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**IN THE SUPREME COURT OF
THE STATE OF IDAHO**

Docket No. 45499

| | | |
|-----------------------------|---|----------------------------|
| STEVEN L. PICATTI, |) | |
| Plaintiff-Appellant, |) | Boise, January 2019 |
| v. |) | Term |
| AARON MINER and |) | Opinion Filed: |
| DENNIS LAURENCE, |) | September 10, 2019 |
| Defendants- |) | Karel A. Lehrman, |
| Respondents, |) | Clerk |
| and |) | SUBSTITUTE OPINION. |
| MARK WILLIAMSON, |) | THE OPINION |
| RANDALL GOOD- |) | PREVIOUSLY |
| SPEED, and JOHN |) | RELEASED ON JUNE |
| DOES 1-5, |) | 7, 2019 IS HEREBY |
| Defendants. |) | WITHDRAWN. |

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Jason D. Scott, District Judge.

The district court's order granting summary judgment is affirmed in part and vacated in part.

Johnson & Monteleone, LLP, Boise, for appellant. Bruce S. Bistline argued.

Jan M. Bennetts, Ada County Prosecuting Attorney, Boise, for respondent. Erica White argued.

BRODY, Justice.

This appeal arises from the district court's decision to bar Steven Picatti's 42 U.S.C. section 1983 claims against two deputies on the basis of collateral estoppel. On July 12, 2014, Picatti struggled to drive home because road access was blocked for the Eagle Fun Days parade. After circumventing some orange barricades, Picatti drove toward two uniformed deputies who were on foot patrol by a crosswalk, which was marked with a large sign reading: "road closed to thru traffic." The factual background from that point becomes heavily disputed.

Picatti alleges that Deputy Miner hit the hood of his car, then pulled Picatti out of his truck to tase and arrest him. The deputies contend that Picatti "bumped" Deputy Miner with his truck and then resisted arrest, forcing them to tase him into submission. Picatti was ultimately arrested on two charges: resisting and obstructing officers (I.C. § 18-705), and aggravated battery on law enforcement (I.C. § 18-915(3)). At the conclusion of the preliminary hearing, Picatti was bound over. Prior to trial, Picatti accepted a plea agreement in which he pleaded guilty to disturbing the peace (I.C. § 18-6409) for "failing to obey a traffic sign and driving into a restricted pedestrian area." The court entered a judgment of conviction, which has not been appealed, overturned, or expunged.

Two years later, Picatti brought a 42 U.S.C. section 1983 suit against his arresting deputies, claiming deprivations of his protected rights to be free from (1)

unreasonable seizure, (2) excessive force, and (3) felony arrest without probable cause. The district court granted summary judgment to the defending deputies holding that collateral estoppel barred Picatti from re-litigating probable cause once it was determined at the preliminary hearing. Picatti timely appealed. We affirm the order granting summary judgment to the deputies as to Picatti's claims of false arrest and unreasonable seizure; however, we vacate the summary judgment as to Picatti's excessive force claim. The district court correctly applied the doctrine of collateral estoppel to Picatti's claims of false arrest and unreasonable seizure, but not as to excessive force. In addition, we cannot find as a matter of law that the deputies are entitled to qualified immunity on Picatti's excessive force claim when there is a genuine issue of material fact.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of July 12, 2014, Steven Picatti drove west on Highway 44 through Eagle, Idaho, on his way home. Because the community was celebrating the Eagle Fun Days festival, a parade blocked access to Picatti's residence. With several access points closed, Picatti drove his vehicle around orange barrel barricades toward a pedestrian crosswalk where two uniformed deputies were on foot patrol. The crosswalk was blocked by a sign marked "road closed to thru traffic."

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Picatti alleges that he approached one officer in his vehicle to ask for directions home. Deputy Miner then advanced towards the vehicle and slammed his hands onto the hood. Miner was agitated and yelling at Picatti, but Picatti could not hear Miner's shouts over the noisy engine. Picatti contends Miner went to the driver's door, opened it, and "grabbed [Picatti] around the neck." Picatti said he could not exit the vehicle because his seatbelt was on, and he was afraid to remove his hands from the steering wheel. He repeated the words "seat belt" to Miner several times. Miner then reached across Picatti to unlatch the seatbelt. Miner and another officer, Deputy Laurence, then pulled Picatti out of the vehicle, and pushed Picatti to the ground in an effort to arrest him. Picatti said he struggled simply to get off the hot pavement and claims he could not breathe as the deputies pushed him against the ground. He also claims that the deputies never gave him any instructions, commands, or explanations as they wrestled him from his truck to the ground. After multiple attempts to push himself off the ground, Picatti was tased in the back and handcuffed.

Miner, however, alleges that Picatti did not slow his truck down as he came around the barricades, nor did it appear that he would stop the vehicle. Laurence even began unholstering his gun out of concern Picatti would not stop the truck. Miner pushed through some pedestrians to place himself in front of the crosswalk, and ordered Picatti to stop the vehicle. The truck slowed down but physically pushed Miner back into the crosswalk before stopping. Miner claimed that

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Picatti looked frustrated and gestured at him with his hands. Miner slammed his hand on the hood of Picatti's truck. The truck then "jerked" forward and hit Miner a second time. Miner walked over to the driver's door, opened it, and ordered Picatti to exit the vehicle. Picatti refused. Miner released Picatti's seatbelt, then he and Laurence pulled Picatti out of the truck. As the three men struggled against one another, Picatti and the deputies went to the ground.

Officer Goodspeed also came to assist in subduing and arresting Picatti. Goodspeed noted that Picatti was "very fit" despite being seventy years old, and struggled against the officers as they tried to handcuff him. Miner contends that Picatti refused to put his hands behind his back, and instead continually tried to get up. During the struggle, Laurence also felt someone tugging on his gun and yelled out, "get your hands off my gun." Once Laurence could see his weapon, he saw that Picatti's hand had become trapped between Laurence's gun and holster; Picatti's "wild" arm movements tugged at the holster even though he did not reach for the weapon. Upon hearing Laurence's shout, however, Miner tased Picatti to quickly quell the struggle. Both Laurence and Goodspeed were also shocked by the taser wires. Finally subdued, the deputies handcuffed Picatti. Deputy Williamson then transported Picatti to the Ada County Jail on a misdemeanor charge of resisting and obstructing officers (I.C. § 18-705), as well as a felony charge for aggravated battery on law enforcement (I.C. § 18-915(3)).

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On August 20, 2014, Picatti appeared before a judge for a preliminary hearing. Picatti and Miner were the only witnesses at the hearing, and both testified. Picatti's attorney cross examined Miner at length, and questioned Picatti as well. At the hearing's conclusion, the court determined there was probable cause to bind Picatti over to the district court on the felony charge, and sufficient cause to believe he was guilty of both charges. The magistrate court explained that Picatti's vehicle came into contact with Miner, with Picatti knowing that Miner was a deputy.

Prior to trial, Picatti reached a plea agreement, in which he pleaded guilty to disturbing the peace (I.C. § 18-6409) for "failing to obey a traffic sign and driving into a restricted pedestrian area." The court entered a judgment of conviction, which has not been appealed or overturned.

Almost two years later, Picatti filed a civil suit against Miner and Laurence, asserting under 42 U.S.C. section 1983 a deprivation of his protected right to be free from (1) unreasonable seizure, (2) excessive force, and (3) felony arrest without probable cause. While the initial complaint asserted claims against four defendants—Miner, Laurence, Goodspeed, and Deputy Mark Williamson—the court dismissed the claims against Williamson and awarded summary judgment to Goodspeed. Only Miner and Laurence remain as defendants.

On July 17, 2017, the deputies filed a motion for summary judgment, arguing in their memorandum

that Picatti's claims were barred by collateral estoppel because the criminal court adjudicated and found probable cause for his arrest. Picatti then filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment, asserting there was no probable cause determination to his claim, nor was there full and fair litigation on the issue of probable cause. After evaluating the parties' claims, the district court granted the deputies' motion for summary judgement on the basis of collateral estoppel—namely, that the August 20, 2014 hearing barred Picatti's civil claim because the earlier criminal proceedings established probable cause for the arrest. The court explained that Picatti's excessive-force claim and false-arrest claim would require the court to re-litigate the existence of probable cause. Picatti timely appealed to this Court.

II. STANDARD OF REVIEW

Determining whether collateral estoppel bars claims from relitigation is a question of law over which the Court exercises free review. *Rodriguez v. Dep't of Correction*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001). Likewise, determining whether an officer is entitled to qualified immunity requires de novo review on appeal. *James v. City of Boise*, 160 Idaho 466, 477, 376 P.3d 33, 44 (2016).

III. ANALYSIS

A. **The district court erred in granting summary judgment to the deputies.**

Picatti's claims for false arrest and unreasonable seizure are premised on the assertion that the deputies did not have probable cause to seize him. The magistrate court ruled at a contested hearing that there was probable cause to believe that Picatti was guilty of committing the charges of aggravated battery on an officer and resisting or obstructing officers. Picatti simply cannot relitigate probable cause for his arrest or felony prosecution. In addition, while Picatti's final claim of excessive force was not decided in the prior criminal proceedings—and, consequently, is not precluded by the doctrine of collateral estoppel—we cannot determine whether the deputies are entitled to qualified immunity until the disputed facts are resolved below. Accordingly, collateral estoppel bars Picatti's claims as to the claims for false arrest and unreasonable seizure, but not his claim for excessive force.

1. **Picatti's claims for false arrest and unreasonable seizure are barred by the doctrine of collateral estoppel.**

Picatti argues that the preliminary hearing cannot collaterally estop his civil claims because the lower standard of proof in a preliminary hearing should not bar relitigation of the issue of probable cause. He also argues that the possibility Miner lied in the

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preliminary hearing should permit a new determination on the existence of probable cause. However, Picatti's arguments miss the mark on the collateral estoppel inquiry—the question is whether Picatti fully and fairly litigated the issue of probable cause before the magistrate court, and was fully incentivized to contest probable cause because of the significance of the preliminary hearing.

Collateral estoppel stems from the doctrine of *res judicata*, and establishes a legal barrier against the relitigation of an identical issue with the same party or its privy. *Rodriguez v. Dep't of Correction*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001); *Anderson v. City of Pocatello*, 112 Idaho 176, 183, 731 P.2d 171, 178 (1986). This doctrine, also known as issue preclusion, prevents a party from resurrecting a lawsuit already put to rest; it protects litigants from unnecessary costs and promotes judicial economy from needless and likely inconsistent adjudications. *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012); *Pines, Inc. v. Bossingham*, 131 Idaho 714, 717, 963 P.2d 397, 400 (Ct. App. 1998).

This Court established five factors that must be evident for collateral estoppel to bar the relitigation of an issue determined in a prior proceeding:

- (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case;
- (2) the issue decided in the prior litigation was identical to the issue presented in the present action;
- (3) the issue sought to

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be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Rodriguez, 136 Idaho at 93, 29 P.3d at 404. Accordingly, a prior criminal proceeding may bar a plaintiff from relitigating the same issue in a subsequent civil action, including suits brought under 42 U.S.C. section 1983. *See, e.g., Anderson*, 112 Idaho at 176, 731 P.2d at 171.

