

1 Court DENIES summary adjudication on the following claims: (2) second cause of action for
 2 assault and battery; (3) third cause of action for intentional infliction of emotional distress; and (4)
 3 fourth cause of action for negligence.

4 **I. Background**

5 **A. The March 15, 2008 Incident**

6 This case arises out of an incident that occurred on March 15, 2008, in which officers of the
 7 Palo Alto Police Department used Taser guns to subdue and arrest Plaintiff Joseph Ciampi. On the
 8 morning of March 15, 2008, Plaintiff was sleeping in his vehicle, a 1985 Dodge Ram van, which
 9 was parked on Lincoln Street in a residential neighborhood of Palo Alto, California. Second
 10 Amended Complaint (“SAC”) ¶ 14. Plaintiff claims that he had been parking his vehicle on
 11 Lincoln Avenue and neighboring streets on and off for nearly ten years. Decl. of Joseph Ciampi in
 12 Supp. of Pl.’s Opp’n to Defs.’ Mot. for Summary Judgment (“Ciampi Decl.”) ¶ 63. That morning,
 13 Palo Alto resident Ken Alsman called the Palo Alto police to complain about a man living in a van
 14 outside his house. SAC ¶ 15; Decl. of Steven Al. Sherman in Supp. of Defs.’s Mot. for Summary
 15 Judgment (“Sherman Decl.”), Ex. 18. Defendants have submitted a recording of the 911 call Mr.
 16 Alsman made to the Palo Alto police dispatch, Sherman Decl. ¶ 21 & Ex. 18, and Plaintiff also
 17 provides a transcript of the call, which conforms to the recording provided by Defendants.¹ Ciampi
 18 Decl. Ex. 548-2 – 548-5. On the call, Mr. Alsman stated that a man, acknowledged by all parties to
 19 be Plaintiff, had been parking and living on the street outside his house and “scares the daylight
 20 out of [Mr. Alsman’s] wife.” Sherman Decl. Ex. 18. Mr. Alsman acknowledged that Plaintiff had
 21 never threatened his wife, but stated that he scares his wife and that “it’s sort of a veiled threat . . .
 22 he’s out there all the time.” *Id.* Mr. Alsman also stated that his wife was coming back from
 23 vacation, and his young daughter was coming back from school, and he did not want Plaintiff to be
 24 there when they returned. *Id.* The dispatcher advised Mr. Alsman that there was no law against

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 27 ¹ Defendants object to the transcript provided by Plaintiff on grounds that it is hearsay. The Court
 28 relies upon the actual recording provided by Defendants, rather than the transcript provided by
 Plaintiff, but simply notes that based upon the transcript submitted, Plaintiff and Defendants appear
 to agree upon the contents of the 911 call.

1 living in a vehicle, but stated that “we’ll check it out.” *Id.* The parties appear to agree that Plaintiff
2 was not violating any laws by sleeping or living in his parked vehicle.

3 At approximately 10:07 a.m. on March 15, 2008, Defendant Police Officers Manuel
4 Temores and Kelly Burger were dispatched to Lincoln Street based on Mr. Alsman’s report. Palo
5 Alto Police Department Report 08-1777 (including reports by Officers Temores, Wagner, and
6 Burger), Sherman Decl. Ex. 2 at 29, 38. Defendant Police Officer April Wagner also responded to
7 the call. *Id.* at 33. Defendant Temores arrived at the scene first, followed by Defendant Wagner.
8 *Id.* at 33, 38. At the location identified by Mr. Alsman, Temores and Wagner saw a blue van with
9 windows that were “boarded up” with cardboard or “blackened.” *Id.* at 29, 33. Temores and
10 Wagner approached the van and knocked on its exterior. *Id.* at 29, 33. Their reports of the incident
11 conflict as to whether they heard a response from inside the van, but they agree that after knocking,
12 Defendant Wagner opened the van’s side door, which she claims was unlocked and partially open.
13 *Id.* at 29, 33. Plaintiff claims that he was asleep and wearing earplugs at the time, and that he was
14 awakened by a noise outside the van. Ciampi Decl. ¶ 65. He claims that before he could identify
15 the noise, an unknown person began to open the door to his van. *Id.* Startled, he shut and locked
16 the door. *Id.*

17 After Plaintiff shut the van door, Defendants Wagner and Temores explained that they just
18 needed to speak with him and told him to open the door so they could talk to him. Sherman Decl.
19 Ex. 2 at 29, 33; Ciampi Decl. ¶ 65. Plaintiff told the police officers that he did not want to talk to
20 them and remained in the van with the door closed and locked. Sherman Decl. Ex. 2 at 29, 33;
21 Ciampi Decl. ¶ 65. Eventually, Defendant Temores “used a bluff” to induce Plaintiff to exit the
22 van. Sherman Decl. Ex. 2 at 29. He first informed Plaintiff that they intended to tow his vehicle
23 for overnight parking and then pretended to use his radio to ask dispatch to send out a tow truck.
24 *Id.* at 29, 33. This induced Plaintiff to open the door and exit the van, barefoot and wearing only a
25 T-shirt and shorts. *Id.* at 29, 33; Ciampi Decl. at 66-67. In their reports on the incident,
26 Defendants Temores and Wagner state that Ciampi was very angry when he exited the van and
27 came out screaming at them. Sherman Decl. at 29, 33. Plaintiff acknowledges that he was “upset”
28 and “agitated” because he believed (apparently correctly) that he was not violating any law and had

1 the right to refuse to speak with the police. Ciampi Decl. ¶ 65-66. Once he exited the vehicle,
 2 Plaintiff demanded to know what ordinance he was accused of violating and why Defendants
 3 intended to tow his vehicle. Ciampi Decl. ¶¶ 66-67. Defendant Wagner’s report characterizes
 4 Plaintiff’s behavior as “verbally abusive and argumentative” and states that he was “completely
 5 uncooperative and used angry words.” Sherman Decl. at 33. Defendant Temores’s report states
 6 that he “felt scared and threatened by the way [Plaintiff] exited the van in such an explosive
 7 manner.” *Id.* at 29.

8 Shortly after Plaintiff exited the van, Defendant Burger arrived on the scene. In his report,
 9 Burger states that when he exited his patrol car, he heard a man using profanity and raising his
 10 voice. Sherman Decl. Ex. 2 at 38. Burger’s report also states that when he arrived at the van,
 11 Plaintiff appeared very upset, and his fists were clenched. *Id.* Around that time, Defendant Burger
 12 commented that Plaintiff was likely under the influence of drugs. *Id.* at 33. The Defendants’
 13 reports state that they observed “pock marks” or abscesses on Plaintiff’s arms similar to those
 14 associated with heroin addicts and other persons who use intravenous drugs. *Id.* at 30, 33, 38. The
 15 police reports also state that Plaintiff’s pupils were either dilated or constricted. *See id.* at 30
 16 (Temores report stating that Plaintiff’s pupils were dilated); *id.* at 38 (Burger report stating that
 17 Plaintiff’s pupils were constricted to 3.0-1.5 millimeters). Based on these observations, as well as
 18 Plaintiff’s agitation, Defendants state that they believed Plaintiff was likely under the influence of a
 19 controlled substance. *Id.* at 30, 33, 38. Indeed, Plaintiff states that Defendant Temores accused
 20 him of being a heroin addict, and that Plaintiff vehemently denied the accusation. Ciampi Decl.
 21 ¶ 68; SAC ¶ 25; *see also* Sherman Decl. Ex. 15 at 10:10:06-08 (MAV recording in which a voice
 22 says, “Are you a heroin addict or what?”). Plaintiff acknowledges that he has a skin condition that
 23 causes sores on his skin, but claims that the sores were on the tops of his arms, not on his veins.²
 24 Ciampi Decl. ¶ 68. Plaintiff states that he pointed this out to Defendants at the time, explaining

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 26 ² It is undisputed that Plaintiff has a skin condition that causes sores on his skin. No party currently
 27 contends that Plaintiff is a heroin addict or unlawfully uses controlled substances. However,
 28 Defendants’ actions must be judged based upon the reasonableness of their actions in light of the
 facts and circumstances confronting them at the time, without the benefit of “the 20/20 vision of
 hindsight.” *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

1 that “drug users don’t shoot into the tops of their arms, they shoot into their veins.” Ciampi Decl.
 2 ¶ 68; Sherman Decl. Ex. 15 at 10:10:07-14. Plaintiff also claims that at some point around this
 3 time, he heard Defendant Burger say that Plaintiff was under arrest. *Id.* ¶ 69. Plaintiff did not
 4 know for what he was being arrested. *Id.* At this point, the situation quickly escalated, and
 5 Plaintiff and Defendants provide somewhat differing accounts of what occurred.

6 **B. Defendants’ Account of the Use of Force**

7 According to the Defendants, at some point, either after Burger used the term “550” (short
 8 for Health and Safety Code § 11550(a), being under the influence of a controlled substance) or
 9 after Burger asked Plaintiff to step away from the van door, Plaintiff jumped back into the van.
 10 Sherman Decl. Ex. 2 at 30, 33, 38. This concerned the Defendants because the van was unsecured,
 11 and they did not know whether Plaintiff had a weapon accessible. *Id.* at 30, 38. Defendant Burger
 12 told Plaintiff to exit the van, but Plaintiff instead starting making a call on his cell phone. *Id.* at 30,
 13 33. When Plaintiff remained in the van, Defendants Burger and Temores activated their Tasers and
 14 pointed them at Plaintiff’s chest. *Id.* at 30, 38. Although Burger warned Plaintiff that they would
 15 deploy their Tasers if he did not come out of the van, Plaintiff refused to come out and told them
 16 that he was calling his lawyer. *Id.* at 30, 38. Plaintiff then scooted toward the door of the van, put
 17 his feet on the pavement, and picked up a two-liter plastic soda bottle partially filled with a liquid.
 18 *Id.* at 30, 33, 38. Defendant Temores claims that he “immediately thought the 2-liter of soda could
 19 be a dry-ice bomb which could be used as a weapon against us.” *Id.* at 30.

20 Defendant Burger then pulled Plaintiff from the van and moved him against a residential
 21 fence.³ Defendant Temores states that Burger attempted to grab Plaintiff’s arms, but Plaintiff
 22 flailed his arms at Burger. *Id.* Temores then “yelled to Officer Burger to deploy his Taser”
 23 because Temores had placed his Taser back in his holster and was too close to deploy it. *Id.*

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 25 ³ The officers’ reports conflict on this point. Defendant Wagner states that Plaintiff “dart[ed] away
 26 from the van, toward the fence by the sidewalk.” Sherman Decl. Ex. 2 at 34. However, Defendant
 27 Burger clearly states, “I pulled him out of the van. I moved the suspect away from the van and
 28 against a residential fence.” *Id.* at 38; *see also* Sherman Decl. Ex. 21 (Declaration of Kelly Burger)
 ¶ 12 (“I grabbed Plaintiff’s right should[er] and pull him out of the van. I then moved him away
 from the van and placed him against a residential fence.”). The video provided by Defendants also
 appears to show Defendant Burger pulling Plaintiff from the van and forcing him back against the
 fence. *See* Sherman Decl. Ex. 14 at 10:10:20-27.

