No. 22-

IN THE

Supreme Court of the United States

BRYAN COWAN AND NICK WEAVER,

Petitioners,

v.

MASA NATHANIEL WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Plaintiff pled no contest to California Penal Code §69 prior to bringing this §1983 action against all three officers who were involved in his arrest. Many federal circuits[1] have adopted a rule which bars a claim under *Heck* if it is based on specific factual allegations that are inconsistent with the facts upon which his criminal conviction was based. Is a claim cognizable under *Heck* when Plaintiff would be required to disprove any part of the unqualified factual basis for his conviction in order to succeed in the tort action?

2. Under *Heck,* can a §1983 action for excessive force be barred against officers who were not named in the criminal charge upon which Plaintiff was convicted,

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1. *Thore v. Howe*, 466 F.3d 173, 179-80 (1st Cir. 2006); *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019); *Jacobs v. Bayha*, 616 F. App'x 507, 513-14 (3rd Cir. 2015); *Bush v. Strain*, 513 F. 3d 492, 498 n. 14 (5th Cir. 2008); *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003); *McCann v. Neilsen*, 466 F.3d 619, 621-22 (7th Cir. 2006); *Gilbert v. Cook*, 512 F.3d 899, 902 (7th Cir. 2008); *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 046 (9th Cir. 2012); *Sanders v. City of Pittsburg*, 14 F.4th 968, 970-71 (9th Cir. 2021); *Galindo v. City of Orange*, 678 F. App'x 559, 560 (9th Cir. 2017); *Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1196 (11th Cir. 2020); *Ducksworth v. Rook*, 647 F. App'x 383, 385-86 (5th Cir. 2016) (citing *Daigre v. City of Waveland, Miss.*, 549 F. App'x 283, 286 (5th Cir. 2013), citing *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656-57 (5th Cir. 2007)); *Dodds v. City of Yorktown*, 656 Fed. App'x 40, 43 (5th Cir. 2016).

as suggested by *Yount v. City of Sacramento,*[2] *Beets v. County of Los Angeles,*[3] and *O'Brien v. Town of Bellingham*[4]?

3. Under the doctrine of judicial estoppel, can a criminal defendant who receives the benefit of a plea agreement assert facts as the plaintiff in a later §1983 action which are in direct conflict with the stipulated factual basis that supports his underlying conviction, without offering any explanation for the inconsistent positions?

4. Did the Ninth Circuit err in denying qualified immunity to the officers when the only material fact disputed by Plaintiff was directly in conflict with the unqualified stipulated factual basis for his underlying criminal plea?

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2. 43 Cal. 4th 885, 896-97 (2008)

3. 669 F.3d 1038, 1045-1046 (9th Cir. 2012)

4. 943 F.3d 514, 529 (1st Cir. 2019)

PARTIES TO THE PROCEEDINGS

Petitioners, Bryan Cowan and Nick Weaver, were both employed by the Redding Police Department, on duty working as uniformed officers on the day of the July 23, 2018, incident. Petitioners were both Defendants in the District Court and Appellants before the Ninth Circuit.

RELATED CASES

This case arises from the following proceedings:

- *Bryan Cowan and Nick Weaver v. Masa Nathaniel Warden,* No. 20-17405 (9th Cir.) (Memorandum of Decision affirming the order of the district court, issued on April 4, 2022);

- *Masa Nathaniel Warden v. Bryan Cowan, Will Williams, and Nick Weaver,* No. 2:19-cv-0431-MCE-AC-PS (E.D. Cal.) (Order granting summary judgment as to Corporal Williams, only, and denying summary judgment as to Officers Cowan and Weaver, issued November 23, 2020); and

- *People vs. Masa Warden,* Shasta County Superior Court Case No. 18-05051 (Judgment entered on August 21, 2018).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case as defined by this Court's Rule 14.1(b)(iii).

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Plaintiff plead *nolo contendere* to one felony violation of California Penal Code §69, supported by a stipulated factual basis without any qualification or limitation. (App. F, 45a-62a.) The factual basis described Plaintiff's contemporaneous acts of resistance against all three officers, stating in part: "[Plaintiff] began motioning with his hand as if he was preparing to draw an unknown weapon from his waistband area… Corporal Williams broadcasted on the radio that he believed [Plaintiff] had a handgun in his waistband. [Plaintiff] *continued to be uncooperative with all three officers* and continued reaching for his waistband area while on the ground…. After [Plaintiff] was shot, officers discovered [he] was not armed and had been simulating he had a weapon. [Emphasis added.]" (App. G, 66a-69a.)

Plaintiff now brings this action under 42 U.S.C. §1983 alleging that all three officers used excessive force against him during the course of his arrest on July 23, 2018. The factual allegations in his Complaint, and elaborated upon at his deposition, directly contradict the stipulated factual basis for his plea. Many federal circuits have a rule against inconsistent factual allegations, and apply *Heck* to bar civil suits of this kind. Although the lower courts refused to answer, address, or even frame the issue of *Heck*'s application in the instant case as to Officers Cowan and Weaver, their decision to ignore it when such a robust body of law is in Petitioners' favor is evidence of how far the Ninth Circuit diverges from existing jurisprudence, thus warranting supervision from this Court.

Federal circuits have grappled with the application of *Heck* and determining whether a civil tort action

would "necessarily imply" the invalidity of a conviction or sentence. The determining factors have been: (1) whether there is a factual basis in the record; (2) whether the conviction was secured by jury verdict or plea; and (3) in the excessive force context, whether the acts of resistance occurred during the arrest, or outside the course of arrest. The lower courts' decisions to avoid the application of *Heck* in Petitioners' case cannot be reconciled with the existing body of law, particularly within the Ninth Circuit. See *Yount v. City of Sacramento,* 43 Cal. 4th 885 (2008); *Smith v. City of Hemet,* 394 F.3d 689 (9th Cir. 2005); *Hooper v. County of San Diego,* 629 F.3d 1127 (9th Cir. 2011); *Beets v. County of Los Angeles,* 669 F.3d 1038 (9th Cir. 2012); *Sanders v. City of Pittsburg,* 14 F.4th 968 (9th Cir. 2021); and *Lemos v. County of Sonoma,* 2022 U.S. App. LEXIS 19856, 40 F.4th 1002 (9th Cir. 2022). Plaintiff's success in this tort action, against any of the three officers, would necessarily negate, at least in part, the factual basis upon which his conviction rests. Both *Sanders* and *Yount*, as well as the dissent in *Lemos,* have held that, under these circumstances, *Heck* applies. Federal law also supports the conclusion that a factual basis may prove more than what is required for a conviction, but not less. However, the trend in the Ninth Circuit is to resolve these questions in favor of allowing the claim to proceed, which is at odds with the direction from this Court. *Lemos,* 40 F.4th at *27 (in dissent), quoting *Spencer v. Kemna,* 523 U.S. 1, 17 (1998) ("'[U]nless one believes (as [the Supreme Court] do[es] not) that a §1983 action for damages must always and everywhere be available,' the long-standing *Heck* preclusion doctrine must not be interpreted in a manner that threatens to swallow the rule.")

Finally, in *New Hampshire v. Maine,* 532 U.S. 742, 749-50 (2001), this Court recognized that the integrity of

the judicial process requires that parties be estopped from deliberately asserting contradictory facts in separate proceedings in order to gain an unfair advantage. That is precisely what Plaintiff is attempting to do here. Yet, neither of the lower courts even addressed this issue, in blatant disregard of this Court's precedent. Failure to apply judicial estoppel in this case directly resulted in the denial of qualified immunity, where the only factual dispute found by the lower courts was Plaintiff's self-contradictory statement that he did not reach for his waistband and therefore was not a threat to the officers. Because qualified immunity is a protection from litigation, not just from liability, the denial of judicial estoppel in this circumstance ultimately stripped the officers of their right to qualified immunity. The issues raised by Petitioners are important because of their nationwide impact on law enforcement officers, the frequency with which they are raised in the fertile ground of §1983 litigation, and the discrepancy among federal circuits as to how these principles are to be applied in concert with each other.

For these reasons, Officers Bryan Cowan and Nick Weaver respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum from the United States Court of Appeals for the Ninth Circuit is unpublished and reported at 2022 U.S. App. LEXIS 9016, 2022 WL 999940. (App. A, pp. 1a-8a.)

The Order from the United States Court of Appeals for the Ninth Circuit denying *En Banc* Rehearing is

unpublished and reported at 2022 U.S. App. LEXIS 14718. (App. D, p. 35a.)

The Order from the Eastern District of California is unpublished and reported at 2020 U.S. Dist. LEXIS 219443, 2020 WL 6872879. (App. B, pp. 9a-10a.)

The Findings and Recommendations from the Eastern District of California is unpublished and reported at 2020 U.S. Dist. LEXIS 171643. (App. C, pp. 11a-34a.)

JURISDICTION

The Ninth Circuit issued its Memorandum on April 4, 2022, and Petitioners' Petition for Rehearing *En Banc* was denied on May 27, 2022. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1331.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provisions are relevant to this Petition:

- United States Constitution, Fourth Amendment (App. 36a);
- 28 U.S.C. §1291 (App. 37a);
- 28 U.S.C. §1331 (App. 38a);
- 42 U.S.C. §1983 (App. 39a);
- Federal Rules of Evidence R. 410 (App. 40a);
- California Penal Code §69 (App. 41a);
- California Penal Code §1016 (App. 42a-43a);
- California Evidence Code §1300 (App. 44a).

STATEMENT OF THE CASE

I. Legal Background

A. Claim of Excessive Force in Violation of the Fourth Amendment

In *Graham v. Connor,* 490 U.S. 386 (1989), this Court held that "all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest…or other 'seizure'…should be analyzed under the Fourth Amendment and its 'reasonableness standard.'" *Id.* at 395. It is settled law that "[t]he calculus of reasonableness 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 397. Therefore, this Court has repeatedly emphasized that the "reasonableness" of a particular use of force is an objective inquiry which must be judged from the perspective of a reasonable officer on the scene facing similar circumstances, rather than with the 20/20 vision of hindsight. *Id.* at 396. When evaluating the reasonableness of the use of deadly force, this Court has focused on "the circumstances at the moment when the shots were fired," and whether an objectively reasonable officer would have perceived that the suspect posed a threat to the officer and/or to innocent bystanders in that moment. *Plumhoff v. Rickard,* 572 U.S. 765, 777 (2014).

B. The *Heck* Doctrine

This Court has jurisdiction to consider Petitioners' argument that Plaintiff's §1983 claim is barred by *Heck*

v. Humphrey, 512 U.S. 477, 487 (1994). *O'Brien v. Town of Bellingham,* 943 F.3d 514, 529 (1st Cir. 2019) (Whether *Heck* bars a §1983 claim is a jurisdictional question that can be raised at any time). However, some circuits have argued that *Heck* is only reviewable on interlocutory appeal with pendent appellate jurisdiction, when the *Heck* argument is inextricably intertwined with their qualified immunity defense, as it is here. *Lucier v. City of Ecorse,* 601 F. App'x 372, 376 (6th Cir. 2015) (citing *McAdam v. Warmuskerken,* 517 F. App'x 437, 438 (6th Cir. 2013); *Crittindon v. LeBlanc,* 37 F.4th 177, 196-97 (5th Cir. 2022) (*Heck* issues are reviewable on interlocutory appeal); *Swint v. Chambers Cty. Comm'n,* 514 U.S. 35, 43-44 (1995) (judicial economy warrants exercise of pendent appellate jurisdiction when, if the party promoting pendent jurisdiction is correct about the merits in its appeal, review of the district court's order would be dispositive of the entire case); *Limone v. Condon,* 372 F.3d 39, 50-52 (1st Cir. 2004) (pendent appellate jurisdiction is appropriate where the review of the pendent issue is essential to ensure meaningful review of the linchpin issue).

For nearly thirty years, this Court had held that a plaintiff cannot maintain a §1983 civil lawsuit for damages, if success in that action would necessarily imply the invalidity of a prior criminal conviction. *Heck v. Humphrey.* Absent proof that the conviction or sentence has been reversed, expunged or invalidated, a §1983 claim for damages is not cognizable and should be barred if, in order to succeed, the plaintiff "would have to negate an element of the offense of which he has been convicted," *id.* at 486-87, or make specific factual allegations which are inconsistent with his criminal conviction. *Galindo v. City of Orange,* 678 Fed. Appx. 559, 559 (9th Cir. 2017).

Heck will not bar a §1983 action if the alleged wrongful conduct is distinct temporally or spatially from the factual basis for the conviction. *Beets v. County of Los Angeles,* 669 F.3d 1038, 1042 (9th Cir. 2012); *Hooper v. County of San Diego,* 629 F.3d 1127, 1134 (9th Cir. 2011). However, jurisprudence advises against temporal hair splitting in search of a distinct break between the criminal act and the challenged use of force where none exists. *Sanders v. City of Pittsburgh,* 14 F.4th 968, 971-72 (9th Cir. 2021); *Lemos v. Cnty. of Sonoma,* 2022 U.S. App. LEXIS 19856, 40 F.4th 968, *21-27 (9th Cir. 2022) (*en banc*) (Callahan, C., dissenting); *Fetters v. County of Los Angeles*, 243 Cal. App.4th 825, 840 (2016) ("To try to parse the relevant facts at issue here into two separate and distinct incidents, as [Plaintiff] attempts to do, would be to engage in the time of 'temporal hair-splitting' that California and other courts correctly refuse to perform."). This is especially true where the conviction was secured by a plea agreement and the factual basis upon which the plea was accepted was made without exception or reservation. *Yount v. City of Sacramento, 43 Cal.4th 885,* 897 (Cal. 2008); *Sanders v. City of Pittsburgh,* 14 F. 4th 968, 972 (2021); *Winder v. McMahon,* 345 F. Supp. 3d 1197, 1203 (C.D. Cal. 2018).

