FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABBI LEMOS, *Plaintiff-Appellant*, v. COUNTY OF SONOMA; STEVE FREITAS; MARCUS HOLTON, *Defendants-Appellees.*	No. 19-15222 D.C. No. 4:15-cv-05188-YGR OPINION

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted En Banc March 23, 2022
Pasadena, California

Filed July 19, 2022

Before: Mary H. Murguia, Chief Judge, and William A. Fletcher, Marsha S. Berzon, Consuelo M. Callahan, Andrew D. Hurwitz, John B. Owens, Michelle T. Friedland, Eric D. Miller, Kenneth K. Lee, Daniel A. Bress and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Miller;
Dissent by Judge Callahan

COUNSEL

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Lizabeth N. de Vries, Scott Law Firm, San Francisco, California; for Plaintiff-Appellant.

Richard W. Osman (argued) and Sheila D. Crawford, Bertrand Fox Elliot Osman & Wenzel, San Francisco, California, for Defendants-Appellees.

OPINION

MILLER, Circuit Judge:

Gabrielle Lemos appeals from the district court's dismissal of her claim under 42 U.S.C. § 1983 alleging that a sheriff's deputy used excessive force in arresting her. The district court held that Lemos's claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because Lemos was convicted of willfully resisting, delaying, or obstructing the deputy during the same interaction. Under *Heck*, a section 1983 action may not proceed if its success would "necessarily require the plaintiff to prove the unlawfulness of his conviction." *Id.* at 486. But because the record does not show that Lemos's section 1983 action necessarily rests on the same event as her criminal conviction, success in the former would not necessarily imply the invalidity of the latter. We therefore reverse and remand for further proceedings.

Late in the evening of June 13, 2015, Sonoma County Sheriff's Deputy Marcus Holton was on patrol in Petaluma, California, when he came upon a pickup truck with a large trailer stopped in the road in front of a house. Hearing raised voices and a reference to a

"fight," he got out of his car to investigate. His body camera recorded what happened next.

Holton approached the driver's side of the truck and asked the driver to leave the vehicle. The driver complied and said that the passenger, Karli Labruzzi, was his girlfriend, that she was drunk, and that she was upset because she had lost her phone. Holton then walked around the truck to confirm the story with Labruzzi. She was leaning out the window and talking to a group of three women standing nearby: her two sisters (one of whom was Lemos) and their mother.

When Holton asked, "Is everything ok?," all four women began yelling at him. After further discussion, Holton said, "I'm not going to leave until I've resolved this," and they answered, "Nothing to resolve." Holton then opened the truck door to see if Labruzzi was injured, at which point Lemos—who would later explain that she had "just graduated from high school" and had consumed "three Jack Daniels and Cokes" earlier in the evening—stepped between him and the door, pointed her finger at him, and shouted, "You're not allowed to do that!" Holton told Lemos to step back and pushed her hand away. After Lemos's mother moved her away, Holton closed the door. The women protested, with Lemos insisting, "You cannot go in the car! You have to have a warrant!" Holton asked them to calm down so that he could explain why he wished to speak to Labruzzi. When they did not do so, he called for backup. The responding deputy, Robert Dillion, later said that he could hear the women's screams over the radio.

Labruzzi eventually got out of the truck. During the next few minutes, all four women continued to remonstrate with Holton, arguing that he should not have opened the door of the truck and that the investigation should be conducted, in Lemos's words, by "a woman cop." After Dillion arrived, Holton separated Lemos's mother from her daughters to explain that he was trying to investigate whether Labruzzi had been the victim of a "domestic incident." Dillion, meanwhile, made repeated but futile efforts to instruct the daughters, "I need one person to talk at a time." They responded by concurrently requesting "a woman cop," claiming to be sober, accusing Holton of "assault," and disparaging Holton and his mother in sexual terms.

Lemos's mother was apparently not convinced by Holton's explanations and twice returned to where her daughters were standing. The second time she returned, some five minutes after the initial encounter at the truck door, she told Lemos to go inside the house. Lemos began to do so, walking past Holton and ignoring his orders to stop. Holton ran after Lemos and grabbed her wrist in an attempt to handcuff her, but she pulled away. He then tackled her and placed her under arrest. Later that night, Lemos was taken to a hospital, where she was treated and released for injuries she sustained when tackled.

