4-26-2018

Picatti v. Miner Appellant's Brief Dckt. 45499

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVEN L. PICATTI Plaintiff/Appellant, v. AARON MINER, DENNIS LAURENCE, MARK WILLIAMSON, RANDALL GOODSPEED, JOHN DOES 1-5. Defendants/Respondents.	**Docket No. 45499-2017** **APPELLANT'S OPENING BRIEF**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JASON D. SCOTT, PRESIDING DISTRICT JUDGE

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

Other Sources

I. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff filed this action to seek pursue false arrest and excessive force claims against four identified police officers. The action is founded in 42 U.S.C. §42-1983 (hereinafter "§1983").

B. Course of Proceedings Below

Through proceedings which Appellant, Steven Picatti (hereinafter "Picatti"), does not consider relevant to this appeal, this action as against Officer Randall Goodspeed and Deputy Mark Williamson was dismissed by the Court. As a result of permitted amendments the complaint relevant to this action is Picatti's Second Amended Complaint. R.519-531. Days before the deadline for the filing of dispositive motions, the remaining Defendants, Aaron Miner and Dennis Laurence (hereinafter the "Deputies") filed a motion for summary judgment. After briefing and a hearing the Court granted the Deputies' Motion for Summary Judgment and entered Judgment on September 6, 2017, dismissing Picatti's action with prejudice. This appeal was filed forty two days later on October 18, 2017.

C. Statement of Facts

On July 12, 2014, the Eagle Fun Days celebration, including a parade, was taking place in Eagle, Idaho. See Plaintiff s First Amended Complaint and Demand for Jury Trial. R. 520, Second Amended Complaint¶ 10-11, and R.198, Deposition of Aaron Miner, 17:18 –18:18, (hereinafter "Depo. Miner"). In order to maintain a safe environment and assist with traffic, extra law enforcement was in place. R.199, Depo. Miner, R.22:23-323:9. Deputy Miner and Deputy Laurence were stationed at the comer of Highway 44 and Eagle

Road to assist with traffic control and maintain a safe environment. R.199, Depo. Miner 22:19-22, and R.257, Exhibit 13, Depo. Miner.

Before the parade was to begin, northbound Eagle Road was closed at Highway 44 to all vehicle traffic. R.263, Deposition of Dennis Laurence, 15:5-10 (hereinafter Depo. Laurence) and R.284, Exhibit B, Depo. Laurence. There were large orange traffic control barrels partially blocking the right turn lane from westbound Highway 44 onto northbound Eagle Road but they were arranged so that Picatti could drive around them with the driver's side wheels still on the pavement. R.306-307, Deposition Steven L. Picatti 80:19- 82:22 (hereinafter Depo. Picatti) and R.353, Exhibit E, Depo. Picatti.[1] There was also a barricade partially blocking the cross walk with which supported a "Road Closed to Thru Traffic" sign. R.357, Exhibit I, Depo. Picatti.

While the Deputies were stationed near the right turn lane from Highway 44 onto northbound Eagle Road (hereinafter the "Scene") Picatti was driving to his home in Eagle to get lunch. R.303, Depo. Picatti 67:20 -68-13. He was aware of three routes by which he could reach his home and he found the first two that he tried had barricades that supported "Road Closed" signs. R.303, Depo. Picatti 68:18 – 70:6 and R.306, 78:17 – 80:21. The third route required a right turn onto Northbound Eagle Road at the Scene and from there a couple of blocks closer to but not across the parade route. R.306, Depo. Picatti 80:10-80:14, See the "dot" on R.352, Exhibit D, Depo. Picatti.

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[1] Picatti recognizes that there are conflicts in the facts, of which this is one. But since this appeal arises out of the entry of Summary Judgment against Picatti the relevant averments of fact are those which favor Picatti's claims or support reasonable inferences that favor Picatti's claims. Consequently, where there is a conflict in the claims of fact and related inferences, Picatti is not going recite those that are adverse to his claims.

Picatti drove around the traffic barrels because he saw an officer up the road by the "Road Closed to Thru Traffic" sign. R.306, Depo. Picatti 76:16- 77:5. He idled up to the Scene and it was his intention to stop where the officers were standing in order to get clearance to go further toward his home. R.309, Depo. Picatti 91:6–91:25. Picatti approached the cross-walk at a speed which was not threatening to Mr. Maldonado who was in the cross-walk. R.413, Affidavit of Ramiro Maldonado ¶7 (hereinafter Aff. Maldonado). Deputy Miner was aware of Picatti's approach and felt sure enough that Picatti was going to stop that he saw no need to clear pedestrians out of the crosswalk. R.207-208, Depo. Miner, 55:20-56:18. He must not have been surprised by Picatti's approach as he had seen other cars do the same thing and he had helped the drivers sort out their access issues – as he claims he would have done if Picatti had stopped sooner. R.218, Depo. Miner 96:19-99:11

Just as he was about to enter the cross-walk Picatti noticed that Deputy Miner was moving toward him and seemed to want him to stop – so he did. R.309, Depo. Picatti 91: 4-19. Mr. Maldonado says he was the last pedestrian crossing at that time and that Picatti stopped close to him. R.414-415, Aff. Maldonado ¶¶ 10 & 13. Mr. Maldonado saw a Deputy was initially about 10 feet away when the truck and when he turned back to the truck it had already stopped. R.413-411, Aff. Maldonado ¶¶ 8 & 10, He then noticed the truck lurched forward about 2 inches and then stopped again, When this happened Mr. Maldonado looked back over his shoulder and saw that Deputy Miner was a still a step or two away from the truck and about to put his hands on the hood of the truck. R.414, Aff. Maldonado ¶11. Mr. Maldonado also indicates that the communication between Deputy

Miner and Picatti was "intense," but because of the noise of the diesel motor he could not hear what was being said. R.415, Aff. Maldonado ¶ 14

Picatti has explained that if the truck's brake is released after the truck is placed in "Park" and while the engine is running the truck will move forward about 2 inches R.418-419, Affidavit of Steven L. Picatti ¶ 2 (hereinafter Aff. Picatti). Picatti believes that he was fully stopped before Deputy Miner reached the front of his truck and pounded on the hood. R.310, Depo. Picatti 96:8-17.

After pounding on the hood of the truck Deputy Miner says he was hit a second time and them moved around to the driver's door. R.208, Depo. Miner 58:2-10 & 60:1-13. Officer Goodspeed did not see Deputy Miner get hit but because nothing about the trucks presence at the scene was alarming to him he was not giving the situation his full attention until he saw Deputy Miner raising his hands to hit the hood. He did notice the truck was no longer moving at that point in time. R.430-431, Deposition Randall Goodspeed 11:4–12:22, (hereinafter Depo. Goodspeed).

