; 1980 c 148 § 8; 1979 ex.s. c 28 § 1; 1969 ex.s. c 198 § 1.]

**RCWA 10.31.050 Officer may use force**

If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

CREDIT(S)

[2010 c 8 § 1031, eff. June 10, 2010; Code 1881 § 1031; 1873 p 229 § 211; 1854 p 114 § 75; RRS § 2084.]

PLAINTIFF'S INSTRUCTION NO. P-10B

**Duty to obey law enforcement officer — Authority of officer.**

(1) Any person requested or signaled to stop by a law enforcement officer for a traffic infraction has a duty to stop.

(2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

(3) Any person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself and give his or her current address.

**RCW 46.61.021**

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PLAINTIFF'S INSTRUCTION NO. P-11

A deputy may not use a routine traffic stop as a basis for a generalized investigative detention. Once the initial purpose of his stop is accomplished, any further detention must be based on articulable facts, giving rise to a reasonable suspicion of criminal activity.

© *State v. Veltri*, 136 Wn. App. 818, 150 P.3d 1178 (2007).

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PLAINTIFF'S INSTRUCTION NO. P-16

Deputy Welton arrested Brian Strange for obstructing a law enforcement officer.

In order for Deputy Welton to have probable cause to arrest a suspect for the crime of obstructing a law enforcement officer, then a preponderance of the evidence must show that, under the totality of the circumstances known to Deputy Welton, a prudent person/cautious deputy would have concluded that there was a fair probability that on January 22, 2006, Brian Strange:

- 1) Willfully hindered delayed or obstructed Deputy Welton while Deputy Welton was discharging his official duties;
- 2) That Brian Strange knew that Deputy Welton was discharging his official duties at the time of this obstruction;
- 3) That Deputy Welton's investigation was actually hindered or obstructed; and
- 4) That Brian Strange's actions were more than mere speech.

If any one of these elements are not met, then probable cause for an arrest for obstruction did not exist.

▶ State v. CLR, 40 Wash.App. 839, 841-842, 700 P.2d 1195, 1197 (Wn. App., 1985)  
● RCW 9A.76.020

PLAINTIFF'S INSTRUCTION NO. P-17

A person commits the crime of obstructing a law enforcement officer when he willfully hinders, delays, or obstructs any law enforcement officer in the discharge of the law enforcement officer's official powers or duties.

Willfully means the person acted purposefully with knowledge that his action would hinder, delay, or obstruct a law enforcement officer in the discharge of the officer's official duties.

**WPIC 120.01, .02, .03 Obstructing A Law Enforcement Officer—Definition, Elements and Willfulness combined.** (A person acts willfully *[as to a particular fact]* when he or she acts knowingly *[as to that fact]*. WPIC 10.05)

CIV/STRANGE/PLEADINGS/STRANGE.TRIAL.JURY.INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S INSTRUCTION NO. P-19

Deputy Welton also arrested Brian Strange for resisting a lawful arrest. A person commits resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him.

In order for Deputy Welton to have probable cause to arrest Brian Strange for the crime of resisting arrest, then a preponderance of the evidence must show that:

- 1) Deputy Welton's arrest of Brian Strange for obstructing was lawful; and that, under the totality of the circumstances known to Deputy Welton, a prudent cautious deputy would have concluded that there was a fair probability that on January 22, 2006, Brian Strange:
  - 2) had knowledge that he was being arrested;
  - 3) prevented or attempted to prevent Deputy Welton from arresting him; and,
  - 4) acted intentionally to prevent Deputy Welton's arrest.

If any one of these elements are not met, then Deputy Welton did not have probable cause for arresting Brian Strange for resisting a lawful arrest.

WPIC 120.06  
RCW 9A.76.040.

CIV/STRANGE/PLEADINGS/STRANGE.TRIAL/JURY.INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S INSTRUCTION NO. P-20

A person commits the crime of resisting arrest when he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her.

That arrest or attempt to arrest must be lawful, and the person must act intentionally for the specific purpose of resisting that arrest.