Lemos brought this action against Holton, Sonoma County Sheriff Steve Freitas, and Sonoma County, alleging that Holton had violated her Fourth Amendment right to be free from excessive force. (Lemos also asserted a claim under the First Amendment, but she

has now abandoned it.) Soon thereafter, the Sonoma County District Attorney charged Lemos with resisting, delaying, or obstructing a peace officer, in violation of California Penal Code section 148(a)(1). The district court stayed proceedings in the civil action while the criminal prosecution was pending.

The criminal case proceeded to a jury trial. The jury was instructed that to find Lemos guilty, it needed to find beyond a reasonable doubt that Holton was "lawfully performing or attempting to perform his duties as a peace officer," that Lemos "knew, or reasonably should have known, that [he] was a peace officer performing or attempting to perform his duties," and that she "willfully resisted, obstructed, or delayed [him] in the performance or attempted performance of those duties." The jury was further instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties."

The instructions stated that the jury could find Lemos guilty based on any one of four acts: (1) if she "made physical contact with [Holton] as he was trying to open the truck door"; (2) if she "placed herself between" Holton and Labruzzi; (3) if she "blocked [Holton] from opening the truck door and seeing or speaking with" Labruzzi; or (4) if she "pulled away when [Holton] attempted to grab her" (just before he tackled her). Although the instructions required the jury to agree unanimously on which act Lemos

committed, the verdict form did not require the jury to identify a specific act. The jury found Lemos guilty.

Once the criminal proceedings concluded, the district court lifted its stay. The parties agreed that the defendants would file a motion for summary judgment limited to the argument that Lemos's action was barred by *Heck*.

The district court granted summary judgment to the defendants. The court reasoned that "[g]iven [Lemos's] and her cohorts' continuous screaming and provoking," there was "no temporal or spatial distinction or other separation between the conduct for which Lemos was convicted, by a jury, and the conduct which forms the basis of her Section 1983 claim." The court concluded that "Holton's actions . . . form[ed] one uninterrupted interaction and the jury's finding that he did not use excessive force would be inconsistent with a Section 1983 claim based on an event from that same encounter."

A divided three-judge panel of this court affirmed. *Lemos v. County of Sonoma*, 5 F.4th 979 (9th Cir. 2021); *see id.* at 987 (Berzon, J., dissenting). We voted to rehear the case en banc. *Lemos v. County of Sonoma*, 22 F.4th 1179 (9th Cir. 2022). We review the district court's grant of summary judgment de novo. *Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 854 (9th Cir. 2019).

We begin by reviewing the preclusion doctrine established in *Heck*. In that case, the plaintiff had been convicted of voluntary manslaughter and, while

serving his sentence, brought a section 1983 action against prosecutors and a police officer who had allegedly engaged in unlawful acts that resulted in his conviction. 512 U.S. at 478–79. The Supreme Court held that the action could not proceed because "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486. Under *Heck*, a section 1983 action is barred if success in the action would "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* But if a criminal conviction has already been reversed, expunged, or otherwise set aside, then a section 1983 action may proceed. *Id.* at 486–87.

Heck thus requires us to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487. By contrast, if "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, in the absence of some other bar to the suit." *Id.* (footnote omitted).

The Supreme Court has since emphasized that it was "careful in *Heck* to stress the importance of the term 'necessarily,'" as, for example, when the Court "acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on

the merits would not '*necessarily* imply that the plaintiff's conviction was unlawful.'" *Nelson v. Campbell*, 541 U.S. 637, 647 (2004) (quoting *Heck*, 512 U.S. at 487 n.7). "To hold otherwise," the Court explained, "would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted." *Id.*

To decide whether success on a section 1983 claim would *necessarily* imply the invalidity of a conviction, we must determine which acts formed the basis for the conviction. When the conviction is based on a guilty plea, we look at the record to see which acts formed the basis for the plea. *See Smith v. City of Hemet*, 394 F.3d 689, 696–97 (9th Cir. 2005) (en banc); *Sanford v. Motts*, 258 F.3d 1117, 1119–20 (9th Cir. 2001). We follow the same approach when the conviction is based on a jury verdict. As several other courts of appeals have recognized, a court must look at the record of the criminal case—including the jury instructions—to determine which facts the jury necessarily found. *See Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1194 (11th Cir. 2020) (examining what "a jury could have found" to determine that the "facts required for [the plaintiff] to prove his § 1983 case do not necessarily logically contradict the essential facts underlying [his] convictions," and concluding that "*Heck* does not bar the § 1983 action from proceeding" (internal quotation marks omitted)); *Lora-Pena v. FBI*, 529 F.3d 503, 506 (3d Cir. 2008) (examining the jury instructions to conclude that "the question of whether the

officers used excessive force was not put before the jury," so the plaintiff's criminal convictions "would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force"); *see also Barnes v. Wright*, 449 F.3d 709, 716–17 (6th Cir. 2006). An action under section 1983 is barred if—but only if—success in the action would undermine the jury's findings in a way that "would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid." *Smith*, 394 F.3d at 699.