The United States Supreme Court has continually recognized that 42 U.S.C. section 1983 “creates a species of tort liability.” *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). The statute specifically provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

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42 U.S.C. § 1983. This provision “supplies a remedy for the deprivation under color of state law of federally protected rights.” *James v. City of Boise*, 160 Idaho 466, 473, 376 P.3d 33, 40 (2016). Thus a police officer could be found liable for damages under 42 U.S.C. section 1983 where he infringed on the plaintiff’s federally protected rights, such as using unreasonable force in effecting an arrest. *See Sprague v. City of Burley*, 109 Idaho 656, 664, 710 P.2d 566, 574 (1985).

Generally, civil tort actions remain inappropriate vehicles to challenge the validity of criminal judgments—concerns for finality and consistency have invariably restricted opportunities for collateral attacks. *Heck*, 512 U.S. at 484–86. In *Heck v. Humphrey*, the U.S. Supreme Court explained that where a section 1983 action would render a criminal sentence or conviction invalid, a plaintiff must prove the criminal adjudication “has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” 512 U.S. at 487. “A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.” *Id.* at 487. Likewise, even where a section 1983 action “does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff’s criminal conviction was wrongful” would require the plaintiff to negate an element of the offense for which he has been convicted.

Id. at 487 n.6. This category would include the situation where a plaintiff resisted arrest and then brought a section 1983 action against a police officer for a violation of his Fourth Amendment right to be free from unreasonable seizures. *Id.*

The key inquiry, the Court explained, is to “consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.” *Id.* at 487. If it would so imply, the complaint must be dismissed until the plaintiff proves the criminal adjudication was invalidated; if it would not imply invalidity, the civil action should proceed. *Id.* For example, in the Ninth Circuit Court of Appeals’s case *Smithart v. Towery*, Smithart brought a section 1983 claim against his arresting police officers, claiming they “used force far greater than that required for his arrest and out of proportion to the threat which he posed to [them].” 79 F.3d 951, 952 (9th Cir. 1996). “Because a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart’s arrest or conviction,” his claim against the officers was not precluded by *Heck* even though he failed to show a reversal, expungement, or other invalidation of his prior conviction. *Id.* at 952–53.

Two Idaho cases demonstrate how a preliminary hearing affects the collateral estoppel factors in a 42 U.S.C. section 1983 claim. First, in *State v. Gusman*, police arrested a driver for driving under the influence, among other charges. 125 Idaho 805, 806, 874 P.2d 1112, 1113 (1994). At the time of Gusman’s arrest, the officer on the scene believed that the driver and

passenger had switched seats, with Gusman ending up as the passenger. *Id.* Believing Gusman to be the real driver, the officer asked Gusman to take a blood alcohol evidentiary test, which she refused. *Id.* He then seized her license. *Id.* At the license suspension hearing (BAC hearing), Gusman—the only witness—showed the court evidence she was not operating the vehicle on the night in question, and the court determined there was no evidence the officer had reasonable grounds or probable cause to believe she was the driver. *Id.* Gusman then raised this BAC-hearing finding during her DUI criminal prosecution as a basis to dismiss the charges, but the court declined to apply collateral estoppel. *Id.* at 807. As a result, Gusman pleaded guilty to both driving under the influence and obstructing an officer to drop the remaining charges against her, and then appealed. *Id.* This Court ultimately affirmed the district court’s decision to not apply collateral estoppel. *Id.*

This Court explained in *Gusman* that the BAC hearing was litigated to a final judgment, but the State did not have a full and fair opportunity to litigate because it had no incentive to vigorously litigate the license suspension. *Id.* at 808. Such a hearing, this Court explained, was just a minor civil matter pursued by the driver, who had the burden to show why she did not submit to an evidentiary test. *Id.* Allowing collateral estoppel to apply would have turned the BAC hearing into a criminal matter, and forced the state to aggressively litigate future BAC hearings to prevent issue preclusion in subsequent criminal prosecutions. *Id.* at 808–09. In addition, this Court held that the issues

were not identical: “the only issues decided at the BAC hearing and the only issue entitled to preclusive effect is that the officer did not have probable cause to request Gusman to submit to the evidentiary test.” *Id.* at 809. Because that issue was not present in the DUI prosecution, the ultimate issues of fact were not identical, nor were they barred by collateral estoppel. *Id.*

Second, in *Anderson v. City of Pocatello*, a plaintiff was acquitted of aggravated assault upon police officers, but criminally convicted of “intentionally, without malice” aiming a firearm at others. 112 Idaho 176, 179, 731 P.2d 171, 174 (1986). The police had been investigating the vandalism of an apartment when Anderson emerged from his neighboring apartment with a loaded shotgun. *Id.* The remaining facts were widely disputed. *Id.* Anderson alleged that he never aimed a gun at anyone—and in fact, did not know the men were police officers—while the defendants said Anderson pointed a gun at them after running out of his apartment, forcing them to fire their own weapons. *Id.* Anderson was shot three times before being arrested for aggravated assault on officers. *Id.* He later brought a 42 U.S.C. section 1983 claim against the arresting officers. The district court granted summary judgment to the officers, determining that there was no factual dispute over whether the officers acted on reasonable grounds. *Id.* at 181.

This Court held that Anderson was estopped from denying he had pointed the gun at the officers because that fact was established by the earlier conviction. *Id.* at 180. Nevertheless, this Court reversed the district

court's grant of summary judgment because the criminal trial did not adjudicate whether the officers acted on reasonable grounds. *Id.* "Because the evidence renders conflicting inferences, a genuine issue of material fact remains as to whether the officers acted with a good faith belief based upon *reasonable grounds* that the measures they took were necessary." *Id.* (emphasis in original). Doubts remained over whether the officers had reasonable grounds to fire at Anderson—doubts that had to be resolved against the moving party in summary judgment. *Id.* While *Anderson* specifically addressed whether collateral estoppel barred a section 1983 claim following a criminal conviction, its principle applies to collateral estoppel questions in general because issue preclusion "works to prevent the relitigation of issues of ultimate fact." *Gusman*, 125 Idaho at 808, 874 P.2d at 1115. Indeed, the exact rule held in *Anderson* stated: "collateral estoppel bars the relitigation of an issue determined in a criminal *proceeding* in which the party sought to be estopped had a full and fair opportunity to litigate that issue." 112 Idaho at 184, 731 P.2d at 179 (emphasis added).

We also find our sister jurisdiction's case law on this issue persuasive. In *Haupt v. Dillard*, the U.S. Ninth Circuit Court of Appeals examined whether the finding of probable cause in the preliminary hearing barred its relitigation in the defendant's later section 1983 claim. 17 F.3d 285, 288–89 (9th Cir. 1994), *as amended* (Apr. 15, 1994). In *Haupt*, the defendant had been arrested and prosecuted for the charges of kidnapping and murdering a seven-year-old boy. *Id.* at

286–87. While the preliminary hearing established probable cause to arrest the defendant, the jury ultimately acquitted him of all charges. *Id.* at 287–88. The defendant then brought a 42 U.S.C. section 1983 action against the police detectives that arrested him, arguing the officers secured an arrest warrant with an affidavit they knew contained false statements and omitted facts showing Haupt’s innocence. *Id.* at 287–88.

The Ninth Circuit applied Nevada law, which “estopped [a litigant] from raising an issue in a subsequent proceeding if (1) the issue was actually litigated and necessarily determined in the prior proceeding, and (2) the parties in the two proceedings were the same or in privity.” *Id.* at 288 (citations omitted). The court held that the probable cause determination at Haupt’s preliminary hearing was “a final, conclusive determination of the issue” and “sufficiently conclusive of the issue to preclude its relitigation.” *Id.* at 288–89. Furthermore, while the court recognized that some defendants may not fully litigate probable cause for tactical reasons—which could, consequently, render collateral estoppel inappropriate—Haupt “vigorously fought the probable cause issue” by pointing out deficiencies in the affidavit and seeking a writ of habeas corpus to overturn the probable cause determination. *Id.* at 289–90. Thus, the court concluded, Haupt could not relitigate the issue of probable cause, and the defendant detectives were immune from suit on charges they violated Haupt’s Fourth Amendment right against unreasonable search and seizure. *Id.* at 290.

Read together, *Anderson*, *Gusman*, and *Haupt* demonstrate that courts should focus on what ultimate issues the prior criminal proceeding established, and whether the proceeding was of such significance to incentivize the parties to fully and fairly litigate the issue. *See Anderson*, 112 Idaho at 184–85, 731 P.2d at 179–80; *Gusman*, 125 Idaho at 808–09, 874 P.2d at 1115–16. However, the decision to bind a defendant over for criminal prosecution does not, on its own, invoke collateral estoppel to bar the relitigation of probable cause in a subsequent section 1983 claim. *Haupt*, 17 F.3d at 289–90. Courts must apply a fact intensive inquiry to determine the ultimate issues established by the prior criminal proceeding and whether the proceeding was of such significance to incentivize the parties to fully and fairly litigate the issue. *See Anderson*, 112 Idaho at 184–85, 731 P.2d at 179–80; *Gusman*, 125 Idaho at 808–09, 874 P.2d at 1115–16. For example, in *Gusman* the record showed that the state did not have a full and fair opportunity to litigate because it lacked the incentive to litigate the license suspension. 125 Idaho at 808, 874 P.2d at 1115. Whereas in *Haupt*, the defendant’s vigorous attempts to undermine the state’s probable cause showing at the preliminary hearing established a full and fair opportunity to litigate the issue. 17 F.3d 285, 289–90. Accordingly, when determining whether collateral estoppel prevents relitigation of an issue determined in a criminal adjudication, Idaho courts must analyze “what the prior judgment decided and the import on the instant civil action of that which was decided at the criminal trial.”

Anderson, 112 Idaho at 185, 731 P.2d at 180 (emphasis omitted).

Therefore, in this case we must look to the collateral estoppel factors and the facts on record to determine whether the preliminary hearing was a final judgment on the merits that provided Picatti with a full and fair opportunity to litigate probable cause.

A “final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.” *Rodriguez v. Dep’t of Correction*, 136 Idaho 90, 94, 29 P.3d 401, 405 (2001) (citation omitted). Tentative decisions will not create a preclusive effect, but a decision can be final for purposes of collateral estoppel where the parties were fully heard, the court supported its decision with a reasoned opinion, and the decision was subject to appeal. *Id.*

A probable cause finding in the preliminary hearing to bind a defendant over for trial can be a final judgment on the merits for collateral estoppel purposes. It is a decision where the magistrate examines evidence “to determine whether or not a public offense has been committed and whether or not there is probable or sufficient cause to believe that the defendant committed such public offense.” I.C. § 19-804; *see also State v. Stewart*, 149 Idaho 383, 387, 234 P.3d 707, 711 (2010) (“The purpose of the preliminary hearing is to determine whether there is probable cause to believe that the defendant committed a felony.”). When a magistrate court finds probable cause, its determination

binds the defendant over for trial—this is a firm, conclusive effect that permits the criminal proceeding to move forward. The method to challenge this determination is found in Idaho Code section 19-815A, which provides:

A defendant once held to answer to a criminal charge under this chapter may challenge the sufficiency of evidence educed at the preliminary examination by a motion to dismiss the commitment, signed by the magistrate, or the information filed by the prosecuting attorney. Such motion to dismiss shall be heard by a district judge.

