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Tase Me One More Time: An Analysis of the Ninth Circuit's Interpretation of the Fourth Amendment, Qualified Immunity, and Tasers in *Brooks v. City of Seattle*

I. INTRODUCTION

In *Brooks v. City of Seattle*, the Ninth Circuit considered whether officers were entitled to qualified immunity when they tased a pregnant woman who refused to exit her car after declining to sign a traffic ticket.[1] Following primarily the multi-factor test from *Graham v. Connor*,[2] the court found that "the Officers [were] entitled to qualified immunity" because their "use of force [was] reasonable and not excessive under the Fourth Amendment."[3]

This Note contends that the Ninth Circuit was incorrect in finding that the officers were entitled to qualified immunity for two reasons: (1) the court should not have raised probable cause issues sua sponte after the officers waived those arguments, and (2) the officers used excessive force when they tased a pregnant woman three times. This Note will begin with an overview of the *Brooks* decision in Part II followed by an overview of the legal background of excessive force claims in Part III. Part IV will summarize the *Brooks* court's decision. Part V will analyze the excessive force issue in connection with Tasers. Finally, Part VI will conclude.

II. FACTS AND PROCEDURAL HISTORY

Malaika Brooks was pulled over by Officer Ornelas for speeding in a school zone on November 23, 2004.[4] Brooks refused to sign the

1. 599 F.3d 1018, 1021–22 (9th Cir. 2010).

2. 490 U.S. 386, 388 (1989).

3. *Brooks*, 599 F.3d at 1025, 1031. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

4. *Brooks*, 500 F.3d at 1020, 1032. Because the officers appealed the denial of their motion for summary judgment, the court assumed the correctness of Brooks's account of the

Notice of Infraction because she claimed she was not speeding.[5] Officer Jones then arrived and Officer Ornelas told him about the situation.[6] Officer Jones attempted to obtain her signature and assured Brooks "that signing was not tantamount to admitting the violation," but "[s]he . . . became upset, repeating 'I'm not signing, I'm not signing' over and over."[7]

The parties disputed whether the officers were asking Brooks to sign "both a Notice based upon her speeding . . . and a Citation to Appear based upon her refusal to sign the Notice";[8] however, the court assumed the validity of Brooks's assertion that she was only asked to sign the Notice of Infraction.[9]

When Brooks refused to exit the car, Officer Jones showed her his Taser and explained how badly it would hurt.[10] Brooks told the officers "she was pregnant and that she needed to use the restroom."[11] Because she continued to stay in the car, Officer Ornelas took the "key out of the ignition, dropping the keys on the floorboard."[12] Officer Ornelas then "employed a pain compliance technique, bringing Brooks's left arm up behind her back," and Brooks grabbed the steering wheel to prevent him from removing her from the car.[13] Because she would not exit the car, "Officer

facts. *See* Schwenk v. Hartford, 204 F.3d 1187, 1195 (9th Cir. 2000) ("[W]e assume the version of the material facts asserted by the non-moving party to be correct.").

5. *Brooks*, 599 F.3d at 1020. Brooks was pulled over for "driving 32 miles per hour, while the posted speed limit was 20 miles per hour." *Id.* at 1032 n.2 (Berzon, J., dissenting).

6. *Id.* at 1020 (majority opinion).

7. *Id.* at 1020–21. The Notice of Infraction informs the driver "that a traffic law has been violated and requires a signature indicating, without admitting to the crime, that the recipient will respond as directed by the Notice." *Id.* at 1020 n.3 (citing WASH. REV. CODE § 46.63.060 (2009)). Brooks had a similar encounter with police in 1996 when "she refused to sign both the Notice and the Citation to Appear because she did not think she was guilty of the traffic offense." *Id.* at 1020–21 n.4.

8. *Id.* at 1020 n.3. The Citation to Appear, separate from the Notice of Infraction, "includes the violation allegedly committed [and] requires a signature promising to appear in court." *Id.* (citing WASH. REV. CODE § 46.64.015 (2009)). Failure to sign a Citation to Appear permits an officer to perform a custodial arrest. *See id.* at 1021 n.4 ("[T]he law would have permitted custodial arrest."). Failure to sign a Notice of Infraction "was at the time a nonarrestable misdemeanor; now in Washington, it is not even that." *Id.* at 1032 (Berzon, J., dissenting) (citing 2006 Wash. Legis. Serv. 1249 (West)).