This case involves a conviction for resisting, delaying, or obstructing a peace officer, in violation of California Penal Code section 148(a)(1). That offense has three elements: "(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." *Yount v. City of Sacramento*, 183 P.3d 471, 479 (Cal. 2008) (quoting *In re Muhammed C.*, 116 Cal. Rptr. 2d 21, 24 (Ct. App. 2002)). The second element is particularly significant because California courts have held that an officer who uses excessive force is acting unlawfully and therefore is not engaged in the performance of his or her duties. *People v. White*, 161 Cal. Rptr. 541, 544–45 (Ct. App. 1980); *see In re Manuel G.*, 941 P.2d 880, 885 (Cal. 1997); *People v. Gonzalez*, 800 P.2d 1159, 1178–79 (Cal. 1990). For that reason, the jury at Lemos's criminal trial was instructed that "[a] peace

officer is not lawfully performing his or her duties if he or she is . . . using unreasonable or excessive force."

It follows that *Heck* would bar Lemos from bringing an excessive-force claim under section 1983 if that claim were based on force used during the conduct that was the basis for her section 148(a)(1) conviction. *See Heck*, 512 U.S. at 486 n.6. In that circumstance, to prevail in the section 1983 action, she would have to prove that Holton used excessive force, thus "negat[ing] an element of the offense" of which she was convicted. *Id.*; *see McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2006) (holding that a claim is *Heck*-barred "if specific factual allegations in the complaint are necessarily inconsistent with the validity of the conviction").

But, crucially, the jury was told that it could find Lemos guilty based on any one of four acts she committed during the course of her interaction with Holton: making physical contact with Holton at the door to the truck; placing herself between Holton and Labruzzi; blocking Holton from opening the truck door; and pulling away from Holton when he attempted to grab her. Because the jury returned a general verdict, we do not know which act it thought constituted an offense. Although any one of the four acts could be the basis for the guilty verdict, Lemos's section 1983 action is based on an allegation that Holton used excessive force during only the last one; at oral argument, Lemos expressly stated that she understood that act to refer to her pulling away from Holton just before he tackled her, and she disavowed any claim based on force used by Holton earlier in their encounter. There would be no

contradiction in concluding (as the criminal jury may have) that Lemos obstructed Holton during the lawful performance of his duties by, say, blocking him from opening the truck door while also concluding (as Lemos alleges in this action) that Holton used excessive force when he tackled her five minutes later. Thus, if Lemos were to prevail in her civil action, it would not *necessarily* mean that her conviction was invalid. The action is therefore not barred by *Heck*.

In reaching a contrary conclusion, the district court reasoned that Holton's acts "form[ed] one uninterrupted interaction" and that there was "no temporal or spatial distinction or other separation between the conduct for which Lemos was convicted . . . and the conduct which forms the basis of her Section 1983 claim." Along similar lines, Holton argues that Lemos's conviction was "based on the entire incident as a whole" and that Lemos could not have been convicted "if any part of Deputy Holton's use of force during the incident was excessive." If that were true, it would not matter which of the four predicate acts the jury agreed on because a finding that Holton used excessive force would invalidate her conviction.

That reasoning, however, cannot be reconciled with the jury instructions in Lemos's underlying criminal case or with California law. As we have explained, the instructions allowed the jury to find Lemos guilty based on any of the four charged acts. And while the instructions specified that "[a] peace officer is not lawfully performing his or her duties if he or she is . . . using unreasonable or excessive force," the use of the

word "is"—in the present tense—is significant. Under the instructions, an officer could have been lawfully performing his duties at time A even if, at some later time B, he used excessive force. So if the jury found that Lemos resisted Holton at the truck and that Holton was acting lawfully at the time, it should have found her guilty, even if it also believed that Holton used excessive force when he tackled her five minutes later. Lemos's success in the section 1983 action thus would not necessarily contradict the verdict.