C. Judicial Estoppel

Before the court can decide whether an officer is entitled to qualified immunity based on their conduct, the court must first determine what exactly their conduct was. *Hunter v. Leeds,* 941 F.3d 1265, 1274 (11th Cir. 2019). In the course of deciding an interlocutory appeal from the denial of qualified immunity, the court has pendent appellate jurisdiction to consider the application of judicial estoppel because it is inextricably intertwined with the appealable

decision on qualified immunity. *Hunter v. Leeds,* 941 F.3d at 1274 n.9. At the summary judgment stage, the court is obligated to draw all reasonable inferences and view the facts in the light most favorable to the non-moving party. *Scott v. Harris,* 550 U.S. 372, 378 (2007). However, this general rule is at odds with judicial estoppel, which precludes a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. *New Hampshire v. Maine,* 532 U.S. 742, 749-50 (2001) (collecting cases); see also *Rissetto v. Plumbers & Steamfitters Local 343,* 94 F.3d 597, 600-01 (9th Cir. 1996); *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 782 (9th Cir. 2001). The law governing judicial estoppel is not fully developed; however, courts generally agree that judicial estoppel only applies to factual assertions rather than inconsistent legal theories. *Boston Gas Co. v. Century Indem. Co.,* 708 F.3d 254, 263-64 (1st Cir. 2013); *Lowery v. Stovall,* 92 F.3d 219, 224 (4th Cir. 1996); *Ezekiel v. Michel,* 66 F.3d 894, 904 (7th Cir. 1995); *Banclnsure, Inc. v. FDIC,* 796 F.3d 1226, 1240-1241 (10th Cir. 2015).

Although declining to issue definitive criteria, this Court has identified three factors to evaluate when considering whether to invoke judicial estoppel : (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) the party succeeded in persuading a court to accept their earlier position, so that judicial acceptance of a later inconsistent position would create "the perception that either the first or the second court was misled;" and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire*, 532 U.S. 742, 750-751 (2001).

This Court left open the possibility that other factors may be relevant in specific factual contexts. *New Hampshire v. Maine,* 532 U.S. 742, 751 (2001).

At the summary judgment stage, although courts are generally obligated to resolve factual disputes in favor of the non-moving party, some courts have estopped the non-moving party from "playing fast and loose with courts" by contradicting themselves with facts that are in direct conflict with those relied upon in a prior proceeding. *Franco v. Selective Ins. Co.,* 184 F.3d 4, 9 (1st Cir. 1999). Therefore, the doctrine is inextricably intertwined with the court's analysis of qualified immunity and resolution of the judicial estoppel issue is necessary to ensure a meaningful review on appeal.

D. Qualified Immunity

The doctrine of qualified immunity shields officers from liability *and litigation,* so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *City of Tahlequah v. Bond,* 142 S. ct. 9, 11 (2021) (quoting *Pearson v. Callahan,* 555 U.S. 223, 231 (2009)); see also *Plumhoff v. Rickard,* 572 U.S. 765, 772 (2019); *White v. Pauly,* 137 s. Ct. 548 (2017). Qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *District of Columbia v. Wesby,* 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

A law is "clearly established" if, at the time of the officer's conduct, the legal principle had a clear foundation in then-existing precedent such that every reasonable

officer would understand the lawfulness of their actions. *District of Columbia v. Wesby,* 138 S. Ct. 577, 589-590 (2018); see also *Ashcroft v. al-Kidd,* 563 U.S. 731, 741 (2011) and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The clearly established standard also requires the legal principle to clearly prohibit the officer's conduct in the particular circumstances before him. *District of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018). This Court has repeatedly warned lower courts – and the Ninth Circuit in particular- not to define clearly established law at a high level of generality. *Kisela v. Hughes,* 138 S. Ct. 1148, 1152 (2018) (collecting cases); see also *City of Tahlequah v. Bond,* 142 S. Ct. 9, 11-12 (2021). "Such 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…will apply to the factual situation the officer confronts. [Internal quotations omitted.] [Citation omitted.]" *Kisela v. Hughes,* 138 S. Ct. 1148, 1152-53 (2018).

The contours of the rule must be so well defined that every reasonable official would interpret it to establish the particular rule of law that the injured party seeks to apply. *District of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018); see also *City of Tahlequah v. Bond,* 142 S. Ct. 9, 11-12 (2021). To be settled law, the legal principle must be dictated by "controlling authority" or "a robust consensus of cases of persuasive authority." *District of Columbia v. Wesby,* 138 S. Ct. 577, 589-590 (2018); Dennis v. City of Phila., 19 F. 4th 279, 288 (3rd Cir. 2021) (citing *Wilson v. Layne,* 526 U.S. 603, 617 (1999) (only controlling precedent in the relevant jurisdiction can place a constitutional question beyond debate).

II. Factual Background

Plaintiff, Masa Warden, was a violent fugitive with a history of gang affiliation and narcotics use, who had an active warrant out for his arrest in Nevada for probation violation stemming from a conviction for kidnapping and attempted coercion with force or threat of force. Plaintiff also had a history of battery on a protected person.

On July 23, 2018, around 6:00am, after being up all night injecting crystal methamphetamine, Plaintiff initiated a violent and unprovoked attack on a Shasta High School employee, punching him in the face multiple times with a closed fist, causing injuries, and threatening to kill the employee. Plaintiff fled the campus and retreated into the mixed-use neighborhood behind Shasta High School, where several other schools and residential properties were located. The employee called 9-1-1 to report the attack, and officers from the Redding Police Department responded to the call, thus beginning an hours-long search for Plaintiff. Meanwhile, after leaving the campus, Plaintiff burglarized an occupied apartment and was causing disturbances on the nearby Sacramento River Trail.

At approximately 9:47am, Plaintiff was finally spotted at the end of Overhill Drive. Corporal Will Williams made the initial contact with Plaintiff on Mary Street in front of Freedom High School. Corporal Williams was driving a marked patrol car and wearing a full police uniform. During Corporal Williams' interaction with Plaintiff, Plaintiff's behavior led Corporal Williams to believe that Plaintiff had a gun located in his waistband. Williams advised over the radio that Plaintiff had a gun

in his waistband. Officers Bryan Cowan and Nick Weaver heard the announcement from Corporal Williams and immediately began making their way to Williams' location to provide backup.

Williams gave Plaintiff several commands to stop and show his hands, which were ignored. Based on the totality of circumstances, Williams' perceived Plaintiff to be an immediate threat and fired one round from his department-issued handgun. Plaintiff immediately fell to the ground, although it was later determined that Williams' bullet never struck Plaintiff. Williams radioed that shots had been fired.

Seconds later, Officers Cowan and Weaver arrived at the scene simultaneously, each driving marked patrol vehicles and wearing full police uniforms. Williams told the officers, again, that Plaintiff was armed with a gun in his waistband. The three officers continued giving Plaintiff, who was on the ground, commands not to move and to show his hands. However, Plaintiff ignored the officers' commands and made a sudden movement. As a result of that movement, Officers Cowan and Weaver simultaneously fired a handful of rounds each, striking Plaintiff several times. The officers made a second radio call that additional shots had been fired. Additional units responded shortly thereafter, at which time the officers were able to secure Plaintiff in handcuffs, and search him for a weapon. It was at that point they discovered he was unarmed. Medical care was provided to Plaintiff at the scene before he was transported to a nearby hospital for further treatment. He survived.

According to Plaintiff's deposition testimony in this action, he moved his hands inward, pushed his upper body

off the pavement, and intended to turn and tell the officers he was unarmed. According to the officers' perceptions, Plaintiff's movement was an apparent attempt to reach for the gun that they had been repeatedly told was in his waistband. As described below, the stipulated unqualified factual basis supporting Plaintiff's criminal conviction is consistent with the Officers' version of the facts.

As a result of his interaction with the three officers on July 23, 2018, Plaintiff was charged with several crimes. In relevant part, he plead *nolo contendere* to felony violations of California Penal Code §§69 (resisting, obstructing, or delaying an officer by force or threat), 422 (criminal threats), and 459 (first degree residential burglary). In exchange for these three pleas, the District Attorney dropped the remaining charges for violations of §148(a)(1) (two counts), §245(a)(4), and §243.6. Plaintiff, who was represented by counsel, stipulated on the record that, without any qualification, the reports prepared by the investigating agencies as to the incidents which took place on July 23, 2018, formed the factual basis for his pleas. Specifically, as to the felony violation of Penal Code §69 (Shasta County Superior Court Case No. 18-05051), Plaintiff stipulated that the factual basis for his plea was the report from the Shasta County Sheriff's Office in their case number 18-25675. (App. F, 45a-62a.) In relevant part, this report stated as follows:

> [Plaintiff] was uncooperative with Corporal Williams and [Plaintiff] began motioning with his hand as if he was preparing to draw an unknown type of weapon from his waistband area. [¶] Corporal Williams broadcasted on the radio he believed [Plaintiff] had a handgun

> in his waistband. Corporal Williams gave [Plaintiff] multiple commands to show his hands and to get his hands out of his pocket. [Plaintiff] continued to make movements to the area of his waistband with his hand and Corporal Williams fired one round, causing [Plaintiff] to fall to the ground. Corporal Williams requested assistance and medical over the radio. [¶] Redding Police Officers Bryan Cowan and Officer Nick Weaver were additional units who arrived on scene within seconds of the shooting. [Plaintiff] continued to be uncooperative with the three officers and continued reaching for his waistband area while on the ground. Due to [Plaintiff] continuing to reach for his waistband area, Officer Cowan and Officer Weaver fired multiple rounds at [Plaintiff]. After [Plaintiff] was shot, he was handcuffed and searched. During the search of [Plaintiff] officers discovered [Plaintiff] was not armed and had been simulating he had a weapon.

(App. G, 66a-69a.)

While serving his sentence in federal prison, Plaintiff filed a civil lawsuit under 42 U.S.C. §1983 against Corporal Williams and Officers Cowan and Weaver for excessive force in violation of the Fourth Amendment. In relevant part, Plaintiff's First Amended Complaint alleges as follows:

> "[O]ne of the three defendants…shot Plaintiff once while Plaintiff had his arms in the air

> screaming and/or yelling that he was not armed with a weapon of any sort. Plaintiff fell to the ground after being shot *where alln* [sic.] *defendants acting in cohort oproceeded* [sic.] *in unison to shoot to kill Plaintiff.* [. . .] [B]eing an unarmed man Plaintiff posed no immediate threat to anybody in the public or to the defendants…. [Emphasis added.]"

Over the course of litigation, Plaintiff has reiterated and elaborated upon these allegations. This §1983 action is based on his steadfast denial of the essential elements of his PC §69 conviction, and his argument that the Officers lied about the contents of the report which forms the basis for his conviction:

- "They was all lies, because I do not recall what was said in the report that was said to me that day, and a lot of it was lies." (Deposition of Masa Warden, April 28, 2020 ("Warden Deposition"), 11:16-18.)

- "But I didn't reach towards no waist area, no none of that." (Warden Deposition, 93:4-5.)

- "No, they didn't [give several commands]. That's all false." (Warden Deposition, 103:18.)

- "There wasn't nothing what they said on this report. That's why I said it's all lies, and it's false allegations what they're saying." (Warden Deposition, 104:9-11.)

- "[T]hat's why I'm saying it's all false allegations. They're lying on me. [. . .] They're lying." (Warden Deposition, 105:2-5.)

- Q: "…I asked if you read those reports, and you said those things are false; correct?" A: "Yeah, they're false." (Warden Deposition, 105:6-9.)

- "[I]t was all lies just to back up what they're trying to say." (Warden Deposition, 105:19-20.)

- "That's a lie, because I wasn't challenging nobody to fight when the officers arrived and all this other stuff. So I don't get what they're saying on that. I disagree with that." (Warden Deposition, 122:16-19.)

- "So that's a lie. I wasn't showing or indicating no behavior that I had a gun, because I didn't have a gun." (Warden Deposition, 122:24-25 – 123:1; see also *Warden v. Cowan, et al.*, Case No. 20-17405 (9th Cir.), DktEntry 19-1, p. 13.)

- "The officers claim to have given [Plaintiff] commands not to move [. . .] [a]cording to [Plaintiff], these commands were followed while he tried to communicate that he was unarmed." (*Warden v. Cowan, et al.*, Case No. 20-17405 (9th Cir.), DktEntry 19-1, p. 14.)

- "[T]hey had no business shooting me while I'm already on the ground, and I wasn't no

threat to them or nobody else, because I'm on my stomach. [. . .] I'm on the ground. How am I a threat to the community or to the officers if the officers in back of me and I'm face down." (*Warden v. Cowan, et al.,* Case No. 2:19-cv-00431-MCE-AC (E.D. Cal.), ECF 13, pp. 3-6; see also Warden Deposition, 124:16-22)

- "[S]omebody won't have to go through what I'm going through now about a whole bunch of lies and stipulations and this and that…." (Warden Deposition, 140:23-25.)

III. Procedural History

Plaintiff filed his original §1983 Complaint, *pro se,* on February 19, 2019, in the United States District Court for the Northern District of California. The Complaint was later transferred to the Eastern District, where Plaintiff's request to proceed *in forma pauperis* was granted and his Complaint was dismissed with leave to amend. Plaintiff filed a First Amended Complaint on April 15, 2019, against Chief Roger Moore, Corporal Will Williams, Officer Bryan Cowan and Officer Nick Weaver, alleging several theories of liability. The District Court dismissed, without granting leave to amend, Plaintiff's causes of action against all Defendants under 42 U.S.C. §1983 for violations of his rights under the First, Eighth and Fourteenth Amendments, as well as violations of the Americans with Disability Act. The Court also dismissed, with leave to amend, all of Plaintiff's claims against Chief Roger Moore. Plaintiff elected not to further amend his complaint and proceeded against only Williams, Cowan,

and Weaver, as to the claim of excessive force in violation of the Fourth Amendment.

On July 24, 2020, Defendants Cowan, Weaver, and Williams filed a Motion for Summary Judgment, which Plaintiff opposed. The Magistrate Judge issued her Findings and Recommendations on September 18, 2020, recommending that summary judgment be granted as to Corporal Williams on the basis that Plaintiff's claim was barred by the *Heck* Doctrine. As to Officers Cowan and Weaver, the Magistrate Judge denied summary judgment on the merits, and denied qualified immunity to either officer. The Magistrate Judge made no finding as to the application of the *Heck* Doctrine on the §1983 action against Officers Cowan and Weaver, nor did the Court address the Petitioners' argument that judicial estoppel precluded Plaintiff from arguing facts contrary to the stipulated unqualified factual basis for his felony conviction. The Magistrate Judge determined that factual issues remained in dispute as to the reasonableness of the amount of force used, precluding the application of qualified immunity. No finding was made as to whether the right potentially violated was clearly established. The Findings and Recommendations were adopted in full, and summary judgment was granted as to Corporal Williams, only, on November 23, 2020.