This process provides a defendant with appellate-like review by a district judge. Other jurisdictions also treat such preliminary hearings as final judgments under the collateral estoppel doctrine. *Autrey v. Stair*, 512 F. App'x 572, 578 (6th Cir. 2013) (recognizing that a finding of probable cause made in the preliminary hearing of a criminal prosecution was a valid, final judgment for collateral estoppel purposes); *Haupt*, 17 F.3d at 288 (holding the probable cause determination in the preliminary hearing was “a final, conclusive determination of the issue.”); *Fontana v. City of Auburn*, No. C13-0245-JCC, 2014 WL 4162528, at *7 (W.D. Wash. Aug. 21, 2014), *aff'd in part*, 679 F. App'x 613 (9th Cir. 2017) (“a probable cause determination made at a preliminary hearing is sufficiently firm to satisfy the requirements of the ‘final judgment’ collateral estoppel requirement.”); *Lay v. Pettengill*, 2011 VT 127, ¶ 24, 191 Vt. 141, 155, 38 A.3d 1139, 1148 (2011)

(holding the preliminary hearing “was a final judgment on the issue of probable cause”); *McCutchen v. City of Montclair*, 73 Cal. App. 4th 1138, 1145–46, 87 Cal. Rptr. 2d 95, 100 (1999) (“A finding of probable cause to hold the defendant over for trial is a final judgment on the merits for the purposes of collateral estoppel.”).

Picatti had a full and fair opportunity to litigate probable cause in his preliminary hearing. As in *Anderson* and *Haupt*, Picatti’s criminal proceedings established several facts for probable cause that he cannot relitigate in the civil arena. Though each party presented a different summary of events, the magistrate court noted several facts that led to a finding of probable cause: the deputies were visible and in uniform; Picatti’s truck “bumped” Miner after approaching the crosswalk closed to through traffic; and Miner tased Picatti after the deputies forcibly removed him from the truck and they struggled on the pavement. From these facts, the magistrate court reasonably determined that probable cause existed to both arrest Picatti and bind him over for prosecution on the felony charges of aggravated battery on an officer and resisting or obstructing officers after hearing both Picatti and Miner testify.

While Picatti contends he did not have the opportunity to fully litigate probable cause, the record proves otherwise. Picatti vigorously argued against probable cause by cross-examining Miner at length before the magistrate court in an attempt to challenge Miner’s factual account and veracity before the

magistrate. The hearing was an adversarial proceeding that incentivized each side to litigate the issue of probable cause—the state needed to demonstrate probable cause to move forward with criminal prosecution of the felony charge, while Picatti needed to disprove probable cause to preserve his liberty. Upon hearing each party’s full account, the magistrate court found that probable cause existed for both the arrest and to bind Picatti over to the district court for prosecution. Accordingly, Picatti’s circumstances meet the collateral estoppel factors and Picatti cannot relitigate probable cause under his false arrest and unreasonable seizure claims.

Picatti also contends that a California district court has carved out exceptions to this collateral estoppel rule by allowing a plaintiff to litigate probable cause in the subsequent civil suit where (1) new or different evidence was available to the judicial officer than was available to the arresting officers, (2) tactical considerations prevented the full and fair litigation of probable cause in the preliminary hearing, or (3) where the plaintiff alleges the arresting officer lied or fabricated evidence. *See Moreno v. Baca*, No. CV 00-7149 ABC (CWX), 2002 WL 338366, at *6 (C.D. Cal. Feb. 25, 2002), *aff’d and remanded*, 431 F.3d 633 (9th Cir. 2005) (affirming other issues; the U.S. Ninth Circuit Court of Appeal did not address the preliminary hearing or collateral estoppel) (internal citations omitted).

Even if we were inclined to adopt these exceptions, Picatti’s reliance is misplaced. His factual evidence and testimony remain virtually identical to the

presentation at the preliminary hearing before the magistrate court; Picatti's attorney cross-examined Miner at length in the preliminary hearing to undermine a probable cause determination and diminish Miner's veracity; and while Picatti alleges Miner likely lied to the court, he offers no substantial evidence to prove this theory.

Picatti's argument here relies primarily on tenuous authority and the premise that a reasonable juror *could have* concluded Miner was lying about the events leading up to Picatti's arrest. Disputed facts by the parties are not equivalent to proof of misrepresentation, and this Court does not second-guess factual determinations or veracity. It is "the province of the fact-finder to assess the credibility of the witnesses in a state court proceeding." *State v. Perry*, 139 Idaho 520, 526, 81 P.3d 1230, 1236 (2003).

2. Picatti's excessive force claim is not barred by collateral estoppel.

The district court determined Picatti could not raise an excessive force claim against the deputies because it would simply relitigate probable cause in a different context. Essentially, because the deputies could arrest him for aggravated battery, Picatti was not free from the forcible removal from his truck. The district court erred in this analysis.

The Fourth Amendment of the U.S. Constitution protects individuals from excessive force by police officers in the course of an arrest, which allows inquiries

to be made into whether the officers' actions were objectively reasonable in light of the circumstances confronting them, "without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The calculus of this inquiry, however, "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.

As shown in *Smithart v. Towery*, "a successful section 1983 action for excessive force would not necessarily imply the invalidity of [a plaintiff's] arrest or conviction." 79 F.3d 951, 952–53 (9th Cir. 1996). Picatti's excessive force claim does not relitigate the magistrate court's finding of probable cause, nor does it invalidate his conviction. Instead, Picatti is trying to litigate whether the deputies acted reasonably in making the arrest, not whether they had probable cause to seize him. This Fourth Amendment inquiry has yet to be decided in either a criminal or civil court proceeding, so it is not barred by collateral estoppel.

3. The trier of fact must resolve the disputed facts before the court can determine whether the deputies are entitled to qualified immunity.

There is a genuine issue of material fact as to whether the deputies violated Picatti's Fourth Amendment right to be free from excessive force, which

impedes the Court's ability to address whether the deputies are immune from suit under the doctrine of qualified immunity. Both Picatti and the deputies have presented arguments on qualified immunity that depend on their own version of the arrest. We cannot determine as a matter of law that the deputies are entitled to qualified immunity when that determination depends on unresolved disputed facts. Therefore, we vacate the district court's award of summary judgment to the deputies and remand the case to the district court for the fact-finder to first resolve the genuine issue of material facts so that the court can answer the remaining issue of excessive force and qualified immunity.

Despite the general proposition that excessive force is contrary to the Fourth Amendment, qualified immunity protects officers from the "hazy border between excessive and acceptable force." *Rosenberger v. Kootenai Cnty. Sheriff's Dep't*, 140 Idaho 853, 856–57, 103 P.3d 466, 469–70 (2004) (citation omitted). It is immunity from suit rather than a defense to liability and ensures that officers are on notice that their conduct is unlawful before they are subjected to a lawsuit. *Id.* Thus, "government officials can benefit from qualified immunity in section 1983 suits if they followed a reasonable interpretation of the law," with the objective reasonableness of the action "assessed in light of the legal rules that were clearly established at the time it was taken." *Miller v. Idaho State Patrol*, 150 Idaho 856, 864, 252 P.3d 1274, 1282 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)); see also *Mullenix*

v. Luna, 136 S. Ct. 305, 308 (2015). “Even law enforcement officials who ‘reasonably but mistakenly conclude that probable cause is present’ are entitled to immunity.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citation omitted).

In *Ashcroft v. al-Kidd*, the U.S. Supreme Court established the two prong analysis required to establish the qualified immunity shield for federal and state officials from money damages: “a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” 563 U.S. 731, 735 (2011). Courts have the discretion to decide which of the two prongs to tackle first, and this Court begins with the second prong to adhere to the principle of avoiding constitutional questions where the case can be decided on other grounds. *James*, 160 Idaho at 473, 376 P.3d at 40.

Normally, qualified immunity is resolved long before trial—“at the earliest possible stage in litigation”—to preserve the doctrine’s status as immunity from suit. *Morales v. Fry*, 873 F.3d 817, 822 (9th Cir. 2017) (quoting *Hunter*, 502 U.S. at 227). This early determination is usually possible because qualified immunity turns on legal determinations rather than disputed facts. *Id.* In fact, qualified immunity is most often a summary judgement vehicle. *Id.* at 823. However, when disputed facts remain, a bifurcation of duties becomes unavoidable: “only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the

factual issues are resolved.” *Id.* Consequently, the trier of fact must resolve the factual disputes before the court can engage in the qualified immunity analysis. *See id.* Indeed, this is an enduring principle of the judicial system: “The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

For example, in the Ninth Circuit case *Morales v. Fry*, disputed facts about the events that occurred during the plaintiff’s arrest barred the appellate court from completing the qualified immunity analysis. 873 F.3d at 825–26. In that case, a woman was arrested during the May 1, 2012 “May Day” protests in Seattle, but the charges against Morales were dismissed as soon as video footage of her arrest went online. *Id.* at 819–20. Morales filed suit against the officer under section 1983. *Id.* At the civil trial, the plaintiff and defendant-officer contested several facts: whether Morales said “Okay, bitch!”, whether she punched the officer in the chest, and whether the officer’s use of pepper spray was intentional or accidental. *Id.* As the Ninth Circuit court explained:

Nor can we determine as a matter of law that Morales’s constitutional rights were not clearly established. Whether Officer Fry . . . reasonably believed that it was lawful to pull her over the bicycle, depends on disputed factual issues that the jury never resolved in specific interrogatories, including whether

Morales said “Okay, bitch!” and whether she punched Officer Fry.

Morales, 873 F.3d at 826 n.7. As a result, the Ninth Circuit vacated the verdict as to the plaintiff’s unlawful arrest and excessive force claims under section 1983, and remanded for a new trial regarding the disputed issues of material fact. *Id.* at 826. Once the jury returned its verdict, the Ninth Circuit instructed, “the ultimate determination of whether Officer Fry violated Morales’s clearly established rights is a question reserved for the court.” *Id.*

While we have not dealt with qualified immunity in this context before, this bifurcated approach is almost universally agreed upon by the federal appellate courts. *Id.* at 824; *also see, e.g., Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005) (“to the extent that a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury.”); *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) (“the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court’s duty.”); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (“the jury was entitled to determine what facts were known to the officers at the time of the arrest” while the “legal conclusions were for

the court to make.”). In contrast, the Fifth Circuit Court of Appeals ordinarily reserves qualified immunity for the court but permits the jury to determine the objective legal reasonableness of an officer’s conduct at trial. *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000). We find *Morales* and the majority case law persuasive.