9. *See Schwenk*, 204 F.3d at 1195 ("[W]e assume the version of the material facts asserted by the non-moving party to be correct.").

10. *Brooks*, 599 F.3d at 1021.

11. *Id.*

12. *Id.*

13. *Id.*

Jones discharged the Taser [in drive-stun mode] against Brooks's thigh, through her sweat pants," causing great pain.[14] After Brooks yelled and honked the horn, Officer Jones tased her on her shoulder and on her bare neck.[15] At this point, Brooks could not exit the car because "her arm was still behind her back."[16] After the third application of the Taser, the officers forced Brooks out of the car "through a combination of pushing and pulling."[17] From the three applications of the Taser, Brooks was burned on her "thigh, arm, and neck" and received permanent "scars on her thigh and upper arm."[18] As soon as the officers removed Brooks from her car, they "laid her on her stomach in the street," and she told them "they were hurting her."[19]

As a result of not cooperating with the officers, Brooks faced charges for (1) "refusing to sign the Notice, and (2) resisting arrest."[20] She was found guilty of the first charge, but the second was dismissed due to a hung jury.[21]

Brooks asserted "a claim under 42 U.S.C. § 1983 and assault and battery claims under state tort law for the alleged excessive force."[22] The district court ruled that the officers used excessive force; therefore, the officers were not entitled to qualified immunity, and the court denied the officers' motion for summary judgment.[23] The officers appealed to the Ninth Circuit, and the Ninth Circuit reversed.[24]

14. *Id*. "The Taser's use in . . . 'drive-stun' mode—as the Officers used it here—involves touching the Taser to the body and causes temporary, localized pain." *Id*. at 1026. A Taser used in barb mode results in Taser barbs sticking in the individual's body causing loss of muscular control. *Id*. at 1027.

15. *Id*. at 1021.

16. *Id*. Although the district court suggested that the Taser may have prevented her from leaving, Brooks stated that she could not move because of the position of her arm. *Id*. at 1021 n.6.

17. *Id*. at 1021.

18. *Id*. at 1033 (Berzon, J., dissenting).

19. *Id*.

20. *Id*. at 1021 (majority opinion).

21. *Id*.

22. *Id*.

23. *Id*. at 1020.

24. *Id*.

III. SIGNIFICANT LEGAL BACKGROUND

Under certain circumstances, officers are granted qualified immunity in excessive force cases so they can avoid the hassle of litigation.[25] When deciding if a police officer is entitled to qualified immunity, courts determine whether the officer had probable cause to perform an arrest and whether the officer used excessive force.[26]

A. Qualified Immunity

Under the doctrine of qualified immunity, an officer does not have "to stand trial or face the other burdens of litigation"[27] if his or her "conduct [does] not violate a clearly established federal right."[28] When determining whether to grant qualified immunity, a court asks two questions: "(1) was there a violation of a constitutional [or other] right, and, if so, then (2) was the right at issue 'clearly established' such that it would have been clear to a reasonable officer that his conduct was unlawful?"[29]

B. Probable Cause

In 2008, the Supreme Court ruled that the Fourth Amendment is not violated when a police officer makes an arrest based on probable cause, even when the arrest is "prohibited by state law."[30] In 2009, the Ninth Circuit ruled that an officer has probable cause to perform an arrest "when the facts and circumstances within the officer's knowledge are sufficient to cause a reasonably prudent person to believe that a crime has been committed."[31]

25. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

26. *Brooks,* 599 F.3d at 1022, 1025.

27. *Mitchell*, 472 U.S. at 526.

28. *Brooks*, 599 F.3d at 1022 (citing *Mitchell*, 472 U.S. at 526).

29. *Id*. (quoting Saucier v. Katz, 533 U.S. 194, 201–02 (2001) *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009)). The Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978)).

30. Virginia v. Moore, 553 U.S. 164, 166, 178 (2008).

31. Lassiter v. City of Bremerton, 556 F.3d 1049, 1053 (9th Cir. 2009) (citing Ybarra v. Illinois, 444 U.S. 85, 91 (1979)). A reasonably prudent person is "a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests." BLACK'S LAW DICTIONARY 1380 (9th ed. 2009).