**WPIC 120.05 Resisting Arrest—Definition, and elements, WPIC 120.06**

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PLAINTIFF'S INSTRUCTION NO. P-21

In order to resist an arrest, a person must know they are under arrest. A person is not ignoring instructions when there is no clear evidence they heard or understood the instructions.

■ Bryan v. MacPherson, 2010 WL 4925422 (C.A.9 (Cal.), 2010)(applying holding to a July 2005 use of a Taser at a traffic stop)

CIV/STRANGE/PLEADINGS/STRANGE.TRIAL.JURY.INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S INSTRUCTION NO. P-22

Where a person complies with every command except the one they assert they did not hear-to remain or return to a car, then a failure to comply with a command to remain in a vehicle does not constitute "active resistance" supporting the use of a Taser. If the resistance is supposed to be a failure to comply with an order that a person remain in his car, then shouting gibberish and acting bizarrely is not actively struggling with an officer attempting to restrain and arrest an individual.

*Bryan v. MacPherson*, 2010 WL 4925422 (C.A.9 (Cal.), 2010) (applying holding to a July 2005 use of a Taser at a traffic stop)

CIV/STRANGE/PLEADINGS/STRANGE TRIAL JURY INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S INSTRUCTION NO. P-23

The use of excessive force to accomplish an arrest, even where that arrest is lawful and supported by probably cause, violates the Fourth Amendment.

▾ *Staats v. Brown*, 139 Wn.2d, 757, 774 (Wash. 2000) (citing ▾ *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865 (1989)).

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PLAINTIFF'S INSTRUCTION NO. P-24

Whether the force used to effect an arrest was unreasonable is to be determined in light of all the surrounding circumstances, viewed from the perspective of a reasonable and prudent sheriff's deputy in the same or similar circumstances, at the time of the event, without regard to that person's intent or motivation.

**WPI 342.03 Definition of Unreasonable Force—Fourth Amendment**

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PLAINTIFF'S INSTRUCTION NO. P-25

When applying a test of reasonableness, you should consider:

1. The severity of the crime at issue;
2. Whether Brian Strange posed an immediate threat to the safety of Deputy Welton or others;
3. Whether Brian Strange was actively resisting arrest, or attempting to evade arrest by flight.

▷ Staats v. Brown, 139 Wn.2d 757, 744-775, 991 P.2d 615, 625 (Wash. 2000) (citing ▷ Scott v. United States, 436 U.S. 128, 137-139, 98 S. Ct. 1717, 1723-1724, ▷ 56 L. Ed. 2d 168 (1978)); and see, ▷ Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868 (1968);

▷ Staats v. Brown, 139 Wn.2d 757, 744-775 (Wash. 2000) (citing ▷ Graham v. Connor, 490 U.S. 386, 387, 109 S. Ct. 1865 (1989)).

PLAINTIFF'S INSTRUCTION NO. P-27

A Taser constitutes an intermediate, significant level of force that must be justified by a strong government interest that compels the use of such force.

■ *Bryan v. MacPherson*, 2010 WL 4925422 (C.A.9 (Cal.),2010) )(applying holding to a July 2005 use of a Taser at a traffic stop)

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PLAINTIFF'S INSTRUCTION NO. P-28

Traffic infractions generally will not support the use of a Taser. A person at a traffic stop does not pose an immediate threat to an officer despite unusual behavior, particularly if the person is unarmed.

*Bryan v. MacPherson*, 2010 WL 4925422 (C.A.9 (Cal.), 2010) (applying holding to a July 2005 use of a Taser at a traffic stop)

CIV/STRANGE/PLEADINGS/STRANGE.TRIAL.JURY.INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S INSTRUCTION NO. P-29

A law enforcement officer may not use a Taser absent facts that indicate that the suspect poses an immediate threat to the officer or a member of the public. A statement by an officer that he fears for his safety or the safety of others is not sufficient to show an immediate threat to an officer's safety. Volatile and erratic conduct does not rise to a threat against personal safety. Shouting expletives and gibberish outside a car do not equate to leveling physical or verbal threats against an officer. If a victim is standing, without advancing, some distance from the officer between the door and body of the car, even taking a step in the officer's direction does not render the suspect an immediate threat justifying a Taser. And where an officer has already unholstered and charged his Taser, the officer is in a position to respond immediately to any change in the circumstances. An officer's desire to quickly resolve a potentially dangerous situation does not justify the use of a Taser.