The Deputies contend that this bifurcation is unnecessary because Picatti bore the burden to present clearly established law that the use of force was excessive. While plaintiffs bear this burden and must cite to case law to show a clearly established right, *James v. City of Boise*, 160 Idaho 466, 477, 376 P.3d 33, 44 (2016), disputed facts still require a bifurcated adjudication process that lets the jury resolve the factual issues *before* a court addresses the qualified immunity analysis. *See, e.g., Morales v. Fry*, 873 F.3d 817 (9th Cir. 2017). The recent U.S. Supreme Court case of *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019), does not alter that analysis, especially because *Emmons* did not contain any disputed facts on appeal.

As recently noted by the U.S. Supreme Court in *Emmons*, specificity is crucial when defining a clearly established right in Fourth Amendment excessive force cases. 139 S. Ct. 500, 503 (2019). In *Emmons*, a defendant brought a 42 U.S.C. section 1983 claim against city police officers for the use of excessive force during his arrest. *Id.* at 502. There were no disputed facts on the record. *Id.* In fact, police body-camera footage documented the officers’ actions. *Id.* At the district court, the officers won on summary judgment because

the plaintiff failed to show a clearly established right and the court found the officers “acted professionally and respectfully in their encounter.” *Id.* On appeal, the Ninth Circuit reversed and remanded for a trial, stating only “The right to be free of excessive force was clearly established at the time of the events in question.” *Id.* The U.S. Supreme Court criticized the Ninth Circuit’s overgeneralized right because federal law requires a right to be defined with specificity. *Id.* at 503. The Court restated:

“Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.

...

[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in

the defendant’s shoes would have understood that he was violating it.”

Id. (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152–53 (2018)). In other words, courts must look at existing precedent to identify a case where an officer acted under similar circumstances and define the right using the specific circumstances of the case. *See id.* (citing *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018)). As articulated by this Court:

The first component of this analysis is defining the relevant legal rule at stake. The Court should not define the right too generally, as doing so would essentially vitiate the qualified-immunity doctrine. Here, for example, it would not be helpful to simply ask whether police must not execute unreasonable searches or, as Appellants suggest, whether the police can obtain bodily fluid from a person reasonably suspected of driving under the influence. Warrantless blood draws and voluntary urine samples are significantly less intrusive than warrantless forcible catheterizations. *Instead, the question should reflect the factual specifics in this case.*

James v. City of Boise, 160 Idaho 466, 473–74, 376 P.3d 33, 40–41 (2016) (emphasis in original).

We cannot articulate a “clearly established” right with specificity until the district court first determines what facts occurred. While the Deputies point to *Emmons* as the basis for a rehearing, *Emmons* did not deal with *any* disputed facts; rather, that case criticized the

Ninth Circuit’s failure to define a right with specificity. The Deputies are correct that a plaintiff bears the burden of showing a clearly established right to be free from excessive force in the particular circumstances. Nevertheless, we cannot reach that step of the qualified immunity inquiry without first resolving the disputed facts. To accept the Deputies’ argument here requires this Court to decide what key facts occurred to define these circumstances, a question reserved for the jury in the bifurcated process outlined in *Morales*, 873 F.3d at 825–26. This Court would be forced to either make factual determinations on appeal or articulate a generalized right, neither of which we can do. *Emmons*, 139 S. Ct. at 503 (2019) (“This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality.”) (quoting *Kisela*, 138 S. Ct. at 1152); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (“The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.”). Like in *Morales*, this Court has “no way of divining which scenario actually happened” to Picatti, 873 F.3d at 825, and thus, the Court is obliged to remand the case to trial. Unlike *Emmons*, however, the Court remands only to resolve the disputed facts, not to deny the Deputies qualified immunity as they contend.

Generally, federal appellate courts let district courts determine whether to employ a general verdict form or utilize special interrogatories. *See, e.g., Morales*, 873 F.3d at 823; *Cavanaugh v. Woods Cross City*,

718 F.3d 1244, 1256 (10th Cir. 2013). We will give district courts that same discretion. However, we stress the importance of the factfinder's mission to discover the disputed facts that are crucial for a court to make the requisite qualified immunity analysis. In the Fourth Amendment context, specificity of the facts is key, especially since a clearly established right must reflect the factual specifics of the case. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Ashcroft*, 563 U.S. at 742; *James*, 160 Idaho at 473–74, 376 P.3d at 40–41.

Nevertheless, despite the need for a jury in this bifurcated process, the ultimate legal questions of clearly established rights, potential violations of those rights, and entitlement to qualified immunity must remain in the court's sphere as legal conclusions. *See, e.g., Morales*, 873 F.3d at 822–23, 825–26. Cases in multiple circuits of the U.S. Courts of Appeals provide good examples of how a court can use specific interrogatories with the jury to unravel the factual disputes. For instance, in *Curley v. Klem*, a jury trial determined facts on remand after the district court had originally failed to recognize factual disputes in its qualified immunity analysis. 499 F.3d 199, 203–04 (3d Cir. 2007). The Third Circuit recounted:

In answer to the special interrogatories, the jury found that, when Klem approached the Camry, Bailey's body was on the front seat of the car, not on the floorboards, and that Klem did not look into the window of the car. Furthermore, the jury found that Bailey's body should have been visible to someone standing

in Klem's position but that Klem had not made an objectively reasonable effort to look into the Camry. The jury also found that it was objectively reasonable for Klem to believe that the toll collector was signaling to the center of the plaza. Additionally, the jury found that Curley did not repeatedly point his gun at Klem, and that, when Curley was shot, he was not raising his gun to point it at Klem. Finally, the jury could not reach a unanimous decision and so did not answer whether Curley's police uniform was visible to someone in Klem's position or whether it was reasonable for Klem to believe that Curley was in civilian clothing.

Id. Likewise, the Second Circuit Court of Appeals explained that “special interrogatories in [a] case resolves the difficulty of requiring the jury to decide ‘what the facts were that the officer faced or perceived’” so the court can make the ultimate legal determinations. *Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir. 2003). Or, as articulated by the Eleventh Circuit Court of Appeals:

Qualified immunity is a legal issue to be decided by the court, and the jury interrogatories should not even mention the term. Instead, the jury interrogatories should be restricted to the who-what-when-where-why type of historical fact issues.

Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002). In addition, we remind the district courts that for the purposes of qualified immunity, a court must resolve all factual disputes in favor of the party

asserting the injury. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013).

Like in those federal cases, Picatti and the deputies dispute key facts surrounding the circumstances of Picatti's arrest that prevent us from determining whether there was a clearly established right to be free from excessive force in these circumstances. The qualified immunity doctrine requires a right to be particularized to the facts of the case at hand and not defined "at a high level of generality." *White*, 137 S. Ct. at 552 (quoting *Ashcroft*, 563 U.S. at 742). Because we must define a right with such specificity, we cannot meaningfully characterize the right at issue without a factfinder first resolving disputed facts. As an appellate court "it is not our role on appeal to retry the case, to weigh the evidence as a trier of the facts or to determine the facts in the case." *Jensen v. Siemsen*, 118 Idaho 1, 6, 794 P.2d 271, 276 (1990).

We will not adopt the role of the trier of fact to resolve these genuine issues of material fact. Instead, we leave these factual questions to the jury to resolve on remand, including, but not limited to, whether Picatti resisted arrest or was simply pushing himself off the pavement, if Miner heard Laurence say "get your hand off my gun," whether Miner asked Picatti to exit the vehicle or immediately grabbed Picatti by the neck to pull him out, and so on. All of these facts contribute to the "totality of the circumstances" and must be established so the court can understand the exact circumstances the deputies faced and whether their conduct violated the Fourth Amendment. *See White*, 137 S. Ct.

at 552; *Ashcroft*, 563 U.S. at 736; *James*, 160 Idaho at 473–74, 376 P.3d at 40–41. Once the jury returns its verdict on those historical facts – establishing the who-what-where-when-why details of the arrest – the ultimate determination of whether the deputies violated Picatti’s clearly established right is a question reserved for the court.

B. The deputies are not entitled to attorney’s fees on appeal.

The deputies argue they are entitled to an award of attorney’s fees because Picatti frivolously raised this appeal. Under 42 U.S.C. section 1988(b), the court “may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs,” in any action or proceeding under 42 U.S.C. section 1983. The deputies, however, did not prevail on all issues and Picatti’s claim was well grounded in fact and law, as demonstrated by the district court’s improper determination that his claim of excessive force was barred by the doctrine of collateral estoppel. As such, we decline to award attorney’s fees.

IV. CONCLUSION

In light of the foregoing, we vacate that portion of the judgment of the district court relative to excessive force and qualified immunity. We affirm the judgment as to Picatti’s claims of false arrest and unreasonable seizure. We remand for further proceedings consistent

with this opinion. We decline to award attorney's fees or costs.

Justices BEVAN, STEGNER and MOELLER CONCUR.

BURDICK, C.J., specially concurring.

I write to make sure our decision is not misinterpreted in 99.9 percent of the preliminary hearings that take place.

Because of the very limited nature of the legal standard found in I.R.C.P. 5. 1, I view this case as a one off.

In these types of cases we put a citizen in an untenable position – waive or minimally participate in the preliminary hearing and increase jeopardy in the criminal case or try to vindicate your rights by a stout defense in the criminal case and weaken or obliterate your cause of action in a civil proceeding.

If the argument is a person can game both the civil and/or the criminal system, the concept of judicial estoppel can enforce the truth telling work of the criminal and civil judicial system without the citizen's rights being weakened in both.

Again a waiver of a preliminary hearing cannot support this concept of collateral estoppel nor can the perfunctory recitation of the elements of the charged crime with defense counsel doing their job of probing for weaknesses in the State's case.

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Although I am very reticent to join the majority, Justice Brody's careful analysis wins my cautious support. However, I implore trial judges and trial lawyers to be sensitive in these choices.

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

STEVEN L. PICATTI,
Plaintiff,

vs.

AARON MINER,
DENNIS LAURENCE,
MARK WILLIAMSON,
RANDALL GOODSPEED,
JOHN DOES 1-5,
Defendants.

Case No.
CV-PI-2016-10624

MEMORANDUM
DECISION AND
ORDER GRANTING
SUMMARY JUDGMENT

(Filed Sep. 5, 2017)

Plaintiff Steven L. Picatti says he was needlessly roughed up and unlawfully arrested by law-enforcement officers in connection with a traffic stop. On that basis, he asserts claims under 42 U.S.C. § 1983 against the involved officers. Two of them—Defendants Aaron Miner and Dennis Laurence, who are Ada County Deputy Sheriffs—move for summary judgment. Their motion was argued on August 23, 2017. During the hearing, Picatti’s counsel was directed to submit one piece of additional evidence he said was in his possession, and described as favorable to Picatti’s case, but nevertheless hadn’t submitted. He complied on August 24, 2017, at which point the motion was taken under advisement. For the reasons that follow, it is now granted.