In connection with determining if an officer's use of force was excessive, probable cause is analyzed when considering the totality of the circumstances.[32] In addition, state qualified immunity on assault and battery claims may be prohibited if officers lack probable cause for an arrest.[33] In light of the two previous statements, the *Brooks* court "consider[ed] whether the Officers had probable cause to arrest Brooks.[34]

C. Excessive Force

1. Amount of force

When determining whether police officers used excessive force, a court first evaluates the amount of force used by the officers.[35] The Ninth Circuit recently addressed claims of excessive force in connection with Tasers.[36] In *Mattos v. Agarano*, "a police officer applied a Taser directly to plaintiff's back, causing her to feel 'an incredible burning and painful feeling.'"[37] The court ruled that the Taser is somewhere between trivial and deadly force.[38] But, the court failed to "differentiate drive-stun and dart modes" and to

32. *See* Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005).

33. Staats v. Brown, 991 P.2d 615, 627–28 (2000). Lacking probable cause does not necessarily prohibit state qualified immunity. *See* Guffey v. State, 690 P.2d 1163, 1167 (Wash. 1984). An officer is entitled to qualified immunity "when the officer (1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably." *Id.* at 627.

34. *Brooks*, 599 F.3d at 1022.

35. Davis v. City of Las Vegas, 478 F.3d 1048, 1055 (9th Cir. 2007).

36. *See* Mattos v. Agarano, 590 F.3d 1082 (9th Cir. 2010) (ruling that the officers did not use excessive force when they used a Taser stun on a domestic violence victim who attempted to stop the officers from arresting her husband); *see also* Bryan v. MacPherson, 630 F.3d 805, 833 (9th Cir. 2010). The court ruled that shooting a Taser at a man during a minor traffic stop was excessive force. *Id.* However, the court reversed its prior ruling on *Bryan* and said that "a reasonable officer confronting the circumstances faced by Officer MacPherson . . . could have made a reasonable mistake of law in believing the use of the Taser was reasonable." *Id.* As such, the courts ruled that qualified immunity should not be denied because the officer may not have had enough information to know that the use of a Taser "constituted an intermediate level of force." *Id.* Prior to the *Bryan* decision, the Ninth Circuit ruled that pepper spray was more than a minimal use of force. *See id.* at 825 (citing Headwaters Forest Def. v. Cnty. of Humboldt, 240 F.3d 1185, 1200 (9th Cir. 2001)). It is unreasonable to believe a police officer would not know that level of force of a Taser is greater than the level of force of pepper spray. However, that is a topic for another note.

37. *Brooks*, 599 F.3d at 1026 (quoting *Mattos*, 590 F.3d at 1085).

38. *Mattos*, 590 F.3d at 1087.

"differentiate the quantum of force used on Mattos from the quantum of force used in *Bryan*."[39]

In *Bryan v. MacPherson*, the court again analyzed the level of force of a Taser.[40] When the dart mode of the Taser is used, the force "constitute[s] an intermediate, significant level of force that must be justified by the government interest involved."[41] In *Bryan*, a police officer shot a barb into a man's arm, causing him "to lose all muscular control, fall face first onto the pavement, shatter four front teeth, and suffer facial abrasions and swelling."[42] In addition, the man required surgery to have the barb removed.[43] As such, Tasers used in this manner "constitute an 'intermediate . . . quantum of force.'"[44] After determining the amount of force used by police officers, courts analyze the *Graham* factors in light of the established level of force.[45]

2. Graham *factors*

Courts evaluate excessive force claims "under the Fourth Amendment's 'objective reasonableness standard.'"[46] This standard provides for the balancing "of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."[47] To determine reasonableness, the court weighs the following factors: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others,[48] and [3] whether he is actively

39. *Brooks,* 599 F.3d at 1026–27.

40. *Bryan*, 630 F.3d at 826.

41. *Id.*

42. *Brooks*, 599 F.3d at 1027 (citing Bryan v. MacPherson, 590 F.3d 767, 771 (9th Cir. 2009)).

43. *Id.*

44. *Bryan*, 630 F.3d at 826 (quoting Sanders v. City of Fresno, 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008)).

45. *See* Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) (quoting Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir. 1994)) ("The three factors articulated in *Graham*, and other factors bearing on the reasonableness of a particular application of force, are not to be considered in a vacuum but only in relation to the amount of force used . . . .").

46. *Brooks*, 599 F.3d at 1025 (quoting Graham v. Connor, 490 U.S. 386, 388 (1989)).

