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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 GUADALUPE MARTINEZ-
11 RODRIGUEZ,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA,

15 Defendant.

CASE NO. C08-0265JLR

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

16 This matter came for trial on September 20-21, 2011, before the court sitting
17 without a jury. Plaintiff Guadalupe Martinez-Rodriguez was represented by Glenn
18 Kenneth Carpenter, Jr. Defendant United States of America was represented by Harold
19 Malkin and Kerry Jane Keefe of the United States Attorney's Office in Seattle,
20 Washington. The court has considered the testimony presented at trial, the exhibits
21 admitted into evidence, and the arguments of counsel. The court has weighed the
22 testimony, exhibits, and evidence using the required "preponderance of the evidence"

1 standard. Now the court, being fully advised, makes its findings of fact and conclusions
2 of law as follows.

3 **I. FINDINGS OF FACT**

4 1. The parties stipulated to the following facts prior to trial (*see* Proposed
5 Pretrial Order (Dkt. # 67)):

6 a. Mr. Martinez-Rodriguez was a resident of Washington State at all
7 times relevant to the lawsuit.

8 b. Defendant United States of America, was the employer of former
9 Defendant Kevin Wetteland, an agent with the United States Drug Enforcement
10 Administration (“DEA”) at all times material hereto.

11 c. At all times relevant to this matter, Special Agent Wetteland was
12 acting within the scope of his employment with the United States of America.

13 d. On August 22, 2005, Mr. Martinez-Rodriguez was arrested by DEA
14 agents, including Agent Wetteland, in the parking lot of Cafe Arizona in Federal
15 Way, Washington.

16 e. During the arrest, two of Mr. Martinez-Rodriguez’s fingers on his
17 right hand were broken and he sustained abrasions to the right side of his face and
18 right shoulder.

19 f. At the time of the arrest, Mr. Martinez-Rodriguez was wearing a
20 white sleeveless t-shirt, knee-length shorts, and sandals.

21 g. As the result of the injury to Mr. Martinez-Rodriguez’s fingers on
22 August 22, 2005, the range of motion of those fingers continues to be limited.

1 h. Mr. Martinez-Rodriguez's injury to his fingers will result in a total
2 economic loss of \$28,211.00 over the remainder of his working life.

3 i. DEA does not instruct DEA agent trainees, and did not instruct
4 Agent Wetteland, in the use of a finger hold.

5 j. DEA training in arrest techniques emphasizes tactics that employ
6 "gross" rather than "fine" motor skills.

7 k. DEA's investigation of Mr. Martinez-Rodriguez was assigned to
8 DEA Special Agent Steven Taibi and was triggered by information Agent Taibi
9 received from a Confidential Source ("C/S") on August 22, 2005.

10 l. At the time of his arrest and just prior to being taken to the ground
11 by Agent Wetteland, Mr. Martinez-Rodriguez participated in the delivery of one
12 pound of methamphetamine to a DEA C/S.

13 m. During the period April 17, 2008 to June 1, 2011, medical records
14 indicate that Mr. Martinez-Rodriguez was treated by medical personnel on three
15 occasions (February 2, 2010, February 10, 2010 and June 1, 2011) for complaints
16 of pain or other complications associated with the middle and ring fingers of Mr.
17 Martinez-Rodriguez's right hand, which were broken during Mr. Martinez-
18 Rodriguez's arrest on August 22, 2005.

19 2. The parties also stipulated to the Physical Capacity Report of Fay J. Tripp,
20 M.S. (*See Proposed Pretrial Order at 13; Pl.'s Ex. 7.*)

21 3. The court makes the following findings regarding credibility and the weight
22 it has given to the testimony of certain witnesses.

1 a. Mr. Martinez-Rodriguez testified on his own behalf. Although the
2 court finds Mr. Martinez-Rodriguez credible regarding the extent of his injuries
3 and the pain that he continues to suffer as a result, the court finds the testimony of
4 Mr. Martinez-Rodriguez to be less credible than the testimony of the DEA Special
5 Agents regarding the events of August 22, 2005. The court's determination that
6 Mr. Martinez-Rodriguez's testimony is less credible is based on Mr. Martinez-
7 Rodriguez's testimony on cross-examination during his rebuttal case that Special
8 Agent John Satchell did not ask him questions while Agent Satchell processed him
9 at the DEA following his arrest and before transporting him to the Pierce County
10 Jail. The evidence was uncontroverted that Agent Satchell processed Mr.
11 Martinez-Rodriguez for booking; the court does not find it credible that Agent
12 Satchell asked Mr. Martinez-Rodriguez no questions during this process.