I.

BACKGROUND

On July 12, 2014, the seventy-year-old Picatti was driving to his home in Eagle, Idaho. (Second Am. Compl. ¶ 10.) He had to take a detour to get home because of a parade occurring nearby. (Id. ¶ 11.) The only way to access his subdivision was a street blocked by traffic-control barrels. (Id. ¶¶ 12-13.) A sign near the crosswalk said the street was closed to “thru traffic,” but there was enough space for Picatti to drive around the barricade. (Id.) Thinking his vehicle wasn’t “thru traffic” since he had no other way to get home, Picatti drove around the barricade. (Id. ¶ 14.) Deputy Miner was standing nearby. (Id. ¶¶ 13, 15.)

Deputy Miner says he saw Picatti drive around the barricade, without even slowing down until he neared a crosswalk occupied by pedestrians. (White Aff. filed July 17, 2017, Ex. A at 54:6-55:24.) According to eye witness Ramiro Maldonado, however, Picatti drove around the barricade at a safe speed. (Maldonado Aff. ¶ 7.) In any event, Deputy Miner then approached Picatti’s vehicle to stop him. (White Aff. filed July 17, 2017, Ex. A at 96:10-13.) What happened next is very much in dispute.

Deputy Miner’s version of events is that Picatti “pushe[d] him with his car a little bit” and then stopped. (White Aff. filed July 17, 2017, Ex. A at 52:2-4.) Deputy Miner then slammed his hands on the hood of Picatti’s vehicle, Picatti responded by gesturing with his hands, and then his vehicle jerked forward, hitting

Deputy Miner “a little harder” than the first time. (White Aff. filed July 17, 2017, Ex. A at 58:4-60:3.) Deputy Laurence, by the way, says he saw Picatti’s car lurch forward and hit Deputy Miner but didn’t see the initial impact reported by Deputy Miner. (White Aff. filed July 17, 2017, Ex. B at 21:7-10, 22:17-23:3.) Then Deputy Miner ordered Picatti to exit his vehicle, but Picatti didn’t comply, so Deputy Miner forcibly removed him from it. (White Aff. filed July 17, 2017, Ex. A at 62:12-67:16.)

Picatti, by contrast, is unsure whether he actually hit Deputy Miner with his vehicle, but neither felt nor heard any contact. (White Aff. filed July 17, 2017, Ex. C at 97:14-22 (“I couldn’t tell you if [the vehicle] hit [Deputy Miner] or not.”), 103:13-21.) Picatti says he knew Deputy Miner was yelling at him, but he couldn’t understand what Deputy Miner was saying, so he simply put his hands in plain sight on the steering wheel. (White Aff. filed July 17, 2017, Ex. C at 104:13-22.) Deputy Miner then opened the driver’s door, grabbed him by the neck, and tried to remove him from the vehicle, but his seatbelt was fastened. (White Aff. filed July 17, 2017, Ex. C at 104:23-105:3.) So Deputy Miner climbed into the vehicle, unfastened Picatti’s seatbelt, and both men then fell to the ground. (White Aff. filed July 17, 2017, Ex. C at 105:4-16.) The ground was extremely hot, so Picatti tried to stand up, but other officers joined in and began trying to force him back to the ground. (White Aff. filed July 17, 2017, Ex. A at 105:17-106:25.)

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Picatti says he was passive while the officers tried to force him to the ground, though he tried to put his hands under his face since the ground was extremely hot and he couldn't breathe. (White Aff. filed July 17, 2017, Ex. C at 106:21-25.) Deputy Miner says Picatti wasn't passive and didn't fall out of the vehicle, instead describing the altercation as a "standing wrestling match," with Deputy Laurence and Defendant Randall Goodspeed, a Meridian police officer, helping him force Picatti to the ground. (White Aff. filed July 17, 2017, Ex. A at 67:24-69:5, 72:15-25.) Deputy Laurence's account is similar, describing Picatti as "yelling, combative, screaming, arms flailing," despite continued commands to stop resisting. (White Aff. filed July 17, 2017, Ex. B at 21:10-17.) Officer Goodspeed also says Picatti was moving, not sitting still. (Bistline Aff. filed Aug. 8, 2017, Ex. B-A at 28:6-17.)

Deputy Laurence says he felt tugging on his gun once they reached the ground, so he yelled something like "oh, my gun," causing Deputy Miner to deploy his taser. (White Aff. filed July 17, 2017, Ex. B at 21:17-25.) Picatti says he felt three shocks (White Aff. filed July 17, 2017, Ex. C at 135:18-22), but Deputy Miner says he only tased Picatti once, with a shock duration of about five seconds. (White Aff. filed July 17, 2017, Ex. A at 81:18-25.) Forensic evidence substantiates Deputy Miner's account. (Rowe Aff. ¶¶ 2-3 & Ex. A.) Picatti was placed in handcuffs shortly after he was tased. (White Aff. filed July 17, 2017, Ex. A at 81:7-13.)

Picatti then was driven to the Ada County Jail by Defendant Mark Williamson, an Ada County Deputy

Sheriff, and was booked on a misdemeanor charge of resisting and obstructing officers and on a felony charge of aggravated battery on an officer. (Second Am. Compl. ¶ 24; Holmes Aff. filed July 17, 2017, Ex. A.) Because of the felony charge, Picatti couldn't obtain his release on bond until after he was arraigned, which did not occur until the following Monday afternoon, two days after his arrest. (Second Am. Compl. ¶ 28.)

On August 20, 2014, a magistrate judge found probable cause to bind Picatti over to district court on the felony charge. (Holmes Aff. filed July 17, 2017, Ex. B.) That finding was made at the conclusion of a preliminary hearing held under I.C.R. 5.1.¹ (White Aff. filed July 17, 2017, Ex. D.) The two original charges

¹ A partial transcript of the preliminary hearing is Exhibit D to the affidavit of the Deputies' counsel, Erica White, filed on July 17, 2017. The hearing's last few moments, including the magistrate's ruling, weren't transcribed. The omission appears to have resulted from some sort of administrative failure to supply the entire audio recording of the preliminary hearing to the court reporter, not from a desire on the part of the Deputies' counsel for only a partial transcript. When Picatti's counsel professed during the summary-judgment hearing to have an audio recording of the untranscribed portion of the preliminary hearing, and asserted it evidenced a defect in the magistrate's probable-cause finding, the Court directed him either to submit a CD containing that recording or to have the recording transcribed and submit a transcript. Picatti's counsel submitted a CD on August 24, 2017. Incidentally, the partial transcript misidentifies the presiding magistrate as Judge James Cawthon, when in fact the presiding magistrate was Judge Daniel Steckel, as the Court could readily discern by listening to the CD (the Court is familiar with Judge Steckel's voice). Judge Steckel's signature appears to be the one affixed to the commitment binding Picatti over to district court. (Holmes Aff. filed July 17, 2017, Ex. B.)

ultimately were dismissed, however, in return for Picatti's guilty plea to an amended charge of misdemeanor disturbing the peace. (Second Am. Compl. ¶¶ 32-33; Holmes Aff. filed July 17, 2017, Exs. D-F.)

On June 9, 2016, Picatti sued Deputy Miner, Deputy Laurence, Deputy Williamson, and Officer Goodspeed, asserting three claims arising under 42 U.S.C. § 1983, denominated in his complaint as follows: (1) a claim for deprivation of the right to be free from unlawful seizure; (2) a claim for deprivation of the right to be free from use of excessive force; and (3) a claim for deprivation of the right to be free from felony arrest without probable cause. (Compl. 7-10.) This action's scope has been narrowed twice since then. First, on October 7, 2016, the claims against Deputy Williamson were dismissed under I.R.C.P. 12(b)(6). Although Picatti was given leave to amend his complaint to try to cure the deficiencies in the pleading of his claims against Deputy Williamson, he never attempted a cure (though he did make technical amendments to his complaint in an amended complaint filed on October 25, 2016). The scope of this action narrowed again during December 2016, when Picatti acceded to summary judgment in Officer Goodspeed's favor. Deputy Miner and Deputy Laurence, who are referenced throughout the balance of this decision as "the Deputies," are the only remaining defendants.

Picatti filed a second amended complaint on August 24, 2017. The sole amendment was the inclusion of a request for punitive damages. Picatti obtained the Court's permission for that amendment on August 9,

2017. He missed the deadline the Court set for its filing, but the late filing is harmless. Consequently, the Court considers the second amended complaint to be Picatti's operative pleading. Moreover, the Court considers the claims asserted in it to have been challenged in the Deputies' motion for summary judgment, which was filed on July 17, 2017, and therefore was already pending when the second amended complaint was filed.

As already noted, that motion was argued on August 23, 2017, and taken under advisement the following day. Argued at the same time was the Deputies' motion for judicial notice of the fact that Picatti was bound over to district court in the underlying criminal case. That motion is denied. The Court need not take judicial notice of that fact. It is established anyway by the records the parties have submitted from the underlying criminal case, judicial notice of which is taken. The motion for summary judgment is now ready for decision.

II.

LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). To obtain summary judgment against a claim or defense of the nonmovant, the movant must show that the evidence doesn't support an element of the challenged claim or defense. *E.g.*,

Holdaway v. Broulim's Supermarket, 158 Idaho 606, 611, 349 P.3d 1197, 1202 (2015). That can be done by offering evidence disproving that element, by demonstrating that the nonmovant is unable to offer evidence proving that element, or in both of those ways. *Id.*; see also I.R.C.P. 56(c)(1). The movant then is entitled to summary judgment unless the nonmovant “respond[s] . . . with specific facts showing there is a genuine issue for trial.” *Wright v. Ada Cty.*, 160 Idaho 491, 495, 376 P.3d 58, 62 (2016). By contrast, “[a] mere scintilla of evidence or only slight doubt as to the facts is not sufficient” to avoid summary judgment. *Id.* In deciding whether to grant summary judgment, the trial court must construe the record in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant’s favor. *Id.*

III.

ANALYSIS

A. False-arrest claims

Picatti’s first claim is denominated in his complaint as one under section 1983 for unlawful seizure. (Second Am. Compl. 8.) His third claim is denominated in his complaint as one under section 1983 for false arrest on a felony charge. (Second Am. Compl. 11.) The intended scope of these claims is clarified in his opposition to the Deputies’ motion for summary judgment. There, Picatti explains that the first claim is for false arrest on both misdemeanor and felony charges, on the theory that probable cause for arrest didn’t exist as to

either the misdemeanor charge of resisting and obstructing an officer or the felony charge of aggravated battery on an officer. (Mem. Opp'n Defs.' Mot. Summ. J. 12.) And he explains that the third claim is simply for false arrest on that same felony charge, on the same theory that probable cause for arrest didn't exist as to it. (Mem. Opp'n Defs.' Mot. Summ. J. 12-13, 18.)