1 Apparently convinced that Plaintiff was attempting to escape and concerned that there might be a
 2 weapon in the van, Defendant Burger shot one Taser cartridge at Plaintiff from approximately one
 3 foot away. *Id.* at 38. Defendant Burger reported that after he activated his Taser, Plaintiff
 4 “appeared to be dancing on his feet.” *Id.* Thereafter, however, the officers claim that Plaintiff
 5 charged at Defendant Burger and either hit or attempted to hit him. *Id.* at 30, 29. Defendant
 6 Burger then pulled Plaintiff to the ground, and Defendants Temores and Wagner fought Plaintiff on
 7 the ground while Burger reloaded his Taser. *Id.* at 30, 39. The officers claim that Plaintiff
 8 continued to resist arrest, kicking and hitting them. *Id.* at 30, 34. During the struggle on the
 9 ground, Defendant Temores activated his Taser in “stun-drive” mode and drove the Taser into
 10 Plaintiff’s front torso. *Id.* at 30. After that, Plaintiff stopped fighting and complied with verbal
 11 commands, and Defendants were able to handcuff and arrest him. *Id.* Defendants’ reports indicate
 12 that Plaintiff was bleeding from his left forearm, causing “a small puddle of blood to gather on the
 13 sidewalk.” *Id.* at 34, 39. Plaintiff also suffered abrasions to his upper left arm, left shoulder, below
 14 his right eye, and to both front thighs. *Id.* at 34.

15 C. Plaintiff’s Account of the Use of Force

16 Plaintiff’s version of the facts leading up to the Taser deployment is somewhat different.
 17 He claims that after he heard Defendant Burger state that he was under arrest, Plaintiff turned
 18 around and picked up his cell phone to call someone to secure his vehicles and possessions so that
 19 they would not be impounded. Ciampi Decl. ¶ 69. However, he claims that as soon as he began to
 20 pick up his cell phone, Defendants Burger and Temores rushed at him. *Id.* Plaintiff therefore
 21 scooted into his vehicle so that he could complete his phone call. *Id.* At that point, Defendants
 22 Burger and Temores pointed their Tasers at Plaintiff and ordered him to exit the vehicle. *Id.*
 23 Plaintiff claims that he complied with this order, pausing on his way out of the van to pick up an
 24 open bottle of Diet Sprite that had fallen to the ground and set it upright. *Id.* Plaintiff states that he
 25 distinctly remembers walking over to the residential fence of his own accord, with his hand in the
 26 air.⁴ *Id.* ¶ 70. Once at the fence, Plaintiff turned around to face Defendant Burger, with Defendant
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28 ⁴ It appears, based on Plaintiff’s account, that he was still attempting to complete his phone call and holding his cell phone in his other hand.

1 Temores standing an arm's length away. *Id.* Defendant Burger ordered Plaintiff to put his hands
 2 behind his back. *Id.* ¶ 71. Concerned that he could lose his belongings permanently if arrested,
 3 Plaintiff wanted to complete his phone call and asked Defendant Burger if he could do so. *Id.*
 4 Plaintiff claims that, then, without any warning, Defendant Burger fired his Taser gun while aiming
 5 the laser sight at Plaintiff's face. *Id.*

6 Plaintiff felt "strong, powerful and extremely painful surges of pressure" in his arm and
 7 chest. *Id.* ¶ 71. He states that the pain was "both excruciating and frightening" and that if felt "like
 8 someone had hooked a fire hose to my arm and were pumping thousands gallons of water into my
 9 body through my arm." *Id.* at ¶¶ 71-72. Plaintiff began to swing his left arm violently in an
 10 attempt to dislodge the Taser probe from his arm. *Id.* at ¶ 71. He states that once he realized that
 11 Burger did not intend to stop Tasing him, he instinctively attempted to knock the Taser out of
 12 Burger's hands. *Id.* at ¶ 72. Plaintiff claims that after he hit the Taser gun, the flow of electricity
 13 stopped, but then Defendant Burger pulled the trigger on the Taser a second time. *Id.* at ¶ 74.
 14 Plaintiff estimates that Defendant Burger shocked him for over 20 seconds total. *Id.* at 76. He also
 15 claims that Defendant Temores deployed his Taser gun in the direction of Plaintiff's face and groin
 16 area. *Id.* ¶ 78. In addition to the injuries acknowledged by Defendants, Plaintiff claims that he
 17 suffered a puncture wound to his rear end and that there was blood all over the back of his shorts
 18 from that wound. *Id.* at ¶ 81.

19 **D. Plaintiff's Criminal Proceedings and Initiation of the Instant Action**

20 After his arrest on March 15, 2008, Plaintiff was charged with obstructing or resisting an
 21 officer in performance of his duties, Cal. Penal Code § 69. *See* Transcript of December 17, 2008
 22 Proceedings in *People v. Ciampi*, No. BB833050, Sherman Decl. Ex. 7 at 185. The state court held
 23 preliminary examination proceedings beginning on December 1, 2008, and considered a motion to
 24 suppress on December 17, 2008. *See* Sherman Decl. Exs. 4-7. In the motion to suppress,
 25 Plaintiff's criminal defense counsel argued that the ruse employed by Officer Temores –
 26 pretending to call a tow truck to tow Plaintiff's van – was unlawful and required suppression of the
 27 Officers' subsequent observations of Plaintiff. Judge Thang Nguyen Barrett agreed, finding that at
 28 the point of the Officers' initial contact with Plaintiff, he was suspected of no criminal activities

1 and had a right to refuse to talk to the police. Sherman Decl. Ex. 7 at 185. Judge Barrett reasoned
2 that the ruse employed by Officer Temores to coerce Plaintiff from his van unlawfully
3 circumvented Plaintiff's right not to submit to a consensual encounter. *Id.* Concluding that the rest
4 of the encounter flowed from the unlawful ruse, Judge Barrett granted the motion to suppress and
5 dismissed the criminal complaint. *Id.* at 185-86.

6 Approximately six months later, Plaintiff filed the instant action in federal court against the
7 City of Palo Alto; former Palo Alto Chief of Police Lynn Johnson; current Chief of Police Dennis
8 Burns; Officers Temores, Wagner, and Burger; Sergeant Natasha Powers; and Agent Dan Ryan.
9 The operative Second Amended Complaint asserts seven causes of action under state and federal
10 law: (1) violations of the Fourth and Fourteenth Amendment, pursuant to 42 U.S.C. § 1983; (2)
11 assault and battery; (3) intentional infliction of emotional distress; (4) negligence; (5) defamation;
12 (6) malicious prosecution; and (7) false arrest and false imprisonment. Defendants now move for
13 summary judgment on all of these claims.

14 II. Legal Standard

15 Summary judgment should be granted if there is no genuine issue of material fact and the
16 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*,
17 477 U.S. 317, 321 (1986). Material facts are those which may affect the outcome of the case, and a
18 dispute as to a material fact is "genuine" only if there is sufficient evidence for a reasonable trier of
19 fact to decide in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
20 (1986). On a motion for summary judgment, the Court draws all reasonable inferences that may be
21 taken from the underlying facts in the light most favorable to the nonmoving party. *Matsushita*
22 *Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "[T]he district court does
23 not assess credibility or weigh the evidence, but simply determines whether there is a genuine
24 factual issue for trial." *House v. Bell*, 547 U.S. 518, 559-560 (2006).

25 The moving party has the initial burden of production for showing the absence of any
26 material fact. *Celotex*, 477 U.S. at 331. The moving party can satisfy this burden in two ways.
27 "First the moving party may submit affirmative evidence that negates an essential element of the
28 nonmoving party's claim. Second, the moving party may demonstrate to the Court that the

1 nonmoving party's evidence is insufficient to establish an essential element of the nonmoving
 2 party's claim.” *Id.* Once the moving party has satisfied its initial burden of production, the burden
 3 of proof shifts to the nonmovant to show that that there is a genuine issue of material fact. A party
 4 asserting that a fact is genuinely disputed must support that assertion by either citing to particular
 5 parts of materials in the record or by showing that the materials cited by the moving party do not
 6 establish the absence of a genuine dispute. Fed. R. Civ. P. 56(c). The nonmovant must go beyond
 7 its pleadings “and by her own affidavits, or by the depositions, answers to interrogatories, and
 8 admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Celotex*,
 9 477 U.S. at 324 (internal quotation marks and citation omitted).

10 **III. Objections to Evidence**

11 On a Rule 56 motion for summary judgment, a party “may object that the material cited to
 12 support or dispute a fact cannot be presented in a form that would be admissible in evidence.” Fed.
 13 R. Civ. Pro. 56(c)(2). In this case, both parties have raised objections to the evidence submitted.

14 **A. Defendants’ Objections to Plaintiff’s Evidence**

15 In support of his opposition brief, Plaintiff, proceeding *pro se*, submitted several hundred
 16 pages of printed documents, including various news articles, transcripts, and photographs, as well
 17 as nine DVDs containing audio and video recordings and over 1,500 pages of electronic
 18 documents. Defendants object to many of these submissions on grounds of irrelevance, improper
 19 opinion, hearsay, lack of personal knowledge, and lack of authentication. The Court finds that
 20 much of the evidence to which Defendants object is not relevant to Defendants’ motion for
 21 summary judgment and need not be considered in resolving the motion. However, the Court will
 22 briefly consider a number of Defendants’ specific challenges that bear on evidence relevant to the
 23 motion. *See Doe v. Starbucks, Inc.*, No. SACV 08–0582 AG (CWx), 2009 WL 5183773, at *1
 24 (C.D.Cal. Dec. 18, 2009) (“In motions for summary judgment with numerous objections, it is often
 25 unnecessary and impractical for a court to methodically scrutinize each objection and give a full
 26 analysis of each argument raised.”).