47. *Graham*, 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

48. This factor is the most significant of the *Graham* factors. *See Chew*, 27 F.3d at 1441 ("[T]he most important single element of the three specified factors [is] whether the suspect poses an immediate threat to the safety of the officers or others.").

resisting arrest or attempting to evade arrest by flight."[49] These factors from *Graham* are analyzed in conjunction with a fourth factor, the totality of the circumstances, after determining the amount of force used by the officers.[50]

Officers have the right to use some physical force in carrying out an arrest,[51] but "the force must be necessary to be reasonable."[52] For example, the *Brooks* court ruled that using force on a suspect under police control is not necessary, and therefore, not reasonable.[53] Officers do not have "to use the least intrusive means available," but they "must act within the range of reasonable conduct."[54] The range of reasonableness is determined by the totality of the circumstances,[55] "including whether a warning was given, and the availability of alternative methods of capturing and subduing a suspect."[56]

IV. THE COURT'S DECISION

In *Brooks*, the Ninth Circuit ruled that "the Officers' use of force [was] reasonable and not excessive under the Fourth Amendment," and the officers were entitled to qualified immunity.[57] First, the court determined that the officers had probable cause to arrest Brooks.[58] Next, in light of the multi-factor test from *Graham v. Connor*, the court ruled that the officers' use of force was not excessive.[59]

In contrast, the dissent argued that the officers lacked probable cause to perform an arrest.[60] The dissent also reasoned that the

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

50. *See* Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005) ("First, it is necessary to assess the quantum of force used."); Forrester v. City of San Diego, 25 F.3d 804, 806 n.2 (9th Cir. 1994) (quoting *Garner*, 471 U.S. at 8–9) ("In *Graham*, the Supreme Court . . . did not . . . limit the inquiry to just these factors. Rather, the Court instructed that the jury should consider . . . 'the totality of the circumstances . . . .'").

51. *Graham*, 490 U.S. at 396.

52. Brooks v. City of Seattle, 599 F.3d 1018, 1025 (9th Cir. 2010) (citing Blankenhorn v. City of Orange, 486 F.3d 463, 480 (9th Cir. 2007)).

53. *Id.* (citing Headwaters Forest Def. v. Cnty. of Humboldt, 276 F.3d 1125, 1125 (9th Cir. 2002)).

54. *Id.* (citing Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994)).

55. *Forrester*, 25 F.3d at 806 n.2 (quoting *Graham*, 490 U.S. at 396).

56. *Brooks*, 599 F.3d at 1025 (citations omitted).

57. *Brooks*, 599 F.3d at 1031.

58. *Id.* at 1024.

59. *Id.* at 1031.

60. *Id.* at 1036 (Berzon, J., dissenting).

officers' use of force was excessive, and the officers were not entitled to qualified immunity.[61]

A. Probable Cause

Brooks argued that the officers lacked probable cause for a custodial arrest and that any amount of force was excessive.[62] Nevertheless, the court stated that a lack of probable cause is only one factor in an excessive force claim.[63] The officers had the right to "detain [Brooks] until they issued her a Notice," and her "refusal to sign the Notice gave the Officers probable cause to continue to detain her."[64]

The court found that probable cause for a custodial arrest existed "for obstructing an officer."[65] Obstruction of an officer occurs when a person impedes the officer in fulfilling his or her duties.[66] The court ruled that "a reasonably prudent person would have believed Brooks was violating" the statute "by obstructing the Officers' attempts to obtain her signature and complete the traffic stop."[67]

The court also found that the officers had probable cause because common law allows for a custodial arrest for traffic violations when an officer reasonably believes that the suspect "'will refuse to respond to a citation.'"[68] The court asserted that, based on Brooks's repeated uncooperative actions during the stop, the officers had reason to believe she would not respond to the citation.[69] Thus, the officers had probable cause.[70]

61. *Id.* at 1043–44.

62. *Id.* at 1022 (majority opinion).

63. *See id.* (quoting Beier v. City of Lewiston, 354 F.3d 1058, 1064 (9th Cir. 2004)).

64. *Id.* at 1023. "Under Washington law, a police officer may arrest an individual for committing a misdemeanor in his presence." *Id.* (citing WASH. REV. CODE § 10.31.100 (2009)). "Failure to sign the Notice is a misdemeanor." *Id.* (citing WASH. REV. CODE § 46.61.022 (2009)).