On November 18, 2020, the Court issued an order appointing pro bono counsel for Plaintiff.

On December 8, 2020, Petitioners gave notice of their intent to file an interlocutory appeal in the Ninth Circuit. On February 4, 2021, Plaintiff filed a motion in the District Court to certify Petitioners' appeal as without merit,

and Petitioners simultaneously filed a motion to stay the District Court proceedings pending their interlocutory appeal. The District Court took both motions under submission without oral argument. Both motions were later denied as moot.

Petitioners pursued their interlocutory appeal in the Ninth Circuit pursuant to 28 U.S.C. §1331, 28 U.S.C. §1291, the collateral order doctrine, and pendant appellant jurisdiction. After the appeal was fully briefed, the matter was argued and submitted before a 3-judge panel in San Francisco, California, on February 16, 2022. The panel issued a memorandum of their decision on April 4, 2022, affirming the decision of the District Court to deny qualified immunity to Officers Cowan and Weaver. In their memorandum, the Panel did not answer, address, or even frame the issues of whether the *Heck* Doctrine applied to bar the case against Officers Cowan and Weaver, or whether judicial estoppel applied to preclude Plaintiff from asserting facts which are in direct conflict with his plea colloquy in the underlying criminal matter. The Panel affirmed the District Court decision, finding that Petitioners may have violated Plaintiff's Fourth Amendment rights and, if so, the right was clearly established. Petitioners filed a Petition for Rehearing *En Banc*, which was denied in an Order dated May 27, 2022. A mandate was issued on June 6, 2022.

REASONS FOR GRANTING THE PETITION

I. The *Heck* Doctrine

As a result of his interaction with the three officers during the course of his arrest on July 23, 2018, Plaintiff

was charged, in relevant part, with a felony violation of California Penal Code §69, which prohibits the attempt, by means of any threat or violence, to deter or prevent an officer from performing any lawful duty or, or who knowingly resists, by use of force or violence, the officer, in the performance of his or her duty. Cal. Pen. Code §69. Under California law, a conviction under this statute requires that the officer was not acting with excessive force at the time the criminal defendant unlawfully used force against him. Cal. Pen. Code §69. Plaintiff plead *nolo contendere* to the felony and in exchange for his plea, the District Attorney dropped the remaining charges which were pending against him. The factual basis for Plaintiff's plea was stipulated to on the record and made without any qualifications. Plaintiff is now attempting to sue the officers whom he was resisting/obstructing, which negates an element of his conviction. His complaint, and every allegation or theory of liability advanced since then, are in direct conflict with the unqualified stipulated factual basis for his conviction.

"The legal proposition at issue here is easily stated but somewhat less easy to apply." *Yount v. City of Sacramento*, 43 Cal. 4th 885, 893 (2008) (citing *Edwards v. Balisok*, 520 U.S. 641, 643 (1997), quoting *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)). Federal courts have struggled with the parameters of the *Heck* Doctrine, as evidenced by the number of times courts have interpreted its application since its inception in 1994. However, despite the breadth of legal precedent, there remains questions of first impression for this Court: (1) Does *Heck* bar a §1983 action based exclusively on facts which are inextricably intertwined, and at odds, with the factual basis for the plea agreement which procured his criminal conviction;

(2) Can *Heck* bar a §1983 action against officers not named in the criminal charge, if the Plaintiff's interaction with them was woven into the factual basis for the plea which forms the basis for an undisturbed conviction; and (3) is a plea and/or underlying stipulated facts admissible in federal court as admissions by the §1983 plaintiff for purposes of *Heck*?

A. The Lower Courts' Decisions Diverge So Far from Accepted Jurisprudence that it Warrants Intervention by this Court.

Half of the federal circuit courts agree that, in cases such as this one, where the civil complaint is based on specific factual allegations that are directly inconsistent with the factual basis for an underlying criminal conviction, *Heck* acts as a bar to the §1983 suit. *Thore v. Howe,* 466 F.3d 173, 179-80 (1st Cir. 2006) (*Heck* bars a claim where plaintiff denies any criminal wrongdoing at all); *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) (*Heck* bars a claim that fails to specify any theory of relief or any factual scenario which would not undermine plaintiff's criminal conviction); *Jacobs v. Bayha,* 616 F. App'x 507, 513-14 (3rd Cir. 2015) (*Heck* can operate as a bar where specific factual allegations in the complaint are necessarily inconsistent with the validity of the conviction); *Bush v. Strain,* 513 F. 3d 492, 498 n. 14 (5th Cir. 2008) (*Heck* applies where the factual basis for the civil claims are inherently at odds with the facts adjudicated adversely during the criminal proceedings); *Okoro v. Callaghan,* 324 F.3d 488, 490 (7th Cir. 2003) (where plaintiff's allegations are inconsistent with the criminal conviction, *Heck* will bar the civil suit as a collateral attack); *McCann v. Neilsen,* 466 F.3d 619, 621-22 (7th Cir. 2006) (despite theoretical

compatibility, plaintiff voluntarily steered the §1983 into *Heck* territory by making specific factual allegations in the complaint which were inconsistent his criminal conviction); *Gilbert v. Cook*, 512 F.3d 899, 902 (7th Cir. 2008) (in drafting his complaint, the plaintiff is the master of his ground, and where a plaintiff chooses a ground that cannot be reconciled with his conviction, *Heck* will bar the civil claim); *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 046 (9th Cir. 2012) (*Heck* will bar a §1983 action if the criminal conviction arising out of the same facts stands, and is fundamentally inconsistent with the unlawful behavior for which damages are sought); *Sanders v. City of Pittsburg*, 14 F.4th 968, 970-71 (9th Cir. 2021) (*Heck* bars a plaintiff's action if it would negate an element of the offense or allege facts inconsistent with the plaintiff's conviction); *Galindo v. City of Orange*, 678 F. App'x 559, 560 (9th Cir. 2017) (plaintiff's §1983 claims were barred by *Heck* because success would require him to negate an element of his conviction and because he pleaded specific factual allegations in his complaint which are inconsistent with the admissions supporting his criminal conviction); *Harrigan v. Metro Dade Police Dep't Station #4,* 977 F.3d 1185, 1196 (the inconsistent factual allegations rule applies when the allegations in the §1983 complaint both necessarily imply the invalidity of the earlier criminal conviction, and are necessary to the success of the §1983 suit itself). "Where a complaint describes 'a single violent encounter in which the plaintiff claimed he was an innocent participant' but the allegations are inconsistent with his conviction, *Heck* applies to bar his excessive force claims." *Ducksworth v. Rook,* 647 F. App'x 383, 385-86 (5th Cir. 2016) (citing *Daigre v. City of Waveland, Miss.,* 549 F. App'x 283, 286 (5th Cir. 2013) (citing *DeLeon v. City of Corpus Christi,* 488 F.3d 649, 656-57 (5th Cir. 2007))); see

also *Dodds v. City of Yorktown,* 656 Fed. App'x 40, 43 (5th Cir. 2016).

Despite the clear precedent to apply the *Heck* Doctrine in factually similar circumstances, neither the District Court nor Ninth Circuit answered, addressed, or even framed the legal question presented by Petitioners concerning its application in this case. The correct application of *Heck* is an important federal question with national importance, particularly for our law enforcement officers, at a time when the political climate in this country threatens to erode the withering protections remaining for them. Where there is such a vast collection of cases decided homogenously on this issue, the Ninth Circuit's refusal to apply those principles here diverges so far from existing jurisprudence that it warrants this Court's intervention. *Heck* is dispositive to this matter and should be applied in favor of Officer's Cowan and Weaver. Proceeding against Officer Cowan and Weaver is completely at odds with the underlying felony conviction and the facts stipulated to by Plaintiff.

B. The Ninth Circuit and the California Supreme Court Have Held that the Factual Basis for a Plea Cannot be "Sliced Up" for Purposes of Avoiding a *Heck* Bar.

Evidencing the confusing nature of Ninth Circuit precedent on the application of *Heck,* the court, sitting *en banc,* recently reversed a decision from the district court in *Lemos v. County of Sonoma* that had been affirmed by split-panel decision. There, the court declined to invoke *Heck* in a case which the dissent argues, and Petitioners agree, runs afoul of the California Supreme Court and

California criminal law. *Lemos v. County of Sonoma,* 2022 U.S. App. LEXIS 19856, 40 F.4th 1002, at *19-20 (9th Cir. 2022) (Callahan, C., dissenting). The dissent is illustrative here.

In *Lemos,* the district court granted summary judgment to the defendants on the basis of *Heck*. *Lemos,* 40 F.4th at *8-9. A split panel affirmed[1] before the Ninth Circuit voted to rehear the case *en banc.* In a controversial decision, the Ninth Circuit reversed the district court's decision and in so doing, overturned, in part, *Smith v. City of Hemet,* 394 F. 3d 689 (9th Cir. 2005) (en banc), and *Beets v. Cnty. of Los Angeles,* 669 F.3d 1038 (9th Cir. 2012). *Lemos*, 40 F.4th at *17-18. The majority held that, if Lemos were to prevail in her §1983 action, it would not necessarily mean that her conviction was invalid because the specific act of resistance constituting her conviction was unclear. *Lemos*, 40 F.4th at *13-14. The majority held that where the criminal defendant was charged with a single act offense, but there were multiple acts involved which could have served as the basis for the conviction, a jury's guilty verdict does not necessarily establish the officer's lawfulness throughout the whole course of defendant's conduct. *Lemos*, 40 F.4th at *17-18 (citing *Smith,* 394 F.3d at 699, n.5). *Lemos* is distinguished by the fact that she was convicted by a jury, not as a result of an unqualified stipulated plea.

In dissent, Judge Callahan, joined by Judge Lee, criticized the majority for creating "an escape hatch to *Heck*" by presupposing that one uninterrupted interaction can be broken up by a temporal or spatial break between a

1. *Lemos v. County of Sonoma,* 5 F.4th 979 (9th Cir. 2021).

§1983 plaintiff's unlawful conduct and an officer's alleged excessive use of force where none existed. *Lemos*, 40 F.4th at *19-20, 25-26 (Callahan, C., dissenting). In so doing, the majority's decision undermines a strong policy against temporal hair-splitting. *Lemos*, 40 F.4th at *20 (Callahan, C., dissenting); see also *Smith,* 394 F.3d at 699 n.5; Fetters *v. County of Los Angeles*, 243 Cal.App.4th 825, 840 (2016); *Winder v. McMahon*, 345 F.Supp. 3d at 1206-1207. The dissent argues that, generally, only conduct which occurred clearly outside the scope of the arrest can create a legitimate temporal or spatial break for purposes of *Heck. Lemos*, 40 F.4th at *25-26 (Callahan, C., dissenting). The dissent finds support in *Sanders v. City of Pittsburg,* 14 F.4th 968 (9th Cir. 2021), a published Ninth Circuit decision issues months after the panel issued its underlying opinion in *Lemos* but was noticeably absent from the *en banc* decision. *Sanders* is instructive here as well.

In *Sanders,* the defendant pleaded no contest to one charge of resisting arrest under Penal Code §148(a)(1) and stipulated that the factual basis for his plea, without qualification, was the preliminary hearing transcript which described multiple instances of the defendant resisting. *Lemos*, 40 F.4th at *26-27 (Callahan, C., dissenting) (citing *Sanders,* 14 F.4th at 970). In *Sanders, t*he Ninth Circuit, relying on the California Supreme Court's decision in *Yount v. City of Sacramento,* 43 Cal. 4th 885 (Cal. 2008), determined that plaintiff's §1983 case was *Heck*-barred, finding that it could not separate out which of the defendant's several obstructive acts led to his conviction "since all of them did." *Lemos,* 40 F.4th at *26-27 (Callahan, C., dissenting) (citing *Sanders,* 14 F.4th at 972-73). *Sanders* is factually analogous to the instant action.

Both *Sanders* and *Yount* reject attempts by the Ninth Circuit to manufacture a temporal break within one continuous transaction. Further, they expressly reject the notion that an unqualified factual basis can be "sliced up" for purposes of avoiding a *Heck* bar. *Sanders,* 14 F. 4th at 972-973. Similarly, the factual basis cannot be parsed through in order to bar a §1983 action against fewer than all of the officers who were involved in the incident. See generally, *Yount* 43 Cal. 4th 885. The California Supreme Court held that failure to apply *Heck* to bar plaintiff's suit against fewer than all of the officers involved amounted to an improper collateral attack on his conviction. *Yount,* 43 Cal. 4th at 897 (citing *Heck*, 512 U.S. at 485). By the same logic, in a part of the decision which remains undisturbed, the Ninth Circuit has previously extended *Heck* to bar a §1983 action brought by a plaintiff who was neither charged nor convicted of a crime. *Beets,* 669 F.3d at 1045-46.

Despite the clear precedent from both the Ninth Circuit and the California Supreme Court, the lower courts blatantly ignored these holdings in Petitioners' case. *Heck* principles should bar the claims against both Officers Weaver and Cowan.

C. There is a Split of Authority Concerning the Admissibility of a *Nolo Contendere* Plea in Federal Courts for Purposes of *Heck*.

In California, a *nolo* plea is considered the same as a plea of guilty, and has the same legal effect of a guilty plea for all purposes. Cal. Pen. Code §1016, subd. 3. Further, under California law, in cases punishable as felonies, the plea and any admissions made as part of the factual

basis for the plea, may be used against the defendant as an admission in a civil suit. Cal. Pen. Code §1016, subd. 3. Federal rules seemingly prohibit this use of a plea in subsequent civil suits. Fed. R. Evid. R. 410(a)(2). However, there is a split of authority among federal courts as to the admissibility of a *nolo* plea in the context at issue here – where a criminal defendant brings a civil rights claim in connection with his arrest, after pleading *nolo contendere* in the underlying criminal action. *Galvan v. City of La Habra,* 2014 U.S. Dist. LEXIS 49248, *26-27 (C.D. Cal. Apr. 8, 2014) (collecting cases).