Use of a Taser in such circumstances is excessive force.

*Bryan v. MacPherson*, 2010 WL 4925422(C.A.9 (Cal.), 2010) (applying holding to a July 2005 use of a Taser at a traffic stop)

PLAINTIFF'S INSTRUCTION NO. P-30

The use of a taser is excessive where a person complies with an officer's instructions to pull his car over, where his crime is a minor seatbelt infraction, where he never attempts to flee, where he is clearly unarmed, and where he is standing, without advancing in any direction, next to his vehicle, while the Deputy is standing approximately twenty feet, with his Taser drawn and charged, even if that person is engaged in some "stationary, bizarre tantrum."

The use of a Taser in dart mode to apprehend that person under such circumstances is excessive force.

*Bryan v. MacPherson*, 2010 WL 4925422 (C.A.9 (Cal.), 2010) (applying holding to a July 2005 use of a Taser at a traffic stop)

CIV/STRANGE/PLEADINGS/STRANGE TRIAL JURY INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S SUPPLEMENTAL INSTRUCTION "FLIGHT" NO. P-31C

To "flee" means to intentionally depart from the scene of the crime. The law makes no nice or refined distinctions as to the manner or mode of flight, and the range of circumstances which may be shown as evidence of flight is broad. However, the circumstance or inference of flight must be substantial and real. It may not be speculative, conjectural, or fanciful. In other words, the evidence or circumstances introduced and giving rise to the contention of flight must be substantial and sufficient to create a reasonable and substantive inference that the defendant's departure from the scene of difficulty was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.

*State v. Bruton*, 66 Wash.2d 111, 112-113, 401 P.2d 340, 341 - 342 (WASH 1965)

CIV/STRANGE/PLEADINGS/STRANGE.TRIALJURY.INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S SUPPLEMENTAL INSTRUCTION "FORCIBLE  
RESISTANCE" NO. P-31d

"Force" for the purpose of forcible resistance means the intentional touching or striking of another person to resist an arrest.

*State v. Aguirre*, 168 Wash.2d 350, 357, 229 P.3d 669, 672 - 673 (Wash.,2010) (definition of "force" relative to the right to forcibly resist an arrest defined by the assault statute). No case law exists identifying "flight" or "you can't make me" as forcible resistance.

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PLAINTIFF'S INSTRUCTION NO. P-35 (edited from prior submission)

Both crimes of "Obstructing an Officer" and "Resisting Arrest" are misdemeanor crimes.

A police officer having probable cause to believe that a person has committed a misdemeanor involving physical harm or threats of harm to any person or property has the authority to arrest the person.

Such an arrest is not mandatory for a misdemeanor however.

Where a person is arrested for a misdemeanor, the arresting officer may serve the person with a citation and notice to appear in court, instead of physical arrest.

▷ RCW 10.31.100

▷ State v. Pulfrey, 154 Wn.2d 517, 526, 111 P.3d 1162, 1166 (Wash., 2005)

CIV/STRANGE/PLEADINGS/STRANGE.TRIAL.JURY.INSTRUCTIONS.1.14.10.FINAL.DOC  
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PLAINTIFF'S INSTRUCTION NO. P-44

A Taser intrudes upon a victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not. While pepper spray causes an intense pain and acts upon the target's physiology, the effects of a Taser are not limited to the target's eyes or respiratory system. Unlike police nunchakus, as an example, the pain delivered by a Taser is far more intense and is not localized, external, gradual, or within the victim's control. A taser shot is a "painful and frightening blow.