Holton's understanding of the instructions and the verdict makes particularly little sense in light of the California Supreme Court's decision in *Yount*. That case involved a section 1983 claim by an arrestee who had resisted being handcuffed by struggling with the officers and kicking them. *Yount*, 183 P.3d at 475–76. Though the officers eventually managed to restrain him, Yount continued to resist, whereupon one officer, intending to tase Yount, accidentally shot him. *Id.* at 476. Yount pleaded no contest to a violation of section 148(a)(1) and then sued the officer who shot him. *Id.* at 476–77. The California Supreme Court held that the action was not barred by *Heck* because a finding that the officer's use of deadly force was excessive would not necessarily be inconsistent with his conviction. *Id.* at 481–82. The court explained that "[t]he subsequent use of excessive force [did] not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it." *Id.* at 482 (quoting *Jones v. Marcum*, 197 F. Supp. 2d 991, 1005 n.9 (S.D. Ohio 2002)). Even though the civil

action and the criminal conviction both arose from "one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." *Id.* (quoting *Jones*, 197 F. Supp. 2d at 1005 n.9).

More recently, in *People v. Williams*, 236 Cal. Rptr. 3d 587 (Ct. App. 2018), the California Court of Appeal applied *Yount*'s reasoning and explained that "the validity of a conviction of an offense involving a peace officer engaged in the performance of his or her duties depends on whether 'the officer was acting lawfully *at the time* the offense against the officer was committed.'" *Id.* at 599 (quoting *Manuel G.*, 941 P.2d at 885). In other words, if the officer is acting lawfully and the defendant resists him, the defendant has violated section 148(a)(1). Whatever might happen later, it cannot undo the violation: "The use of excessive force after the completed section 148(a)(1) violation would not invalidate the completed section 148(a)(1) violation." *Id.* at 601. The jury instructions here reflected those principles.

Holton relies on a footnote in our decision in *Smith*, in which we suggested a different approach to reviewing a jury verdict in a section 148(a)(1) case. We observed that "[w]here a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction." *Smith*, 394 F.3d at

699 n.5. So far, so good. But we went on to say that "a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would '*necessarily* imply the invalidity of his conviction.'" *Id.* (quoting *Susag v. City of Lake Forest*, 115 Cal. Rptr. 2d 269, 274 (Ct. App. 2002)). That statement was dictum—*Smith* involved a guilty plea, not a jury verdict—and it was decided before the California Supreme Court decided *Yount*. *See Hooper v. County of San Diego*, 629 F.3d 1127, 1132 (9th Cir. 2011). As we have already explained, applying *Heck* requires looking at the factual basis for a conviction, regardless of whether that conviction is based on a jury verdict or a guilty plea. And where, as here, a jury is instructed that it may find a defendant guilty based on one of several different events, then a guilty verdict does *not* necessarily "determine[] the lawfulness of the officers' actions" throughout the entire encounter. *Smith*, 394 F.3d at 699 n.5. We therefore disapprove of that statement in *Smith*.

As Holton points out, the relevant language from *Smith* reappeared in *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012). But again, the statement was dictum. Although *Beets* did involve a jury verdict, both the criminal prosecution and the section 1983 action involved the same event: Officers fatally shot a man who was driving a truck toward them. *Id.* at 1040. The passenger in the truck was convicted of aiding and abetting the driver's assault on the officers, and the parents of the deceased driver brought a section 1983

claim, alleging that the officers used excessive force. *Id.* at 1040–41. We held that *Heck* precluded the section 1983 action because success would have necessarily implied the invalidity of the passenger's criminal conviction. *Id.* at 1047–48. We explained that "there are *not* multiple factual bases for [the passenger's] conviction for aiding and abetting in the assault." *Id.* at 1045 (emphasis added). In other words, the section 1983 action was predicated on the same conduct that the criminal jury had already determined was lawful. *Id.* at 1045, 1048. Although we disapprove of *Beets*'s repetition of the *Smith* dictum, the reasoning of *Beets* does not undermine our holding here. In this case, unlike in *Beets*, the jury was instructed that multiple acts could serve as the predicate for the criminal conviction, and we do not know which the jury chose.

Because the district court erred in holding that Lemos's action was barred by *Heck*, we reverse the grant of summary judgment to the defendants. We express no view on the merits of Lemos's claim or on any other defenses that the defendants may assert. We leave those matters for the district court to consider on remand.

REVERSED and REMANDED.