The seminal case in support of admissibility is *Walker v. Schaeffer,* 854 F.2d 138 (6th Cir. 1988). There, the Sixth Circuit held that equity requires admission of a plea for estoppel purposes where it is not being used "against the defendant" within the meaning of Rule 410. *Walker,* 854 F.2d at 143. The holding in *Walker* has been affirmed by the Tenth Circuit in *Rose v. Uniroyal Goodrich Tire Co.,* 219 F.3d 1216, 1219-21 (10th Cir. 2000). The Third Circuit rejected *Walker,* and the First Circuit attempted to distinguish the holding. *Sharif v. Picone,* 740 F.3d 263, 270 (3rd Cir. 2014); *Olsen v. Correiro,* 189 F.3d 52, 62 (1st Cir. 1999). The Ninth Circuit has yet to squarely address the issue. *Galvan,* 2014 U.S. Dist. LEXIS 49248 at *27-34. However, case law seems to favor admission of pleas for purposes of *Heck. Galvan,* 2014 U.S. Dist. LEXIS 49248 at *27-34; *Alatraqchi v. City & Cnty. of San Francisco,* No. 99-4569, 2001 U.S. Dist. LEXIS 7488, 2001 WL 637429 (N.D. Cal. May 30, 2001); *Nuno v. County of San Bernardino,* 58 F.Supp.2d 1127, 1129, 1137, 1138 n.12 (C.D. Cal. 1999); *Ove v. Gwinn,* 264 F.3d 817, n.4 (9th Cir. 2001).

In this matter, Plaintiff's guilty plea and the stipulated factual basis should be admissible for purposes of *Heck,*

judicial estoppel, and qualified immunity, as they are dispositive of the excessive force claims against Officers Cowan and Weaver.

II. Judicial Estoppel

A. Pursuant to this Court's Holding In *New Hampshire v. Maine*[2], Plaintiff Should Be Judicially Estopped from Pursuing Civil Damages Based on Allegations Inconsistent with the Factual Basis for His Criminal Plea.

Judicial estoppel is to be applied where "'intentional self-contradiction is being used as a means of obtaining unfair advantage.'" *In re Cassidy,* 892 F.2d 637, 641 (7th Cir. 1990); *Allen v. Zurich Ins. Co.,* 667 F.2d 1162, 1166 (4th Cir. 1982); *Edwards v. Aetna Life Ins. Co.,* 690 F.3d 595, 598 (6th Cir. 1982). It was not until 2001 that this Court defined and endorsed the doctrine of judicial estoppel. *New Hampshire v. Maine,* 532 U.S. 742 (2001). However, the prerequisites for its applicability are flexible and, as a result, the doctrine has not been uniformly applied by the lower courts. *New Hampshire,* 532 U.S. at 750-751.

There are two leading cases[3] which have directly addressed the application of judicial estoppel when a plaintiff asserts facts that contradict the plea colloquy supporting his conviction. This Court has never directly addressed the doctrine's application in this context. However, determination of this issue is dispositive of the

2. 532 U.S. 742 (2001).

3. *Thore v. Howe,* 466 F.3d 173 (1st Cir. 2006) and *Lowery v. Stovall,* 92 F.3d 219 (4th Cir. 1996).

qualified immunity analysis. Therefore, a ruling from this court on the doctrine's application in this circumstance promotes finality and consistency among federal court decisions.

Beginning with the first consideration set forth by this Court, there can be no doubt that the facts presented by Plaintiff in this action are clearly inconsistent with the stipulated facts which form the basis for his conviction. Furthermore, because the facts upon which Plaintiff relies in the instant action were offered without any explanation for their inconsistency, the Court is within its right to determine that the facts upon which Plaintiff relies now are a sham. *Thore v. Howe*, 466 F.3d at 185 (citing *New Hampshire,* 532 U.S. at 753, 75; *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 806-07 (1999); *Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 998-99 (9th Cir. 2009); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-251 (1986). The sham affidavit rule holds, generally, that a party may not create a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict. *Baer v. Chase,* 392 F.3d 609, 624 (3rd Cir. 2004) (citing *Hackman v. Valley Fair,* 932 F.2d 239, 241 (3rd Cir. 1991)). "Although District Courts do not always refer to the sham affidavit doctrine by name, its roots in the federal courts can be traced at least as far back as the Second Circuit's decision in *Perma Research & Development Co. v. Singer Co.,* 410 F.2d 572, 577-78 (2nd Cir. 1969)." *Jimenez v. All Am. Rathskeller, Inc.,* 503 F.3d 247, 251 (3rd Cir. 2007). Since *Perma Research,* every federal court of appeals has adopted some form of the sham affidavit doctrine. *Jiminez,* 503 F.3d at 252 (collecting cases).

Second, Plaintiff succeeded in persuading the state court to accept his earlier position, such that acceptance of his current version of events would create the perception that one of the two courts has been misled. The question of whether an earlier inconsistent position was "accepted" by the judge turns on the particulars of a given case. This Court has tied "acceptance" to the risk of inconsistent decisions from two courts. *Thore,* 466 F.3d at 184 (citing *New Hampshire,* 532 U.S. at 750-51). Here, in order to succeed in the instant tort action, Plaintiff would have to prove facts which are in direct conflict with his factual basis for his plea and negate nearly every element of his conviction, such that the two judgments cannot coexist without the validity of one being questioned.

Third, Plaintiff would derive an unfair advantage if not estopped. Although pleas are often made as part of a bargaining process, California law permits a criminal defendant to limit the basis for his plea. *Yount,* 43 Cal. 4th at 897 (a criminal defendant has the option to identify and limit the basis for his plea); see also *Smith*, 394 F.3d at 699 n.5 (overruled on other grounds); *Winder v. McMahon,* 345 F. Supp. 3d 1197, 1203 (C.D. Cal. 2018). The federal rule "is that the facts recited 'may prove more than what is charged, but not less.'" *Thore,* 466 F.3d at 184 (quoting *United States v. Christian,* 342 F.3d 744, 748 (7th Cir. 2003)). The California Supreme Court has pointed out that the criminal defendant receives a substantial benefit from entering a general plea, without qualification, such as the Plaintiff did here. "By declining to limit the scope of his no contest plea, Yount is protected against a new prosecution for resisting [any of the] officers by the double jeopardy clause. [Citations omitted.] It would be anomalous to construe Yount's criminal conviction broadly

for criminal law purposes so as to shield him from a new prosecution arising from these events but then, once he had obtained the benefits of his no contest plea, to turn around and construe the criminal conviction narrowly so as to permit him to prosecute a section 1983 claim arising out of the same transaction." *Yount,* 43 Cal. 4th at 897; see also *Lemos,* 40 F.4th at *21, *23-24.

In the oft-cited Fourth Circuit case, the plaintiff based his civil suit on the allegation that directly contradicted the factual basis for his plea. *Lowery,* 92 F.3d at 224-225. The court found this "'too much to take.'" *Lowery,* 92 F.3d at 225. "Particularly galling is the situation where a criminal convicted on his own guilty plea seeks as a plaintiff in a subsequent civil action to claim redress based on repudiation of the confession. The effrontery, or as some might say it, chutzpah, is too much to take. *There certainly should be an estoppel in such a case.* [Emphasis added.]" *Ibid.* (quoting Geoffrey Hazard, *Revisiting the Second Restatement of Judgements; Issue Preclusion and Related Problems,* 66 CORNELL L. REV. 564, 578 (1981)). Petitioners concur, and request that it be applied here.

III. Qualified Immunity

A. Consistent with *Thore v. Howe*[4] and *Lowery v. Stovall*[5], the Only Fact In Dispute Is Not "Genuine" and May Be Disregarded for Purposes of a Qualified Immunity Analysis.

Both the district and appellate courts correctly stated that, on interlocutory appeal, the facts and all reasonable

4. 466 F.3d 173 (1st Cir. 2006).

5. 92 F.3d 219 (4th Cir. 1996).

inferences must be drawn in favor of the non-moving party. However, neither answered, addressed, or even framed the legal question of whether the non-moving party may be estopped from asserting facts that are in direct conflict with the factual basis supporting their underlying conviction. For reasons stated above, Petitioners contend that they are. In this case, a finding in favor of Petitioners on this issue would eliminate any *genuine* dispute of material facts, thus equating to a finding that Plaintiff's constitutional rights were not violated and entitling Petitioners to qualified immunity.

B. The Ninth Circuit's Application of Qualified Immunity Runs Afoul of Established Jurisprudence.

Whereas this Court has, for almost forty years, held that qualified immunity should protect all but the plainly incompetent and those who knowingly violate the law[6], the trend in the Ninth Circuit has been to whittle that protection away. One of the ways in which the Ninth Circuit has effectively sought to eliminate qualified immunity is by reserving the issue for trial in excessive force cases. *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir. 2002). Reserving the issue for trial runs afoul of the nature and intent of the doctrine, and is contrary to the direction from this Court. The lower courts further ignored precedent of this Court when they failed to judge the facts from the perspective of an objectively reasonable officer, failed to consider the facts based on a totality of the circumstances, and gave consideration to the subjective intents and motivations of the suspect.

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6. *District of Columbia v. Wesby,* 138 S. ct. 577, 589 (2018) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

Finally, although the district court never even reached the question, the Ninth Circuit failed to define the clearly established right with specificity in contravention with this Court's decisions in *City of Escondido v. Emmons*[7] *and Kisela v. Hughes*[8]. Assuming *arguendo* the lower courts correctly decided that Petitioners violated Plaintiff's constitutional rights, the Ninth Circuit incorrectly defined the clearly established law. The Panel relied upon *Cruz v. City of Anaheim,* 765 F.3d 1076, 1078-79 (9th Cir. 2014), and *George v. Morris,* 736 F.3d 829, 838-39 (9th Cir. 2013), in holding that: "[i]t would be unquestionably reasonable for police to shoot a suspect [. . .] If he reaches for a gun in his waistband, or even if he reaches there for some other reason… Conversely, if the suspect doesn't reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him…." *Warden v. Cowan, et al.,* Case 20-17405, DktEntry 36-1, p. 8. However, to reach this part of the analysis, the Court must disregard the stipulated factual basis and only consider Plaintiff's later-asserted, contradictory, "facts." Thus, the question is not whether Plaintiff made a fateful reach, but rather, whether it was clearly established at the time of the incident that a suspect lying on the ground, who is believed to be armed with a gun in his waistband, who was wanted for several felonies including violent crimes, who had been reported and witnessed acting erratically, and who ignored officers' commands not to move, has a right to be free from deadly force when they push up off the ground and twist their body toward the officers – regardless of the reason. Based on that question, neither Plaintiff nor the lower courts identified a case on point and Petitioners could find none.

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7. 139 S. Ct. 500, 502 (2019).

8. 138 S. Ct. 1148, 1153-54 (2018).

While this Court generally will generally not review the misapplication of a properly stated rule of law, failure to do so here constitutes such a strong divergence from normal proceedings and would create such bad legal precedent that it warrants review and correction. The Ninth Circuit should not be permitted to contravene and ignore such settled principles of the law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 4, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-17405
D.C. No. 2:19-cv-00431-TLN-AC

MASA NATHANIEL WARDEN,

Plaintiff-Appellee,

v.

BRYAN COWAN; NICK WEAVER,

Defendants-Appellants,

and

WILL WILLIAMS; ROGER MOORE, CHIEF OF POLICE,

Defendants.

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted February 16, 2022
San Francisco, California

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Before: SILER,** S.R. THOMAS, and CALLAHAN, Circuit Judges.

Officers Bryan Cowan and Nick Weaver appeal from the district court's denial of their motion for summary judgment on the basis of qualified immunity. Applying de novo review, and given the limited inquiry presented at this stage of the proceeding, we affirm the district court's denial of qualified immunity on summary judgment.

1. Masa Warden argues that we lack jurisdiction to consider this interlocutory appeal because it challenges the merits of the district court's findings of disputed facts. Although denials of summary judgment are typically not appealable, *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 944 (9th Cir. 2017), we may review orders denying qualified immunity on summary judgment under the collateral order exception to finality, *Plumhoff v. Rickard*, 572 U.S. 765, 771-73, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Foster v. City of Indio*, 908 F.3d 1204, 1209 (9th Cir. 2018) (per curiam).

The scope of our review, however, is "circumscribed." *Foster*, 908 F.3d at 1210 (quoting *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013)). We may only consider whether the defendant would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved and all reasonable inferences are drawn in plaintiff's favor. *See Estate of Anderson v. Marsh*, 985 F.3d 726, 731

** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

(9th Cir. 2021). Accordingly, we only have jurisdiction to consider the officers' arguments that (1) as a matter of law, the officers' use of force was objectively reasonable such that it did not violate Warden's constitutional rights; and (2) as a matter of law, clearly established law at the time of the violation would not have put the officers on notice that their conduct was unlawful.[1]

2. We review a denial of qualified immunity on a motion for summary judgment de novo. *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010). The qualified immunity inquiry consists of two parts: (1) "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).) On review of this denial of summary judgment, we resolve all factual disputes and draw all inferences in Warden's favor in order to answer the very narrow question before us: whether *as a matter of law* Officers Cowan's and Weaver's conduct (1) violated a constitutional right that (2) was clearly established at the time of the violation. *Id.*

Taking Warden's facts as true, he was shot 16-17 times as he lay on his stomach in a prone position, with his feet

1. Officers Cowan and Weaver also argue that the district court made several reversible errors in denying summary judgment by failing to consider the correct facts. We lack jurisdiction to consider these arguments because they effectively ask this court to evaluate on this interlocutory appeal whether the district court properly determined that there was a genuine issue of material fact. *See Foster*, 908 F.3d at 1212-13.

closer to the officers, while repeatedly yelling that he did not have a weapon. According to Warden, Officers Cowan and Weaver began shooting immediately after he moved his previously outstretched arms towards his shoulder area and pressed down on the concrete to "do a pushup." Warden testified that he made this movement so that he could lift his upper body off the ground, turn his head, and again tell the officers that he did not have a weapon.

"In evaluating a Fourth Amendment claim of excessive force, we ask 'whether the officers' actions [wer]e "objectively reasonable" in light of the facts and circumstances confronting them.'" *Rice v. Morehouse*, 989 F.3d, 1112, 1121 (9th Cir. 2021) (quoting *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)) (alteration added). In doing so, we judge the reasonableness of a particular use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (internal quotation marks and citation omitted). To assess reasonableness, we consider the *Graham* factors, 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." *Wilkinson*, 610 F.3d at 550 (quoting *Graham*, 490 U.S. at 396).