27 First, Plaintiff has submitted a number of newspaper articles in support of his defamation
 28 claim. Ciampi Decl. Ex. 321. Defendants object to these articles on grounds of relevance, hearsay,

1 and lack of proper authentication. However, these articles are directly relevant to Plaintiff's
2 defamation claim because they demonstrate publication of statements made by several of the
3 Defendants. *See* Fed. R. Evid. 401 (evidence is relevant if it has "any tendency to make the
4 existence of any fact that is of consequence to the determination of the action more probable or less
5 probable"). Moreover, insofar as they are offered as evidence of publication, the articles are not
6 hearsay because they are not offered to prove the truth of the statements contained therein. *See*
7 Fed. R. Evid. 801(c). Finally, the Court finds that most of the articles are sufficiently
8 authenticated. Pursuant to Federal Rule of Evidence 902(6), printed materials purporting to be
9 newspapers or periodicals are self-authenticating. Here, however, Plaintiff submits copies of
10 newspapers, as well as print-outs of internet publications. Generally, evidence will be admissible if
11 "sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity
12 or identification." *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000) (quoting *United States*
13 *v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985)). In considering internet print-outs, courts have
14 considered the "distinctive characteristics" of the website in determining whether a document is
15 sufficiently authenticated. *See, e.g. Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, No. SACV
16 06-0827 AG (RNBx), 2008 WL 1913163, at *6 (C.D. Cal. Mar. 27, 2008); *Perfect 10, Inc. v.*
17 *Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1153-54 (C.D. Cal. 2002). In this case, most of the
18 articles submitted by Plaintiff contain sufficient indicia of authenticity, including distinctive
19 newspaper and website designs, dates of publication, page numbers, and web addresses. *See*
20 *Premier Nutrition, Inc.*, 2008 WL 1913163, at *6 (finding internet print-outs including web address
21 and dates printed to be sufficiently authenticated). Only the internet print-outs of the Daily News
22 articles contained in Exhibits 321-4 and 321-7, which do not contain a web address and lack other
23 identifying characteristics, appear to be insufficiently authenticated. The Court will not consider
24 these two articles, but overrules the objection as to the remainder of the articles in Exhibits 321-6
25 to 321-14.

26 Second, Plaintiff has submitted over 1,500 pages of printed and electronic documents in
27 which he purports to analyze the Taser and Mobile Audio Visual recordings of the incident in order
28 to demonstrate that Defendants have tampered with the evidence. *See, e.g., Ciampi Decl. Exs. 508-*

1 4 to 508-9, 512 (consisting of Microsoft Word documents totaling over 1500 pages of text and still
2 frames from the Taser and MAV recordings), 517-8 to 517-12, 520. Defendants object that
3 Plaintiff's analysis of the Taser and MAV recordings constitutes lay witness opinion that is not
4 admissible under Federal Rule of Evidence 701. In this case, Plaintiff has not argued that he is
5 offering an expert opinion, and he has set forth no facts establishing that he would qualify as an
6 expert of any kind. Pursuant to Federal Rule of Evidence 701, a lay witness may testify only as to
7 those opinions or inferences which are "(a) rationally based on the perception of the witness, (b)
8 helpful to a clear understanding of the witness' testimony or the determination of a fact in issue,
9 and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule
10 702." Fed. R. Evid. 701. Accordingly, lay witness opinions are admissible only to the extent that
11 they are "based upon . . . direct perception of the event, are not speculative, and are helpful to the
12 determination" of factual issues before the jury. *United States v. Freeman*, 498 F.3d 893, 905 (9th
13 Cir. 2007).

14 The Court agrees that the inferences and opinions contained in Plaintiff's analysis of the
15 Taser and MAV recordings do not fall within the scope of Rule 701. Although Plaintiff directly
16 perceived the March 15, 2008 incident, the opinions he offers in his analysis of the recordings are
17 based not upon his own experience of the incident, but upon a frame-by-frame analysis of video
18 recordings. *See United States v. Durham*, 464 F.3d 976, 982 (9th Cir. 2006) ("opinion testimony of
19 lay witnesses must be predicated upon concrete facts within their own observation and
20 recollection") (quotation marks and citation omitted). For the most part, the inferences and
21 opinions Plaintiff draws are based upon minute differences, sometimes imperceptible to this Court,
22 between the various recordings. Based on its review of the documents submitted, the Court finds
23 that Plaintiff's analysis is speculative and unlikely to assist a jury in determining the factual issues
24 before it. The Court finds, further, that analysis of video and audio recordings for evidence of
25 tampering or alteration requires technical or specialized knowledge and is not a proper subject of
26 lay opinion. *Cf. United States v. Rearden*, 349 F.3d 608, 613 (9th Cir. 2003) (discussing expert
27 testimony offered to show that images were not manipulated or altered); *Davis v. Clearlake Police*
28 *Dept.*, No. C-07-03365 EDL, 2008 WL 4104344 at *10 (N.D. Cal. Sept. 3, 2008) (sustaining

1 objection to letter offered to support argument that audio recording was altered as improper expert
2 testimony). Accordingly, Defendants' objection to this evidence is sustained.

3 **B. Plaintiff's Objections to Allegedly Altered Evidence and False Statements**

4 Plaintiff also objects to much of the Defendants' evidence and argues that their motion
5 should be stricken as based on false statements and evidence. First, Plaintiff objects to statements
6 by Defendants that they were dispatched to the scene based on a report that Plaintiff made Mr.
7 Alsman's wife and daughter uncomfortable by the way he watched them. It is quite clear that Mr.
8 Alsman never indicated that Plaintiff watched or leered at his wife or daughter. Sherman Decl. Ex.
9 18 (recording of 911 call). However, it seems that for unexplained reasons the 911 call was
10 inaccurately reported on the Computer Automated Dispatch ("CAD") report that was dispatched to
11 patrol cars. See Sherman Decl. Ex. 3 (CAD report); *id.* Ex. 4 at 81 (explaining that CAD reports
12 are dispatched to patrol cars via computer). The CAD report states that Mr. Alsman called
13 regarding a man who "makes his wife and young daughters uncomfortable they [sic] way he
14 watches them." *Id.* Ex. 3. It is unclear to what extent the Defendant officers received their
15 information about Plaintiff from the CAD report as opposed to the radio dispatch, which only
16 included the code for "suspicious vehicle" and indicated that the subject was living out of a van.
17 See Sherman Decl. Ex. 18 at 3:18-54 (recording of radio dispatch); *id.* Ex. 4 at 82 (explaining code
18 for suspicious vehicle). At the very least, however, there is evidence that some of the Defendants
19 were dispatched to the scene based on a CAD report which indicated that Plaintiff watched
20 Alsman's wife and daughter in a way that made them uncomfortable. While this misinformation is
21 quite unfortunate, it is not grounds for striking portions of Defendants' motion or evidence.

22 Second, Plaintiff argues that Defendants' motion should be stricken because Defendants
23 have tampered with the evidence and failed to provide Plaintiff with the original recordings from
24 the Taser cameras involved in the incident. Defendants have submitted four recordings of the
25 incident: two Mobile Audio Video ("MAV") recordings taken from cameras on Temores' and
26 Burger's patrol cars, and two Taser video recordings taken from cameras on Temores' and
27 Burger's Taser guns. These recordings have been the subject of several motions to compel, and
28 Plaintiff has repeatedly argued that Defendants altered, manipulated, or even destroyed this

1 evidence. Based on the history of motions to compel in this case, it appears that, at times,
 2 Defendants have not fully or promptly complied with their discovery obligations. Indeed, just
 3 before the hearing on this motion, Magistrate Judge Paul S. Grewal granted Plaintiff's motion to
 4 compel Defendants to provide him with copies of MAV recordings containing the original
 5 watermark. *See* Order Granting Mot. to Compel (Apr. 21, 2011), ECF No. 144. It also appears
 6 that Defendants and their expert have made errors during the discovery process that have
 7 contributed to Plaintiff's suspicions regarding tampering. *See* Def.'s Suppl. Ex. 13 in Supp. of
 8 Mot. for Summary Judgment (Decl. of Andrew Hinz), ECF No. 129 (declaration submitted to
 9 correct errors in the original expert declaration submitted with Defendants' summary judgment
 10 motion). However, as discussed above, Plaintiff has not produced admissible expert testimony
 11 suggesting that Defendants altered or tampered with the MAV or Taser recordings.⁵ Accordingly,
 12 Plaintiff's request to strike this evidence and/or Defendants' motion is denied.

13 **IV. Federal Claims Pursuant to 42 U.S.C. § 1983**

14 In his Second Amended Complaint, Plaintiff brings a number of claims for violations of his
 15 Fourth Amendment rights pursuant to 42 U.S.C. § 1983.⁶ Defendants seek summary judgment on
 16 grounds that no constitutional violation occurred, or, in the alternative, that they are entitled to
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18 ⁵ Because documents submitted in connection with this motion referenced a forensic analysis of the
 19 MAV and Taser recordings conducted by Gregg Stutchman, the Court requested the Plaintiff
 20 provide a copy of this analysis. *See* Stutchman Forensic Report, ECF No. 145. However, the
 21 analysis does not provide any facts pertaining to Stutchman's qualifications or the reliability of his
 22 methods, and therefore it cannot be considered as expert opinion. *See Avila v. Willits
 Environmental Remediation Trust*, 633 F.3d 828, 836 (9th Cir. 2011) (noting that to be admissible
 as expert opinion, the expert witness must be qualified "by knowledge, skill, experience, training,
 or education," and the opinion must be based upon reliable principles and methods).

23 ⁶ The SAC also alleges violations of Plaintiff's right to due process and equal protection, but does
 24 not indicate the basis for these claims. In his opposition brief and at the motion hearing, Plaintiff
 25 indicated that the basis for his due process claim is the withholding of material, exculpatory
 26 evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), alleged to have occurred during
 27 his criminal case. As pled in the SAC, however, Plaintiff's § 1983 claim merely states that
 28 defendants' conduct "constitutes a deprivation of Plaintiff's right to be free from an unlawful entry,
 an unlawful arrest, and unreasonable searches and seizures, and the right to be free from
 interference with the zone of privacy," and "further constitutes obstruction of justice with the
 malicious intent to deprive Plaintiff of his rights to due process and equal protection of the law."
 SAC ¶ 53. These vague allegations regarding obstruction of justice and deprivation of due process
 are not sufficient to plead a § 1983 claim based on alleged *Brady* violations.

1 qualified immunity for any constitutional violation found by the Court. Accordingly, the Court
2 will first provide a framework for addressing Defendants' claims of qualified immunity and then
3 turn to the substance of each of Plaintiff's federal claims. For the reasons discussed below, the
4 Court GRANTS summary adjudication of Plaintiff's § 1983 claims in favor of the Defendants.

5 **A. Qualified Immunity Doctrine**

6 The doctrine of qualified immunity protects government officials "from liability for civil
7 damages insofar as their conduct does not violate clearly established statutory or constitutional
8 rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S.Ct. 808, 815
9 (2009). Because qualified immunity is an immunity from suit, rather than a defense to liability, it
10 is effectively lost if a case is erroneously permitted to go to trial. *Id.* For this reason, the Supreme
11 Court has stressed the importance of resolving immunity questions at the earliest possible stage in
12 litigation. *Id.* Therefore, if, drawing all reasonable inferences in favor of the nonmoving party, it
13 is clear as a matter of law that the defendants are entitled to qualified immunity, summary
14 judgment should be granted. *See Wilkinson v. Torres*, 610 F.3d 546, 548 (9th Cir. 2010) (reversing
15 denial of summary judgment where defendants were entitled to qualified immunity as a matter of
16 law). Where a defendant's entitlement to qualified immunity turns on genuinely disputed issues of
17 fact, however, summary judgment is not appropriate. *See Espinosa v. City and County of San*
18 *Francisco*, 598 F.3d 528, 532 (9th Cir. 2010) (affirming denial of summary judgment because there
19 were genuine issues of fact regarding whether officers violated plaintiff's Fourth Amendment
20 rights and whether those rights were clearly established); *Serrano v. Francis*, 345 F.3d 1071, 1077
21 (9th Cir. 2003) ("If a genuine issue of material fact exists that prevents a determination of qualified
22 immunity at summary judgment, the case must proceed to trial.").