At this point, while the engine noise made it hard to hear what he was saying, Deputy Miner was clearly yelling and angry. R.310-311, Depo. Picatti 97:19 to 98:8. Deputy Miner indicates that by the time he was moving around to the side of the truck he had already decided to that Picatti "was coming out of his car" R.217, Depo. Miner 92:24–93:8 and was going to be handcuffed. R. 209, Depo. Miner 61:3-6. After he reached the side of the truck Deputy Miner opened the driver's door and stepped up on the running board and grabbed Picatti around the neck and begin to try to pull him out of the truck. Picatti was waiting for instructions but got none and he was not told he was under arrest. While Deputy Miner was tugging on his neck trying to pull Picatti out of the truck the only

thing being said by either of them was that Picatti repeated "Seat Belt' several times. R.312, Depo. Picatti 104:13 – 105:12.

Picatti acknowledges that while Deputy Miner was coming around to the side of the vehicle and while he was tugging on Picatti's neck, Picatti sat still with both hands on the steering wheel of the truck. R.209, Depo. Miner 61:19 – 62:11. He did this not because he was trying to be difficult. If Deputy Miner had deescalated and asked Picatti to release the seat belt, turn off the motor or get out of the truck Picatti would have obliged. R.419, Aff. Picatti ¶3. But Deputy Miner had become agitated and erratic. *Id.* Picatti did not want to take his hands off of the wheel of his truck until he had a clear command to do so because he wanted to be sure that Deputy Miner could see his hands and not be threatened about the potential that Picatti was reaching for a weapon. *Id.* and R.314, Depo. Picatti 110:12-18. Picatti behaved in this manner because he had been told by a Boise City Officer during an earlier traffics stop this was the correct way to behave when stopped. R. 313-314, Depo. Picatti 109:5- 110:8, Deputy Miner acknowledges that this is advice commonly given to drivers. R.216, Depo. Miner 92:11-23.

While Picatti sat calmly in the truck waiting for directions, Deputy Miner reached across Picatti and released the seat belt. R.209, Depo. Miner 62:5-63:6. Deputy Miner then pulled Picatti out of the truck and the fell to the ground. R.312, Depo. Picatti 105:4-16. As the pavement was as very hot Picatti started to get up but by then there was at least one other officer involved and it seemed like they tugging him about like a rag doll and resisting each other's movements. R.312, 105:17- 106:14 When the officers finally got coordinated, they slammed Picatti to the ground again. R.312, 106:15-20. During this time

no one said he was under arrest and no one told him to put his hands behind his back. R 315, Depo Picatti, 114:1-24.

After he was taken to the ground the second time his only desire was to keep his face from being pressed into the hot pavement. He did not try to get up again. R. 419, Aff. Picatti ¶ 4 He did not understand what the officers were doing to him or why. He still had not been told he was under arrest and he was not told that they wanted him to put his hands behind his back. Depo. Picatti. *Id.* He was not trying to hit or grab any officer – he just wanted to keep his face off the pavement. R.313, Depo. Picatti 106:21 -107:12.

While Picatti was on the ground with the Deputies on top of him, Officer Goodspeed intervened. At that point Officer Goodspeed observed that Picatti was lying somewhat on his left side and his right arm was free. R.434-435, Depo. Goodspeed 27:3-28:1. Picatti was moving his legs (not kicking or flailing) and his hands were not behind his back. R.435, Depo. Goodspeed 28:6-17. During the time that Officer Goodspeed was there, he had control of Picatti's right arm (one hand on the wrist and the other on the elbow). R.432, Depo. Goodspeed 18:23 – 19:10. He does not remember ever hearing anyone tell Picatti that he was under arrest. R.440, Depo. Goodspeed 51:6-9.

At this point Picatti was tased by Deputy Miner. Deputy Miner claims he usually announces the use of a Taser by saying "TASER, TASER, TASER. R. Depo. Miner 80:24-81:2. Such an announcement is consistent with Sheriff Department regulations. R.465-466, Report of Leach p 10-11, Exhibit B-B Affidavit of Bruce S. Bistline. Neither Picatti nor Officer Goodspeed heard any announcement of the intent to use the Taser. R.313, Depo. Picatti 107:13-15and R.436, Depo. Goodspeed 35:8-9. While Deputy Miner claims he heard Deputy Laurence say "get your hands off of my gun" and this factored into the

decision to utilize the Taser after some additional wrestling with Picatti. R. 212-213, Depo. Miner 73:3-21 and 79:3-14. Neither Officer Goodspeed, nor Picatti heard anyone say anything about a gun. R. 436, Depo. Goodspeed 35:4-7, R.315, Depo. Picatti 115:21-25.

After being tased Picatti was cuffed. R.215, Depo. Miner 84:12-18. Later he was taken to the Ada County jail where he was booked in. R. 317, Depo. Picatti 124:8 – 125:16. He was charged with for felony Aggravated Battery on a law enforcement officer pursuant to I.C § 18-915(3) and misdemeanor Resisting and Obstructing Officers pursuant to Idaho Code § 18-705. R. 96-97, Exhibit A, Affidavit of Elyshia Holmes, (hereinafter Aff. Holmes). The Plaintiff posted bond R.324, Depo. Picatti 152:13-20.

On August 20, 2014, the Plaintiff appeared before a Magistrate for a probable cause hearing. R. 358-388, Exhibit D, Affidavit of Erica White. The Plaintiff was represented by attorney Mark Manweiler. *Id.* Deputy Miner testified on direct examination and was cross-examined by Mr. Manweiler. *Id.* The Plaintiff also testified for the extremely limited purpose of demonstrating the lack of any damage to his truck or of any other indication that the front of his truck struck anyone or anything. R.378- 381, Partial Transcript of Preliminary Hearing, State v. Picatti 69:24-73:25. No other witnesses were called. *Id.*

The Preliminary Hearing was not conducted by Picatti's criminal defense attorney with any intention toward having a full and fair litigation of probable cause. His goal was to tie down the officer's testimony and being to expose weaknesses in the case. R.478-479, Affidavit of Mark Manweiler ¶¶ 8- 12 (hereinafter Aff. Manweiler). Moreover, he could not have fully litigated the matter because he had not been provided critical information relative to Mr. Maldonado (his contact info) and Officer Goodspeed (his report) even though that information was available to the State prior to the hearing R.476-

477, Aff. Manweiler, ¶¶ 6-7. Based upon the testimony and evidence presented at the contested probable cause hearing, the Plaintiff was bound over to district court for further proceedings on the charges. R.98-99, Exhibit B, Aff. Holmes

Prior to trial, an Amended Complaint was filed in State v. Picatti which provides that the Plaintiff did "willfully and maliciously disturb the peace of a neighborhood, to wit: the intersection of Eagle Road and State Highway 44, by tumultuous conduct, to wit: by failing to obey a traffic sign and driving into a restricted pedestrian area." R.103-104, Exhibit E, Aff. Holmes. A Rule 11 Plea Agreement limiting the possible sentence on the charge of Disturbing the Peace was entered into by the parties and accepted by the Court. R. 102, Exhibit D, Aff. Holmes. Picatti pled guilty to this charge at the hearing held on February 4, 2015. R.105, Exhibit F, Aff. Holmes. A Judgment of Conviction was entered in which Plaintiff waived his right to all defenses. *Id.* The conviction has not been appealed, overturned, or expunged.