The Deputies argue that these claims are barred by the doctrine of collateral estoppel, also called "issue preclusion." This argument is based on the magistrate's finding in the underlying criminal case, after a preliminary hearing, that probable cause existed to bind Picatti over to district court on the felony charge. Picatti cannot maintain false-arrest claims, of course, if probable cause existed for his arrest. *See, e.g., Hutchinson v. Grant*, 796 F.2d 288, 290 (9th Cir. 1986) ("A police officer has immunity if he arrests with probable cause."). The Deputies argue that Picatti is precluded by the doctrine of collateral estoppel from relitigating the issue of probable cause in this action. That doctrine bars relitigating an issue decided in prior litigation, so long as the following five criteria are satisfied:

- (1) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue decided in the earlier case;
- (2) the issue decided in the prior litigation was identical to the issue presented in the present action;
- (3) the issue sought to be precluded was actually decided in the prior litigation;
- (4) there was a final judgment on the merits

in the prior litigation; and (5) the party against whom the issue is asserted was the party or in privity with a party in the prior litigation.

E.g., Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC, 157 Idaho 732, 738, 339 P.3d 1136, 1142 (2014). Whether these criteria are satisfied in a given case is a question of law. *E.g., id.*

There is no question that state law on issue preclusion can be applied in this very context, so as to bar relitigating, in false-arrest litigation under section 1983, a prior probable-cause finding. *See, e.g., Haupt v. Dillard*, 17 F.3d 285, 288-90 (9th Cir. 1994). Picatti concedes as much, but he disputes that this is an appropriate circumstance for applying such a bar. (Mem. Opp'n Defs.' Mot. Summ. J. 11.) In that regard, he argues that precluding him from relitigating the issue of probable cause would be inappropriate because (1) the record in the underlying criminal case supposedly is insufficient to review the magistrate's probable-cause finding, (2) his tactical objectives during the preliminary hearing supposedly prevented him from taking full advantage of the opportunity to litigate the issue of probable cause, and (3) Deputy Miner supposedly testified falsely during that hearing. (Mem. Opp'n Defs.' Mot. Summ. J. 11-15.) The Court examines in turn these three arguments, which seemingly are directed to only the first and third of the five criteria for applying the doctrine of collateral estoppel.

The first of Picatti's three arguments fails because the record in the underlying criminal case makes clear that the magistrate understood perfectly well the elements of the felony charge at issue and determined that the evidence presented during the preliminary hearing supported a finding of probable cause to believe Picatti was guilty of that charge. Picatti's counsel argued during the summary-judgment hearing that an audio recording of the magistrate's findings at the conclusion of the preliminary hearing, which had not yet been included in the record in this action, revealed deficiencies in the magistrate's analysis, particularly with respect to the intent element of the felony charge. The Court's immediate response to that argument was to direct Picatti's counsel to submit a CD containing the recording, or a transcript of the recording, for the Court's consideration. Picatti's counsel complied. The Court takes judicial notice of the recording, which is a copy of an official court record. Having listened to the recording in chambers, the Court concludes that it provides no support whatsoever for counsel's assertion that the magistrate's analysis was deficient. The recording plainly demonstrates the magistrate's awareness of the intent element. His probable-cause finding need not have been articulated on an element-by-element basis to encompass the intent element.

Picatti's second argument also is belied by the record in the underlying criminal case, which makes clear that Picatti took full advantage of his opportunity to litigate the issue of probable cause. The Court is aware of statements that arguably are somewhat to

the contrary in the affidavit of Mark Manweiler, Picatti's defense attorney in the underlying criminal case. Manweiler said he didn't treat the preliminary hearing "as an opportunity to fully litigate probable cause," but instead as an opportunity to depose prosecution witnesses and to "alert[] the Prosecutor's Office to defects in the case." (Manweiler Aff. ¶ 9.) But the supposed distinction between contesting probable cause, on one hand, and examining witnesses in a way that alerts the prosecutor to weaknesses in his case, on the other hand, is an elusive one. Regardless, the transcript of the preliminary hearing shows that Manweiler vigorously contested probable cause, spending significantly more time examining the prosecutor's only witness than did the prosecutor herself, and even calling Picatti as a witness. Manweiler then asked the magistrate "to not bind over in this case" because, in his view, of a lack of substantial evidence to support the charge. (White Aff. filed July 17, 2017, Ex. D at 74:23-76:7.) Thus, Picatti's argument that the issue of probable cause was not fully and fairly litigated is flatly contradicted by the record in the underlying criminal case.

Picatti's third argument is that he should be permitted to relitigate the issue of probable cause because Deputy Miner lied during the preliminary hearing. The Court cannot, however, determine whether Deputy Miner actually lied without allowing Picatti to relitigate the issue of probable cause. Picatti hasn't shown that Idaho law on issue preclusion allows a party to relitigate an issue whenever that party asserts that his

defeat in the prior litigation was the product of the other party's lies. Picatti had the opportunity during the preliminary hearing to try to show that Deputy Miner's version of events was untruthful. He in fact tried in various ways to convince the magistrate of that (White Aff. filed July 17, 2017, Ex. D at 74:23-76:7), but the magistrate didn't see it that way. As a result, the magistrate found probable cause. Simply saying Deputy Miner lied doesn't entitle Picatti to a second bite at the apple.

The five criteria for applying the doctrine of collateral estoppel are satisfied here. Consequently, Picatti may not relitigate the issue of whether the Deputies had probable cause to arrest him on the felony charge. Because the Deputies had probable cause to make that arrest, Picatti's third claim fails in its entirety and his first claim fails to the extent it is based on his having been arrested on the felony charge. Moreover, that there was probable cause to arrest Picatti on the felony charge negates any need to litigate whether there was also probable cause to arrest him on the misdemeanor resisting-and-obstructing charge. There was only one arrest, albeit on two charges. Because Picatti was lawfully arrested on the felony charge, liability for false arrest can't arise from his conjoint arrest on the misdemeanor resisting-and-obstructing charge, even in the absence of probable cause to arrest on that charge. See *Mays v. Stobie*, 2011 WL 2160364, at * 8 (D. Idaho June 1, 2011) ("A false arrest claim under § 1983 will fail if there was probable cause to arrest for at least one of the offenses involved.") (citing *Johnson v. Knorr*,

477 F.3d 75, 82 (3d Cir. 2007)). Thus, Picatti's first claim also fails to the extent it is based on his having been arrested on the misdemeanor charge.

For these reasons, the Deputies are granted summary judgment against Picatti's first and third claims. That leaves his second claim to be considered.

B. Excessive-force claim

Picatti's second claim is that the Deputies used excessive force against him twice, first when they removed him from his vehicle, and again when they tased him. Excessive-force claims necessitate an inquiry into whether law enforcement's actions were objectively reasonable under the circumstances. *E.g.*, *Graham v. Connor*, 490 U.S. 386, 397 (1989). The reasonableness of an officer's use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. This inquiry takes in account the totality of the circumstances, though certain factors are particularly relevant, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

On summary judgment, the Deputies argue that they didn't use excessive force and that, even if they did, they have qualified immunity from section 1983 liability because Picatti had no clearly established right to be free from the level of force they used. Picatti

says the level of force they used was excessive under clearly established law, including *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011), which addresses excessive-force claims based on taser use.

The qualified-immunity doctrine “‘shields federal and state officials from money damages’” under section 1983 unless the plaintiff proves “‘(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.’” *James v. City of Boise*, 160 Idaho 466, 473, 376 P.3d 33, 40 (2016) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). The Court has discretion as to which prong to address first. *Id.* “Addressing the second prong first is consistent with the general rule of avoiding constitutional questions when the case can be decided on other grounds.” *Id.* The Court chooses that approach here.

In addressing the second prong, the Court must take care not to define the statutory or constitutional right at stake too generally, as doing so would vitiate the qualified-immunity doctrine. *Id.* Giving that doctrine its intended vitality requires framing the right at issue in light of the factual specifics of the case before determining whether that right is clearly established. *Id.* at 474, 376 P.3d at 41. So, the question isn’t whether Picatti had a constitutional right to be free from use of excessive force. That question is much too broad. It must be narrowed to reflect the factual specifics of the case. Taking into account the factual specifics, the Court frames the questions at issue as follows:

- (1) Did Picatti have a clearly established right to be free from forcible removal from his vehicle after he had given Deputy Miner probable cause to believe he had committed an aggravated battery upon Deputy Miner, and after he had failed to voluntarily exit his vehicle as lawfully ordered by Deputy Miner?
- (2) Did Picatti have a clearly established right to be free from Deputy Miner's deployment of a taser when—after he had given Deputy Miner probable cause to believe he had committed an aggravated battery upon Deputy Miner, and after he had failed to voluntarily exit his vehicle as lawfully ordered by Deputy Miner—he engaged in a physical struggle with Deputy Miner and other officers upon being forcibly removed from his vehicle?

The answers to these questions, which the Court will address in turn, plainly are “no.”

The Court's analysis of the first question begins with some additional explanation for why the Court has framed the question that way. The additional explanation is this: the existence of probable cause to believe Picatti had committed aggravated battery on Deputy Miner can no more be relitigated in the excessive-force context than it can be relitigated in the false-arrest context. Picatti is collaterally estopped from challenging the existence of probable cause. Consequently, at the time he was forcibly removed from his vehicle, Deputy Miner had probable cause to arrest him on that felony charge. For that reason, Deputy Miner plainly had authority to order Picatti to exit his

vehicle. Indeed, even without probable cause for arrest, Deputy Miner had authority to order Picatti to exit his vehicle, as an officer has that authority in connection with any lawful traffic stop. *E.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

Picatti doesn't deny that Deputy Miner ordered him to exit his vehicle. He simply says he couldn't understand what Deputy Miner was telling him to do. His testimony in that regard, while accepted as true on summary judgment, doesn't create a genuine factual dispute about whether Deputy Miner ordered him to exit his vehicle. The evidence establishes as a matter of law that Deputy Miner gave that order. Further, the evidence establishes as a matter of law that Picatti didn't exit his vehicle as ordered. Thus, from Deputy Miner's perspective—the one that is relevant here under *Graham*—the situation confronting him was that a man who had just committed an aggravated battery against him was now unresponsive to a lawful order to exit his vehicle. In that situation, Picatti had no clearly established right to be free from forcible removal from his vehicle.

The Court now turns to the second question, involving taser use. When Deputy Miner tased Picatti, Deputy Miner had probable cause to arrest him for aggravated assault, he hadn't followed Deputy Miner's lawful order to exit his vehicle, and upon his forcible removal from his vehicle he had engaged in a physical struggle with Deputy Miner and other officers, which was put to an end by the tasing. Picatti's struggle with

armed officers was inherently dangerous,² especially in light of the pedestrians in the area. Although there might have been other ways of ending the struggle short of tasing Picatti, neither *Mattos* nor any other case cited by Picatti establishes that he had a clearly established right to be free from deployment of Deputy Miner's taser under the circumstances. By contrast, *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993), which involves the deployment of a taser in at least passingly similar circumstances, supports the opposite conclusion.

For these reasons, summary judgment is entered against Picatti's excessive-force claim.