CALLAHAN, Circuit Judge, joined by LEE, Circuit Judge, dissenting:

Like a wolf in sheep's clothing, the majority opinion may appear at first blush to simply dispense with

the *Heck* preclusion doctrine due to the unique factual scenario presented, but something more troubling lingers beneath the surface. The majority's reasoning presupposes that an uninterrupted interaction with no temporal or spatial break between a § 1983 plaintiff's unlawful conduct and an officer's alleged excessive force can be broken down into distinct isolated events to avoid the application of the *Heck* bar. In this way, the decision creates an escape hatch to *Heck*.

The outcome, which reflects a misapprehension of California criminal law, violates the very purposes cited by the Supreme Court when it established the *Heck* preclusion doctrine. Specifically, it undermines the strong policy against the creation of two conflicting resolutions arising out of a single transaction, and ignores the Supreme Court's concerns for finality and consistency between criminal and civil judgments. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994); *see also McDonough v. Smith*, 139 S. Ct. 2149, 2157 (2019) (discussing the purposes underlying *Heck*). For these reasons, I respectfully dissent and would affirm the district court's application of the *Heck* bar to Lemos's § 1983 claim.

The majority's analysis begins and ends with its parsing of the jury instructions provided in Lemos's criminal trial for her violation of California Penal Code section 148(a)(1). The majority recognizes that "*Heck* would bar Lemos from bringing an excessive-force claim under section 1983 if that claim were based on the same conduct as her section 148(a)(1) conviction." That is because to prevail on her § 1983 claim, Lemos

would have to prove that Deputy Holton used excessive force, thereby negating an element of the offense of which she was convicted[1]. Cal. Penal Code § 148(a)(1). "But," the majority reasons, "crucially, the jury was told that it could find Lemos guilty based on any one of four acts she committed during the course of her interaction with Holton." Thus, the majority concludes that because "we do not know which act" the jury convicted her on, Lemos's § 1983 action cannot be barred by *Heck*.

There are at least two problems with the majority's reasoning—first, it ignores California's continuous course of conduct rule, and second, under the facts presented, there was no break between any of Lemos's illegal acts and the excessive force she alleges in her § 1983 complaint.

Under California's continuous course of conduct rule, Lemos's conviction for violating section 148(a)(1) necessarily includes all of the acts that comprise a continuous or indivisible transaction. *People v. McFarland*,

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[1] The majority "disapproves" of what it construes as dicta in *Smith* (repeated later in *Beets*) which states that "a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would '*necessarily* imply the invalidity of his conviction.'" *Smith v. City of Hemet*, 394 F.3d 689, 699 n.5 (9th Cir. 2005) (en banc). I continue to think this language accurately reflects California law and the spirit of *Heck*, but nevertheless this court remains bound by California's interpretation of what is required for a jury to convict under section 148(a)(1).

376 P.2d 449, 455–56 (Cal. 1962). As we correctly explained in our dissent in *Smith v. City of Hemet*:

> The major considerations in determining whether similar acts are part of the same transaction are the amount of time elapsed between the discrete incidents, and whether there was any break in the criminal activity. *See People v. Jefferson*, 123 Cal.App.2d 219, 221, 266 P.2d 564 (1954) (holding that two distinct acts of assault with a deadly weapon taking place within a fifteen minute period "were a part of the same incident, and they could not reasonably be held to constitute two separate offenses, each complete in itself, and each of which would require a separate charge"); *People v. Mota*, 115 Cal.App.3d 227, 233, 171 Cal.Rptr. 212 (1981).

394 F.3d 689, 709 (9th Cir. 2005) (en banc) (Silverman, J., dissenting). Applying those considerations, *People v. Moreno*, 108 Cal. Rptr. 338, 342–43 (1973) held that two instances of violating section 148 were two separate offenses because thirty minutes elapsed between the two incidents and "[i]n the intervening space of time the defendant had completely calmed down, and ceased his criminal activity."

By contrast, Lemos never cooperated with the officers—rather, as the body camera footage presented to the jury confirms, throughout the roughly seven minutes that elapsed between Lemos's first obstructive encounter with Deputy Holton at the truck and the time of her eventual arrest, Lemos resisted,

obstructed, and delayed Deputy Holton in the performance of his duties at every turn. There can be no dispute regarding the facts here, but a narrative description of the conduct simply cannot do it justice. Instead, the video depicting what occurred from start to finish supports the continuous nature of the interaction, which involved not just Lemos but her mother (who was also convicted under section 148(a)(1)) and Lemos's two sisters.