II. ISSUES PRESENTED ON APPEAL

A. Given the record before it, did the District Court err in applying the doctrine of collateral estoppel to bar Picatti's Third Claim for Relief --false arrest on a felony?

B. Did the District Court err by founding its analysis of Picatti's Excessive Force Claim upon the premise that, as a matter of law, Deputy Miner had a right to order Picatti to exit his vehicle?

C. Given the record before it did the District Court err by failing to deny the Defendants' Motion for Summary Judgment as to Picatti's Second and Third Claims for Relief?

III. STANDARD OF REVIEW

The standard of review of an appeal to this Court from a summary judgment entered by a district court is the same standard which should have been applied by the District Court in ruling on the motion. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust* 144 Idaho 233, 237, 159 P.3d 870, 874 (2009). In determining whether summary judgment was properly entered, an Idaho appellate court exercises free review of the entire record that was before the district judge. *Id.*

Summary judgment is proper only, "...[I]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *I.R.C.P.* Rule 56, s*ee Northwest Bec-Corp. v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 166 (2002). The burden is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868, 452 P.2d 362, 365 (1969) (emphasis added). All controverted facts are liberally construed in favor of the nonmoving party. *See, e.g., Tusch Enterprises v. Coffin,* 113 Idaho 37, 46, 740 P.2d 1022, 1031 (1987). Additionally, the non-moving party is entitled to have all reasonable inferences from the evidence drawn in its favor. *Earl v. Cryovac*, 115 Idaho 1087, 1093, 772 P.2d 725, 732 (Ct.App. 1989) (citing *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982)). Summary judgment is only proper, if the evidence before the court would warrant a directed verdict, if the case were to go to trial. *Jephson v. Ambuel,* 93 Idaho 790, 793, 473 P.2d 932, 935 (1970).

To resist a motion for summary judgement, the non-moving party need only establish a genuine issue of material fact regarding the element or elements challenged by

the moving party's motion. *See Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994). Moreover, the burden upon the non-moving party "is not to persuade the judge that an issue will be decided in his favor at a trial; rather, "...he simply must present sufficient materials to show that there is a triable issue.'" *Earl*, 115 Idaho at 1093, 772 P.2d at 732 (quoting 6 J. Moore, W. Taggart, & J. Wicker, MOORE'S FEDERAL PRACTICE §56.11(3), at 56-243 (2d ed. 1988) (emphasis in original)).

In the context a §1983 the threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 553 U.S. 194, 201 (2001) A Plaintiff may not rely on conclusory allegations *Ivey v. Bd. Of Regents of Univ. of Alaska* 673 F.2d 266, 268 (9th Cir. 1982) and when faced with a properly supported motion for summary judgment based upon official immunity, the Plaintiff must produce evidence to support the allegations that have been made. *Butler v. San Diego Dist. Atty's Office* 370 R.3d 956, 963 (9th Cir. 2004).

IV. ARGUMENT

A. THE RELEVANT RECORD DOES NOT SUPPORT APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL TO BAR PICATTI'S THIRD CLAIM FOR RELIEF (FALSE ARREST ON A FELONY).

1. Introduction

Picatti recognizes that in other jurisdictions it has been determined that §1983 cases turning upon a claim for false arrest can be collaterally estopped or precluded by a finding of probable cause at a preliminary hearing in the criminal proceeding arising from that arrest. *See, e.g. Haupt v. Dilliard* 17 F.3d 285, 288-289 (9th Cir. 1949), as amended (Apr. 15, 1994) (applying Nevada law). Not all Courts agree. *See., Patterson v. City of Yuba City,No.16-16001,http://cdn.ca9.uscourts.gov/datastore/opinions/2018/03/07/16-*

16001.pdf. So far as Picatti can determine this is an issue of first impression in Idaho.[2] The Idaho Supreme Court appears to have accepted as good law the principle that where there are conflicting facts, the existence of probable cause is a question for the jury, *Sprague v. City of Burley,* 109 Idaho 656, 663, 710 P.2d 566, 573 (1985) citing favorably, *Patzig v. O'Neil*, 577 F.2d 841, 848 (3rd Cir.1978).[3] If the Court adheres to the holding in *Sprague, Id.,* then given the conflicting facts and inferences demonstrated by the record, summary judgment on the false arrest claim should not have been granted.

If the Court determines that in the circumstances of this case it is appropriate to a consider whether a probable cause determination at a preliminary hearing can collaterally estop a civil action for false arrest, that inquiry must necessarily lead to the conclusion that summary judgment was improperly granted. Of the five criteria which must be present for a matter to be collaterally estopped by a prior judicial determination, *see, Pocatello Hosp. LLC v. Quail Ridge Med. Inv'r LLC,* 157 Idaho 732, 738, 339 P.3d 1136, 1142 (2014), three are not satisfied given the conflicting facts and inferences demonstrated in and supported by the record on this appeal. At its heart, the doctrine of collateral estoppel is intended to prevent re-litigation of issues which have been fully and fairly litigated. What in the context of a §1983 false arrest claim constitutes a full and fair opportunity to litigate

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[2] While it might, at first blush appear that this question was addressed and resolved adverse to Piccati's argument in *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171, (1986), it should be noted that in that case Anderson had been convicted at a criminal proceeding – that is a proceeding in which the State had to make its case "beyond a reasonable doubt." As demonstrated below, the finding at a preliminary hearing is made at a standard which is not only lower but which is actually lower than the standard necessary to prevail in a civil action. Hence, *Anderson,* should not be taken as controlling authority in this action.

[3] The crime charged in *Sprague* is not one that resulted in a preliminary hearing. The crime for which Patzig was arrested is not one that resulted in a preliminary hearing.

of the probable cause issue in a preliminary hearing in a criminal case has been considered by many courts. As the Court acknowledged in *Haupt,* 17 F.3d at 289, there are reasons why a probable cause determination following a preliminary hearing might not be based upon full and fair opportunity to litigate probable cause to arrest and therefor there are exceptions to the general rule. Three commonly articulated exceptions are:

(1) where there were facts presented to the judicial officer presiding over the preliminary hearing which were additional to (or different from) those available to the officers at the time they made an arrest; or

(2) where tactical considerations prevented a litigant/prior criminal defendant from vigorously pursuing the issue of probable cause during the prior criminal prosecution/preliminary hearing, see id.at 289; and

(3) where a plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing.

See e.g. *Moreno v. Baca*, No. CV 00-7149 ABC (CWX), 2002 WL 338366, at *6 (C.D. Cal. Feb. 25, 2002), aff'd and remanded, 431 F.3d 633 (9th Cir. 2005). *McCutchen v. City of Montclair* 87 Cal Rptr. 2d 95, 99-101 (1999).