Accordingly,

IT IS ORDERED that the Deputies' motion for judicial notice is denied, but their motion for summary judgment is granted.

² Indeed, according to the Deputies, the tasing by Deputy Miner resulted directly from Deputy Laurence's exclamation about Picatti reaching for Deputy Laurence's gun. (White Aff. filed July 17, 2017, Ex. A at 73:1-21, Ex. B at 20:23-22:2.) That said, Picatti denies touching the gun and says he never heard the officers tell him to get his hands off the gun. (White Aff. filed July 17, 2017, Ex. C at 115:21-25.) The Court leaves this factual dispute to the side in deciding the Deputies' motion for summary judgment, noting again, though, that the gun's presence makes the physical struggle dangerous.

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Dated this 5th day of September, 2017.

/s/ Jason D. Scott Signed:
9/5/2017 11:26 AM

Jason D. Scott
DISTRICT JUDGE

**IN THE SUPREME COURT OF THE
STATE OF IDAHO**

STEVEN L. PICATTI,
Plaintiff-Appellant,
v.
AARON MINER and
DENNIS LAURENCE,
Defendants-Respondents,
and
MARK WILLIAMSON,
RANDALL GOODSPEED,
and JOHN DOES 1-5,
Defendants.

**Order Denying
Petitions for
Rehearing**

Docket No. 45499-2017
Ada County
District Court
CV-PI-2016-10624

The Appellant having filed a Petition for Rehearing on June 27, 2019, and supporting brief on July 08, 2019, of the Court's Published Opinion released June 07, 2019; and the Respondents having filed a Petition for Rehearing on June 28, 2019, and supporting brief on July 12, 2019, of the Court's Published Opinion released June 07, 2019; therefore, after due consideration,

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IT IS HEREBY ORDERED that Appellant's and Respondents' Petitions for Rehearing be, and hereby are, denied as a Substitute Opinion has been issued.

Dated
September 10, 2019.

By Order of the
Supreme Court

/s/ Melanie Gagnepain
for Karel A. Lehrman
Clerk of the Courts

IN THE SUPREME COURT
OF THE STATE OF IDAHO

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|-------------------------|---|-------------------|
| STEVEN L. PICATTI |) | Docket No. |
| Plaintiff/Appellant, |) | 45499-2017 |
| vs. |) | |
| AARON MINER, DENNIS |) | |
| LAURENCE, MARK |) | |
| WILLIAMSON, RANDALL |) | |
| GOODSPEED, JOHN |) | |
| DOES 1-5, |) | |
| Defendants/Respondents. |) | |
| and |) | |
| MARK WILLIAMSON, |) | |
| RANDALL GOODSPEED, |) | |
| AND JOHN DOES 1-5 |) | |
| Defendants. |) | |

**RESPONDENTS' BRIEF IN SUPPORT
OF PETITION FOR REHEARING**

Appeal from the District Court, Fourth Judicial
District, County of Ada, State of Idaho

HONORABLE JASON D. SCOTT,
PRESIDING DISTRICT JUDGE

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[1] I. STATEMENT OF THE CASE

On June 7, 2019, this Court issued its decision in *Steven L. Picatti v. Aaron Miner and Dennis Laurance* (hereinafter “decision”). In its decision, this Court held that it could not determine whether the Defendants were entitled to qualified immunity without the trier of fact first resolving the disputed facts. Thus, the case was remanded to the district court for a bifurcated proceeding wherein the jury will determine the historical facts—establishing the who-what-where-when-why details of the arrest—while the court will ultimately determine whether the deputies violated Picatti’s clearly established right.

On June 28, 2019, the deputies filed a Petition for Rehearing on the issue of whether they are entitled to qualified immunity on Picatti’s excessive force claim. For the reasons provided below, the deputies assert that factual issues do not need to be resolved by the trier of fact before this Court can grant qualified immunity to them on Picatti’s excessive force claim because Picatti failed to come forward with case law that clearly established that the deputies’ conduct was unlawful under the circumstances of this case.

The circumstances of this case include the fact that the magistrate court found probable cause for Picatti's arrest. This establishes as a fact that Deputy Miner was warranted in his belief that Picatti committed felony aggravated battery on a law enforcement officer. This is an indisputable fact that must be taken into consideration when viewing the facts of this case.

II. ARGUMENT

A. This Court Erred in Concluding That it Could Not Determine as a Matter of Law That the Deputies are Entitled to Qualified Immunity Because of Disputed Facts.

[2] On a motion for summary judgment, a court typically evaluates whether there are material issues of fact in dispute. *Romero v. Kitsap County*, 931 F.2d 624, 628 (9th Cir. 1991). However, when a court is asked to enter summary judgment based on qualified immunity, it is required to view the facts in the light most favorable to the non-moving party and decide whether the defendants are entitled to qualified immunity based on those facts. *Id.*; see also *Mueller v. Aufer*, 576 F.3d 979, 1006 (9th Cir. 2009) (Wallace, J. dissenting). If it is determined that no clearly established right was violated based upon the facts taken in the light most favorable to the non-moving party, the factual dispute becomes immaterial. *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993). Additionally, the court is required to determine what objectively reasonable inferences may be drawn from such facts as that determination is a matter of logic and law. *Torres*

v. City of Los Angeles, 548 F.3d 1197, 1211 (9th Cir. 2008).

Likewise, on appeal, a court must properly analyze whether clearly established law prohibited the defendant's actions. *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503-504 (2019). It cannot simply deny qualified immunity and remit the case for a trial. *Id.* To deny summary judgment any time a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.” *Saucier v. Katz* 533 U.S. 194, 202, 121 S. Ct. 2151, 2156 (2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982)).

Thus, the only time the jury needs to decide issues of fact prior to the court determining whether the defendants are entitled to qualified immunity is if the defendants would be entitled to [3] qualified immunity based on their version of the facts but not based on the plaintiff's version of the facts. That situation is not present here because qualified immunity is warranted based on Picatti's version of the facts coupled with the indisputable fact that Deputy Miner had probable cause to arrest Picatti for felony aggravated battery on a law enforcement officer.

Before remanding this case to the district court with instructions to carry out the bifurcated approach utilized in *Morales v. Fry*, 873 F.3d 817, 822 (9th Cir. 2017), this Court must analyze whether Picatti met his

burden to come forward with case law that clearly established that the deputies' conduct was unlawful under the circumstances of this case. When this Court undertakes that analysis, it will find that Picatti failed to meet his burden as he did not cite to any cases that clearly defined the right with sufficient specificity and the deputies are entitled to qualified immunity.

1. It is an indisputable fact that Deputy Miner was warranted in his belief that Picatti committed felony aggravated battery upon a law enforcement officer.

“Collateral estoppel bars the relitigation of an issue determined in a criminal *proceeding* in which the party sought to be estopped had a full and fair opportunity to litigate that issue.” *Anderson v. City of Pocatello*, 112 Idaho 176, 179, 731 P.2d 171, 174 (1986) (emphasis added). The courts should focus on what ultimate issues the prior criminal proceeding established, and whether the proceeding was of such significance to incentivize the parties to fully and fairly litigate the issue. *See Anderson*, 112 Idaho at 184-85, 731 P.2d at 179-80; *State v. Gusman*, 125 Idaho 805, 808-09, 874 P.2d 1112, 1115-16 (1994).

[4] In its decision, this Court explained that while *Anderson* specifically addressed whether collateral estoppel barred a section 1983 claim following a criminal conviction, its principle applies to collateral estoppel questions in general because issue preclusion “works to prevent the relitigation of issues of ultimate fact.”

Gusman, 125 Idaho at 808, 874 P.2d at 1115. Therefore, in *Anderson*, this Court held that Anderson was estopped from denying he had pointed the gun at the officers because that fact was established by the earlier conviction. (emphasis added).

In the present case, the deputies are not arguing that Picatti's claim for excessive force is barred by the doctrine of collateral estoppel or, if successful, it would imply the invalidity of his conviction. Rather, they are simply asking the Court to apply the principle from *Anderson* and argue that pursuant to that principle, Picatti cannot dispute what was established in the criminal proceeding.

The criminal proceeding established that there was probable cause to arrest Picatti for aggravated battery on a law enforcement officer. Probable cause exists when the facts and circumstances are sufficient to warrant a reasonable person in believing that the suspect had committed a crime. Thus, the criminal proceedings established that the facts and circumstances were sufficient to warrant Deputy Miner in believing that Picatti had committed the crime of felony aggravated battery on a law enforcement officer by intentionally striking Deputy Miner with his truck.

As explained by this Court in *Anderson*, Picatti's criminal proceeding established facts that he cannot relitigate in the civil arena including the fact that it was objectively reasonable for Deputy Miner to believe that Picatti committed felony aggravated battery upon a law [5] enforcement officer. Whether Picatti actually

intentionally hit Deputy Miner with his truck is irrelevant to the present analysis of Picatti's claim for excessive force because the criminal proceeding already established that a reasonable person would have been warranted in their belief that Picatti intentionally struck Deputy Miner.

The law is clear and there is no dispute that excessive use of force claims are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred. *Graham v. Conner*, 490 U.S. 386, 396 (1989). Further, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. *Id.* It was established at the criminal proceeding that an objectively reasonable officer on the scene would have been warranted in his belief that the Picatti committed felony aggravated battery on a law enforcement officer. This perspective and fact cannot be disputed and must be taken as true in this Court's analysis of qualified immunity.

In its decision concluding that Picatti's excessive force claim was not barred by collateral estoppel, this Court stated "Picatti is trying to litigate whether the deputies acted reasonably in making the arrest, not whether they had probable cause to seize him." In litigating whether the deputies acted reasonably in making the arrest, the Court must undertake that evaluation on the established fact that Deputy Miner was warranted in his belief that Picatti had committed felony aggravated battery on a law enforcement officer. In doing so, the Court will find that there is no clearly

established law that meets the U.S. Supreme Court's demand for specificity.

2. The Plaintiff failed to show that clearly established law prohibited the force used in this case.

[6] A plaintiff “bears the burden of showing that the right at issue was clearly established.” *Emmons v. City of Escondido*, 921 F.3d 1172 (9th Cir. 2019) (citing *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011)); *Miller v. Idaho State Patrol*, 150 Idaho 856, 865, 252 P.3d 1274, 1283 (2011). “To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he was doing violates that right.” *Reichle v. Howards*, 566 U.S. 658 (2012) (emphasis added). As the Supreme Court has frequently stated, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Immunity applies unless existing precedent has placed the statutory or constitutional questions “beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added).