23 In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-part approach
24 for analyzing qualified immunity. The analysis contains both a constitutional inquiry and an
25 immunity inquiry. *Johnson v. County of Los Angeles*, 340 F.3d 787, 791 (9th Cir. 2003). The
26 constitutional inquiry requires the court to determine this threshold question: "Taken in the light
27 most favorable to the party asserting the injury, do the facts alleged show the officer's conduct
28 violated a constitutional right?" *Saucier*, 533 U.S. at 201. The immunity inquiry, on the other

1 hand, asks whether the right Plaintiff claims was clearly established. *Id.* “The relevant, dispositive
 2 inquiry in determining whether a right is clearly established is whether it would be clear to a
 3 reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 202. The
 4 court has discretion to consider the constitutional and immunity inquiries in any sequence.
 5 *Pearson*, 129 at 818.

6 **B. Fourth Amendment Claims against Defendants Wagner, Temores, and Burger**

7 **1. Unlawful detention and arrest**

8 In his § 1983 claim, Plaintiff alleges that Defendants subjected him to an unreasonable
 9 seizure and unlawfully detained and arrested him in contravention of his Fourth Amendment rights.
 10 SAC ¶ 53. The parties’ briefs focus on two “seizures” or “detentions” that occurred during the
 11 course of the March 15, 2008 incident: (1) Defendant Temores’ conduct in getting Plaintiff to exit
 12 the van in the first instance, and (2) the attempt to detain Plaintiff after he returned to the van. The
 13 Court will consider each of these seizures in turn.

14 **a. Initial Attempt to Remove Plaintiff from the Van**

15 First, the parties focus on Defendant Temores’ initial attempt to remove Plaintiff from the
 16 van by pretending to call a tow truck to tow Plaintiff’s truck. As noted above, the state court found
 17 this “ruse” unlawful and dismissed the criminal charges against Plaintiff on that ground.
 18 Defendants argue that the state court applied the wrong legal principles and urge this Court to find
 19 that Temores’ ruse was lawful.⁷

20 It is well-settled that police officers may use deceptive tactics under some circumstances.
 21 *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996). There are limits to the lawful use
 22 of deception, however. For instance, an officer may not gain entry to a suspect’s home by
 23 misrepresenting the scope, nature, or purpose of a government investigation. *United States v.*
 24 *Bosse*, 898 F.2d 113, 115 (9th Cir. 1990). Such a “ruse entry[,] when the suspect is informed that

25 ⁷ Because the Defendant police officers were not in privity with the State in the criminal
 26 proceeding, issue preclusion does not apply, and they are permitted to relitigate the
 27 constitutionality of Temores’ “ruse” before this court. *See, e.g., Medina v. Miller*, 114 F.3d 1195,
 28 at *1 (9th Cir. 1997) (table) (“individual law enforcement officers are not collaterally estopped by
 state court judgments that reverse criminal convictions on constitutional grounds”); *Yezek v.*
Mitchell, No. C-05-03461 TEH, 2007 WL 61887, at *4-5 (N.D. Cal. Jan. 8, 2007) (individual
 police officer not estopped from relitigating Fourth Amendment issue).

1 the person seeking entry is a government agent but is misinformed as to the purpose for which the
 2 agent seeks entry[,] cannot be justified by consent.” *Id.* Similarly, although the police ordinarily
 3 have authority to conduct a warrantless arrest of a suspect standing in the doorway of his home,
 4 such an arrest is not lawful if the suspect came to the doorway in response to misrepresentations by
 5 the police. *United States v. Johnson*, 626 F.2d 753, 756-57 (9th Cir. 1980). The concern about
 6 police deception is “at its zenith when government officials lie in order to gain access to places and
 7 things they would otherwise have no legal authority to reach.” *United States v. Alvarez-Tejeda*,
 8 491 F.3d 1013, 1017 (9th Cir. 2007). Ultimately, “general Fourth Amendment principles apply:
 9 the ruse becomes a search if it intrudes on the person’s reasonable, subjective expectation of
 10 privacy.” *United States v. Garcia*, 997 F.2d 1273, 1280 (9th Cir. 1993).

11 Here, Plaintiff was suspected of no criminal activity and therefore had a right to remain in
 12 his van and refuse a consensual contact with Defendants Temores and Wagner. *See Florida v.*
 13 *Royer*, 460 U.S. 491, 497-98 (1983) (absent reasonable suspicion, police may approach any person
 14 in a public place, but that person need not answer any questions and “may go on his way”). It
 15 would seem, therefore, that Temores employed the ruse precisely to “gain access to places and
 16 things they would otherwise have no legal authority to reach,” *Alvarez-Tejeda*, 491 F.3d at 1017 –
 17 that is, to gain access to Plaintiff in a public space. The Court agrees with Plaintiff, and with the
 18 state court, that by circumventing his right to refuse a consensual encounter, the ruse intruded upon
 19 Plaintiff’s reasonable expectation of privacy and violated his Fourth Amendment rights.

20 Defendants argue, however, that they are entitled to qualified immunity for any
 21 constitutional violations arising from Temores’ use of the ruse. They point out that the law
 22 prohibiting police deception has been applied primarily in the context of a residence, rather than a
 23 vehicle or other location. The federal cases this Court has identified deal with “ruse entry” into a
 24 home or deception used to lure a person to the doorway of his residence. *See Johnson*, 626 F.2d at
 25 756-57 (emphasizing enhanced privacy expectations in one’s home). Similarly, the California
 26 cases relied upon by the state court dealt with “a ruse that lures a suspect out of a residence.”⁸

27 _____
 28 ⁸ It is not entirely clear whether the decisions in these California cases are made under state or
 federal law. Both cases refer to both state and federal cases, but rely primarily on California case
 law.

1 *People v. Reyes*, 83 Cal. App. 4th 7, 12, 98 Cal. Rptr. 2d 898 (Cal. Ct. App. 2000); *see also id.* (“A
2 deception used to gain entry into a home and a ruse that lures a suspect out of a residence is a
3 distinction without much difference”); *see also People v. Reeves*, 61 Cal. 2d 268, 273, 38 Cal. Rptr.
4 1 (1964) (evaluating ruse to induce opening of hotel room door).

5 As Defendants note, Fourth Amendment jurisprudence has long viewed vehicles as
6 presenting different safety concerns and privacy expectations than stationary residences. While the
7 Supreme Court has recognized that individuals have privacy interests in their vehicles, it has found
8 that those interests are due a lesser degree of protection for two reasons: (1) the exigency that
9 accompanies the “ready mobility” of vehicles, and (2) the reduced expectations of privacy
10 associated with “the pervasive regulation of vehicles capable of traveling on the public highways.”
11 *California v. Carney*, 471 U.S. 386, 390-91 (1985). The Supreme Court has found, moreover, that
12 this lesser degree of protection holds even when the vehicle is capable of functioning as a home, as
13 long as the vehicle is readily mobile and located “in a setting that objectively indicates that the
14 vehicle is being used for transportation.” *Id.* at 393. Under this principle, motor homes and house
15 boats have been treated as vehicles for purposes of Fourth Amendment analysis, even where those
16 vehicles possess many attributes of a home. *See id.* at 393-94 (holding that the automobile
17 exception to the warrant requirement applies to a motor home that is readily mobile, licensed to
18 operate on public streets, and parked in a public lot); *United States v. Albers*, 136 F.3d 670, 673
19 (9th Cir. 1998) (holding that readily mobile houseboat found in open public waters is subject to the
20 automobile exception). Here, although Defendants had some evidence that Plaintiff was using his
21 van as a home, Plaintiff’s van was parked on a public street, readily mobile,⁹ and registered for use
22 on public roads and highways. Thus, for purposes of the Fourth Amendment, Plaintiff’s vehicle
23 would most likely be treated as a vehicle, subject to lesser protections. *See Carney*, 471 U.S. at
24 394 n.3 (noting that factors used to determine whether the automobile exception applies include
25 “location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks,
26

27 _____
28 ⁹ The 911 call indicates that Plaintiff moved his vehicle to different locations, *see* Sherman Decl.
Ex. 18, and Plaintiff acknowledges that he frequently moved his van between Lincoln Avenue and
downtown Palo Alto. Ciampi Decl. ¶ 63.

1 whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient
2 access to a public road”).

3 Defendants argue that case law permitting officers to remove a person from his vehicle for
4 purposes of officer safety would have led a reasonable officer to believe that Plaintiff could
5 lawfully be extracted from his vehicle either by force or by ruse. *See Pennsylvania v. Mimms*, 434
6 U.S. 106, 111 n.6 (holding that “once a motor vehicle has been lawfully detained for a traffic
7 violation, the police officers may order the driver to get out of the vehicle”); *Maryland v. Wilson*,
8 519 U.S. 408, 413 (1997) (extending *Mimms* rule to permit removal of passengers following a
9 lawful traffic stop). Because the police had not lawfully detained Plaintiff’s van prior to the
10 attempted extraction, the Court does not agree that *Mimms* and *Wilson* would justify removal of
11 Plaintiff by ruse or by force. Nor does Plaintiff’s refusal to speak to the police, without more,
12 furnish reasonable grounds to detain Plaintiff and remove him from his car. *See Florida v. Royer*,
13 460 U.S. at 498. Nonetheless, the Court agrees that the “weighty interest in officer safety” during
14 vehicle stops, the lesser protection accorded to readily mobile vehicles, and the unsettled scope of
15 case law on unlawful ruses, taken together, is sufficient to demonstrate that the law was not clearly
16 established at the time of Plaintiff’s seizure. While case law clearly prohibited a ruse entry into a
17 home, or a ruse that lures a person out of the heightened protection of a residence, it was not
18 entirely clear, in March 2008, that this line of cases should extend to ruses intended to lure a person
19 out of a less protected location, such as a vehicle parked on a public street. Given the reduced
20 expectations of privacy recognized in vehicles and the weight given to officer safety concerns
21 surrounding vehicle stops, it was reasonable for the officers to think that deception, which is lawful
22 in some instances, would be justified under the circumstances they confronted. Plaintiff has not
23 presented any case law suggesting that the law on this issue was clearly established. Accordingly,
24 the Court finds that Defendants are entitled to qualified immunity as to any Fourth Amendment
25 violation caused by Officer Temores’ use of a ruse to extract Plaintiff from his van.