The record in this matter contains substantial and competent evidence that could be relied upon by a reasonable and rational juror to conclude that the Officer who made the arrest and who was the State's sole witness at the preliminary hearing was lying about the events that led up to the arrest and which provided the factual basis for the Magistrate's probable cause determination. In this circumstance, two of the criteria for the application of collateral estoppel –"identity of issue" and "preclusive effect" are not satisfied. It is in acknowledged these circumstances that the issue relative to "probable cause to bind over"

that was presented to the magistrate is not identical to the issue relative to "probably cause to arrest" that is presented in this civil action. See, e.g. *Wige v. City of Los Angeles*, 713 F.3d 1183, 1185–86 (9th Cir. 2013), (preliminary hearing), *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001), (preliminary hearing), .*Hinchman v. Moore*, 312 F.3d 198, 202-03 (6th Cir.2002), (grand jury).[4]

Further, because of the differing standard of proof applicable to preliminary hearings (likely or probable) and civil litigation (more likely than not) a determination positive in the former which conflicts with a determination in the latter is a possibility. Thus, one does not necessarily preclude the other.

The record in this matter also contains substantial and competent evidence that demonstrates Picatti, both because of strategy decisions appropriately made by his criminal defense lawyer and because of State's incomplete discovery responses which prevented his lawyer from identifying and locating necessary witnesses, was denied a full and fair opportunity to litigate the probable cause at the preliminary hearing.

2. The Finding of Probable Cause at the Preliminary Hearing in the Related Criminal Action Does Not *Preclude* a Finding of a Lack of Probable Cause in this Action.

At first blush it may appear that a judicial determination that there is probable cause to bind a person over to a district court for a felony trial precludes a finding that there was no probable cause for a warrantless arrest. In those cases in which the facts are not materially disputed and the question of probable cause is a matter of determining if the available facts are substantial evidence of the material elements of the crime, it may be

[4] The one exception that may exist, arose in a case in which the Defendant in a criminal proceeding explicitly challenged the veracity of the testimony and the Court makes an explicit finding of truthfulness. *Greene v. Bank of Am.*, 236 Cal. App. 4th 922, 934–35, 186 Cal. Rptr. 3d 887, 896–97 (2015), as modified on denial of reh'g (May 28, 2015).

appropriate to hold that a magistrates finding that the facts stated demonstrate the existence of probable cause is preclusive. This case presents a materially different set of circumstances.

Here, there is a genuine dispute about the whether the only witness offered by the State testified truthfully. Thus, in this setting, a false arrest claim does not present an attack upon the Magistrate's determination that a set of facts provided substantial evidence of the elements of a crime but rather an attack the set of facts. While a preliminary hearing may involve an unstated determination that to a low threshold of proof the State's witness as likely telling the truth, there is nothing about such a finding which should be sufficient to preclude a plaintiff from pursuing a civil action for false arrest.

In this case the testimony of Officer Goodspeed and the Affidavit of Roberto Maldonado provide a factual basis upon which a reasonable juror could rely in concluding that Deputy Miner was lying and that the claimed felony assault for which Picatti was arrested and bound over never happened. The significance of a challenge to the truthfulness of Deputy Miner's testimony to "preclusion effect", turns upon the difference between it the "issue" relative to "probable cause" that must be decided at each of the two proceedings.

In the context of a preliminary hearing in a felony prosecution, Idaho law requires that the magistrate court determine that "a public offense has been committed and that there is probable or sufficient cause to believe that the defendant committed such offense..." I.C.R. 5.1(b). The Idaho Supreme Court has clearly and expressly held that the preliminary hearing standard of "probably or likely" is less than a preponderance of the evidence. *State v. Neal*, 155 Idaho 484, 486–87, 314 P.3d 166, 168–69 (2013) (citing *State v.*

Edmonson, 113 Idaho 230, 234, 743 P.2d 459, 463 (1987). Where only one witness at the preliminary hearing in support of probable cause, the "issue" at the preliminary hearing was whether it was "probable or likely" that the events described by the witness happened. Put mathematically the only thing that can be known from a finding of truthfulness in this setting is that it was based on something less than a 50% probability.

In the context of a civil action for false arrest a plaintiff cannot prevail without a jury determination that there was no probable cause for the arrest. In this setting the standard of proof is "preponderance" of the evidence. *See, Ware v. Riley*, 25 F. Supp. 3d 492, 499 (D. Del.), aff'd, 587 F. App'x 705 (3d Cir. 2014) cert. denied 135 S.Ct. 1553, and IDJI 4.10 and 1.20.1. In general terms the issue to be determined by a preponderance of the evidence is whether "the facts and circumstances within [the officers'] knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent person in believing that the suspect had committed an offense." *Kiss v. City of Santa Clara,* 206 Fed. Appx 679, 2006 WL 3312040 (2006). Here, where the record on the motion for summary judgment contains adequate evidence to support a rational conclusion that Deputy Miner was lying at the preliminary hearing, the "issue" at a civil trial in this matter would be whether more likely than not that events described by Deputy Miner actually happened. Put mathematically the thing that Picatti would have to demonstrate in order to prevail at trial is that, to a probability of something greater than 50%, the events relied upon by Deputy Miner as probable cause to arrest him never actually happened.

The core issue at the two proceedings is not just different, it is materially different. Due to the differing thresholds of proof, a finding, based upon less than 50% probability, that there is truthful testimony which provides a factual basis for probable cause at the

preliminary hearing does preclude the possibility that the jury would, at trial, conclude, based upon more than 50% probability that Deputy Miner was lying and that there was no probable cause to arrest Picatti. For this reason it is not rational to conclude that, where Deputy Miner's credibility is a legitimate factual issue, a determination in a preliminary hearing which is based upon something less than a preponderance, precludes, in a civil action, a finding, based on something more than a preponderance Both outcomes are possible. Consequently, the District Court could not properly conclude on summary judgment that the third criteria for the application of the doctrine of collateral estoppel – "preclusive effect"– was met in this case.

3. In This Action the Question of Whether the Evidence Supports a Finding of Probable Cause at a Preliminary Hearing Does Not Present an "Identical Issue" to the Question of Whether the Evidence Supports a Finding of the Lack of Probable Cause in a Civil Action.

Generally, where the evidence known to the arresting officers is not materially different from the evidence presented at the preliminary hearing, "a finding of sufficiency of the evidence to require the defendant to stand trial is a finding of probable cause to arrest the defendant" for the purposes of a civil action. *Haupt* 17 F.3d at 289,[5] *McCutchen* 87 Cal.Rptr.2d at 100. Where the facts are the same in both proceedings there is "identity of issue" between the two proceedings. *Wige v. City of Los Angeles*, 713 F.3d 1183, 1185–86 (9th Cir. 2013)

[5] *But see, Schmidlin v. City of Palo Alto,* 157 Cal.App.4th 728 (2007) in which the a California appellate court argues for the principle that in the context of California law there is never identity of issue between the probable cause determination incident to a preliminary hearing and the probable cause determination necessary to a civil action for false arrest.