In its recent decision in *White v. Pauly*, the U.S. Supreme Court reversed the denial of qualified immunity in the context of a Fourth Amendment excessive force claim. *White v. Pauly*, 137 S. Ct. 548, 551-552 (2017). In doing so, the Court observed that “[i]n the last five years, this Court has issued a number of

opinions reversing federal courts in qualified immunity cases.” *Id.* at 551. The Court explained that it “has found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.” *Id.*

In the wake of *White v. Pauly*, in *S.B. v. County of San Diego* the Ninth Circuit stressed that liability cannot be imposed for an alleged constitutional violation unless existing precedent has been identified that provides “clear notice” the conduct was unconstitutional under the circumstances. *S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017). In *S.B.*, the Ninth Circuit [7] specifically “acknowledge[d] the Supreme Court’s recent frustration with failures to heed its holdings.” *Id.* It also acknowledged that “[t]he Supreme Court has ‘repeatedly told courts-and the Ninth Circuit in particular-not to define clearly established law at a high level of generality.’” *Id.* (citing *City & County of San Francisco, California v. Sheehan*, 135 S. Ct. 1765, 1775-1776 (2015)).

Most recently, the U.S. Supreme Court remanded the Ninth Circuit’s decision in *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503-504 (2019). In that case, the U.S. Supreme Court reiterated that:

Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.

Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. . . .

It does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

Identifying the clearly established right by saying that the right to be free from excessive force was clearly established was too high a level of generality. *Id.* at 503. Therefore, on remand, the Ninth Circuit requested supplemental briefing on the following question: "Did clearly established law prohibit the officers from stopping and taking down a man in these circumstances?" *Emmons v. City of Escondido*, 921 F.3d 1172, 1173-1175 (9th Cir. 2019).

The circumstances in *Emmons* were as follows: the police responded to a 911 call reporting [8] a fight at an apartment. *Id.* at 1173. Once on scene, the officers were told by one of the residents, who was now at the pool, that everything was fine and they were not needed. *Id.* Nonetheless, the officers proceeded to the

apartment. *Id.* Despite repeated requests, the officers were not allowed in the apartment. *Id.*

According to the plaintiff, he exited the apartment with his back to the exterior hallway and began to close the door. *Id.* He could not see any officers by the door and did not hear anyone telling him to keep the door open. *Id.* He first knew that the defendant was there when the defendant grabbed him and threw him to the ground. *Id.* A witness described the interaction as one in which “Mr. Emmons was pulled out of the door,” and “tackled to the ground.” *Id.* The Court also noted that although the plaintiff posed no apparent danger to the defendant, the officers were investigating an incident that occurred inside the apartment and the plaintiff had not been ruled out as a suspect. *Id.*

The Ninth Circuit held that the defendant was entitled to qualified immunity as it was unable to find a case so precisely on point to satisfy the Supreme Court’s demand for specificity. *Id.* at 1175. Although the plaintiff cited several cases he believed clearly established that the defendant used excessive force, this Court found that those cases did not present sufficiently similar factual circumstances to have “placed the . . . constitutional question beyond debate.” *Id.* at 1174. The cases cited by the plaintiff included *inter alia* *Blankenhorn v. City of Orange*, 485 F.3d 463, 478479 (9th Cir. 2007), *Santos v. Gates*, 287 F.3d 846, 853-854 (9th Cir. 2002), and *Meredith v. Erath*, 342 F.3d 1057, 1059 (9th Cir. 2003).

In *Blankenhorn*, the plaintiff was gang-tackled by three officers for suspected trespassing at [9] a shopping mall. 485 F.3d at 478. The plaintiff had not been given any warning that he was under arrest and the officers knew that the plaintiff had been cooperative with law enforcement in the past. *Id.* In *Santos*, the plaintiff was taken down so forcefully he allegedly suffered a broken back. 287 F.3d at 853. In *Meredith*, the plaintiff was not even a suspect in a crime. 342 F.3d at 1059. Rather, the plaintiff was present in an office where IRS agents were conducting a search. *Id.* Although she made no attempt to leave, one of the agents grabbed her by the arms, forcibly threw her to the ground, twisted her arms, and handcuffed her. *Id.* Because those cases were not sufficient to meet the U.S. Supreme Court's demand for specificity, the defendant was granted qualified immunity.

Turning to the present case, as in *Emmons*, Picatti has failed to meet his burden to come forward with a case sufficient to meet the U.S. Supreme Court's demand for specificity. Like *Emmons*, this Court should ask: Did clearly established law prohibit the deputies from removing Picatti from his truck and taking him to the ground in these circumstances?

The circumstances in the present case, taking the facts in the light most favorable to Picatti are as follows:

- i. Deputy Miner was warranted in his belief that Picatti committed felony aggravated battery on a law enforcement officer.

- ii. Picatti knew that Deputy Miner was trying to communicate to him but could not hear what he was saying.
- iii. Picatti did not release his own seatbelt and Deputy Miner reached in and released it.
- iv. Deputy Miner removed Picatti from the truck and took him to the ground with the assistance of Deputy Laurance.
- [10] v. Picatti attempted to stand up and used his hands to push his face off the ground.

Therefore, in order to meet his burden, Picatti would have had to identify a case where the defendant officer was facing a situation in which:

- i. He had a warranted belief that the plaintiff had committed a serious crime similar to felony aggravated battery on a law enforcement officer,
- ii. The plaintiff did not comply with officer commands, whether it was because he could not hear them, could not comply or refused to comply;
- iii. The officer took the plaintiff to the ground and struggled with him on the ground to handcuff him, whether the struggle was because the plaintiff was 'resisting' or something innocent such as simply trying to stand up or push his face off the ground with his hands.

Picatti has not come forward with a case sufficiently on point that could be considered as having clearly established the right to be free from the force

used in these circumstances. The only case cited by Picatti was *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993). That case is not factually similar as the plaintiff was not being arrested for a serious felony and the force at issue was handcuffing the plaintiff too tightly and then refusing to loosen the handcuffs. *Id.* Also, it defined the right at issue as the right to be free from excessive force. In the years since 1993, it has become overwhelmingly clear that the right cannot be defined at that high of a level of generality.

Instead, this Court should use the *Emmons* case as its guide in conducting the required qualified immunity analysis. In *Emmons*, the plaintiff at least identified cases that had potentially similar facts but in the end each of them was distinguishable and did not clearly establish the right at [11] issue under the circumstances of that case. Picatti has failed to satisfy his burden and the deputies are entitled to qualified immunity with regard to the removal and take down of Picatti as the law was not clearly established.

The same analysis applies to Picatti's claim that the taser use was excessive. Picatti came forward with some cases in an attempt to meet his burden. However, he still falls short as the cases cited by him do not meet the U. S. Supreme Court's requirement for specificity. Picatti relied on *Mattos v. Agarano*, 661 F.3d 433, 437-452 (9th Cir. 2011) which is an *en banc* decision evaluating two prior decisions, *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010) and *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir. 2010). Those cases are distinguishable from the present case and did not put the issue of

whether it was reasonable to tase Picatti under the circumstances of this case beyond debate.

The deputies will not reiterate their argument in its entirety as to why the right was not clearly established at the time of this incident but rather will address it in only a limited sense and rely on their prior briefing as the argument would be much the same.

Although this Court is required to essentially accept Picatti's version of the facts as true in its summary judgment analysis, the analysis is slightly different because qualified immunity is involved. Qualified immunity is unique and it requires that the Court view Picatti's version of the facts from the perspective of a reasonable officer on the scene. This Court recognized and applied that duty in *James v. City of Boise*, 160 Idaho 466, 471-478, 376 P.3d 33, 38-45 (2016).

In *James*, the police responded to a call that someone broke into an office building. *Id.* at 471. The officers used a K9 to search the building. *Id.* at 472. The K9 ultimately found, bit and [12] restrained the plaintiff who, it was later determined had a right to be in the building. *Id.* In her § 1983 suit, plaintiff argued that had the officers evaluated the totality of the circumstances, they would have determined why she was in the building and that no force was necessary. *Id.* at 473.

The Court denied the validity of the argument, stating the claim called for applying hindsight to the analysis and not an analysis of the event as it was perceived in the moment. *Id.* at 475. This Court stated, “[t]he Supreme Court has made it clear that the clearly

established law at issue must take into account the factual circumstances facing the officers.” *Id.* The Court in *James*, like the case at hand, acknowledged that probable cause to arrest existed, so the analysis turned to the use of force to make that arrest given the facts associated with the existence of probable cause. *Id.* at 478.

When the Court applies that analysis, it becomes clear that Picatti’s failure to get out of the truck upon Deputy Miner’s command, whether due to fear, misunderstanding, or inability, could reasonably have been viewed as refusing to comply with his commands. Further, Picatti trying to stand up and using his hands to push himself off the ground, even though innocent, could reasonably have been viewed by an officer on the scene as ‘resisting.’ These are objectively reasonable inferences that may be drawn by the Court from Picatti’s facts and determined as a matter of law. *See Torres v. City of Los Angeles*, 548 F.3d 1197, 1211 (9th Cir. 2008).

It is this Court’s duty to evaluate the facts, taken in the light most favorable to Picatti, but from the perspective of an objectively reasonable officer on the scene. It must undertake the analysis to determine, based on those facts, whether the law was clearly established. In doing so, it becomes evident that the law was not clearly established as the *Mattos en banc* decision does not [13] “squarely govern the specific facts at issue” and thus does not meet the U.S. Supreme Court’s demand for specificity.

In *Mattos* and *Brooks*, the plaintiffs were not similarly situated to Picatti, the crimes at issue were not similar, and the facts leading up to the moment of tasing were not similar. In *Brooks*, the plaintiff was a seven months pregnant woman that had been pulled over for speeding. After refusing to sign the citation and get out of the car, the officers discussed where to tase her in light of her pregnancy and then tased her three times in less than a minute. In *Mattos*, the plaintiff was the victim of a domestic dispute call. When the police arrived the situation was relatively calm and all she did was raise her arm to protect her breasts from being smashed by one of the officers as he tried to walk by her. In this case, the deputies reasonably believed that Picatti had just committed a felony, the situation was quickly escalating, and they were unable to control Picatti even if it was simply because he was trying to stand up.

This Court must follow the directive of the U.S. Supreme Court and conduct the qualified immunity analysis to determine whether the precedent cited by Picatti “squarely governs the facts of this case” so that every reasonable officer would have known that the conduct was unlawful under the circumstances of this case. It cannot be debatable. Thus, just like the Ninth Circuit concluded in *Emmons*, this Court should conclude that the precedent relied upon by Picatti did not meet the demand for specificity and did not put the deputies on notice that their conduct was unlawful, entitling them to qualified immunity.

If this Court determines that the cases cited by Picatti did squarely govern the facts of this case and did meet the demand for specificity so that every reasonable officer would have known [14] that their conduct was violating Picatti's right, then the case can be remanded to the trial court. It is only after concluding that qualified immunity to the deputies is not warranted based on Picatti's facts viewed from the perspective of a reasonable officer on the scene, should the Court remand to the district court for the bifurcated trial process.

III. CONCLUSION

Based on the foregoing, the deputies respectfully request that this Court grant their Petition for Rehearing so that this Court can undertake the proper qualified immunity analysis and determine that Picatti failed to prove that the law was clearly established and that the deputies are entitled to qualified immunity.

DATED this 12th day of July, 2019.

JAN M. BENNETTS

Ada County Prosecuting Attorney

By: /s/ Erica White
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[Certificate Of Service Omitted]