26 In sum, the Court agrees with the determination of the state criminal court that by
27 circumventing Plaintiff’s right to refuse a consensual encounter, the ruse employed by Defendant
28 Temores intruded upon Plaintiff’s reasonable expectation of privacy and violated his Fourth

1 Amendment rights. However, because the law regarding the use of ruses during vehicle contacts
2 was not clearly established at the time of the March 15, 2008 incident, the Court finds that
3 Defendants are entitled to qualified immunity on this claim. For this reason, the Court GRANTS
4 Defendants' motion for summary adjudication as to this specific issue.

5 **b. Seizure of Plaintiff upon Retreat Into Van**

6 The parties next dispute the constitutionality of Defendants' second attempt to remove
7 Plaintiff from the van and detain him. After Plaintiff initially exited the van in response to
8 Temores' ruse, Defendant Burger arrived on the scene. It is undisputed that Plaintiff was agitated
9 and exchanged angry words with Defendants Temores, Wagner, and Burger. After Burger arrived,
10 the Defendants began to express concerns that Plaintiff was under the influence of a controlled
11 substance, and Plaintiff, fearful that he would be arrested and his possessions confiscated, retreated
12 into his van to make a call on his cell phone. At that point, Defendants Burger and Temores
13 pointed their Tasers at Plaintiff, ordered him out of the van, and eventually Defendant Burger
14 forcibly pulled Plaintiff away from the van. Defendants argue that this seizure was justified by
15 their reasonable suspicion that Plaintiff was engaged in the criminal activity of being under the
16 influence of a controlled substance.

17 Pursuant to the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), the police
18 may conduct "a brief, investigatory search or seizure, so long as they have a reasonable, articulable
19 suspicion that justifies their actions." *Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 (9th Cir.
20 2002). Officers may also use reasonable force to effect an investigatory detention where officer
21 safety is at issue. *See Allen v. City of Los Angeles*, 66 F.3d 1052, 1056-57 (9th Cir. 1995); *see also*
22 *United States v. Jacobs*, 715 F.2d 1343, 1345-46 (9th Cir. 1983) ("the use of force in making a stop
23 will not convert the stop into an arrest 'if it occurs under circumstances justifying fears for personal
24 safety'" (quoting *United States v. Beck*, 598 F.2d 497, 501 (9th Cir. 1979)). The reasonable
25 suspicion standard applied to investigatory stops is "'a less demanding standard than probable
26 cause,' and merely requires 'a minimal level of objective justification.'" *Id.* (quoting *Illinois v.*
27 *Wardlow*, 528 U.S. 119, 123 (2000)). In determining whether officers had reasonable suspicion to
28 justify a brief seizure, courts must "look at the 'totality of the circumstances' of each case to see

1 whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal
2 wrongdoing.” *United States v. Arvizu*, 534 U.S. 266, 273 (2002). This approach allows officers to
3 “draw on their own experience and specialized training to make inferences from and deductions
4 about the cumulative information available” to them. *Id.* Nonetheless, an officer may not rely
5 upon a mere hunch to justify an investigatory stop. *Id.* at 274. Rather, “in justifying the particular
6 intrusion the police officer must be able to point to specific and articulable facts which, taken
7 together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v.*
8 *Ohio*, 392 U.S. 1, 21 (1968).

9 In this case, Defendants Temores, Wagner, and Burger claim that they had a reasonable
10 suspicion that Plaintiff was under the influence of a controlled substance, and that they needed to
11 bring Plaintiff under control for their own safety. As discussed in the Background section,
12 Defendants have stated that they believed Plaintiff was under the influence of a controlled
13 substance for the following reasons: (1) Plaintiff was “clearly agitated beyond that of an average
14 person”; (2) Plaintiff was tensing his arms and clenching his fists, and his mouth trembled while he
15 talked to the officers; (3) Plaintiff had sores on his arms that Defendants claim resembled the “pock
16 marks” common to people who use intravenous drugs; and (4) Plaintiff’s pupils were either dilated
17 or constricted. Sherman Dec. Ex. 2 at 30, 33, 38. Although Plaintiff acknowledges that he was
18 agitated and angry at the officers, he argues that the facts available to them did not amount to a
19 reasonable suspicion that he was under the influence of a controlled substance. Plaintiff notes,
20 first, that the Defendants’ reports regarding the size of his pupils contradict each other. *See*
21 Sherman Decl. Ex. 2 at 30 (Temores report stating that Plaintiff’s pupils were dilated); *id.* at 38
22 (Burger report stating that Plaintiff’s pupils were constricted). Plaintiff also points out that he
23 denied using controlled substances and showed Defendants that the sores were located on the tops
24 of his arms and not near his veins, where one would expect to see sores from intravenous drug use.
25 *See* Burger MAV recording, Sherman Decl. Ex. 15 at 10:10:06-12 (recording of Plaintiff denying
26 that he is a heroin addict and asking “why would I be popping needles there?”). He also argues
27 that mere anger and agitation do not provide a particularized and objective basis for inferring that a
28 person is under the influence.

1 Disregarding the inconsistent evidence of Plaintiff's pupil size, the Court nonetheless
2 agrees with Defendants that the evidence submitted supports a "particularized and objective basis'
3 for suspecting legal wrongdoing." *Arvizu*, 534 U.S. 273. Looking at the totality of the
4 circumstances, as the Court must, the Court finds that Defendants were faced with an individual
5 who had appeared unusually agitated since the beginning of the encounter, who exhibited tensed
6 and twitching muscles that could be consistent with use of a controlled substance, and who had
7 "fresh and old" sores on his arms that appeared similar to sores Defendants had observed on
8 individuals suspected of illegal drug use. Sherman Dec. Ex. 2 at 30, 33, 38; *id.* Ex. 21 ¶ 9.
9 Plaintiff does not controvert these facts, but claims that Defendants drew an incorrect inference
10 from them. As Defendants point out, however, a "mistake of fact will not render a stop illegal, if
11 the objective facts known to the officer gave rise to a reasonable suspicion that criminal activity
12 was afoot." *United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004) (quoting *United States v.*
13 *Mariscal*, 285 F.3d 1127, 1131 (9th Cir. 2002)). Here, Defendants mistakenly believed that the
14 sores on Plaintiff's arms were associated with intravenous drug use. Although it appears that
15 Plaintiff attempted to demonstrate that his sores were not consistent with drug use, given the tense
16 and fast-moving circumstances, it was not unreasonable for Defendants to conclude otherwise.
17 Reasonable suspicion requires a level of certainty "considerably short of . . . a preponderance of the
18 evidence," and "[a] determination that reasonable suspicion exists . . . need not rule out the
19 possibility of innocent conduct." *Arvizu*, 534 U.S. at 274, 277. In this case, the uncontroverted
20 facts, taken together, are sufficient to support a reasonable suspicion that Plaintiff was under the
21 influence. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1021 (9th Cir. 2009) (finding
22 reasonable suspicion that suspect was under the influence based on fact that the suspect appeared to
23 be sleeping in a car parked outside a drug store with its parking lights on, suspect was breathing
24 rapidly, and suspect gave a "testy" response when the officer tapped on his window). Accordingly,
25 the Court GRANTS Defendants' motion for summary adjudication on this claim, on grounds that
26 Defendants had reasonable suspicion to justify a brief, investigatory detention of Plaintiff. The
27 Court will now consider whether the use of force that occurred following the initial investigatory
28 stop was reasonable.

1 the type and amount of force” that the Defendants used against Plaintiff. *Bryan v. MacPherson*,
2 630 F.3d 805, 824 (9th Cir. 2010). With respect to Tasers, a series of recent Ninth Circuit
3 decisions has clarified the quantum of force associated with the different ways in which a Taser can
4 be deployed. In *Bryan*, the Ninth Circuit considered the use of a Taser in dart mode – that is, when
5 an officer uses the Taser to shoot a pair of aluminum darts tipped with stainless steel barbs that are
6 connected to the Taser by insulated wires. *Id.* The *Bryan* court explained that when the probes
7 strike a person, an electrical charge is delivered, and “[t]he electrical impulse instantly overrides
8 the victim’s central nervous system, paralyzing the muscles throughout the body, rendering the
9 target limp and helpless.” *Id.* Based on its analysis of the “physiological effects, the high levels of
10 pain, and foreseeable risk of physical injury,” the Ninth Circuit concluded that the use of a Taser in
11 this manner constituted an “intermediate, significant level of force that must be justified by the
12 governmental interest involved.” *Id.* at 825-26. In contrast, the Ninth Circuit in *Brooks v. City of*
13 *Seattle* considered use of a Taser in “drive-stun” mode, which “involves touching the Taser to the
14 body and causes temporary, localized pain only.” *Brooks v. City of Seattle*, 599 F.3d 1018, 1026
15 (9th Cir. 2010). The *Brooks* court found that use of a Taser in drive-stun mode, although “certainly
16 a serious intrusion” is “less than the intermediate” intrusion found in *Bryan*. *Id.* at 1028.

17 In this case, it is undisputed that Defendant Burger deployed his Taser in dart mode. Thus,
18 pursuant to *Bryan*, Defendant Burger employed an “intermediate, significant level of force that
19 must be justified by the governmental interest involved.” *Bryan*, 630 F.3d at 825-26. In order to
20 determine whether this level of force was objectively reasonable, the Court must consider (1) the
21 severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the
22 officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by
23 flight. *Id.* at 826 (citing *Graham*, 490 U.S. at 396). As to the severity of the crime at issue,
24 Defendants acknowledge that this factor does not weigh in favor of the use of force, given that

25 other citizen.” *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000) (quoting *United States v.*
26 *Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir. 1994), *rev’d on other grounds*, 518 U.S. 81 (1996).
27 Defendants have not argued that Wagner attempted to intercede or lacked a reasonable opportunity
28 to do so. Accordingly, if a reasonable officer would have known that Burger’s use of the Taser
amounted to excessive force, all three officers on the scene may be held liable. *See Motley v. Parks*,
383 F.3d 1058, 1071 (9th Cir. 2004) (finding that officers who either participated in or failed to
intervene to stop an unreasonable search could be held liable).

1 Plaintiff was contacted for purposes of community policing and was not suspected of any crime.
2 Defs.’ Mot. for Summary Judgment at 12. At most, Plaintiff was suspected of being under the
3 influence of a controlled substance, a misdemeanor. Given the relatively minor and non-violent
4 nature of this crime, this factor weighs against of the use of significant, intermediate-level force.
5 *See Bryan*, 630 F.3d at 829 (reasoning that factor weighs in favor of plaintiff where crime was a
6 misdemeanor that is not inherently dangerous or violent); *Hammer v. Gross*, 932 F.2d 842, 846
7 (9th Cir. 1991) (indicating that offense of drunk driving “while certainly not to be taken lightly,
8 was a misdemeanor” and therefore would weigh in favor of plaintiff).