It is clear however, that there are circumstances when the information known to the officers at the time of the arrest is different from the information that they supply to the Court at a preliminary hearing. This difference can occur when the magistrate's finding of probable cause at the preliminary hearing is based upon information obtained by law enforcement after the arrest. *Wige v. City of Los Angeles,* 713 F.3d at 1186. The difference can also occur when the magistrate's finding of probable cause is based upon testimony about events that the arresting officer knows never occurred. *Id.*. Either way, assuming that the record on summary judgment is sufficient to raise a question of fact relative to whether the evidence in the civil action is different from the evidence provided in the preliminary hearing the "issue" – whether the facts establish probable cause – will be different at the civil trial than it was at the preliminary hearing.

Here there is a clear and material conflict between the evidence available at the preliminary hearing and the evidence available in this action. At the preliminary hearing Deputy Miner testified that he was struck twice by Picatti's truck and that one of these strikes was so forceful as to knock him back a couple of steps. In this record there is evidence, from an uninvolved witness (Mr. Maldonado) to support a finding that Deputy Miner had not contact with the truck until he banged his hands on the hood.

The conflict is clearly material. Deputy Miner testified that after these two strikes occurred it was his intention to arrest Picatti for a felony aggravated assault and that had these two strike not occurred he would have calmly talked to Picatti and helped him to address his concern – getting to his home.

Clearly, a reasonable person could conclude that Deputy Miner told the Magistrate a fabricated story. To the extent that a jury in this action reached the conclusion that Deputy

Miner had not told the truth at the preliminary hearing it would effectively be concluding that the magistrate's probable cause determination was based upon events which never occurred. In this scenario, the jury would not be determining that the magistrate reached the wrong conclusion given the facts he was presented. Instead the jury would only be concluding that the Magistrate was considering the legal impact of different "facts" and hence a different "issue" than what was presented to the jury.

Given that the "facts" presented to the Magistrate are clearly and materially different from the facts available on the record in this matter, the District Court could not properly conclude on summary judgment that the second criteria for the application of the doctrine of collateral estoppel – identity of issue – was met in this case.

4. Picatti Has Never Had a Full and Fair Opportunity to Litigate the Veracity of Deputy Miner's Claim that He Had Probable Cause to Arrest Picatti for an Aggravated Assault on a Law Enforcement Officer.

The record in this matter is sufficient for summary judgment purposes to support the conclusion that Picatti never had a "full and fair opportunity" to probable cause and hence that collateral estoppel should not be applied.

It is evident form the Affidavit of Mark Manweiler that while it was his intention to lock in Deputy Miner's testimony and to "start the process of alerting the Prosecutor's Office to the defects in the case" it was never his intention to fully litigate probable cause. Indeed, as he points out because he was, consistent with his experience with the Ada County Prosecuting Attorney's Office, provided incomplete discover responses prior to the preliminary hearing, he could not have fully litigated the veracity of Deputy Miner's testimony even if he had wanted to.

Specifically while he knew, three weeks before the hearing that there were citizen witnesses including Mr. Maldonado and police witnesses including Officer Goodspeed he was not provided with critical information in the possession of the State regarding those witnesses. Mr. Manweiler was told that Mr. Maldonado's address was unknown even though it is clear that Deputy Miner had possession of an e-mail address for Mr. Maldonado for more than a month before the preliminary hearing. The involvement of Officer Goodspeed was reported three weeks before the hearing but the report that he prepared 12 days prior to the preliminary hearing was not supplied to Mr. Manweiler until 5 days after the hearing. The involvement of Officer Severson and his report, also prepared 12 days before the hearing, were not disclosed until after the preliminary hearing. These officers observed the approach of Picatti's truck. Clearly, Officer Goodspeed's testimony about events conflicts in material ways with Deputy Miner's claims. These witnesses possessed very material knowledge pertaining to the veracity of Deputy Miner's testimony at the preliminary hearing but their value as witnesses was substantially obscured by the State's conduct during the prosecution – conduct with Mr. Manweiler had learned to expect.

Mr. Manweiler is an experienced criminal defense lawyer who made conscious and rational tactical decisions. He could and did articulate an alternative logical account of events. He could and did, provide some evidence to demonstrate that things might not have played out as testified to by Deputy Miner. He could and did, consistent with his intent, point to circumstances and testimony which called into question the accuracy of Deputy Miner's story. However he could not, due to incomplete discover, and did not, as a matter of strategy, directly challenge and fully litigate Deputy Miner's credibility. While these were sound decisions given his role as a criminal defense attorney, they were decisions

which had the effect of denying Picatti an opportunity to fully and fairly litigate the probable cause issue which turns upon the veracity of Deputy Miner's story.

While the Magistrate found that the "bare bones" of the charge were established he did not make any comment about or adjudication of the veracity of Deputy Miner. Indeed he did not need to make and explicit finding that Deputy Miner was telling the truth about what happened. Absent the evidence that existed but which Mr. Manweiler did not know about and did not present, the Magistrate had no reason to think that the sworn testimony of a police officer was not "probably or likely" truthful and thus no reason to make an explicit finding.

Given these circumstances, the District Court could not properly conclude on summary judgment that the first criteria for the application of the doctrine of collateral estoppel –full and fair opportunity to litigate– was met in this case.

B. THE DISTRICT COURT'S ANALYSIS OF PICATTI'S EXCESSIVE FORCE CLAIM IS FOUNDED UPON THE INHERENTLY FLAWED BASIC PREMISS THAT, AS A MATTER OF LAW, DEPUTY MINER HAD A RIGHT TO ORDER PICATTI TO EXIT HIS VEHICLE.

The District Court chose evaluate the viability of Picatti's excessive force claim by considering first, whether Picatti had a clearly established right to be free from forcible removal from his vehicle and subjected to violent struggle (including being tased) in order to be handcuffed and arrested. It is well established that to prevail on an excessive force claim the plaintiff must prove both that the officer conduct at issue violated a constitutional right and that the right was clearly established at the time of the incident. *Torres v. City of Madera* 648 F.3d 1119, 1123 (9th Cir. 2011). It is also clear that the Court may use its discretion in deciding which prong to evaluate first. *Mueller v. Auker,* 576 F.3d 979,

993(9th Cir. 2009). The analysis of validity of any excessive force case requires the consideration of the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386 (1989);

In determining if there was a clearly established right relevant to the circumstances of the case the "relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz, 533 U.S. 194. 201 (2001)* (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Here the District Court narrowly framed of the "established right" question based upon the premise that "Picatti is collaterally estopped from challenging the existence of probable cause" *Id.* The District Court cited no authority to support the conclusion and arrived at the conclusion *sua sponte.*[6] The District Court did offer the explanation that "the existence of probable cause to believe Picatti had committed aggravated battery on Deputy Miner can no more be re-litigated in the excessive-force context than it can be re-litigated in the false-arrest context.[7] *Id.*

Here, the District Court, instead of considering the question in light of the totality of the circumstances leapfrogged over material and relevant circumstances (such as Mr. Maldonado's observation that Picatti's truck was fully stopped before Deputy Miner was close enough to be hit by it) in order to arrive at the conclusion that Deputy Miner armed

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[6] In this regard it should be noted that the benefit/protection of the doctrine of collateral can be waived. See, e.g. *Currier v. Baldridge*, 914 F.2d 993, 996 (7th Cir. 1990). In this case the doctrine was not plead as a defense to any cause of action, the assertion of the doctrine in connection motion for summary judgment relative to the false arrest claim might be seen as an act to preserve the issue as to the false arrest claims However, where it has not been plead or relied upon by the Deputies in connection with the excessive force claim it should be treated as waived.