65. *Id.* (citing WASH. REV. CODE § 9A.76.020 (2009)). "That violation is a gross misdemeanor for which custodial arrest is appropriate." *Id.* at 1024 (citing WASH. REV. CODE §§ 9A.76.020(3), 10.31.100 (2009)).

66. *Id.* at 1024 (quoting WASH. REV. CODE § 9A.76.020 (2010)).

67. *Id.*

68. *Id.* (quoting State v. Hehman, 578 P.2d 527, 528–29 (Wash. 1978)).

69. *Id.*

70. *Id.*

Because Brooks obstructed the officers and would likely have not responded to the citation, the court reasoned, the officers had probable cause to perform a custodial arrest.[71]

B. Excessive Force

The officers contended that their use of a Taser to force Brooks to cooperate "was not objectively unreasonable," in part because the officers made other attempts to obtain cooperation and warned that "the Taser would be used."[72] Furthermore, they argued that, although the initial risk of harm to the officers and others was low, the risk increased when Brooks "became confrontational and refused to leave her running car."[73]

1. Amount of force

The court ruled that the use of the Taser in drive-stun mode is a low-level amount of force because the use is similar to "pain compliance applied through the use of" various police techniques such as pepper spray.[74] The use of the Taser was a serious intrusion; however, the amount of force of the Taser in this mode did not rise to the level of an intermediate force.[75]

2. Graham *factors*

In *Graham v. Connor*, the Court indicated that three factors to consider in determining whether excessive force was used are: (1) the severity of the crime, (2) the threat posed to officers or bystanders, and (3) whether the suspect is resisting arrest or attempting to flee.[76] The court also indicated that these three factors should be analyzed in conjunction with the totality of the circumstances.[77]

a. Severity of the crime. Brooks was initially "detained for refusing to sign . . . the Notice" and later held "for obstructing a police

71. *Id.*
72. *Id.* at 1025.
73. *Id.*
74. *Id.* at 1026.
75. *Id.* at 1028.
76. Graham v. Connor, 490 U.S. 386, 396 (1989).
77. *See id.*

officer in the exercise of his official duties."[78] Although obstruction is more serious than the traffic offense, "it is . . . not a serious crime."[79] Accordingly, the court ruled that "[t]his factor weigh[ed] in favor of finding the force excessive."[80]

b. Threat posed to officers or bystanders. The court considers this factor the most important of the *Graham* factors.[81] Consequently, the court paid special attention to the fact that Brooks had access to her keys while they were on the floorboard of the car.[82] Because "she might [have] . . . drive[n] off erratically," some threat existed.[83] Also, she posed a threat because she continued to disregard the officers' orders, and the "officers [were] unable to predict what type of noncompliance might come next."[84] The court ruled that this factor weighed against finding the force excessive because Brooks posed "some threat by virtue of her continued non-compliance."[85]

c. Resistance to arrest and risk of flight. Brooks did all she could to prevent the officers from removing her from the car.[86] As a result, the court ruled that Brooks's resistance weighed "against finding the force used excessive."[87]

d. Totality of the circumstances. The next factor the court addressed was whether the officers should have used another method to remove Brooks from her car.[88] The court stated that the officers had no other alternatives prescribed to them from the police department other than two similar pain compliance techniques—pepper spray and hair control holds.[89] The court contended that there was no way to determine if the other methods would have worked and suggested that pepper spray may have caused more

78. *Brooks*, 599 F.3d at 1025.

79. *Id.*

80. *Id.*

81. *Id.* (citing Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir. 1994)).

82. *Id.*

83. *Id.*

84. *Id.* at 1028–29.

85. *Id.* at 1029.

86. *See id.* ("[S]he grasped the steering wheel and wedged herself between the seat and steering wheel, and she refused to get out of the car when asked.").