Officers Cowan and Weaver were aware at the time of the shooting that Warden was suspected of committing a number of crimes earlier that morning. *See S.R. Nehad v. Browder*, 929 F.3d 1125, 1136 (9th Cir. 2019) (explaining that the government's interest in apprehending criminals,

and particularly felons, factors "strongly" in favor of the use of force). Additionally, Warden had resisted arrest in his interactions with Corporal Williams but was lying on his stomach by the time Officers Cowan and Weaver arrived on the scene. *See Rice*, 989 F.3d at 1123 (discussing the distinction between active and passive resistance).

However, the second, and "most important," factor, which assesses whether Warden posed an immediate threat to the safety of the officers and others, *id.* at 1121, involves genuine issues of disputed facts. In assessing this factor, we focus on the movement which, by Officers Cowan's and Weaver's own admission, precipitated their use of deadly force—Warden's self-described "pushup" movement. We consider whether, as a matter of law, this movement would cause a reasonable officer on the scene to believe that Warden posed an immediate threat to the safety of the officers or others.

Officers Cowan and Weaver were informed by their fellow officer, Corporal Williams, that Warden had a gun in his waistband. Officers Cowan and Weaver were entitled to rely on this information as if they had personal knowledge of it themselves. *See United States v. Bernard*, 623 F.2d 551, 560-61 (9th Cir. 1979), as revised (Apr. 28, 1980); *see also United States v. Del Vizo*, 918 F.2d 821, 826 (9th Cir.1990) ("When there has been communication among agents, probable cause can rest upon the investigating agents' collective knowledge." (internal quotation marks omitted)); *United States v. Hensley*, 469 U.S. 221, 232, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1027-28 (9th Cir. 2002) (line

officers acted reasonably by accepting their superiors' representations that they had a valid warrant; even if the superiors might be liable, the line officers were not).

However, the fact that a person is armed does not end the reasonableness inquiry. *See Hayes v. County of San Diego*, 736 F.3d 1223, 1233 (9th Cir. 2013). Under the second *Graham* factor, we must consider whether a reasonable officer on the scene would have perceived Warden, even if armed, to pose an immediate threat to the safety of the officers and others given the totality of the circumstances at the time he made his "pushup" movement, taking the facts as Warden describes them. *See Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010).

On this interlocutory appeal, given that the facts and all reasonable inferences must be drawn in Warden's favor, we cannot accept as true the disputed testimony of Officers Cowan and Weaver that Warden's pushup movement gave him access to his waistband in a way that would allow him to shoot the officers or others, or otherwise create an immediate threat to their safety. Therefore, given Warden's version of events, we cannot conclude that as a matter of law Officers Cowan and Weaver acted objectively reasonably when they shot Warden. Therefore, the district court did not err in finding that the question of whether a constitutional violation occurred was a matter for the jury to determine. *See George*, 736 F.3d at 838; *Jones v. Las Vegas Metro. Police Dep't.*, 873 F.3d 1123, 1131 (9th Cir. 2017); *Longoria v. Pinal County*, 873 F.3d 699, 706-07 (9th Cir. 2017).

3. Because Officers Cowan and Weaver may have committed constitutional violations, we consider the second element of qualified immunity: whether the right allegedly violated was clearly established at the time. *See Jones*, 873 F.3d at 1131. Conduct violates a "clearly established" right if "the unlawfulness of the action in question [is] apparent in light of some pre-existing law." *Benavidez v. County of San Diego*, 993 F.3d 1134, 1152 (9th Cir. 2021) (quoting *Devereaux v. Perez*, 218 F.3d 1045, 1053 (9th Cir. 2000)). There need not be a Supreme Court or circuit case directly on point, but existing precedent must place the lawfulness of the conduct "beyond debate." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7-8, 211 L. Ed. 2d 164 (2021) (per curiam).

It is clearly established that firing on someone who makes no "furtive movement, harrowing gesture, or serious verbal threat" is unreasonable, even where the suspect is still armed with a deadly weapon. *See George*, 736 F.3d at 838-39 (holding that summary judgment for the officers was inappropriate given evidence that the suspect was pointing a gun away from the officers when they shot him). More specifically, *Cruz v. City of Anaheim* defines the bounds of clearly established law on a furtive movement like the one asserted by Officers Cowan and Weaver:

> It would be unquestionably reasonable for police to shoot a suspect in Cruz's position if he reaches for a gun in his waistband, or even if he reaches there for some other reason.... Conversely, if the suspect *doesn't* reach for his

> waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him after he stopped his vehicle and opened the door.

765 F.3d 1076, 1078-79 (9th Cir. 2014).

Because the facts surrounding Warden's alleged "furtive movement" and whether it objectively posed an immediate threat to a reasonable officer under the circumstances are in dispute, we cannot conclude on the present record that Officers Cowan and Weaver are entitled to qualified immunity as a matter of law.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED NOVEMBER 23, 2020

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:19-cv-0431 MCE AC PS

MASA NATHANIEL WARDEN,

Plaintiff,

v.

B. COWAN; W. WILLIAMS; and N. WEAVER,

Defendants.

November 23, 2020, Decided;
November 23, 2020, Filed

ORDER

Plaintiff, a state prisoner, is proceeding in this action in pro per and in forma pauperis. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

On September 18, 2020, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties

that any objections to the findings and recommendations were to be filed within twenty-one days. ECF No. 52. Defendants have filed objections to the findings and recommendations. ECF No. 53.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed September 18, 2020 are adopted in full.

2. Defendants' motion for summary judgement (ECF No. 43-1) is GRANTED as to Corporal Williams only, and DENIED as to the remaining defendants, Officers Cowan and Weaver.

IT IS SO ORDERED.

Dated: November 23, 2020

/s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, JR.
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C — FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FILED SEPTEMBER 18, 2020

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:19-cv-00431 MCE AC PS

MASA NATHANIEL WARDEN,

Plaintiff,

v.

B. COWAN; W. WILLIAMS; AND N. WEAVER,

Defendants.

September 17, 2020, Decided;
September 18, 2020, Filed

FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner, is proceeding in this action pro se and in forma pauperis and the case was accordingly referred to the undersigned by Local Rule 302(c)(21). Defendants have moved for summary judgment. ECF No. 43. Plaintiff filed an opposition to the motion, ECF No. 48, and defendants replied. ECF No. 49. Plaintiff filed an unauthorized surreply. ECF No. 50. Based on the analysis below, defendants' motion should be GRANTED in part, as to defendant W. Williams only, and otherwise DENIED.

Appendix C

I. Complaint and Procedural Background

This case proceeds on the basis of the First Amended Complaint ("FAC"), ECF No. 13. On screening pursuant to the in forma pauperis statute, the undersigned found that the FAC stated a Fourth Amendment claim for use of excessive force against Redding Police Officers B. Cowan, N. Weaver, and W. Williams. ECF No. 17. Plaintiff was given the opportunity to amend the complaint or to proceed only on those claims and against those defendants identified by the court. *Id.* Plaintiff chose to move forward with the FAC as limited by the screening order, and defendants filed an answer. ECF No. 33.

Plaintiff alleges that on July 23, 2018, one of the officers—he states that he is unsure which one—shot him once while he had his arms in the air and was screaming that he was not armed. He fell to the ground, and all three officers "acting in cohort" proceeded "in unison" to shoot him 17 times. *Id.* at 3, 5.

Correctional records attached to the FAC indicate that the shooting occurred in connection with plaintiff's arrest. *Id.* at 10. According to comments in the prison records, which were based on Redding Police Department reports, officers responded after plaintiff punched an individual, burglarized a residence, and started challenging people to fight. *Id.* "When officer's [sic] arrived [plaintiff] was uncooperative and showed behaviors indicative that he had a gun and was going to shoot officers which lead to Officers shooting [him] multiple times. It was discovered [plaintiff] did not have a gun. [Plaintiff] was subsequently transported to a medical facility for treatment." *Id.*

Plaintiff alleges that he was shot because he is black. *Id.* at 6. He states that he was unarmed and posed no immediate threat; and that, due to the number of recent shootings of other black people by white police officers, he was trying to make it clear that he was unarmed at the time he was shot. *Id.* at 3, 6. He alleges that as a result of the shooting, he is now "permanently disabled" and has to use a wheelchair and a walker to get around; he also suffers daily pain from multiple bullets that remain in his body. *Id.* at 3-4.

Discovery in this case has concluded, and the instant motion for summary judgment was filed on July 24, 2020. ECF No. 43.

II. Standard for Summary Judgment

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under summary judgment practice, "[t]he moving party initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.,* 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The moving party may accomplish this by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by showing that such

materials "do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

Summary judgment should be entered, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. In such a circumstance, summary judgment should "be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.*

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a fact "that

might affect the outcome of the suit under the governing law," *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson,* 477 U.S. at 248. In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "'the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *T.W. Elec. Service, Inc.,* 809 F.2d at 630 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 288-89, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)). Thus, the "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita,* 475 U.S. at 587 (citation and internal quotation marks omitted).

"In evaluating the evidence to determine whether there is a genuine issue of fact, [the court] draw[s] all inferences supported by the evidence in favor of the non-moving party." *Walls v. Cent. Costa County Transit Auth.,* 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Neilson Freight Lines,* 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586 (citations omitted). "Where the record

taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (quoting *First Nat'l Bank*, 391 U.S. at 289).

III. Statement of Undisputed Facts

Unless otherwise specified, the following facts are either expressly undisputed by the parties or have been determined by the court, upon a full review of the record, to be undisputed by competent evidence. Defendants' statement of undisputed facts is located at ECF No. 43-2, and is supported by multiple declarations, medical reports dated December 31, 2018 (ECF No. 43-8 at 8-9), a transcript form plaintiff's felony plea and sentencing dated August 21, 2018 (*id.* at 127-40), and independent report from the Shasta County Office of the District Attorney dated May 23, 2019 (*id.* at 142-47). *See* ECF Nos. 43-3 through 43-8. Plaintiff did not submit a statement of undisputed facts or specifically contest defendants' statement of undisputed facts, though he did attach various police and investigation reports to his opposition. ECF No. 48.

This case involves an incident that took place on July 23, 2018, in Redding, California. Plaintiff Masa Warden injected himself with drugs and had crystal methamphetamine in his system on that date. Deposition of Masa Nathanael Warden, taken April 28, 2020 ("Warden Depo.") (ECF No. 43-7) at 27:5-26, 28:1-6). Early in the morning, plaintiff jumped into the pool at Shasta High School and swam fully clothed, leaving the

pool area in his wet clothes with a pair of blue goggles on his forehead, and a white towel around his waist. Warden Depo. 57:19-25, 59:1-19, 65:1-10, 68:16-24. When plaintiff was leaving the school, he was confronted by John Decker, with whom a fight ensued involving plaintiff punching Mr. Decker multiple times and threatening to kill him. Warden Depo. 60:2-25, 61:15-23, 62:1-8, 65:20-25, 66:6-11. Decker called 9-1-1 and reported the attack, advising the dispatcher that the suspect was a black male adult, short hair, approximately 5'9" to 5'10" tall, wearing a gray or white shirt, khaki pants, and a pair of blue swimming goggles on his head. Meanwhile, plaintiff fled the scene. Warden Depo. 61:5-8, 62:16-18; Declaration of Will Williams ("Williams Decl.") ¶4; Declaration of Bryan Cowan ("Cowan Decl.") ¶4; Declaration of Nick Weaver ("Weaver Decl.") ¶4.

Following the altercation with Decker, a witness observed a black male adult behind Shasta High School between the football and baseball fields, heading toward Mary Street, who was approximately 6'0" tall and wearing a short sleeve shirt and khaki pants. ECF 13:9-10 (First Amended Complaint, Exhibit A- Classification Committee Chrono); Warden Depo. 62:19-23, 69:5-10, 16-23, 70:5-14; Williams Decl. ¶¶4-5. Redding Police Officer Brian Moore responded to Shasta High School around 6:00 a.m. on July 23, 2018 to interview Decker regarding the assault, while Corporal Will Williams conducted a search of the Sacramento River Trail and "old rail trail" areas looking for the suspect. Williams Decl. ¶¶ 5-9. Around 7:38 a.m., Shasta High School employee Ryan Brown called 9-1-1 and reported that, while searching for the suspect in the area

around the high school on a Kubota tractor, they spotted a man matching plaintiff's description entering the backyard of a private residence at 310 Overhill Drive. ECF No. 45-5 at 6. Dispatchers notified officers over the police radio that the suspect of the Shasta High School incident that morning had been seen entering the backyard of a residence at 310 Overhill Drive, but officers were unable to locate plaintiff when they responded and conducted a search of the premises. ECF No. 43-5 ("Sheldon Report") at 2.

Around 8:29 a.m., Nueme Wells called 9-1-1 and reported that her surveillance cameras showed an adult intruder had come through the gate at her 4-plex residence located at 250 Overhill Drive around 6:00 a.m. that morning, had left a backpack on her porch, and was seen on tape watching a female tenant/neighbor leave her apartment. ECF 13 at 9-10; Sheldon Report at 2. Dispatchers notified officers via police radio of the intruder reported by Wells, and advised that the description was a black adult male. Williams Decl. ¶¶10-11.

Corporal Williams heard the transmission and radioed Officer Moore stating that the backpack left behind could have been left by the same suspect responsible for the attack on John Decker at Shasta High School that morning, and Officer Moore was dispatched to investigate. Williams Decl. ¶¶10-11. At or around 8:38 AM, Nueme Wells called 9-1-1 again and reported that one of her tenants at the 4-plex, Cheri Lovejoy, had been burglarized that morning, and swim goggles were left on the bed. Sheldon Report at 2. Officer Moore arrived at 250 Overhill Drive and conducted a burglary report. *Id.*

Appendix C

Plaintiff fled to the Sacramento River Trail, where he began exercising, running sprints, and went for a swim, fully clothed, in the Sacramento River. Warden Depo. 29:20-25, 30:4-6. Around 9:00 a.m., a call for service was relayed from the Sacramento River Trail indicating a male wearing a blue shirt and light-colored pants had been acting strangely on the Sacramento River Trail, appeared to be on drugs, was acting agitated, talking to himself and asking people if they wanted to fight. Williams Decl. ¶12. Around 9:15 a.m., Officer Moore advised over the radio that the suspect wanted for the attack on John Decker at Shasta High School was also wanted for trespass and burglary of a residence at 250 Overhill Drive based on surveillance footage that had been obtained by police at both crime scenes. *Id.* at ¶13. Officer Moore further advised that the suspect was likely also the same person who was causing problems along the Sacramento River Trail. *Id.*

Officer Little, who was the school resource officer for Shasta High School, obtained video surveillance footage of the Decker attack and positively identified plaintiff walking up from Overhill Drive from the Sacramento River Trail access point toward Mary Street. Williams Decl. ¶14. Corporal Williams was 2-4 blocks away from the area at the time and quickly dispatched to the location in his clearly marked Redding Police Department SUV. *Id.* at ¶15. While Corporal Williams was on his way to attempt contact with the plaintiff on Mary Street, Officer Moore advised over the radio that the plaintiff was wanted and arrestable for battery of a school employee, residential "cat" burglary, and harassing citizens along the

Sacramento River Trail. Williams Decl. ¶¶16-17. Corporal Williams found plaintiff on the 700 block of Mary Street near Freedom High School and radioed that he had located plaintiff. Williams Decl. ¶18. Corporal Williams parked his SUV in the roadway and exited his vehicle wearing a full Redding Police Department uniform. ¶¶19-20.