13 b. Each party presented a medical expert to testify as to his or her
14 opinions regarding the mechanism by which Mr. Martinez-Rodriguez's fingers
15 were broken. Mr. Martinez-Rodriguez called Dr. Randall Patten, a diagnostic
16 radiologist. The United States called Dr. Sarah Beshlian, a board-certified
17 orthopedic surgeon specializing in injuries to the hand and upper extremities.
18 Although the court finds both experts to be credible, the court placed more weight
19 on the opinions offered by Dr. Beshlian because Dr. Beshlian has more relevant
20 experience diagnosing and treating injuries to the bones of the hands and fingers
21 than Dr. Patten.

1 4. DEA's investigation of Mr. Martinez-Rodriguez was assigned to Agent
2 Taibi and triggered by information he received from a C/S on the morning of August 22,
3 2005. The C/S related that he had had several prior conversations with Mr. Martinez-
4 Rodriguez during which Mr. Martinez-Rodriguez indicated a willingness to supply the
5 C/S with methamphetamine.

6 5. Prior to attempting to arrange a delivery of methamphetamine by Mr.
7 Martinez-Rodriguez to the C/S, Agent Taibi enlisted the assistance of other DEA agents
8 in the investigation, including Agent Wetteland, and provided them with an Operational
9 Briefing during which they were apprised of the plan to stage a "buy-bust" operation
10 involving methamphetamine.

11 6. Following the Operational Briefing, Agent Wetteland's involvement with
12 Agent Taibi's investigation of Mr. Martinez-Rodriguez commenced with surveillance of
13 Mr. Martinez-Rodriguez as he met with the C/S outside Freddie's Casino in Fife,
14 Washington, at approximately 5:30 p.m. on August 22, 2005. The purpose of the
15 meeting was for Mr. Martinez-Rodriguez to deliver a one-ounce sample of
16 methamphetamine to the C/S.

17 7. At the conclusion of the meeting between Mr. Martinez-Rodriguez and the
18 C/S at Freddie's Casino, the C/S provided Agent Taibi with what Mr. Martinez-
19 Rodriguez represented was the one-ounce sample of methamphetamine. Following Mr.
20 Martinez-Rodriguez's departure, Agent Taibi field-tested the substance, confirmed that
21 the substance tested positive for methamphetamine, and broadcast confirmation via radio
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1 of the one-ounce delivery to the other agents involved in the investigation, including
2 Agent Wetteland.

3 8. As Mr. Martinez-Rodriguez's car departed Freddie's Casino, Agent
4 Wetteland followed the car in which Mr. Martinez-Rodriguez was traveling to an
5 apartment complex in Kent, Washington.

6 9. Agent Wetteland and another DEA Task Force agent separately surveilled
7 the Kent apartment complex until Mr. Martinez-Rodriguez and a second individual left
8 the complex, at which time Agent Wetteland followed Mr. Martinez-Rodriguez's car to
9 Cafe Arizona in Federal Way, Washington.

10 10. During a phone conversation the C/S had with Mr. Martinez-Rodriguez at
11 Agent Taibi's direction minutes before Mr. Martinez-Rodriguez left the Kent apartment
12 complex, Mr. Martinez-Rodriguez agreed to deliver a pound of methamphetamine to the
13 C/S at Cafe Arizona in Federal Way, Washington. Agents involved in the investigation,
14 including Agent Wetteland, were advised of this fact by radio.

15 11. Distribution of methamphetamine is a serious offense.

16 12. Mr. Martinez-Rodriguez selected Cafe Arizona as the location for his
17 second meeting with the C/S.

18 13. Mr. Martinez-Rodriguez arrived at Cafe Arizona at approximately 6:30
19 p.m. in the passenger seat of a green Plymouth Breeze, followed shortly thereafter by the
20 C/S, who parked his car some distance from Mr. Martinez-Rodriguez. After about five
21 minutes, Mr. Martinez-Rodriguez's car re-positioned itself across from the C/S's car.
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1 14. After arriving in the vicinity of Cafe Arizona, Agent Wetteland, who was
2 wearing a vest with the word "POLICE" visible across the front, located himself some
3 distance to the east of where Mr. Martinez-Rodriguez and the C/S were parked.