87. *Id.*

88. *Id.*

89. *Id.* at 1029–30.

harm; thus, the court ruled that this factor did "not weigh in favor of finding the Officers' actions unreasonable."[90]

Beyond these considerations, the court addressed three additional factors: (1) that the officers gave multiple warnings before using the Taser, (2) that the officers considered Brooks's pregnancy, and (3) that the officers tased Brooks three times.[91] The officers' warnings and consideration of Brooks's pregnancy weighed against finding the force excessive, and the multiple tasings weighed in favor of excessive force. But in totality, this was not enough to overcome the other factors.[92] In light of all of these factors, the court held that the officers' use of force was not excessive.[93]

C. Dissent

1. Probable cause

The dissent argued that the officers waived the argument of obstruction because they "never raised this theory in their briefs."[94] Even if the obstruction argument were properly made, the officers did not have probable cause because they were "entitled [only] 'to identify [her], check for outstanding warrants, check the status of [her] license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infractions.'"[95] Also, the dissent argued, the claim for probable cause based on the fear that Brooks might not have responded to a citation was waived.[96] However, there would be no probable cause because Brooks did not give the officers any reason to believe she would not respond.[97]

90. *Id.* at 1030. "[P]epper spray effects . . . last[] up to forty-five minutes." *Id.* (citing LaLonde v. Cnty. of Riverside, 204 F.3d 947, 960–61 (9th Cir. 2000)).

91. *Id.*

92. *Id.*

93. *Id.* at 1031.

94. *Id.* at 1034 (Berzon, J., dissenting) (citing Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 900 (9th Cir. 2007)).

95. *Id.* (quoting WASH. REV. CODE § 46.61.021 (2010)).

96. *Id.* at 1035.

97. *Id.* at 1036.

2. Excessive force

a. Amount of force. A "single activation of a Taser in drive-stun mode [is] a 'serious intrusion.'"[98] The Eighth Circuit "held that a reasonable jury could find that a single application of a Taser in drive-stun mode to the arm" of someone who committed a minor offense "constituted excessive force."[99] The *Brooks* dissent argued, following the reasoning of the Eighth Circuit, that the amount of force in this instance was significant and excessive.[100]

b. Graham *factors.* The crime that Brooks was alleged to have committed—"refusing to sign the notice of infraction"—was less than not serious; "it was trivial."[101] Hence, the first *Graham* factor weighed heavily in favor of finding the use of force excessive.[102] Additionally, the dissent contended, the threats to the officers' safety spoken of by the majority were not real.[103] Thus, like the first factor, this factor weighed in favor of finding the use of force excessive.[104] Lastly, the dissent conceded that Brooks did resist arrest, but stated that if "[t]his level and type of resistance . . . weighs against a finding of excessive force at all, [it] does so only slightly."[105]

c. Totality of the circumstances. The dissent argued that two additional factors weighed in favor of finding the use of force excessive.[106] First, the officers had no right to perform a custodial arrest.[107] Second, "the Officers could not have known how this woman who was seven months pregnant would respond . . . to the repeated application of thousands of volts of electricity to any part of

98. *Id.* at 1037 (quoting Mattos v. Agarano, 590 F.3d 1082, 1087 (9th Cir. 2010)).

99. *Id.* (quoting Brown v. City of Golden Valley, 574 F.3d 491, 497–98 (8th Cir. 2009)).

100. *Id.* at 1038.

101. *Id.*

102. *Id.*

103. *Id.* at 1039 ("The majority . . . departs from the record to speculate about actions Brooks *might* have taken, and concludes, rather inexplicably, that a mother driving her son to school did pose 'some threat.'").

104. *Id.*

105. *Id.* at 1041.

106. *Id.* at 1042.

107. *Id.*

her body."[108] Accordingly, the dissent maintained, these two additional factors weighed in favor of a finding of excessive force.[109]

3. Qualified immunity

In its conclusion, the dissent argued that because the use of force was excessive, and "the right violated was clearly established," the officers should not have been entitled to qualified immunity.[110]

V. ANALYSIS

The *Brooks* dissent was correct in arguing that the officers were not entitled to qualified immunity. First, the officers did not have probable cause to perform an arrest. Next, the officers clearly exceeded the amount of necessary force when they performed an arrest on Brooks.

A. Probable Cause

An officer has "probable cause . . . when the facts and circumstances within the officer's knowledge are sufficient to cause a reasonably prudent person to believe that a crime has been committed."[111] The officers obviously had probable cause when Brooks refused to sign the Notice in front of the officers.[112] Nonetheless, Brooks's crime was a civil infraction,[113] and the dissent correctly pointed out that "[a]ll the Officers had authority to do at that point was to 'detain' Brooks 'for a reasonable period of time necessary to identify her," check for warrants, determine if she owned the car and had insurance, and issue the Notice.[114] Even after she refused to sign the Notice, which is a misdemeanor, the officers "were entitled [only] to detain her . . . as long as 'reasonably necessary to issue and serve a citation and notice,' which . . . they never did."[115]

108. *Id*.