Officer Williams identified himself as police and asked to talk to plaintiff, with his hand on his gun in the low ready position. Williams Decl. ¶20. Plaintiff began walking hurriedly toward Williams waving his arms and throwing unknown items that he had in his hands. Williams Decl. ¶¶21-23. Because plaintiff's clothes were wet, he was holding them up with both hands. Warden Depo. 78:1-25, 79:1-25. When Corporal Williams saw plaintiff reach for his waistband, he radioed that the suspect had a gun in his waistband. Williams Decl. ¶¶23-25.

Officers Cowan and Weaver, who were already a few blocks from Corporal Williams' location, heard dispatch advise that plaintiff had a gun in his waistband and began responding Code 3 with lights and sirens toward Corporal Williams. Cowan Decl. ¶¶16-17; Weaver Decl. ¶¶15-16. Officer Williams was giving plaintiff commands to stop and to show his hands, which plaintiff ignored and instead continued moving his body. Warden Depo. 81:4-25, 100:21-23, 101:1-21; Williams Decl. ¶¶26-30. Plaintiff saw that Corporal Williams had his gun out, and turned his shoulder to hide his chest while holding his waistband to keep his pants from falling down. Warden Depo. 81:1-25; Williams Decl. ¶¶29-30. Corporal Williams fired one round from his department issued duty weapon at plaintiff, and

plaintiff immediately fell hard to the ground. Warden Depo. 81:24-25, 82:1-15; Williams Decl. ¶¶30-32. The bullet from Corporal Williams' weapon did not actually hit plaintiff. Warden Depo. 81:25, 82:1-5.

Immediately after firing his weapon, Corporal Williams made multiple calls over the police radio that shots had been fired and there was one down and medical was requested. Warden Depo. 82:16; Williams Decl. ¶¶ 33, 34; Waver Decl. ¶17. Officers Cowan and Weaver arrived on the scene nearly simultaneously and within seconds of Corporal Williams' "shots fired" radio call. Williams Decl. ¶35; Cowan Decl. ¶19; Weaver Decl. ¶18. Officers Cowan and Weaver, each dressed in full Redding Police Department uniforms, responded to the scene in their marked Redding Police Department patrol vehicles, finding plaintiff lying on the ground, partly on his back and partly on his side, while being given commands not to move. Cowan Decl. ¶¶19-20; Weaver Decl. ¶¶19-20. Corporal Williams told Officers Cowan and Weaver that plaintiff had a gun his waistband and had been shot once. Williams Decl. at ¶36; Cowan Decl. ¶20; Weaver Decl. ¶20. The officers continued giving plaintiff commands to not move, and to show his hands. Williams Decl. ¶¶37-38; Cowan Decl. ¶¶21-22; Weaver Decl. ¶¶19, 21-22.

Plaintiff made a movement with his upper body. Warden Depo. 83:1-25, 84:1-25; Williams Decl. ¶¶39-40; Cowan Decl. ¶¶21-22, 24-26; Weaver Decl. ¶¶19, 21-22. Cowan and Weaver simultaneously fired their department-issued duty weapons at the plaintiff. Williams Decl. ¶¶39-40; Cowan Decl. ¶¶24-29; Weaver Decl. ¶¶21-27. Officer

Cowan and officer Weaver each fired several rounds at plaintiff. Cowan Decl. ¶28; Weaver Decl. ¶26; Sheldon Report at 7. Immediately after Officers Cowan and Weaver discharged their weapons, a radio call was made that additional shots had been fired and medical aid was requested. Williams Decl. ¶¶41-42; Cowan Decl. ¶¶30-31; Weaver Decl. ¶¶28-29. A fourth police unit arrived on scene within seconds of the second "shots fired" radio call, at which time plaintiff was placed under arrest and emergency first-aid was rendered until the paramedics arrived. Warden Depo. 97:13-25, 98:1-8, 102:21-25, 103:1-7, 106:2-10.

Plaintiff was transported from the scene to Mercy Medical Center in Redding, where he remained for about three weeks and was treated for his injuries. Warden Depo. 106:2-10. Plaintiff was placed under arrest at Mercy Medical Center on August 11, 2018, following his discharge from the hospital, and was booked into the Shasta County Jail. Warden Depo. 106:5-22, 108:6-9. Plaintiff was charged with one count of obstructing or resisting arrest, a felony, in violation of Cal. Penal Code § 69 for his interaction with Corporal Williams; two counts of resisting, obstructing, or delaying an officer, a misdemeanor, in violation of Penal Code § 148(a)(1) for his interactions with Officers Cowan and Weaver; one count of criminal threats, a felony, a violation of Penal Code § 422 for the threats he made against John Decker; one count of first-degree residential burglary, a felony, in violation of Penal Code § 459 for the burglary of Cheri Lovejoy's residence; one count of assault with force likely to cause great bodily injury, a felony, a violation of Penal Code

§ 245(a)(4) for the attack on John Decker; and one count of battery on a school employee, a misdemeanor, in violation of Penal Code § 243.6, also for the attack on John Decker. Sheldon Decl. Exhibit A; Warden Depo. Exhibit F (SCSC Case No. 18-05051); Warden Depo Exhibit E (SCSC Case No. 18-05052).

On August 21, 2018, during his first appearance in Shasta County Superior Court, while represented by a public defender, plaintiff plead no contest to felony resisting arrest with respect to Corporal Williams in violation of Penal Code § 69, as well as felony criminal threats in violation of Penal Code § 422, and felony first-degree residential burglary in violation of Penal Code § 459. Warden Depo. 109:8-10, 110:10-15, 111:17-25, 112:1-13, 113:1-14, 117:3-15, Exhibit E, Exhibit F, Exhibit G. Plaintiff and his attorney stipulated on the record that the factual basis upon which he entered his plea of no contest to resisting arrest in violation of Penal Code § 69 was the Summary of Events prepared by Det. Julie Soksoda of the Shasta County Sheriff's Office, attached to the Criminal Complaint in Shasta County Superior Court Case No. 18-05051. Declaration of Patrick L. Deedon, ¶14 and Exhibit 13 (Sentencing Transcript, ECF No. 43-8 at 133-35). Plaintiff and his attorney stipulated on the record that the factual basis upon which he entered his pleas of no contest to criminal threats in violation of Penal Code § 422 and no contest to first-degree residential burglary in violation of Penal Code § 459 was the Investigative Narrative, Declaration for Arrest Warrant, and Affidavit in Support of Ramey Warrant prepared by Investigator Jonathan Sheldon of the Redding Police Department, as well as

the Arrest Warrant issued pursuant thereto by the Hon. Stephen Baker of the Shasta County Superior Court, all of which were attached to the Criminal Complaint in Shasta County Superior Court Case No. 18-05052. *Id.* The Shasta County District Attorney's Office investigated the officer-involved shooting which forms the basis of plaintiff's FAC and declined to prosecute any of the defendants, finding that all three officers were justified in their actions and that the shooting was lawful. *Id.* at ¶15 and Exhibit 14 (District Attorneys' Report).

IV. Analysis

A. Claims Against Officer Williams are Heck-Barred

Defendants contend that plaintiff's claims against Corporal Williams are barred by *Heck v. Humphrey,* 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). ECF No. 43-1 at 12-13. Under *Heck,* a prisoner may not proceed on a claim for damages under § 1983 if a judgment favoring plaintiff "would necessarily imply the invalidity of his conviction or sentence." *Heck,* 512 U.S. at 487. In such a case, plaintiff is foreclosed from proceeding absent proof that the conviction or sentence has been reversed, expunged or invalidated. *Id.* at 486-487. However, "if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed ...." *Id.* at 487. As an illustration of the rule's application, the Heck Court explained that an individual convicted of resisting arrest, defined as intentionally preventing a peace officer from

effecting a lawful arrest, would be barred from bringing a claim for damages for unlawful arrest. *Id.* at 487 n.6. That result is compelled by the fact that plaintiff, in order to prevail on his § 1983 claim, would have to negate an element of his conviction offense: the lawfulness of the arrest. *Id.*

When a plaintiff bringing an excessive use of force claim has been convicted of resisting arrest, application of the *Heck* bar turns on the relationship between the arrest that has been determined lawful in the criminal case and the use of force alleged to have violated plaintiff's rights. For example, an "allegation of excessive force by a police officer would not be barred by *Heck* if it were distinct temporally or spatially from the factual basis for the person's conviction." *Beets v. County of Los Angeles,* 669 F.3d 1038, 1042 (9th Cir. 2012); *see also Sanford v. Motts,* 258 F.3d 1117, 1120 (9th Cir. 2001) ("[e]xcessive force used after an arrest is made does not destroy the lawfulness of the arrest"). Similarly, *Heck* does not bar an excessive force claim based on allegations that the force used was unreasonable in relation to the degree of resistance to arrest. *Hooper v. County of San Diego,* 629 F.3d 1127, 1133 (9th Cir. 2011). Such a claim, if proven, would not imply the invalidity of a conviction for resisting arrest. *Id.* In sum, *Heck* does not bar claims against police for excessive force arising from conduct independent of the facts giving rise to a plaintiff's prior conviction. *Smith v. City of Hemet,* 394 F.3d 689, 698 (9th Cir. 2005)-99 (9th Cir.) (en banc), *cert. denied,* 545 U.S. 1128, 125 S. Ct. 2938, 162 L. Ed. 2d 866 (2005).

In contrast, a § 1983 action must be dismissed if the criminal conviction stands and arises "out of the same facts ... and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought ...." *Beets,* 669 F.3d at 1042 (internal citations and quotation marks omitted) (barring plaintiff's § 1983 claim for excessive force when decedent killed by officer but accomplice convicted of aiding and abetting assault on peace officer). Where the alleged wrongful conduct that serves as the basis of the § 1983 claim is very "closely interrelated" with the act for which plaintiff was convicted, the claim is *Heck*-barred. *Cunningham v. Gates,* 312 F.3d 1148, 1154 (9th Cir. 2002), *as amended on denial of reh'g* (Jan. 14, 2003) (applying *Heck* bar where there was no break between the plaintiff's provocative act of firing on the police and the police response that he claimed was excessive).

The application of *Heck,* as the foregoing authorities demonstrate, is a highly fact-dependent inquiry that turns on the precise factual basis for the conviction. In the case at bar, plaintiff pled no contest to a charge of violating Cal. Penal Code § 69 (resisting or obstructing an officer), and was convicted. A conviction under Cal. Penal Code § 69, which makes it a crime to resist, obstruct, or delay a peace officer in the performance of his or her duties, "can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful," because the conviction itself "requires only that some lawful police conduct was resisted, delayed, or obstructed during that continuous chain of events." *Hooper,* 629 F.3d at 1131 (citing *Yount v. City of Sacramento,* 43 Cal. 4th 885, 76 Cal.

Rptr. 3d 787, 183 P.3d 471 (2008)). The conduct on which a no contest plea to such a charge is based may coexist with conduct supporting a Section 1983 claim insofar as "two isolated factual contexts exist." *Id.* at 1132. When a case involves a plea of no contest, as it does here, the question of whether the *Heck* bar applies turns on exactly what facts the plea was based on; the facts that establish the foundational basis for the plea cannot be undermined by the §1983 claim. *See Winder v. McMahon,* 345 F. Supp. 3d 1197, 1203 (C.D. Cal. 2018).

The court previously construed plaintiff's FAC as alleging an excessive force claim under the Fourth Amendment. ECF No.15 at 4-5. The Fourth Amendment analysis requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances. *Graham v. Connor,* 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them[.]" *Id.* at 397 (citations omitted); *see Rodriguez v. City of Los Angeles,* 891 F.3d 776, 797 (9th Cir. 2018) ("We determine whether the Fourth Amendment has been violated by assessing the objective reasonableness of the force used, balancing the degree of intrusion against the government's interest.").

Based on a comparative review of plaintiff's plea and his §1983 claims, the undersigned concludes that

the claim against Corporal Williams is *Heck*-barred. In relevant part, plaintiff's plea stipulated that he was "uncooperative" with Williams, that he made movements "with his hand as if he was preparing to draw an unknown type of weapon from his waistband area," that Williams gave him "multiple commands to show his hands and to get out his hands out of his pocket," but that he "continued to make movements to the area of his waistband," and that Williams "fired one round, causing [plaintiff] to fall to the ground." ECF No. 43-8 at 134-35 (Sentencing Hearing Transcript), ECF No. 43-7 at 127-28 (Criminal Complaint Summary of Events). The actions plaintiff stipulated to in his plea, particularly the use of his hands to appear as if he was drawing a weapon, make it impossible to separate plaintiff's conduct giving rise to his conviction and Corporal Williams' use of force in discharging his weapon at plaintiff. The factual basis supporting the conviction and the factual basis of the excessive use of force claim are inextricably intertwined. Having stipulated to these facts as the basis for his conviction, plaintiff cannot now challenge Corporal Williams' use of force in these events in a §1983 action; such a challenge necessarily goes to the validity of the conviction and is barred by *Heck.* Plaintiff does not allege that his conviction has been vacated or overturned. Thus, this claim cannot proceed.