4 15. A surveillance video shot by Agent Jewell outside Cafe Arizona shows Mr.
5 Martinez-Rodriguez getting out of the car and walking towards the C/S's car wearing
6 knee-length shorts and a white tank top.

7 16. The DEA video also captures the individual who arrived at Cafe Arizona
8 with Mr. Martinez-Rodriguez getting out of the car at the same time as Mr. Martinez-
9 Rodriguez and retrieving a package from the trunk. This second individual deposited the
10 package in the back seat of the Breeze. Moments later, the video shows Mr. Martinez-
11 Rodriguez getting into the back seat of Mr. Martinez-Rodriguez's car, the C/S opening
12 the door and looking into the back seat of the car, and then the C/S leaving the car and
13 giving a pre-arranged "bust" signal to nearby undercover DEA agents.

14 17. Upon seeing the C/S give the pre-arranged "bust" signal, which signaled
15 that the C/S had seen the methamphetamine in Mr. Martinez-Rodriguez's car, agents
16 converged on Mr. Martinez-Rodriguez and the driver of the Plymouth Breeze.

17 18. Agent Wetteland reasonably presumed that Mr. Martinez-Rodriguez, who
18 had just delivered one pound of methamphetamine to DEA's C/S, could be armed and
19 dangerous.

20 19. As Agent Taibi approached Mr. Martinez-Rodriguez at rifle point, Agent
21 Taibi shouted at him to "Raise your hands; get on the ground!" At the same time, Special
22 Agent Errin Jewell, who was located on the other side of Mr. Martinez-Rodriguez,

1 shouted “Manos arriba!”—“Hands up!” in Spanish. Agent Jewell stopped shouting when
2 he realized that Agent Taibi’s shouts were louder.

3 20. Mr. Martinez-Rodriguez did not “get on the ground,” as he was instructed
4 to do, but instead raised his hands to his head, looked from side to side and then, without
5 being instructed to do so, began to lower his hands.

6 21. From his vantage point, Agent Wetteland reasonably interpreted Mr.
7 Martinez-Rodriguez’s failure to follow agent commands, his head movements, and the
8 lowering of his hands as an indication that Mr. Martinez-Rodriguez was contemplating
9 flight or about to flee.

10 22. Agent Wetteland reasonably believed that the risk posed by Mr. Martinez-
11 Rodriguez’s imminent flight from the crime scene could endanger the safety of DEA
12 agents attempting to subdue him and/or members of the general public in the vicinity of
13 the Cafe Arizona.

14 23. In the few seconds Agent Wetteland had to react to Mr. Martinez-
15 Rodriguez’s actions, Agent Wetteland elected to attempt to subdue Mr. Martinez-
16 Rodriguez by taking Mr. Martinez-Rodriguez to the ground.

17 24. Agent Wetteland took Mr. Martinez-Rodriguez to the ground by running
18 towards Mr. Martinez-Rodriguez, who was standing at a slight angle, and by extending
19 his forearm into Mr. Martinez-Rodriguez’s upper torso, which caused Mr. Martinez-
20 Rodriguez to fall backwards and to the right.

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1 25. After being struck and knocked to the right by Agent Wetteland, Mr.
2 Martinez-Rodriguez fell to the ground landing on his right hand, which resulted in him
3 breaking his middle and ring fingers.

4 26. The events that transpired between when Mr. Martinez-Rodriguez was
5 confronted by officers and Agent Wetteland's decision to take Mr. Martinez-Rodriguez to
6 the ground took place within less than 10 seconds.

7 27. Agent Wetteland did not attempt to subdue Mr. Martinez-Rodriguez by
8 grabbing his fingers and twisting them until they broke.

9 28. DEA does not instruct DEA agent trainees, and did not instruct Agent
10 Wetteland, in the use of a finger hold. Rather, DEA's training in arrest techniques
11 emphasizes tactics that employ "gross" rather than "fine" motor skills.