109. *Id*. at 1042–43.

110. *Id*. at 1043–44.

111. Lassiter v. City of Bremerton, 556 F.3d 1049, 1053 (9th Cir. 2009).

112. *Brooks*, 599 F.3d at 1020–21 (majority opinion).

113. SEATTLE, WASH., MUN. CODE § 11.52.100 (2010); WASH. REV. CODE §§ 46.61.440, 46.63.020 (2009).

114. *Brooks*, 599 F.3d at 1033–34 (Berzon, J., dissenting) (citing WASH. REV. CODE § 46.61.021 (2009)).

115. *Id*. at 1034 (citing WASH. REV. CODE § 46.64.015 (2009)).

The court's analysis of the officers' probable cause should have ended there but the court speculated as to why the officers may have had probable cause.[116] The court concluded that Brooks obstructed justice;[117] however, Brooks's actions did not limit the officers' ability to carry out their legal duties.[118] Additionally, the court ruled that she *might* have failed to respond to a citation had one been issued.[119] Other than the fact that she failed the sign the Notice, the court had no reason to believe she would not respond.[120]

The court's reasoning for finding probable cause is flawed for two reasons: (1) the officers waived the right to have those arguments heard when they failed to raise the issues in their briefs,[121] and (2) the court should not be allowed to punish Brooks for a crime it *thought* she would have committed had she been given the chance.

The court should be precluded from deciding probable cause based on issues raised sua sponte. When the court raises issues on its own accord, the losing party—in this case Brooks—does not have an opportunity to present its arguments to the court. In many instances, that party may have a sufficient counter-argument, but it is never given the chance to plead its case. Judges should resist the urge to rule based on issues not raised on appeal, because they do not have enough information to make an informed decision.[122] Courts do not have to ignore new issues. In fact, the court has many options, including asking the parties for supplemental briefs.[123] The cost of

116. *Id*. at 1023–24 (majority opinion).

117. *Id*. at 1024.

118. *Id*. at 1034 (Berzon, J., dissenting).

119. *Id*. at 1024 (majority opinion).

120. *Id*.

121. *Id*. at 1034 (Berzon, J., dissenting) (citing Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 900 (9th Cir. 2007)).

122. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 245 (2002).

> We don't know enough about [sua sponte issues]. You're playing God then because you haven't had the benefit of the lawyers, the judges below, or the clients, or the evidence. You're just playing God without a record, and you have to assume a certain competence in your counsel . . . . I'm loath to do it. . . . I guess I really don't like to do it because it's too dangerous. There's nothing worse than a lawyer being beaten by an assumption that simply is incorrect and wasn't raised.

Id. (quoting Thomas B. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversay System 122 (1978) (ellipsis in original)

123. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1256 (2002).

ruling on a case based on an incorrect assumption or incomplete evidence is greater than the cost of asking the parties to submit supplemental briefs.

In addition, it was unjust for the court to base its ruling partially on a crime it *thought* Brooks might commit. Making this ruling was akin to finding that the officers used excessive force because they *would have* beaten Brooks with their batons had they been given the opportunity. Both scenarios are equally outrageous. The court should never base its ruling, whether in a civil or criminal case, on something that a party may have done if the situation had presented itself.

B. Excessive Force

When all facts are analyzed in perspective, the court's ruling that the force was not excessive is incomprehensible. A seven-month pregnant woman was pulled over and would not cooperate with police.[124] The highly trained police officers could have left her with an unsigned ticket, but instead chose to remain on scene and escalate the problem.[125] Three officers surrounded the woman and repeatedly tased her to force her to exit her car.[126] The officers likely had no idea what could have happened to her unborn child.[127] Because three officers refused to walk away from a confrontational speeder, a pregnant woman was tased three times, leaving burns and permanent scars.[128] The officers also laid the pregnant woman on her stomach, as she complained that they were hurting her, to perform the

> When appellate judges believe that a potentially dispositive issue was missed by the parties, they have several options: (1) they can ignore the issue; (2) they can spot the issue in their opinion, but treat it as not properly raised or waived; (3) they can spot the issue and remand it for resolution in the first instance in the trial court; (4) they can ask the parties for supplemental briefs before deciding the issue; (5) they can decide the issue without briefs; (6) they can spot the issue in the opinion, and write dicta.