9 The second factor and third factors, regarding the safety threat posed and resistance/evasion
10 of arrest, hinge on issues of genuine factual dispute and cannot be definitely resolved on summary
11 judgment. Defendants argue that Plaintiff posed a safety threat from the time that he retreated into
12 his van, where he could have had a weapon accessible. However, in the recordings submitted by
13 Defendants, while Plaintiff appears angry and agitated after he first emerges from the van in
14 response to Temores’ ruse, *see* Burger MAV recording, Sherman Decl. Ex. 15 at 10:09:50-10:45
15 (recording of Plaintiff swearing and angrily asking why he is being harassed), once he retreats back
16 into the van, Plaintiff appears relatively calm and somewhat cooperative. On the recording made
17 by Burger’s Taser camera, Plaintiff can be seen sitting in the van, making a call on his cell phone
18 in his right hand and holding his left hand in his lap. Sherman Decl. Ex. 12B at 0:00-02. When
19 one of the Defendants states “I’m gonna Tase you,” Plaintiff calmly states that he is calling his
20 lawyer. *Id.* Seconds later, when one of the Defendants says, “let me see your hands,” Plaintiff
21 raises his left hand and also slightly opens the palm of his right hand to show that he is holding
22 only his cell phone to his ear. *Id.* at 0:03-10. He remains seated in the van with his right hand
23 holding the cell phone to his ear and his left hand in the air until he begins to exit the vehicle, of his
24 own accord, several seconds later. *Id.* On his way out of the van, Plaintiff picks up a two-liter
25 soda bottle on the ground and appears to set it upright. *Id.* at 0:18-21. At that point, Burger
26 appears to forcibly pull Plaintiff away from the car and push him across the sidewalk and up
27 against the residential fence. Temores MAV recording, Sherman Decl. Ex. 14 at 10:10:20-26.
28

1 Based on these facts, the question of whether Plaintiff's actions and the presence of the plastic soda
2 bottle gave rise to a reasonable concern for officer safety is matter of genuine factual dispute.

3 Moreover, it is not clear, based on the evidence presented, whether Plaintiff had actively
4 resisted the officers prior to being Tased. At the preliminary examination in the criminal case,
5 Defendant Temores testified that up to the point when Defendant Burger deployed his Taser,
6 Plaintiff had not attempted to strike any of the officers or threatened to use physical force against
7 them. Sherman Decl. Ex. 4 at 105:28-106:14. Similarly, based on the MAV recording from
8 Defendant Temores' patrol car, it does not appear that Plaintiff attempted to use physical force
9 against any of the Defendants until Burger either shot him with Taser or at least had the Taser
10 pointed directly at him after pushing him against the residential fence. *See* Sherman Decl. Ex. 14
11 at 10:10:20-30. Accordingly, the extent to which Plaintiff posed an immediate safety threat and
12 was actively resisting or evading arrest is the subject of a material, factual dispute. Drawing all
13 inferences in light of Plaintiff, however, a reasonable jury could find that the threat and resistance
14 posed by Plaintiff was slight in comparison to the significant, intermediate level of force employed
15 by Defendant Burger. Based on this analysis, the Court finds that there is a genuine issue of
16 material fact as to whether Defendant Burger, supported by Defendants Temores and Wagner, used
17 objectively unreasonable force by deploying his Taser against Plaintiff in dart mode.

18 The Court agrees with Defendants, however, that they are entitled to qualified immunity on
19 the excessive force claim. It is only recently that the Ninth Circuit has definitively determined the
20 level of force associated with Tasers deployed in dart mode. *See Bryan*, 630 F.3d at 833
21 (describing "dearth of prior authority" on the use of tasers); *Mattos v. Agarano*, 590 F.3d 1082,
22 1089-90 (9th Cir. 2010) (describing absence of case law finding taser use unconstitutional);
23 *Brooks*, 599 F.3d at 1031 n.18 (describing shortage of cases regarding use of tasers in drive-stun
24 mode). For this reason, in its recent Taser decisions, the Ninth Circuit has uniformly found that the
25 law surrounding tasers was not clearly established and concluded that the officers were entitled to
26 qualified immunity. *See Bryan*, 630 F.3d at 833; *Mattos*, 590 F.3d 1082, 1089-90 (9th Cir. 2010);
27 *Brooks*, 599 F.3d at 1031 n.18. However, these cases involved conduct that occurred between
28 2004 and 2006, whereas here the conduct occurred on March 15, 2008. In making a qualified

1 immunity determination, the court must “consider the state of the law at the time of the alleged
2 violation.” *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007).

3 In determining whether the law was clearly established at any given time, courts within the
4 Ninth Circuit look first to the decisional authority of the Supreme Court and the Ninth Circuit.
5 *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004). In the absence of binding precedent,
6 however, courts may “look to whatever decisional law is available to ascertain whether the law is
7 clearly established for qualified immunity purposes.” *Id.* (quotation marks and citations omitted).
8 The Ninth Circuit’s decision in *Mattos* establishes that the law regarding Tasers was not clearly
9 established as of August 23, 2006, at least for cases in which the conduct alleged was not “so
10 patently violative of [the plaintiff’s] constitutional rights that reasonable officials would know
11 without guidance from the courts that the action was unconstitutional.” *Mattos*, 590 F.3d at 1090.
12 Based on its review of district court decisions within this Circuit, the Court finds that by March
13 2008, it was clearly established that use of a Taser upon a suspect who had already been subdued
14 and arrested was objectively unreasonable and constituted excessive force. *See Wakefield v. City of*
15 *Escondido*, Nos. 05-56769, 05-56809, 2007 WL 2141457, at *1 (9th Cir. July 26, 2007) (upholding
16 denial of qualified immunity where taser was deployed “repeatedly and without warning” against a
17 partially restrained, unarmed individual “who was in the throes of a claustrophobic attack, and who
18 pleaded with [the officer] not to shoot him”); *Richards v. Janis*, No. CV-06-3064-EFS., 2007 WL
19 3046252, at *4 (denying summary judgment where officer used taser on a suspect who “was
20 handcuffed, lying on the ground, already subject to substantial physical force from the other three
21 officers, and physically hurt”). In other circumstances, however, the case law was much less clear.
22 There are relatively few decisions that address Taser use in detail, and those that do vary in their
23 assessment of the quantum of force involved and reasonableness of applying that force to subdue
24 an unrestrained suspect. *See, e.g., Goldsmith v. Snohomish County*, 558 F. Supp. 2d 1140, 1150-51
25 (use of Taser to subdue suspect was reasonable); *McDonald v. Pon*, No. C05-1832JLR, 2007 WL
26 4420936 at *2 & n.7 (finding that Taser may cause superficial injuries and muscle fatigue, but
27 concluding that quantum of force applied is not severe); *Beaver v. City of Federal Way*, 507 F.
28 Supp. 2d 1137, 1144-46 (W.D. Wash. 2007) (finding that “use of a Taser constituted significant

1 force” and concluding that continued use of Taser after a second officer arrived on the scene was
2 objectively unreasonable). In *Bryan*, the Ninth Circuit granted qualified immunity in a case where
3 the officer shot his Taser, without warning, at an “unarmed, stationary individual, facing away
4 from an officer at a distance of fifteen to twenty-five feet” who had been stopped for not wearing
5 his seatbelt. *Bryan*, 630 F.3d at 827-28, 831. In this case, although Plaintiff was similarly
6 unarmed and stopped based on suspicion of a non-violent misdemeanor, he was located much
7 closer to the officers and was given some warning that he would be shot with a Taser if he did not
8 comply with the officers’ orders. The Court has not found that the law regarding Tasers was
9 significantly clarified between 2005, when the conduct in *Bryan* occurred, and March 15, 2008,
10 when the incident at issue in this case occurred. *Bryan* thus appears to compel a finding of
11 qualified immunity in this case. Accordingly, although the Court finds that triable issues of fact
12 exist regarding the reasonableness of deploying a Taser in dart mode against Plaintiff, the Court
13 concludes that Defendants are entitled to qualified immunity on this claim. For this reason, the
14 Court GRANTS Defendants’ motion for summary adjudication of this issue.

15 **b. Use of Taser in Stun Drive Mode**

16 As to the second Taser deployment in stun-drive mode, the Court finds no evidence that this
17 use of force violated Plaintiff’s constitutional rights. As noted above, the Ninth Circuit has
18 concluded that the use of a Taser in drive-stun mode, as opposed to dart mode, constitutes a less
19 than intermediate level of force. *Brooks*, 599 F.3d at 1028. By the time that Defendant Temores
20 deployed his Taser in drive-stun mode, Plaintiff was actively resisting the officers by punching,
21 hitting, and kicking them. *See* Temores MAV recording, Sherman Decl. Ex. 14 at 10:10:30-45. It
22 is not until after Temores deploys his Taser that Plaintiff calms down and complies with the
23 officers’ orders. “Police officers are entitled to employ reasonable methods to protect themselves
24 and others in potentially dangerous situations.” *Allen v. City of Los Angeles*, 66 F.3d at 1056.
25 Under the circumstances presented, it was objectively reasonable to use a less-than-intermediate
26 level of force to subdue Plaintiff and prevent him from injuring the officers. Accordingly, the
27 Court GRANTS Defendants’ motion for summary adjudication as to this issue.
28

1 **C. Municipal and Supervisory Liability (Defendants City of Palo Alto, Johnson, Burns, and Powers)**

2 In addition to his claims against Defendants Temores, Wagner, and Burger, who were all
3 present during the March 15, 2008 incident, Plaintiff also brings his constitutional claims against
4 the City of Palo Alto, former Palo Alto Chief of Police Lynn Johnson, current Palo Alto Chief of
5 Police Dennis Burns, and Sergeant Natasha Powers.¹¹ Plaintiff alleges that these Defendants
6 permitted and tolerated a pattern and practice of unreasonable searches and seizures, excessive use
7 of force, and obstruction of justice by police officers. SAC ¶ 57. He also claims that they have
8 maintained an ineffective system for investigation and review of police conduct and have failed to
9 take appropriate measures to prevent the pattern and practice of constitutional violations from
10 continuing. SAC ¶¶ 58-60. Defendants argue that Plaintiff can produce no evidence in support of
11 these allegations and move for summary judgment on that ground.

12 Under *Monell v. Department of Social Services of City of New York*, local governments are
13 considered “persons” for purposes of Section 1983 and may be held liable for monetary damages in
14 cases where “the action that is alleged to be unconstitutional implements or executes a policy
15 statement, ordinance, regulation, or decision officially adopted and promulgated by that body's
16 officers.” 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A local government may not
17 be sued under a theory of respondeat superior for injuries inflicted solely by its employees or
18 agents. *Monell*, 436 U.S. at 691; *Anderson v. Warner*, 451 F.3d 1063, 1070 (9th Cir. 2006). Rather,
19 a plaintiff must demonstrate that the government's official policy or custom was the “moving
20 force” responsible for infliction of her injuries. *Monell*, 436 U.S. at 694. Under *Monell*, a plaintiff
21 may establish municipal liability by demonstrating that “(1) the constitutional tort was the result of
22 a longstanding practice or custom which constitutes the standard operating procedure of the local
23 government entity; (2) the tortfeasor was an official whose acts fairly represent official policy such
24 that the challenged action constituted official policy; or (3) an official with final policy-making
25 authority delegated that authority to, or ratified the decision of, a subordinate.” *Price v. Sery*, 513
26 F.3d 962, 966 (9th Cir. 2008). In addition, a supervisor may be held liable under Section 1983 for
27

28 ¹¹ Although the SAC indications that Plaintiff’s § 1983 claims are brought against all Defendants, see SAC at p. 10, Defendant Dan Ryan is not named in this cause of action.