12 29. The testimony of DEA Special Agent Nikos Eliopoulos established that the
13 manner in which Agent Wetteland took Mr. Martinez-Rodriguez to the ground following
14 his failure to comply with lawful commands was consistent with the training Agent
15 Wetteland received in arresting non-compliant suspects. Agent Wetteland attempted (1)
16 to gain control of the situation by going "hands on"; (2) to disrupt Mr. Martinez-
17 Rodriguez's balance; and (3) to take Mr. Martinez-Rodriguez to the ground so that he
18 could be handcuffed.

19 30. Although the agents were aware that Mr. Martinez-Rodriguez spoke
20 Spanish, at no time prior to Mr. Martinez-Rodriguez's arrest did Agent Wetteland or
21 other agents involved in Mr. Martinez-Rodriguez's arrest have information that Mr.
22 Martinez-Rodriguez did not understand English.

1 31. Following Mr. Martinez-Rodriguez's arrest, Agents Taibi, Jewell and
2 Satchell observed Mr. Martinez-Rodriguez display an understanding of English.

3 32. X-rays taken of Mr. Martinez-Rodriguez's broken fingers on August 22,
4 2005, at St. Francis Hospital, do not reveal a spiral fracture pattern, which would be
5 present were Mr. Martinez-Rodriguez's injuries purely rotational in nature.

6 33. The testimony of Dr. Beshlian, a Board-certified orthopedic surgeon with
7 "Added Qualifications in Hand Surgery," established that it was more likely than not that
8 Mr. Martinez-Rodriguez's fingers were broken when he fell to the ground and landed in
9 whole or in part on his right hand, and not as the result of Agent Wetteland twisting Mr.
10 Martinez-Rodriguez's fingers.

11 34. Testimony at trial established that given the totality of the circumstances
12 with which he found himself confronted and of which he had knowledge on August 22,
13 2005, Agent Wetteland's actions when subduing Mr. Martinez-Rodriguez were
14 objectively reasonable.

15 II. CONCLUSIONS OF LAW

16 1. Under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*,
17 "The United States shall be liable . . . relating to tort claims, in the same manner and to
18 the same extent as a private individual under like circumstances, but shall not be liable
19 for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674.

20 2. Liability and, if appropriate, damages under the FTCA are determined in
21 accordance with the law of the place where the act or omission that is the subject of an
22 FTCA action took place. 28 U.S.C. § 1346(b)(1); *see, e.g., Klein v. United States*, 537

1 F.3d 1027, 1030 (9th Cir. 2008). In this action, the relevant acts took place in
2 Washington and, therefore, Washington law applies.

3 3. Any damages Mr. Martinez-Rodriguez may be awarded cannot exceed
4 \$350,000, the amount set forth in the administrative tort claim that Mr. Martinez-
5 Rodriguez presented to DEA on June 18, 2007. 28 U.S.C. § 2675(b)

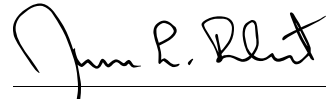
6 4. Washington law defines the tort of assault as the use or threatened
7 immediate use of force that causes reasonable apprehension of harm. *Brower v. Ackerley*,
8 943 P.2d 1141, 1144-45 (Wash. Ct. App. 1997).

9 5. Battery is defined under Washington law as an intentional tort, requiring
10 the tortfeasor to intend a harmful touching and requiring the plaintiff to show that there
11 was no consent to the touching. *Garratt v. Dailey*, 279 P.2d 1091, 1093 (Wash. 1955).

12 6. Under Washington law, force used by a police officer is not unlawful
13 “[w]hen necessarily used . . . in the performance of a legal duty.” *See Brooks v. City*
14 *of Seattle*, 599 F.3d 1018, 1031 (9th Cir. 2010) (citing RCW 9A.16.020(1)).

15 7. When assessing the liability of federal law enforcement officers for torts
16 committed in the course of making an arrest, Washington law employs the “objective
17 reasonableness” standard of the Fourth Amendment. *See Garcia v. United States*, No.
18 C06-0041JCC, slip op. at 14-15 (W.D. Wash. August 7, 2008) (“objective
19 reasonableness” test applies under Washington law to assault claim against federal agent
20 brought under FTCA) (citations omitted) (citing *Seaman v. Karr*, 59 P.3d 701, 709
21 (Wash. Ct. App. 2002); *McKinney v. City of Tukwila*, 13 P.3d 631, 641 (Wash. Ct. App.
22 2000)).

Dated this 22nd day of September, 2011.



JAMES L. ROBART
United States District Judge

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