**H** *Bryan v. MacPherson*, 2010 WL 4925422 (C.A.9 (Cal.), 2010) (applying holding to a July 2005 use of a Taser at a traffic stop)

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PLAINTIFF'S INSTRUCTION NO. P-47

The use of a taser gun against a non-violent misdemeanor who appeared to pose no threat and who is given no warning is an unconstitutional use of excessive force for which an officer does not enjoy qualified immunity. If a person is stopped for a minor traffic offense, where there is no reasonable basis to conclude that the person is armed, where the person is twenty feet away and is not physically confronting the officer, where the person is not facing the Officer when he is shot, then a reasonable officer in these circumstances would have known that it was unreasonable to deploy a Taser, and he is not entitled to qualified immunity.

It is only if an officer could have made a reasonable mistake of law in believing the use of the Taser was reasonable that he is entitled to qualified immunity.

■ *Bryan v. MacPherson*, 2010 WL 4925422 (C.A.9 (Cal.), 2010) (applying holding to a July 2005 use of a Taser at a traffic stop)

INSTRUCTION NO. 8

The use of excessive force to accomplish an arrest, even when that arrest is lawful and supported by probable cause, violates the Fourth Amendment.

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INSTRUCTION NO. 9

A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor when the offense is committed in the presence of the officer.

INSTRUCTION NO. 10

If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

INSTRUCTION NO. 11

The use, attempt, or offer to use force upon or toward the person of another is not unlawful whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction.

Instruction No. 12

Whether the force used to effect an arrest was unreasonable is to be determined in light of all the surrounding circumstances, viewed from the perspective of a reasonable and prudent law enforcement officer in the same or similar circumstances, at the time of the event, without regard to that person's intent or motivation.

INSTRUCTION NO. 16

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.

Willfully means a person acts purposely.

A person also acts willfully as to a particular fact when he or she acts knowingly as to that fact.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 17

A person commits the crime of resisting arrest when he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 18

"Probable cause" means facts that would cause a reasonably cautious officer to believe that the person had committed that crime. In determining whether the facts known to the officer justified this belief, you may take into account the officer's experience and expertise.

## Taser Download Receipt Form

Date of download: 012206 Comments: Welton  
Time of download: 0452  
Taser time: 0452 File name: 06021900-p3044549  
Taser reset? yes  no   
Received from: Welton Signature: \_\_\_\_\_  
Downloaded by: Staley Signature: \_\_\_\_\_  
Taser assigned to: Welton  
\_\_\_\_\_

Injuries:

Taser probe marks to suspects back.

Spokane Co. # 00-2-02851-4  
Strange vs. Spokane County  
Plaintiff Exh. # 146  
Disposition \_\_\_\_\_

Line 315) 01/16/06 20:08:30, Monday ✓  
Line 316) 01/16/06 20:08:36, Monday ✓  
~~Line 317) 01/16/06 22:17:23, Monday ✓~~  
Line 318) 01/20/06 17:37:27, Friday  
Line 319) 01/21/06 19:32:15, Saturday  
Line 320) 01/22/06 01:55:46, Sunday  
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STRANGE, DANIEL

### Taser Download Receipt Form

Date of download: 012206                      Comments: Welton  
Time of download: 0452  
Taser time: 0452                      File name: 06021900-p3044549  
Taser reset?    yes     no   
Received from: Welton                      Signature: \_\_\_\_\_  
Downloaded by: Staley                      Signature: \_\_\_\_\_  
Taser assigned to: Welton  
\_\_\_\_\_

Injuries:

Taser probe marks to suspects back.

Copy TO D. MANROE  
4-13-07

Strange v. Spokane County  
Spokane Co. No. 06-2-05251-4  
Plaintiff's Exhibit No. 146A

Device Serial Number [ P3-044549 ]  
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Line 003) 02/10/04 00:41:23, Tuesday  
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Line 005) 02/10/04 00:41:34, Tuesday  
Line 006) 02/10/04 00:41:39, Tuesday  
Line 007) 02/10/04 00:41:45, Tuesday  
Line 008) 02/10/04 00:41:51, Tuesday  
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