[7] The District Court incorporated the same basic assumption into the question it framed relative to the use of the Taser. Since the core assumption is the same in both instances the two questions will not be addressed separately.

with probable cause to arrest Picatti for aggravated battery on a law enforcement officer had the right to violently extract Picatti from his truck because he failed to exit it when lawfully order by Deputy Miner to do so. *Memorandum Decision and Order Granting Summary Judgment* R.543. To the extent that this Court concludes, that, as Picatti argues above, that doctrine of collateral estoppel could not and should not be applied bar Picatti's third cause of action, then it is not appropriate to rely upon the doctrine of collateral estoppel as justification for incorporating the irrebuttable presumption that Deputy Miner had probable cause to arrest Picatti for aggravated assault into the "established right" analysis.

The District Court's reasoning and conclusion is not, so far as Picatti can determine, supported by any reported decision of the, the United States Supreme Court, Ninth Circuit Court of Appeals, any other Circuit Court, any Federal District Court or the Idaho Supreme Court. Indeed it would appear to be contrary to the general rule that excessive force cases are not collaterally estopped by a determination of probable cause to arrest except where the initial proceeding necessarily involved a determination that there was no excessive force employed in the arrest process. *Compare: Dixon v. Richer,* 922 F.2d 1456 (10th Cir. 1991) (state court's determination of probable cause had no bearing on the issue of excessive force), *Gibson v. City of Oakland, Cal.,* 902 F.2d 39 (9th Cir. 1990) (conviction did not necessarily lead to the conclusion that the officers had not used excessive force), *Corbett v. Biggs*, No. 01 C 7421, 2005 WL 991903, at *5 (N.D. Ill. Mar. 23, 2005)(where it does not appear that the jury which convicted the plaintiff of Obstructing ever considered whether officer used excessive force, collateral estoppel does not bar the excessive force claim) *with Mink v. Weglage*, 614 F. Supp. 93, 96 (S.D. Ohio 1985) (considering the jury

instructions given a finding of guilt in a resisting arrest prosecution must necessarily have involved a finding that not excessive force was involved).

The District Court also appeared to perceive that its framing of the "established right" questions was appropriate because Deputy Miner had authority to order Picatti out of his vehicle in connection with a lawful traffic stop. To support reliance upon this collateral matter the District Court cited *Pennsylvania v. Mimms* 434 U.S. 106, 111 (1977). This wholly collateral issue should be given no weight in the analysis of the "substantial right" question. The District Court never conducts an analysis relative to this conclusion. Consequently the District Court does not explain how it arrived at the conclusion that there was a traffic stop in this case. The matter decided in *Pennsylvania v. Mimms* arose out of a situation in which two officers observed a moving vehicle, acted to stop it with the intention to briefly detain the driver in order to issue a citation, executed the stop on the side of a road, and directed the driver to exit the vehicle in accordance with an established policy intended to protect the driver and the officer. *Id.* 107 & 110. Here if Picatti and Mr. Maldonado are believed, there was no traffic stop and there was no behavior that would have justified Deputy Miner's response to Picatti's actions. Picatti pulled up fully intending to voluntarily stop in response to the "Road Closed to Thru Traffic" because he wanted to speak to the on duty law enforcement personnel and to secure permission to drive into (but not through) the restricted zone so that he could get home for lunch. Deputy Miner indicates that if this is what Picatti had done then Deputy Miner would have helped him arrive at a solution. Mr. Maldonado, who was walking through the crosswalk as Picatti drove up did not feel threatened by the approaching vehicle and indicated that it did not appear to him that Deputy Miner had even reached the vehicle before it came to a complete

stop. This evidence does not support a finding on summary judgment that there was a traffic stop. Moreover there is no evidence of the existence of a policy which directed Deputy Miner given the circumstances to order Picatti out of the vehicle for any safety related reason. This case presents circumstances materially different from those present in *Pennsylvania v. Mimms* and consequently the District Court has provided no justification for its conclusion that the act of ordering Picatti out of his vehicle was justifiable.

C. GIVEN THE RECORD BEFORE IT, THE DISTRICT COURT SHOULD HAVE DENIED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PICATTI'S SECOND AND THIRD CLAIMS FOR RELIEF.

There were two questions which the District Court should have addressed in processing the Defendants' Motion for Summary Judgment. The order in which these questions were addressed is, as noted above, within the discretion of the Court. One of those questions was whether the facts, taken in the light most favorable to the non-moving party. Picatti, show that the officers conduct violated a constitutional right. The other of those questions was whether the facts, taken in the light most favorable to Picatti show that the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood that his conduct was unlawful in that situation. *Torres v. City of Madera,* 648 F.3d at 1123

1. <u>District Court Should Have Concluded That the Record Presented a Triable Question Relative to Whether a Constitutional Right to be Free From the Use of Excessive Force Was Violated.</u>

The use of force to effect a warrantless arrest must, to be constitutional, be reasonable giving consideration to all relevant circumstances. *County of Los Angeles v. Mendez,* 137 S.Ct. 1539, 1547 (2017). The relevant circumstances must be analyzed from

the perspective of a reasonable officer on the scene. *Graham v. Connor* 490 U.S. 386, 396 (1989). The "settled and exclusive framework" for determining if the force used was reasonable is "whether the totality of the circumstances justifie[s] a particular sort of search or seizure" *Mendez, 137 S.Ct.* at 1546 (citations omitted).

The core considerations for assessing the force justified by the circumstances are: "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest." *Graham v. Connor, 490 U.S.* at 396. These factors while primary are not exclusive. *See, Mattos v. Agarano,* 661 F. 3d 433, 441 (9th Cir. 2011). The court making the inquiry should consider "whatever specific factors may be appropriate in a particular case." *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (citations omitted). These factors may include the availability of less intrusive means, *Glenn* v. *Washington Cnty.,* 673 F.3d 864, 876 (9th Cir. 2011) and the role of officer conduct leading up to the use of force. *Id.* (lack of waring before employing force) and *Mendez,* 137 S.Ct. at 1547, fn. * (unreasonable conduct prior to the use of force that foreseeably created the need to use it).[8]

Ultimately, the determination of what is reasonable requires careful consideration of the objective facts and circumstances that confronted the officers. *Smith v. City of Hemet* 394 F.3d 689, 701 9th Cir. 2005). As such summary judgment should be granted sparingly in excessive force cases. *Santos v. Gates*. 287 F.3d 846, 853 (2002). Indeed summary judgment in favor of defendants in excessive force cases should only be granted when,

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[8] In *Mendez* the Supreme Court held that provocative Officer conduct could not render unreasonable force which was found to have satisfied the *Graham* factors but it expressly did not rule against the proposition that a proper application of Graham precludes taking into account unreasonable police conduct **prior** to the use of force that foreseeably created the need to use that force

after resolving all factual disputes in favor of the plaintiff, it is clear that the officer's use of force was objectively reasonable under the circumstances. *Scott v. Henrich* 39 F.3d 912, 915 (9th Cir. 1994).