B. Officers Weaver and Cowan are Not Entitled to Summary Judgment on the Merits

Defendants argue that plaintiff's remaining Fourth Amendment unlawful force claims against Officers Weaver and Cowan fail on the merits and that they are entitled to

summary judgment. ECF No. 43-1 at 14-20. "An objectively unreasonable use of force is constitutionally excessive and violates the Fourth Amendment's prohibition against unreasonable seizures." *Torres v. City of Madera,* 648 F.3d 1119, 1123-24 (9th Cir. 2011). The Fourth Amendment requires police officers making an arrest to use only an amount of force that is objectively reasonable in light of the circumstances facing them. *Tennessee v. Garner,* 471 U.S. 1, 7-8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

Excessive force cases often turn on credibility determinations, and "[the excessive force inquiry] 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom.'" *Smith,* 394 F.3d at 701 (alteration in original) (quoting *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir. 2002)). Therefore, "'summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.'" *Id.* The Ninth Circuit has "held repeatedly that the reasonableness of force used is ordinarily a question of fact for the jury." *Liston v. County of Riverside,* 120 F.3d 965, 976 n.10 (9th Cir. 1997), *as amended* (Oct. 9, 1997) (citations omitted). In evaluating a claim of excessive force, a court must balance the "nature and quality of the intrusion" against the "countervailing government interests at stake." *Graham v. Connor,* 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (citations omitted). Factors to be considered in assessing the government interests include, but are not limited to, "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." *Graham,* 490 U.S. at 396.

Appendix C

In this case, the facts related to Officers Weaver and Cowan's use of force are disputed, and the undisputed facts are not clearly favorable to the officers. On summary judgment the undisputed facts must be viewed in the light most favorable to plaintiff. *Walls,* 653 F.3d at 966. Here, those facts include that both Officers Weaver and Cowan discharged multiple rounds of bullets at an unarmed black man while he was on the ground and (as far as they knew) had already been shot. Cowan Decl. ¶¶ 22, 28; Weaver Decl. ¶¶ 19, 26. These facts do not support judgment for the defendants as a matter of law.

Even so, the disputed facts in this case make summary judgment inappropriate. For example, plaintiff testified that, despite the officers' claims that he was reaching toward pockets, the pants he was wearing did not have pockets. Warden Decl. 104:15-22. Plaintiff testified that while the officers were yelling to put his hands out, he told them his hands were already out. *Id.* Plaintiff testified that he said "I don't have a weapon. I don't have a weapon. I don't have a weapon." *Id.* He testified that when he was on the ground he pushed up just to keep telling them that he did not have a weapon, "and then they shot me, and then they start laughing at the end." Id., 105:1-4. The officers do not agree to these assertions as undisputed facts, and thus central facts surrounding the incident, which go directly to the reasonableness of the officers' use of force, are in dispute. Accordingly, summary judgment cannot issue.

C. Qualified Immunity Does Not Defeat Plaintiff's Claims Against Weaver and Cowan

Defendants argue that qualified immunity protects Officers Weaver and Cowan because they believed their lives were at risk when they fired their weapons at plaintiff. ECF No. 43-1 at 20-23. Government officials are immune "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Ideally, qualified immunity is determined at the earliest possible stage in litigation to avoid unnecessary burden and expense. *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam).

The Supreme Court has established a two-step inquiry for determining whether qualified immunity applies. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (overruled in part by *Pearson,* 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565). First, a court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* Second, if the answer to the first inquiry is "yes," the court must ask

whether the constitutional right was "clearly established." *Id.* This second inquiry is to be undertaken in the specific context of the case. *Id.* In *Pearson v. Callahan,* the Supreme Court removed any requirement that the Saucier test be applied in a rigid order, holding "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson,* 555 U.S. at 236.

"The plaintiff bears the burden of proof that the right allegedly violated was clearly established." *Tarabochia v. Adkins,* 766 F.3d 1115, 1125 (9th Cir. 2014) (internal quotation marks omitted). "To meet this standard the very action in question need not have previously been held unlawful." *Id.* (internal quotation marks omitted). This is especially the case in the context of alleged Fourth Amendment violations, where the constitutional standard of "reasonableness" requires a fact-specific inquiry. *Mattos v. Agarano,* 661 F.3d 433, 442 (9th Cir. 2011) (en banc). The court must determine "whether a reasonable officer would have had fair notice that the action was unlawful[.]" *Tarabochia,* 766 F.3d at 1125 (internal quotation marks and brackets omitted). At its base, "[t]he qualified immunity doctrine rests on a balance between, on the one hand, society's interest in promoting public officials' observance of citizens' constitutional rights and, on the other, society's interest in assuring that public officials carry out their duties and thereby advance the public good." *Beier v. City of Lewiston,* 354 F.3d 1058, 1071 (9th Cir. 2004).

Here, defendants argue that "while it is clearly established that 'a police officer may not seize an unarmed, nondangerous suspect by shooting him,' there is no case law to support a finding that an officer violates the Fourth Amendment if he uses deadly force to seize a dangerous suspect who posed a threat of serious physical harm." ECF No. 43-1 at 21, quoting *Tennessee,* 471 U.S. at 11. This argument is a nonstarter, because plaintiff alleges that he did not pose a threat of serious harm because he was unarmed and lying on the ground at the time Officers Cowan and Weaver fired their weapons. Indeed, it is undisputed that plaintiff was already on the ground when Officers Cowan and Weaver shot him multiple times, as discussed above. Defendants' argument does not accurately reflect the facts of this case.

The Ninth Circuit has repeatedly recognized that excessive force cases often turn on credibility determinations, and that the excessive force inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom." *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir. 2002). Where, as here, facts relevant to the reasonableness of force used are disputed, the case cannot be resolved at summary judgment on qualified immunity grounds. *See Liston,* 120 F.3d at 975; *Santos,* 287 F.3d at 853. Accordingly, qualified immunity is not a proper ground for summary judgment here.

Appendix C

Conclusion

Accordingly, for the reasons explained above, IT IS RECOMMENDED that defendants' motion for summary judgment (ECF No. 43-1) be GRANTED as to Corporal Williams only, and DENIED as to remaining the remaining defendants, Officers Cowan and Weaver.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. *Id.; see also* Local Rule 304(b). Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed with the court and served on all parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan,* 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst,* 951 F.2d 1153, 1156-57 (9th Cir. 1991).

IT IS SO ORDERED.

DATED: September 17, 2020

/s/ Allison Claire
ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 27, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-17405
D.C. No. 2:19-cv-00431-TLN-AC
Eastern District of California, Sacramento

MASA NATHANIEL WARDEN,

Plaintiff-Appellee,

v.

BRYAN COWAN; NICK WEAVER,

Defendants-Appellants,

and

WILL WILLIAMS; ROGER MOORE, CHIEF OF POLICE,

Defendants.

ORDER

Before: SILER,* S.R. THOMAS and CALLAHAN, Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

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* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

APPENDIX E — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV (1791)

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

Appendix E

28 USCS § 1291, Part 1 of 3

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

Appendix E

28 USCS § 1331, Part 1 of 3

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Appendix E

42 USCS § 1983, Part 1 of 16

§ 1983. Civil action for deprivation of rights

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix E

USCS Fed Rules Evid R 410

Rule 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Appendix E

State of California

PENAL CODE

Section 69

69. (a) Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer bylaw, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.

(b) The fact that a person takes a photograph or makes an audio or video recording of an executive officer, while the officer is in a public place or the person taking the photograph or making the recording is in a place he or she has the right to be, does not constitute, in and of itself, a violation of subdivision (a).

Appendix E

State of California

PENAL CODE

Section 1016

1016. There are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction:

1. Guilty.

2. Not guilty.

3. Nolo contendere, subject to the approval of the court. The court shall ascertain whether the defendant completely understands that a plea of nolo contendere shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty. The legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

4. A former judgment of conviction or acquittal of the offense charged.

5. Once in jeopardy.

6. Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission

of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged.

Appendix E

State of California

EVIDENCE CODE

Section 1300

1300. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil actionto prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.

(Amended by Stats. 1982, Ch. 390, Sec. 2.)

APPENDIX F — SENTENCING TRANSCRIPT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SHASTA, DEPARTMENT 1, DATED AUGUST 21, 2018

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SHASTA
DEPARTMENT 1

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MASA NATHANIEL WARDEN,

Defendant.

CASE NOS. 18F5051, 18F5052, 18F5398

HONORABLE ADAM B. RYAN,
JUDGE PRESIDING

FELONY PLEA & JUDGMENT AND SENTENCING

TUESDAY, AUGUST 21, 2018

Appendix F

[3] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: I'm going to call the matter of Masa Warden. I have been informed that he is going to be transported from the jail via wheelchair. He is not down now, so I'm going to continue that matter. I'm going to continue that matter later today at 2:00 o'clock.

MS. DONAHOO: Okay.

(RECESS IN PROCEEDINGS.)

(AFTERNOON ADJOURNMENT.)

[4] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: The gentleman seated in the wheelchair, are you Masa Warden?

THE DEFENDANT: Yes, sir.

MR. LOOS: That's my client.

THE COURT: We still need to plea dispo this matter, correct?

MR. LOOS: Yes, we do, Your Honor. As soon as I'm done with this, I'll be glad to do so.

MS. VELIKONAV: Your Honor, my understanding from Ms. Donahue was that it was already discussed in the back. There's a four year offer that the Defendant will either accept or we will set dates.

THE COURT: Right. I just wasn't sure if there was any further need to discuss it in the back.

MR. LOOS: No, there's no further need to discuss in the back. I just need to discuss it with my client.

THE COURT: Okay. So I'll have these files in Chambers. Come back if you need to discuss anything.

MS. VELIKANOV: Thank you, Your Honor.

(BRIEF RECESS IN PROCEEDINGS.)

MR. LOOS: Your Honor, might I inquire in Mr. Warden's case whether you have in his 1551 some documents to sign where he would agree to?

THE COURT: You mean 18F5398?

MR. LOOS I believe so.

THE COURT: You want to approach?

MR. LOOS: Yes.

THE COURT: I'm just handing him the waiver form.

Appendix F

Let's go off the record. We will take a look at a few [5] things first .

(OFF THE RECORD.)

THE COURT: Call the matter of Masa Warden, Case Nos. 18F5051, 5052, and 5398.

Mr. Loos, you are appearing for the People?

MR. LOOS: Yes. Oh, no, I'm not. Sorry.

MS. VELIKANOV: Margarita Velikanov for the People.

VOIR DIRE EXAMINATION

BY THE COURT: I do have in front of me a change of plea form. Mr. Warden is present in the courtroom with us.

Q. Sir, do you recognize this change of plea form?

A. Yeah.

Q. You have to speak up just a little bit for me.

A. Yes, sir.

Q. Did you read through that plea form yourself today?

A. Yes, sir.

Q. And did you have an opportunity, as you read through that form, to discuss any questions you might have had with your lawyer?

A. Yes, sir.

Q. As you read through the plea form, did you read through it paragraph by paragraph?

A. Yes, sir.

Q. As you did so, did you place your initials in the box next to each numbered paragraph?

A. Yes, sir.

Q. Did you also come across certain paragraphs where there was an "X" in the box next to it?

A. Yes, sir.

Q. And for those paragraphs did you have an understanding that you could skip those paragraphs because they no longer -- or they didn't apply to you or your [6] case?

A. Yes, sir.

Q. Ultimately, did you make your way to the next to the last page, there is a signature I pointed to. Is that your signature?

A. Yes, sir.

Q. And did you sign that form only after you read and understood all the information contained within that form?

A. Yes, sir.

Q. The form is designed to explain to you all the rights that you have in these cases. Do you understand that if you were to give up -- sorry. If you were to enter a plea as is indicated on this form, you would no longer be using those rights and, in fact, you'd be waiving them?

A. Yes, sir.

Q. Is that what you intend to do today?

A. Yes, sir.

Q. My understanding is in a moment you are going to change your plea to --

THE COURT: No contest or a guilty plea, Counsel?

THE DEFENDANT: No contest.

MR. LOOS: No contest.

BY THE COURT: Q A no contest plea in 18F5052 to Counts 1 and 2. Count 1 being a violation of Penal Code Section 422 as a felony. It's a strike.

Appendix F

And Count 2, as a violation of Penal Code Section 459, a first degree residential burglary.

THE COURT: Counsel, is this a violent burglary?

MS. VELIKANOV: No, Your Honor.

MR. LOOS: Non-hot, Your Honor.

THE COURT: So it's what we commonly refer to as a "cold burglary"?

MR. LOOS: Yes.

[7] MS. VELIKANOV: Yes, Your Honor.

THE COURT: So is there a Motion to strike the language pursuant to 667.5(c)(21) as charged in the Complaint?

MS. VELIKANOV: There is, Your Honor.

THE COURT: I will strike that language.

MS. VELIKANOV: Thank you.

BY THE COURT: So, sir, that is a serious felony, not a violent felony.

In exchange for the plea to those two charges, the remaining charges would be dismissed.

Appendix F

In 18F5051, you're going to change your plea to no contest to a violation of Penal Code Section 69, that's obstructing or resisting an executive officer. In exchange for that plea, any remaining counts in that case would be dismissed.

As a consequence, you appear to have agreed to a four year stipulated state prison sentence.

Q. Is that your understanding of the agreement that you have with the People today?

A. Yes, sir.

Q. Other than what I just talked about, did anyone promise you anything else in order to get you to do this?

A. No, sir.

Q. Anyone threaten you with anything in order to get you to do this?

A. No, sir.

Q. Do you feel like you're thinking clearly today?

A. Yes, sir.

Q. Are you under the influence of anything at all that might impair your thinking, such as alcohol, prescription drugs or illicit substances?

A. No, sir.

Q. Having all those rights and consequences in mind, do you, in fact, give up those rights in order to enter [8] this plea?

A. Yes, sir.

THE COURT: Factual basis?

MS. VELIKANOV: Factual basis in 18F5052, which is the 422 and the 459 first count, can be found in Redding Police Department Agency No. 18-52541.

And then a plea to the PC 69, which is in 18F5051, can be found in Shasta County Sheriff's Department Agency No. 18-25675.

MR. LOOS: So stipulated.

THE COURT: Stipulated factual basis led to the filing of a criminal Complaint in 18F5052 on August 6th of this year. That criminal Complaint contains a Count 1. Count 1 charges you with a violation of Penal Code Section 422, commonly referred to as criminal threats.

It's alleged that on or about July 23rd of this year, you did commit that crime upon a person by the name of John Brian Decker. And that is a serious felony pursuant to 1192.7 Sub. (c) Sub. 38.