1 “1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2)
2 their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct
3 that showed a reckless or callous indifference to the rights of others.” *Edgerly v. City and County*
4 *of San Francisco*, 599 F.3d 946, 961 (9th Cir. 2010) (quoting *Cunningham v. Gates*, 229 F.3d
5 1271, 1292 (9th Cir. 2000)).

6 In support of their motion for summary judgment, Defendants have submitted a declaration
7 by current Chief of Police Dennis Burns stating that the City of Palo Alto Police Department has
8 no policy, practice, or custom authorizing or condoning the use of excessive force, unlawful
9 searches or seizures, or any other unlawful conduct alleged in Plaintiff’s Second Amended
10 Complaint. Sherman Decl. Ex. 19 ¶¶ 4, 7, 16. In his declaration, Burns also provides a description
11 of the hiring, training, and review of police officers by the Palo Alto Police Department, as well as
12 the procedure for review of citizens’ complaints. *Id.* ¶¶ 8-11. He states, as well, that Plaintiff has
13 made no attempt to take his deposition. *Id.* ¶ 3.

14 In its review of the evidence submitted by Plaintiff in support of his opposition brief, the
15 Court has found no evidence suggesting that the City of Palo Alto maintains a policy, practice, or
16 custom, written or otherwise, that could be considered the “moving force” behind Plaintiff’s
17 alleged injuries. *Monell*, 436 U.S. at 694. Nor has the Court identified evidence suggesting that
18 Defendants Burns, Johnson, or Powers can be held liable for Plaintiff’s injuries in their supervisory
19 capacities. At the motion hearing, when the Court asked what evidence he had to establish a policy
20 or practice on the part of the City, Plaintiff identified the Use of Force Report prepared by
21 Defendant Powers, which describes the March 15, 2008 incident. *See Ciampi Decl. Ex. 503-11.*
22 This one-page description of the incident does not suggest that the City had a policy or practice that
23 caused Plaintiff’s injuries, nor does it suggest any culpability on the part of Defendant Powers.
24 Accordingly, the Court agrees with Defendants that there is no evidence in the record to support
25 Plaintiff’s § 1983 claims for municipal or supervisory liability. The Court therefore GRANTS
26 Defendant’s motion for summary adjudication of the § 1983 claims against Defendants City of
27 Palo Alto, Johnson, Burns, and Powers.
28

1 **V. State Law Claims**

2 In addition to his federal § 1983 claims, Plaintiff has asserted a number of state law claims
3 against the Defendants in this action. The Court will consider each of Plaintiff's state law claims in
4 turn.

5 **A. Assault and Battery (against Defendants Temores, Burger, Wagner, and the
6 City)**

7 Plaintiff's second cause of action alleges a claim of assault and battery against Defendants
8 Temores, Burger, Wagner, and the City of Palo Alto. Under California law, law enforcement
9 officers are explicitly permitted to use reasonable force to effect an arrest, prevent escape, or
10 overcome the resistance of a person being arrested. Cal. Penal Code § 835a. Accordingly, a law
11 enforcement officer who uses force in the course of an arrest is not liable for battery unless the
12 plaintiff proves that the force used was unreasonable. *Edson v. City of Anaheim*, 63 Cal. App. 4th
13 1269, 1272-73, 74 Cal. Rptr. 2d 614 (Cal. Ct. App. 1998). For this reason, battery claims brought
14 under California law are analyzed under the reasonableness standard used to evaluate Fourth
15 Amendment claims and require the same evidentiary showing. *See id.* at 1274; *Susag v. City of
16 Lake Forest*, 94 Cal. App. 4th 1401, 1413, 115 Cal. Rptr. 2d 269 (Cal. Ct. App. 2002); *Saman v.
17 Robbins*, 173 F.3d 1150, 1156-57 & n.6 (9th Cir. 1999). Thus, the analysis of Plaintiff's Section
18 1983 claim applies equally to Plaintiff's claim for assault and battery. The Court has found that a
19 genuine issue of material fact exists regarding whether Defendants Burger, Temores, and Wagner
20 used reasonable force in detaining Plaintiff. Although qualified immunity bars Plaintiff's federal
21 claim for excessive force, it does not bar his state law claim for battery. *See Robinson v. Solano
22 County*, 278 F.3d 1007, 1016 (9th Cir. 2002) ("California denies immunity to police officers who
23 use excessive force in arresting a suspect."). Additionally, because the City of Palo Alto is liable
24 for the acts or omissions of its employees if those acts or omissions would have given rise to a
25 cause of action against that employee, Cal. Gov't Code § 815.2(a), there is also a genuine issue of
26 material fact regarding the City's liability. Accordingly, the Court DENIES Defendants' motion for
27 summary adjudication of Plaintiff's battery claim.
28

1 **B. Intentional Infliction of Emotional Distress**

2 Plaintiff's third cause of action asserts a claim of intentional infliction of emotional distress
 3 ("IIED") against all Defendants. To prevail upon an IIED claim under California law, Plaintiff
 4 must show (1) outrageous conduct by the defendants; (2) an intention to cause, or reckless
 5 disregard of the probability of causing, emotional distress; (3) severe emotional suffering; and (4)
 6 actual and proximate causation of the emotional distress. *Wong v. Tai Jing*, 189 Cal. App. 4th
 7 1354, 1376, 117 Cal. Rptr. 3d 747 (Cal. Ct. App. 2010). A defendant's conduct is "outrageous"
 8 when it is "so extreme as to exceed all bounds of that usually tolerated in a civilized community."
 9 *Hughes v. Pair*, 46 Cal. 4th 1035, 1050-51, 209 P.3d 963 (2009) (quotation marks and citation
 10 omitted).

11 Plaintiff's IIED claim appears to be based upon Defendants' alleged use of excessive force,
 12 malicious prosecution, and defamation of Plaintiff.¹² See SAC ¶ 72 (describing suffering
 13 associated with Defendants' use of force, injury to Plaintiff's reputation, and fear of being
 14 maliciously prosecuted); Ciampi Decl. ¶¶ 83-84 (describing "unbearable" stress, anxiety, and chest
 15 pains due to allegedly falsified videos); *id.* ¶ 92 ("I live in perpetual fear of being falsely
 16 incriminated by the Defendants"). Defendants argue that because their conduct was lawful, it was
 17 not outrageous as a matter of law. In particular, they argue that because the use of reasonable force
 18 is privileged under California Penal Code § 835a, Defendants cannot be held liable for any
 19 infliction of emotional distress arising out of their use of reasonable force.

20 Conduct that is privileged may not form the basis for an IIED claim. *Ross v. Creel Printing*
 21 *& Publishing Co.*, 100 Cal. App. 4th 736, 745, 122 Cal. Rptr. 2d 787 (Cal. Ct. App. 2002). The
 22 Court concludes below that Defendants are entitled to immunity on Plaintiff's claims of defamation
 23 and malicious prosecution. Thus, the allegations related to these claims cannot serve as a basis for
 24 Plaintiff's IIED claim. However, as discussed above, the Court has found that a genuine issue of
 25 material fact exists regarding whether Defendants Burger, Temores, and Wagner used reasonable
 26

27 ¹² In his opposition brief and declaration, Plaintiff also claims that he suffered severe emotional
 28 distress when Interim City Attorney Don Larkin showed the allegedly falsified MAV video to the
 media. However, Mr. Larkin is not a defendant in this action, and the SAC contains no allegations
 regarding public showings of the videos.

1 force in detaining Plaintiff. Accordingly, there remain triable issues of fact regarding whether their
2 conduct was lawful or privileged under California law, and whether the use of force may serve as
3 the basis for Plaintiff's IIED claim. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 487 n.17
4 (9th Cir. 2007) (reversing grant of summary judgment on IIED claim because excessive use of
5 force could constitute outrageous conduct). Aside from arguing that their conduct was lawful and
6 privileged, which cannot be established on this motion, Defendants have offered no other grounds
7 for summary adjudication of Plaintiff's IIED claim. For these reasons, the Court must DENY
8 summary adjudication of this claim as to Defendants Temores, Wagner, Burger, and the City of
9 Palo Alto. The motion is GRANTED as to the remaining Defendants.

10 C. Negligence

11 Plaintiff's Fourth Cause of Action alleges that Defendants Temores, Wagner, and Burger
12 breached a duty to Plaintiff to perform their police duties without unreasonable searches and
13 seizures and without excessive force. SAC ¶ 76-78. Plaintiff also alleges that the City of Palo Alto
14 breached a duty to adequately train, supervise, and control its employees. SAC ¶ 82. Defendants
15 argue that this claim fails as a matter of law because the officers acted reasonably and without
16 excessive force. As previously indicated, however, the Court has found triable issues of fact
17 regarding whether Defendants Temores, Wagner and Burger used excessive force. Thus, the Court
18 cannot grant summary adjudication on that ground.

19 Defendants also argue that they would be immune from liability pursuant to California
20 Government Code § 820.2, which provides that a public employee is not liable for an injury arising
21 from an act or omission that "was the result of the exercise of the discretion vested in him, whether
22 or not such discretion be abused." The scope of immunity under § 820.2 is somewhat limited,
23 however. California case law establishes that "not all acts requiring a public employee to choose
24 among alternatives entail the use of 'discretion' within the meaning of section 820.2." *Barner v.*
25 *Leeds*, 24 Cal. 4th 676, 684-85, 102 Cal. Rptr. 2d 97 (2000). In analyzing the discretionary
26 immunity conferred by § 820.2, the California Supreme Court has drawn a distinction between
27 policy decisions, which are immunized, and ministerial or operational decisions, which are not. In
28 *Caldwell v. Montoya*, the California Supreme Court explained that immunity is reserved for areas

1 of quasi-legislative policy-making and applies only to “*deliberate and considered* policy decisions,
 2 in which a [conscious] balancing [of] risks and advantages . . . took place.” 10 Cal. 4th 972, 981,
 3 42 Cal. Rptr. 2d 842 (1995) (quotation makes and citation omitted).

4 In contrast, day-to-day operational decisions are not immunized by § 820.2, even if they
 5 require “exercise of considerable judgmental skills.” *Barner*, 24 Cal. 4th at 686-87. Thus, while a
 6 public defender’s initial decision to represent a particular defendant may be a discretionary
 7 decision immunized by § 820.2, the decisions made and actions undertaken during the course of
 8 the representation are not immunized, even though “such legal representation entails difficult
 9 choices among complex alternatives and the exercise of professional skill.” *Id.* at 688, 691.
 10 Similarly, while a police officer’s initial decision to investigate a car accident may constitute a
 11 discretionary decision immunized by § 820.2, the officer is not immunized from any negligence in
 12 *conducting* the investigation. *McCorkle v. City of Los Angeles*, 70 Cal. 2d 252, 261-262 74 Cal.
 13 Rptr. 389 (1969).