In this case there is no dispute about a significant portion of the facts. Picatti, in an effort to get home for lunch and having confronted "Road Closed" signs on all other routes, drove around some traffic control barrels and pulled up to a "Road Closed to Thru Traffic" sign where, of his own accord, he stopped his vehicle. He did so expecting to be able to have a civil discussion with an officer he saw standing nearby and to make arrangements to get to his home which was in between the location where he stopped and the area which was closed to traffic in order to accommodate a parade. His expectation was not unreasonable given Deputy Miner's testimony that he had accommodated other drivers who drove around the barrels for similar reasons. At that point, Picatti observed what from his perspective was erratic and irrational police behavior and he became concerned for his own safety if he acted in a way that caused the officers to be concerned for their safety. He had a seat belt on and the diesel engine on his truck was running. To turn off the motor and to release the seat belt would have required him, given the height of his truck to move his hands were the officers could not see them. Consequently he chose to sit still and keep his hands on the wheel where they could be seen and await directions. Deputy Miner acknowledged that he is aware that police officers instruct drivers who have been stopped to do exactly what Picatti was doing – keep hands visible. At no time did Picatti attempt to harm or take the offensive against any of the police who were using force upon him.

There is also ample evidence to support relevant findings on other portions of the facts. Picatti's approach to the sign was observed by Mr. Maldonado who was in the cross walk and considered it not threatening. From Mr. Maldonado's perspective the truck had come to a complete stop before Deputy Miner ever reached it and it is therefore appropriate to infer that, if there was contact between the truck and Deputy Miner, the contact was initiated by Deputy Miner. Deputy Miner opened the door of Picatti's truck and started to try to pull him out but never gave Picatti any direction about what he should do to cooperate with the officer. Deputy Miner then lunged over Picatti released the seat belt and immediately pulled Picatti out of the truck and to the ground. He never told Picatti he was under arrest. He never told Picatti to turn off the truck. He never told Picatti to release the seat belt, He did yell for Picatti to get out of the truck. Picatti was drug to the ground by Deputy Miner and by Deputy Laurence, who by that point had joined him. Picatti not realizing what was happening or why tried to stand up. He was taken back to the ground by the Deputies and they were joined by Officer Goodspeed, responding to an officer call for assistance. While he was on the ground, he was trying to keep his face from being pressed into hot pavement and the police involved were trying to get his hands behind his back. During this time both Picatti and Officer Goodspeed never heard any officer telling Picatti he was under arrest or that he needed to put his hands behind his back so they could cuff him. During the struggle he was tased by Deputy Miner. No notice was given that he was about to be tased. No exigent circumstances warranted the use of the Taser without notice. The Taser during the five seconds while it was still "hot" was applied several times to Picatti's skin and left multiple prong marks.

Thus, on the record before the District Court, the facts after resolving all disputes in favor of Picatti demonstrate that Picatti was violently arrested and in the process tased for doing nothing more than what other citizens did, with Deputy Miner's assistance, in order to get access to locations within an area closed to "thru" traffic in order to provide traffic control for an parade route which was closed to all traffic. On these facts, a jury could rationally determine that giving due consideration to the *Graham* factors and other circumstances of the case that the Deputies conduct toward Picatti was not objectively reasonable.

The only crime involved before Picatti was assaulted was of nominal severity. Picatti plead guilty to disorderly conduct for driving around the traffic barrels. While he undeniable did drive around the barrels, this is, considering the facts in the light most favorable to him, the only conduct he engaged in which could have amounted to a crime and even that crime was one that Deputy Miner has been prepared, in instances not involving Picatti, to ignore. In any event, disorderly conduct is a low grade crime. Given that the crime involved was so minor as to be overlooked by the Deputy and that other evidence supports the conclusion that Picatti's conduct was not threatening to anyone or intentionally uncooperative. A jury could quite reasonable conclude that the severity of the crime involved was so nominal that before an objectively reasonable officer escalated to violence and Taser use he would have attempted calm and quite communication with Picatti which would have begun with opening the door of the truck and quietly asking Mr. Picatti to turn of the motor

Force can also be reasonable where there is an immediate threat to the safety of officer and others. Threat to safety is considered the " 'most important single element' "

of the governmental interests at stake. *City of Hemet, 394 F.3d* at 702 (citation omitted). There is a factual basis for concluding that safety what not an issue at the time that Deputy Miner begin to use force on Picatti. Mr. Maldonado, was not threatened by the truck even though as it approached he was directly in its path and, once it had stopped, he could have reached out and touched it. He perceived that the truck had come to a complete stop before Deputy Miner reached it. Indeed, it would be reasonable to infer that Deputy Miner recognized that the truck had come to a complete stop and was in "Park" – so as to not pose any ongoing threat. If not, his failure to clear the cross-walk of pedestrians before proceeding to drag Picatti out of the truck while it was still running is one which instead of reducing the danger actually would have substantially increased the danger. Under these circumstances a jury could reasonably conclude that at the time Deputy Miner charged the driver's door, no objectively reasonable officer would have perceived that Picatti posed any ongoing threat at all to any officer or anyone else.

Force can be reasonable where a suspect was actively resisting arrest. Resistance is not a "binary state" but instead spans a gamut from "the purely passive protester who refuse to stand to the individual who is physically assaulting the officer." *Bryan v. MacPherson, 630 F.3d.*at 830. In the absence of exigent circumstances, attempts to flee, threats to officers, or violent actions toward officers, a refusal to get out of a car, including physical resistance to being removed from a car, does not justify an escalation to violence, including tasing. Where the offense is nominal and no threat is present this sort of conduct be seen as excessive force. *Mattos,* 661 F.3d at 445. In this case a jury could reasonably conclude that an objectively reasonable officer would have recognized that there was no conduct approaching serious resistance until force was already being improperly employed

upon Picatti. In Idaho it is a crime for an officer to, without lawful necessity, assault a citizen. I.C. § 18-706.