Id.

124. *Brooks*, 599 F.3d at 1020–21 (majority opinion).

125. *See id.* at 1020 n.4.

126. *Id.* at 1021.

127. *See Preterm Labor and Birth: A Serious Pregnancy Complication*, MARCH OF DIMES, http://www.marchofdimes.com/Pregnancy/preterm_indepth.html (last visited Mar. 12, 2011) ("Some studies have found that certain lifestyle and environmental factors may put a woman at greater risk of preterm labor. These factors include . . . physical . . . or emotional abuse . . . [and] stress . . . .").

128. *Brooks*, 599 F.3d at 1020–21, 1027.

arrest.[129] All these events occurred because a woman was driving twelve miles per hour over the speed limit.[130]

The court's ruling that using a Taser in drive-stun mode is a "less than intermediate" amount of force is incorrect. Other examples of less than intermediate amounts of force include wrist twisting and hair pulling.[131] The Seattle Police Department ("SPD") recognized the risk of tasing certain members of the public when it changed its policy six months after this incident to protect pregnant women, elderly people, and others.[132] The pertinent SPD policy states that "the need to stop the behavior should clearly justify the potential for additional risks."[133] Additionally, after experiencing the dangers of tasing, the Army's occupational health sciences directors warned that "[s]eizures and ventricular fibrillation can be induced by the electric current" and "the practice of using these weapons on U.S. Army military and civilian forces in training is not recommended."[134] If the Army is concerned for the safety of its fit and healthy soldiers, this court should also be concerned for the safety of a seven-month pregnant woman.

In addition to the Army's warnings, Amnesty International has warned of the dangers of Tasers.[135] In the last decade, "351 individuals in the United States have died after being shocked by police Tasers."[136] One example is a 39 year-old-man named Byron Black who was killed in 2004 by a police Taser.[137] Black was fighting with police in his prison cell when the police "used a Taser in drive-stun mode and pepper spray. He collapsed at the scene and was pronounced dead in [the] hospital." [138] Contrary to what the court suggests, the previous example, along with many others over the past

129. *Id*. at 1033 (Berzon, J., dissenting).

130. *Id*. at 1032 n.2.

131. *Id*. at 1028, 1030 (majority opinion).

132. Hector Castro, *Police Used Taser on Pregnant Driver: Woman Convicted of Refusing to Obey Seattle Officers*, SEATTLE POST-INTELLIGENCER, May 10, 2005, at B1.

133. *Id*.

134. Robert Anglen, *Study Raises Concerns Over Tasers' Safety*, ARIZ. REPUBLIC, Feb. 13, 2006, at 1A.

135. AMNESTY INT'L, 'LESS THAN LETHAL'? THE USE OF STUN WEAPONS IN US LAW ENFORCEMENT (2008).

136. *Taser Abuse in the United States*, AMNESTY INT'L, http://www.amnestyusa.org/us-human-rights/taser-abuse/page.do?id=1021202 (last visited Mar. 7, 2011).

137. AMNESTY INT'L, *supra* note 135, at 61.

138. *Id*.

ten years,[139] proves that drive-stun tasing does not belong in the same category as hair pulling and wrist twisting.

VI. CONCLUSION

The court's decision that the officers were entitled to qualified immunity is partly the result of the judges deciding issues not raised on appeal. The outcome is unjust when the parties are not allowed to plead their case. In addition, the *Brooks* court severely understated the dangers of Tasers, especially when used on pregnant women. In conclusion, the court erred because it incorrectly found probable cause for the custodial arrest and because it grossly misrepresented the dangers of Tasers.

Joseph G. Walker[*]

139. "Eddie Alvarado was shocked five times in drive-stun mode after he was observed to have seizure activity and continued to 'thrust and kick' as he lay prone on the floor handcuffed behind his back; moments later he was found to be in cardiopulmonary arrest." *Id.* at 52. "Johnny Lozoya . . . was shocked with a Taser in drive-stun mode when he became combative while restrained on a board during transportation to [the] hospital and went into cardiac arrest while still in the ambulance." *Id.* Officers "used a Taser in drive-stun mode and pepper spray" on Byron Black. *Id.* at 61. "He collapsed at the scene and was pronounced dead in [the] hospital." *Id.*

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