To that charge, sir, what is your plea?

Appendix F

A. No contest.

Q. As to Count 2, it alleges a violation of Penal Code Section 459. That's first degree residential burglary. It's again alleged to have occurred on or about July 23rd, 2018, and having occurred in the residence of Cherie K. Lovejoy. First name is spelled C-h-e-r-i-e. That, again, is a serious felony, otherwise known as a strike pursuant to 1192(c)(18).

To that charge, sir, what is your plea?

A. No contest.

THE COURT: The remaining counts dismissed as part of the plea?

MS. VELIKANOV: With a Harvey Waiver, Your Honor.

THE COURT: Dismissed with a Harvey Waiver?

[9] MS . VELIKANOV: Yes, please.

THE COURT: Thank you.

BY THE COURT: Q Moving to 18F5051, the stipulated factual basis led to the filing of a criminal Complaint on August 6th of this year. It contains a Count 1. Count 1 charges you with a violation of Penal Code Section 69. That's obstructing or resisting an executive officer as a felony. It's alleged that you committed that crime on or

about August 1st, 2018 upon Redding Police Department Officer W. Williams.

To that charge, sir, what is your plea?

A. No contest.

THE COURT: Counts 2 and 3 dismissed with a Harvey Waiver?

MS. VELIKANOV: Yes, Your Honor. Thank you.

THE COURT: Okay. And Counsel, do you join in the plea?

MR. LOOS: I do.

THE COURT: I'll accpet the plea, find him guilty based upon that plea. Make a finding·that you knowingly, expressly, intelligently waived your rights. Further find that your plea was free and voluntary.

Counsel, do you concur?

MR. LOOS: Yes.

THE COURT: Sir, you are prohibited from owning, purchasing, receiving, possessing, or having under your custody or control any firearms, ammunition, or ammunition feeding devices, including but not limited to magazines. You are ordered to relinquish all firearms you own or possess pursuant to 29810 of the Penal Code. I'll

order you to meet with Laticia Jefferies from the probation department and complete a prohibited person's firearm relinquishment form.

Counsel, are you asking for a PSI in this case?

MR. LOOS: No, we are not, Your Honor, immediate [10] sentencing. I would also give my client the form for Laticia Jefferies.

THE COURT: Waive time and arraignment for sentencing?

MR. LOOS: Yes, I do.

THE COURT: Any legal reason why judgment should not now be pronounced?

MR. LOOS: None.

MS. VELIKANOV: No, Your Honor.

THE COURT: Pursuant to the stipulation of the parties, probation is denied.

Beginning with 18F5052, specifically Count 2, it's a violation of Penal Code Section 459, I'm going to impose the aggravated term.

Correct, Counsel?

MR. LOOS: Yes. No, the midterm.

MS. VELIKANOV: No, it's the middle term, Your Honor.

MR. LOOS: 2, 4, 6.

THE COURT: You're right. The midterm of four years in state prison.

As to Count 1 in 18F5052, I'm going to impose the aggravated term of three years to be served concurrently with Count 2.

And in 18F5651, for Count 1, a violation of Penal Code Section 69, I'm going to again impose the aggravated term of three years to be served concurrently with Count 2 in 18F5052.

In other words, Mr. Warden, pursuant to your agreement and the stipulation of the· parties, four plus three plus three equals four. Total of four years state prison sentence. (sic.)

Do you have credits?

THE PROBATION OFFICER: Yes, Your Honor. In 18F5051, his credits are 11 actual, 10 conduct, for a [11] total of 21.

In 18F5052, they are 11 actual, 10 conduct, for a total of 21 days.

THE COURT: Thank you.

Appendix F

In each case the Defendant is ordered to pay a restitution fine of $300 pursuant to Penal Code Section 1202.4(b)(2). He is also ordered to pay an additional parole revocation restitution fine pursuant to 1202.45(a). That fine's going to be stayed pending successful completion of parole.

Court is going to reserve jurisdiction to award restitution in 18F5051 to Officer Williams from the Redding Police Department; Officer Cowan, C-o-w-a-n, from the Redding Police Department; and Officer Weaver, again from the Redding Police Department.

And in 18F5052, Court's going to reserve jurisdiction to award restitution to John Brian Decker, Cherie K. Lovejoy.

Any other parties?

MS. VELIKANOV: No, Your Honor. But I would ask the Court to impose a no contact order to the victims of John Brian Decker, as well as Cherie K. Lovejoy.

THE COURT: The Defendant reserves his right to a Restitution Hearing should any claim for restitution be made.

Mr. Loos, you want to be heard with regard to the no contact order?

MR. LOOS: My client doesn't know these individuals. I doubt he ever wants to see them again. So I have no objection.

Appendix F

THE COURT: Mr. Warden, I'm going to order you have no contact either directly or through third parties with John Brian Decker or Sherry or Cherie K. Lovejoy.

I will order further that you pay a court operations assessment fee of $40; a court -- sorry. A [12] criminal conviction assessment fee of $30. You are to provide buccal swab samples, a right thumbprint, a full palm print impression of each hand, and any blood specimens or other biological samples required by Penal Code Section 296.

You are advised that you will be released on parole for a period not to exceed three years. If you are found to be in violation of the terms of your parole, you could be returned to state prison for a period of up to 12 months. However, if you abscond any period following suspension or revocation of parole until you return to custody, shall not apply to the limits on the parole term.

You understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Any other further orders?

MR. LOOS: No, Your Honor.

MS. VELIKANOV: No, Your Honor. Thank you.

THE COURT: Defendant is remanded to the custody of the Shasta County Sheriff for delivery to the California Department of Corrections and Rehabilitation upon completion of an abstract.

MR. LOOS: There is an additional matter, Your Honor.

THE COURT: I'm getting there.

MR. LOOS: Thank you.

BY THE COURT: Finally, we have 18F5398. That is an extradition matter.

Q. Mr. Warden, I have in front of me a form entitled Waiver of Rights of Extradition; do you recognize that form?

A. Yeah.

Q. Is that your signature I'm pointing to?

A. Yes, sir.

Q. Did you understand and read that form before you signed it?

[13] A. Yes, sir.

Q. And you understand that by signing that form you are waiving your right to a hearing, an identity hearing with regard to extradition

A. Yes, sir.

Q. Is that what you intend to do?

A. Yes, sir.

Q. And do you, in fact, waive that hearing?

A. Yes, sir.

THE COURT: Anything further needed, Counsel?

MR. LOOS: No.

MS. VELIKANOV: No, Your Honor. Thank you.

THE COURT: I'm going to set a status date on 18F5398 in approximately 30 days.

THE CLERK: September 20th.

BY THE COURT: Q Mr. Warden, I'm going to order you to report to this department September 20th, 2018. And that's just if you haven't been transported yet to Nevada.

A. Okay.

Q. Just to keep an eye on things, okay?

A. Okay. Do you think I have to do DOC(sic.) here, then I go to Nevada?

Q. Talk to your attorney about that.

A. Okay.

Q. Okay?

THE COURT: Okay, we are off the record. Thank you.

MS. VELIKANOV: Thank you, Your Honor.

(END OF PROCEEDINGS.)

APPENDIX G — CRIMINAL COMPLAINT

IN **THE SUPERIOR COURT OF CALIFORNIA,**
COUNTY OF SHASTA
Redding Branch

No. 18-05051

COMPLAINT-CRIMINAL

Felony

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MASA NATHANIEL WARDEN,

Defendant(s).

DA # F-18-05051
SHASTA COUNTY SHERIFF'S DEPARTMENT
1825675

The District Attorney of Shasta County, by and through the undersigned Deputy District Attorney, on information and belief, complains and accuses defendant(s) of having committed, in the County of Shasta, State of California, the crime(s) of:

Appendix G

COUNT 1

OBSTRUCT/RESIST EXECUTIVE OFFICER, in violation of Section 69 of the Penal Code, a Felony.

Defendant (s)
MASA NATHANIEL WARDEN,
On or about the 1st day of August, 2018, did willfully and unlawfully attempt by means of threats and violence to deter and prevent REDDING POLICE DEPARTMENT OFFICER W. WILLIAMS, who was then and there an executive officer, from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his/her duty.

COUNT 2

RESIST, OBSTRUCT, DELAY OFFICER OR EMT, in violation of Section 148(a)(1) of the Penal Code, a Misdemeanor.

Defendant (s)
MASA NATHANIEL WARDEN,
On or about the 1st day of August, 2018, did willfully and unlawfully resist, delay and obstruct REDDING POLICE DEPARTMENT OFFICER B. COWAN, who was then and there a public officer, peace officer, or an emergency medical technician attempting to and discharging the duty of his/her office and employment.

Appendix G

COUNT 3

RESIST, OBSTRUCT, DELAY OFFICER OR EMT, in violation of Section 148(a)(1) of the Penal Code, a Misdemeanor.

Defendant (s)
MASA NATHANIEL WARDEN,
On or about the 1st day of August, 2018, did willfully and unlawfully resist, delay and obstruct REDDING POLICE DEPARTMENT OFFICER N. WEAVER, who was then and there a public officer, peace officer, or an emergency medical technician attempting to and discharging the duty of his/her office and employment.

/s/ Curtis Woods
CURTIS WOODS
Senior Deputy District Attorney

Subscribed and sworn on August 3, 2018

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defense counsel provide discovery to the people as required by Penal Code Section 1054.3.

Appendix G

69 PC: Obstruct/Resist Exec Offc Case No. 18-25675
(S) Warden, Masa Nathaniel Summary of Events
Detective Soksoda #190
Sergeant ID#

Summary of Events

On Monday, 07-23-2018, at approximately 1011 hours, I was informed officers with the Redding Police Department had recently been involved in an Officer Involved Shooting near Freedom High School at 590 Mary Street, Redding California. I responded to the scene and I was assigned as the lead detective. At 1027 hours, I arrived on scene and I attended a joint briefing. I was informed the following in summary:

On 07-23-2018 at approximately 0559 hours, Redding Police Officers responded to Shasta High School regarding a school staff member being violently assaulted at 2500 Eureka Way, Redding California. Prior to Redding Police Officer's arrival, the suspect, later identified Masa Nathaniel Warden fled the scene. Warden was described as a black male adult wearing a blue or white shirt and tan pants.

At approximately 0826 hours, the Redding Police Department received a report of a residential burglary of an occupied apartment at 250 Overhill Drive, Redding California. The residential burglary was a short distance from Shasta High School. During the residential burglary, items were taken from the residence and a pair of swimming goggles were left inside the residence, which did not belong to the residents.

It was later determined by video surveillance from Shasta High School, the suspect involved in the assault at Shasta High School was wearing a pair of swimming goggles on his head, which were similar to the pair left on scene at the residential burglary. As Redding Police Officers searched the area for Warden, they received information of a person matching Warden's description on the Sacramento River Trail who was acting suspicious and challenging people to fight. The Sacramento River Trail is a short distance from Shasta High School and the residential burglary on Overhill Drive.

At approximately 0947 hours, Redding Police School Resource Officer Eric Little was in the area obtaining video surveillance from the school regarding the assault earlier in the morning. As Officer Little was at the end of Overhill Drive, he saw a subject matching the description of Warden walking towards Mary Street. Overhill Drive turns into Mary Street at the west end of Mary Street. Officer Little was unable to contact the subject but relayed the information to other responding units over the radio.

At approximately 0949 hours, Corporal Will Williams with Redding Police Department located Warden in front of Freedom High School at 590 Mary Street. Corporal Williams pulled up in a marked Redding Police vehicle and was wearing a police uniform. Warden was uncooperative with Corporal Williams and Warden began motioning with his hand as if he was preparing to draw an unknown type of weapon from his waistband area.

Appendix G

69 PC: Obstruct/Resist Exec Offc Case No. 18-25675
(S) Warden, Masa Nathaniel Summary of Events
Detective Soksoda #190

Corporal Williams broadcasted on the radio he believed Warden had a handgun in his waistband. Corporal Williams gave Warden multiple commands to show his hands and to get his hands out of his pocket. Warden continued to make movements to the area of his waistband with his hand and Corporal Williams fired one round, causing Warden to fall to the ground. Corporal Williams requested assistance and medical over the radio.

Redding Police Officers Bryan Cowan and Officer Nick Weaver were additional units who arrived on scene within seconds of the shooting. Warden continued to be uncooperative with the three officers and continued reaching for his waistband area while on the ground. Due to Warden continuing to reach for his waistband area, Officer Cowan and Officer Weaver fired multiple rounds at Warden. After Warden was shot, he was handcuffed and searched. During the search of Warden, officers discovered Warden was not armed and he had been simulating he had a weapon.

Officers immediately requested for medical personnel and they began lifesaving first aid on Warden. One of the officers applied a tourniquet to Warden's left leg prior to the ambulance arriving. Shortly thereafter, ambulance personnel arrived on scene and Warden was transported to Mercy Medical Center for treatment. Warden is expected to survive.

Appendix G

During the initial investigation it was learned that Warden is from Las Vegas, Nevada. Warden is identified as a violent fugitive from Nevada and he has an active warrant for violating his probation. Warden is on probation for kidnapping and attempt coercion with force or threat of force. Warden also has a history of battery on a protective person, he was a known gang member and a narcotics user with violent tendencies.

During the investigation several witnesses were contacted. Witnesses revealed Warden was given several commands to comply with the officers orders. Several eye witnesses provided detailed information about the officer's actions during the confrontation. One eye witness listed as T.C., told investigators "If he was in the officer's position he would have probably shot sooner and done the same thing (regarding shooting the suspect)." Detectives have also obtained video surveillance of the unprovoked, violent battery on the school official, the residential burglary, and the officer involved shooting. The video surveillance reaffirms the reports and witness accounts.

The Shasta County Multiagency Officer Involved Critical Incident Protocol was initiated and the Shasta County Sheriff's Office was designated as the lead investigating agency. I was assigned as the lead detective from the Shasta County Sheriff's Office. Based upon my training and experience, my review of evidence and statements obtained at this time in the investigation, I request an arrest warrant be issued for Warden's arrest for violating Penal Code section 69: Threats of Violence toward a Peace Officer and Penal Code section 148 (a);

Appendix G

Obstruction of a Peace Officer. This report is a summary of events as future supplemental reports will be generated.

Case Status: Open, refer to District Attorney's Office for warrant.