If Deputy Miner was himself violating the law he was acting without justification when he started trying to drag Picatti out of the truck then he was breaking the law and certainly was not discharging a duty of his office. If he was not discharging a duty of his office then any failure on Picatti's part to succumb to what appeared to him to be an attack upon him would not, within the meaning of Idaho law, constitute resisting arrest. I.C. §18-705. This is consistent with case law which recognizes a limited right to offer reasonable resistance to an arrest that is the product of an officer's personal frolic. *United States v. Span*, 970 F.2d 573, 580 (9th Cir.1992) (citation omitted). Moreover resistance in the form of self-defense does not provide an objectively reasonable basis for the use or force to overcome that resistance. *Jackson v. City of New York* 939 F.Supp2d 235 (2013). Under these circumstances a jury could reasonably conclude that Picatti's conduct would not have been perceived by an objectively reasonable officer as a justification for violently removing him from his truck, subjecting him to being forcefully thrown onto hot pavement and ultimately tased.

There is evidence upon which a jury could conclude that Picatti, without any appropriate justification, was not informed he was being arrested or why and that he was not informed he was about tased. Failing to inform him that he was being arrested and the reason for that arrest is a violation of I.C. §19-608. Failing to warn him that he is about to be tased was both contrary to Deputy Miner's established practice but also, absent exigent circumstances, contrary to express policies of the Ada County Sheriff's Office. These failures to warn weigh against the reasonableness of the Deputies use of force.

There is also evidence upon which a jury could conclude that force was initiated against Picatti before any less intrusive alternatives were pursued. Deputy Miner has indicated that when he came around the front of the truck that Picatti was coming out of the truck regardless of what it took. This position was taken notwithstanding that he acknowledges that he could tell what Picatti was saying given the noise of the motor and that he must have understood that Picatti could not hear him. While he was not bound to use the least intrusive means available, *Scott,* 39 F.3d at 915 he did need to consider if there were less intrusive means and then to take action within a reasonable range of conduct. *Glenn 673 F.3d* at 876. There is evidence upon which a jury could conclude that he did not so despite the fact that he knew that communication was problematic as long as the truck motor was operating. This failure to even consider less intrusive means weighs against the reasonableness of the Deputies use of force.

When all of these factors are, viewed in the light most favorable to Picatti (as the non-moving party) and considered as a totality it is apparent that a jury could easily conclude that a reasonable officer would not have believed that the force used on Picatti was reasonable. Consequently, the District Court could not properly have granted summary judgment to Defendants on the basis that no constitutional right had been violated.

2. The District Court Should Have Concluded That the Impropriety of the Force Used upon Picatti' Was Clearly Established.

The second prong of analysis in determining whether the Defendants are entitled to qualified immunity turns upon whether Picatti's right to be free, under the circumstances from the force used was clearly established. This evaluation typically calls the Court to consider Supreme Court and Ninth Circuit case law existing at the time of the alleged acts.

See Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996). In the absence of binding precedent, the district court should look to available decisions of other circuits and district courts to ascertain whether the law is clearly established. *Id.* It is also apparent that a violation of statutory law may be relevant to the analysis of what is required by the clearly established law. *Harlow v. Fitzgerald,* 457 U.S. 800, 819, (1982)

The inquiry of whether a right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). "The relevant, dispositive inquiry is whether in the light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). The existing precedent must place the relevant statutory or constitutional question beyond debate." *Mullenix v. Luna,* 136 S.Ct. 305, 308 (2015) (citing *Ashcroft v. al-Kidd,* 563 U.S. at 741). The Court is not required to find a case with exactly the same facts but there must be decisional law which makes it clear that an "officer acting under similar circumstances . . . was held to have violated the Fourth amendment." *White v. Pauly,* 137 S.Ct. 548, 551-52 (2017).

The 9th Circuit Court has held that even where there is actually a traffic stop, there can be liability for physically abusive behavior which is less violent than the physical force employed on Picatti in this case because no reasonable officer would have thought this conduct was constitutional. *Palmer v. Sanderson*, 9 F.3d 1433, 1434–36 (9th Cir.1993). By this measure it could be said that no reasonable officer could have thought that using the physical force which was employed on Picatti was constitutional where there was no traffic stop and the only theoretically committed offense was a misdemeanor and a citable

offense, I.M.C.R. 3, which Deputy Miner had overlooked with other drivers at that same location on that same day.

Moreover the physical force employed on Picatti was contrary to Idaho law. With exceptions not relevant here, a person must be given notice that he is arrested and the reason for that arrest before any force can be used to effectuate that arrest. I.C. § 19–610 and I.C. § 19–608. This has been established law since 1985. *Sprague v. City of Burley*, 109 Idaho 656, 667, 710 P.2d 566, 577 (1985). Moreover, where no attempt has been made to reason with an individual who has committed a minor offense, is not threatening anyone, is at most passively resisting, is not attempting to flee and could be cited for the offense involved, it cannot be said that there is a lawful necessity for the officer to use force of any kind and in that event the use of force violates a clearly stated Idaho law. I.C. 18-706.

The deployment of the Taser was similarly contrary to established law. Prior to the decision in *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011), the precise contours of the constitutional limits upon the use of Tasers had not been clearly established. When that decision was issued in 2011 the 9th Circuit Court cleared up the conflict in its decisions by reversing earlier decisions in *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010) and *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir. 2010) and by engaging in a detailed analysis to demonstrate why the use of the Taser in those cases violated the Plaintiff's' constitutional rights. This brought these decisions into line with *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). It is clear from these decisions that the 9th Circuit Court considers the Taser to be less intrusive than deadly force but none the less a significantly intrusive and intermediate use of force. From the decisions it is apparent that the use of a Taser should be announced, it should be reserved for cases involving serious offenses, it

should be reserved for cases where the threat to officers is significant and present at the time of deployment and where there is a significantly aggressive resistance. Given these articulated standards, it cannot be said in this case that Deputy Miner did not, as a matter of law have fair warning that the use of the Taser would violate Picatti's constitutional rights where, as here, the following findings are supported by the evidence in the record:

a. Picatti was being physically controlled by three officers and could not flee;

b. the underling offense involved nothing more than driving around some traffic barrels to access a passage marked with a "Road Closed to Thru" traffic sign and could have been dealt with by issuing a citations;

c. no warning was given that a Taser was going to be deployed and not exigent circumstances existed;

d. no violence was directed toward any officer and the Picatti was not armed; and,

e. Picatti, while being subjected to overwhelming force, had never been told he was under arrest.

Under these circumstances the District Court could not properly grant the Deputies' Motion for Summary Judgment relative to Picatti's excessive force claim.

3. The District Court Should Have Concluded That the Record Presented a Triable Issue of Fact Relative to Whether a Constitutional Right to be Free from Arrest Without Probable Cause Was Violated.

As argued above, there are ample facts to support a jury determination that Picatti was subjected to a felony arrest without probable cause. To the extent this is true a violation of the right to be free from seizure in the absence of probable cause which is protected pursuant to the 4th Amendment of the United States Constitution would be clearly stated.

Moreover the case law which clearly establishes that right is well known. See, e.g. *Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1078 (9th Cir. 2011).

V. CONCLUSION

For the foregoing reasons it is respectfully submitted that the Court should reverse the Judgment in this matter and remand this case with directions to the District Court to deny the Defendant Motion for Summary Judgment.

DATED: This 26th day of April, 2018.

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