14 Based on these cases, it would seem that the officers’ original decision to follow up on Mr.
 15 Alzman’s 911 call and make contact with Plaintiff might constitute acts of discretion immunized by
 16 § 820.2. However, the decisions made and actions taken during the conduct of their contact with
 17 and arrest of Plaintiff would not be immunized. *See Liberal v. Estrada*, 632 F.3d 1064, 1084 (9th
 18 Cir. 2011) (“As a matter of law, section 820.2 immunity does not apply to an officer's decision to
 19 detain or arrest a suspect.”). Accordingly, Defendants are not entitled to summary adjudication on
 20 the basis of state law immunities. Because the Court has found triable issues of fact regarding the
 21 reasonableness of the force used by Defendants Temores, Wagner, and Burger, Defendants’ motion
 22 for summary adjudication of Plaintiff’s negligence claim against these Defendants and the City
 23 must be denied.

24 **D. Defamation (against Defendants Burns, Johnson, Ryan, Temores, and the City)**

25 Plaintiff’s fifth cause of action asserts a claim of defamation against Defendants Burns,
 26 Johnson, Ryan, Temores, and the City of Palo Alto. The SAC alleges that Defendants made
 27 defamatory statements including (1) that Plaintiff leered at a wife and young children; (2) that
 28 Plaintiff had scared a wife and her daughter and made them feel uncomfortable by the way he

1 watched them; and (3) that Plaintiff was a drug addict. SAC ¶ 85. Plaintiff claims that Defendants
2 Burns and Johnson published these statements in May to July 2008 in the Palo Alto City Council
3 Report, the Palo Alto Daily news, and elsewhere. SAC ¶¶ 86-87. Plaintiff also claims that
4 Defendants Ryan and Temores published such statements in December 2008 in the Palo Alto Daily
5 News and the Palo Alto Online News. SAC ¶¶ 88-89. In response to discovery requests, Plaintiff
6 also identified similar statements made in police reports and in Plaintiff's criminal court
7 proceeding.

8 Defendants do not dispute that some of the alleged statements may have been false. Mr.
9 Alsman did not state on the 911 call that Plaintiff leered or looked at his wife and daughter in a
10 way that made them uncomfortable, *see* Sherman Decl. Ex. 18 (recording of 911 call), and no
11 evidence has been presented suggesting that Plaintiff has a drug addiction. Defendants argue,
12 however, that they are immune from liability under California Government Code § 821.6. The
13 Court agrees.

14 Pursuant to § 821.6, “[a] public employee is not liable for injury caused by his instituting or
15 prosecuting any judicial or administrative proceeding within the scope of his employment, even if
16 he acts maliciously and without probable cause.” California courts construe this provision broadly
17 “in furtherance of its purpose to protect public employees in the performance of their prosecutorial
18 duties from the threat of harassment through civil suits.” *Gillan v. City of San Marino*, 147 Cal.
19 App. 4th 1033, 1048, 55 Cal. Rptr. 3d 158 (2007). Accordingly, § 821.6 has been held to
20 immunize actions taken in preparation for formal judicial proceedings, as well as the actual
21 institution and prosecution of such proceedings. *Id.* “Acts undertaken in the course of an
22 investigation, including press releases reporting the progress or results of the investigation,” are
23 considered preparation for formal proceedings and are therefore encompassed by § 821.6
24 immunity. *Id.* However, immunity may also extend to statements made after a conviction is
25 obtained and prosecution has ended. *See Cappuccio, Inc. v. Harmon*, 208 Cal. App. 3d 1496,
26 1500, 257 Cal. Rptr. 4 (Cal. Ct. App. 1989). “[T]he test of immunity is not the timing of the
27 publication but whether there is a causal relationship between the publication and the prosecution
28 process. If the making and publication of the statements were part of the process, they [are]

1 protected by the immunity in section 821.6.” *Ingram v. Flippo*, 74 Cal. App. 4th 1280, 1292-93,
 2 89 Cal. Rptr. 2d 60 (Cal. Ct. App. 1999). Immunity under § 821.6 is not limited to claims for
 3 malicious prosecution, but also extends to other causes of action arising from conduct protected
 4 under the statute, including defamation. *Gillan*, 147 Cal. App. 4th at 1048.

5 Here, Plaintiff claims that Defendants made defamatory statements in the months prior to
 6 his criminal proceeding, during his criminal proceeding, and soon thereafter. *See* SAC ¶¶ 86-89;
 7 Ciampi Decl. Ex. 321-2 – 322-10. It appears that the media publications to which Plaintiff refers
 8 quoted the Defendants’ statements from official police reports and testimony in the judicial
 9 proceeding. *See, e.g., id.* Ex. 321-6, 321-9, 321-10, 321-11. Such statements form part of the
 10 preparation and prosecution of the judicial proceedings against Plaintiff and are therefore covered
 11 by § 821.6. In addition, Defendant Ryan’s statements were made in response to the dismissal of
 12 Plaintiff’s criminal case. *See id.* Ex. 321-12. California courts have ruled that public statements
 13 made to report on the outcome of a prosecution are also part of the prosecution process and come
 14 within the scope of § 821.6. *Cappuccio*, 208 Cal. App. 3d at 1500. Accordingly, the Court agrees
 15 that § 821.6 grants Defendants immunity from Plaintiff’s defamation claim and GRANTS
 16 summary adjudication on this issue in favor of Defendants.

17 **E. Malicious Prosecution**

18 Plaintiff’s sixth cause of action asserts a claim of malicious prosecution against all
 19 Defendants. As Defendants point out, however, California Government Code § 821.6 grants public
 20 employees immunity from malicious prosecution claims. *See* Cal. Gov’t Code § 821.6 (“A public
 21 employee is not liable for injury caused by his instituting or prosecuting any judicial or
 22 administrative proceeding within the scope of his employment, even if he acts maliciously and
 23 without probable cause.”); *see also Asgari v. City of Los Angeles*, 15 Cal. 4th 744, 752, 63 Cal.
 24 Rptr. 2d 842 (1997) (“Under California law, a police officer is granted statutory immunity from
 25 liability for malicious prosecution”). “The immunity applies even if the officers abused their
 26 authority,” *County of Los Angeles v. Superior Court*, 181 Cal. App. 4th 218, 229, 104 Cal. Rptr. 3d
 27 230 (Cal. Ct. App. 2009), and extends to claims that the police suppressed evidence. *Randle v.*
 28 *City and County of San Francisco*, 186 Cal. App. 3d 449, 456-57, 230 Cal. Rptr. 901 (Cal. Ct. App.

1 1986). Pursuant to § 821.6, Defendants are immune from liability on Plaintiff's malicious
 2 prosecution claim. Accordingly, the Court GRANTS summary adjudication of this claim.

3
 4 **F. False Arrest and False Imprisonment (against Defendants Temores, Burger,
 Wagner, and the City)**

5 Plaintiff's final cause of action asserts a claim for false arrest and false imprisonment
 6 against Defendants Temores, Burger, Wagner, and the City of Palo Alto. Under California law, the
 7 elements of false imprisonment are "(1) the nonconsensual, intentional confinement of a person,
 8 (2) without lawful privilege, and (3) for an appreciable period of time, however brief." *Lyons v.*
 9 *Fire Ins. Exchange*, 161 Cal. App. 4th 880, 888, 74 Cal. Rptr. 3d 649 (Cal. Ct. App. 2008) (quoting
 10 *Easton v. Sutter Coast Hospital*, 80 Cal. App. 4th 485, 496, 95 Cal. Rptr. 2d 316 (Cal. Ct. App.
 11 2000)). "In California, false arrest is a species of the tort of false imprisonment." *Blankenhorn v.*
 12 *City of Orange*, 485 F.3d 463, 486 n.15 (9th Cir. 2007). "A person is falsely imprisoned 'if he is
 13 wrongfully deprived of his freedom to leave a particular place by the conduct of another.'" *Hagberg v. California Federal Bank FSB*, 32 Cal. 4th 350, 373, 81 P.3d 244 (2004) (quoting
 14 *Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1123, 252 Cal. Rptr. 122, 762 P.2d 46 (1988)). In his
 15 opposition brief, Plaintiff argues that Defendants are liable for false imprisonment or arrest because
 16 they lacked articulable facts to detain Plaintiff. However, the Court has found that Defendants had
 17 a reasonable, articulable suspicion that justified their detention of Plaintiff, and that officer safety
 18 concerns justified subsequent use of the Taser in drive-stun mode to subdue and restrain Plaintiff.
 19 Accordingly, Plaintiff's arguments do not establish a claim for false imprisonment, and the Court
 20 GRANTS Defendants' motion for summary adjudication of this claim.

21
 22 **VI. Plaintiff's Motions for Reconsideration**

23 Finally, the Court notes that on April 21, 2011, Plaintiff filed a motion styled as a motion
 24 for leave to file a motion for reconsideration. *See* Mot. for Leave to File a Mot. for
 25 Reconsideration, ECF No. 146. Subsequently, on April 25, 2011, Plaintiff filed a supplement to
 26 the April 21 motion. *See* Supplement to Mot. for Leave to File a Mot. for Reconsideration, ECF
 27 No. 148. Through these motions, Plaintiff seeks to supplement his briefing in opposition to the
 28 motion for summary judgment with case law of which he was unaware when his opposition brief

1 was due. The Court has reviewed Plaintiff's motions and found that nothing contained therein
 2 would change the reasoning or outcome of this Order. Additionally, Plaintiff's motions are
 3 untimely and procedurally improper. *See* Civ. L.R. 7-3(d) (governing supplemental material filed
 4 after a reply); Civ. L.R. 7-9 (governing motions for reconsideration of an interlocutory order).
 5 Accordingly, the Court DENIES Plaintiff's request for leave to file the proposed motions for
 6 reconsideration.

7 **VII. Conclusion**

8 For the reasons discussed above, the Court GRANTS in part and DENIES in part Defendants'
 9 motion for summary judgment. The Court GRANTS summary adjudication in favor of Defendants
 10 on the following claims: (1) first cause of action under 42 U.S.C. § 1983; (2) fifth cause of action
 11 for defamation; (3) sixth cause of action for malicious prosecution; and (4) seventh cause of action
 12 for false imprisonment and false arrest. The Court DENIES summary adjudication on the
 13 following claims: (2) second cause of action for assault and battery; (3) third cause of action for
 14 intentional infliction of emotional distress; and (4) fourth cause of action for negligence.

15 **IT IS SO ORDERED.**

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 17 Dated: May 11, 2011

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 19 _____
 20 LUCY H. KOH
 21 United States District Judge
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