It makes sense then why Lemos was charged and convicted of just a single count of violating section 148(a)(1)—the continuous course of conduct rule bars the state from prosecuting a defendant again for acts that were part and parcel of the same continuous transaction, a rule designed to protect criminal defendants. Again, our dissent in *Smith* explained this well:

> It is this rule that now prevents the State of California from charging Smith anew for the conduct occurring after he first refused to take his hands out of his pockets. And again for refusing to put his hands on his head. And again for not turning around. And again for not coming off the porch. And again for refusing to submit to handcuffing. Smith was charged and convicted of one count of resisting an officer that necessarily encompassed the entire sequence of events leading up to his arrest. If, for whatever reason, Smith wanted to waive the protection of that rule and plead guilty to one identified act, leaving himself open to possible prosecution for acts that otherwise

> would be dead letters, it was incumbent upon him to say so.

394 F.3d at 709 (Silverman, J., dissenting). For that reason, to paraphrase the California Supreme Court in *Yount v. City of Sacramento*, 183 P.3d 471, 481 (Cal. 2008), "[i]t would be anomalous to construe [Lemos's] criminal conviction broadly for criminal law purposes so as to shield [her] from a new prosecution arising from these events but then, once [she] had obtained the benefits . . . , to turn around and construe the criminal conviction narrowly so as to permit [her] to prosecute a section 1983 claim arising out of the same transaction." *Id.* (alterations added). The majority opinion fails to appreciate California law on this issue and thereby creates tension with this legal principle.

Of course, an allegation of excessive force by a police officer is not barred by *Heck* if the alleged act is distinct temporally or spatially from the factual basis for the section 148(a)(1) conviction, because such an allegation would not "necessarily" imply the invalidity of the conviction. *See Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1042–43 (9th Cir. 2012). But the court must determine whether there is a legitimate analytical way to parse the individual's obstructive acts from the officer's use of force. The majority apparently concludes that the four acts identified in the jury instructions provide all the court needs to make its *Heck* determination.

For that reason, I believe some context is useful here. Counsel admitted at en banc oral argument that

the defense requested this instruction because they had concerns about whether their clients' verbal conduct would be considered resisting, obstructing, or delaying by the jury. Had the prosecutor not agreed to satisfy defense counsel's concerns, perhaps this case would not be before us at all. And, as *Yount* cautioned, it would [*sic*] "anomalous" to allow defense counsel to use this jury instruction as a shield for criminal law purposes, but as a sword to permit Lemos's § 1983 claim to proceed. *Yount*, 183 P.3d at 481.

Accordingly, the fact that the jury instructions offered four acts which could form the basis for Lemos's section 148(a)(1) conviction cannot alone be determinative of whether the *Heck* bar applies. Under California law, the question remains whether Lemos's obstructive acts can be separated, temporally or otherwise, from Deputy Holton's alleged excessive force. Here, they cannot.

The cases tend to fall into two categories: the first, where the alleged excessive force occurs after the chain of events underlying the section 148(a)(1) conviction[2], such as in *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) and *Sanford v. Motts*, 258 F.3d 1117, 1118 (9th Cir. 2001) (the *Heck* bar does not apply), and the second, where the alleged excessive force occurs during the chain of events underlying the section 148(a)(1) conviction, such as in *Beets* and *Sanders*

[2] Even *Yount*, which the majority heavily relies upon, falls into this second category, as it involved an officer's "subsequent" accidental use of deadly force after Yount had been handcuffed. *See Yount*, 183 P.3d at 475–76, 482.

v. City of Pittsburg, 14 F.4th 968, 970 (9th Cir. 2021) (the *Heck* bar applies). Thus, if Lemos had been bitten by a police dog after she had been arrested for violating section 148(a)(1), for example, her conviction for resisting an officer would not have barred her § 1983 lawsuit. But the facts underlying Lemos's conviction, including each of the four acts listed in the jury instructions and Deputy Holton's alleged excessive force, all occurred during a single indivisible chain of events before her arrest, and therefore her § 1983 is barred by *Heck*.

This distinction is reflected in *Sanders*, a decision published just months after the underlying opinion in *Lemos* and absent from discussion in the majority opinion. In *Sanders*, the defendant fled from police after being spotted in a stolen car. 14 F.4th at 970. The defendant led police on a car chase and then a foot chase. *Id.* When an officer caught up to the defendant, he resisted. *Id.* The officer then commanded a police dog to bite the defendant's leg, which it did. *Id.* The defendant was finally arrested and charged with a violation of section 148(a)(1). *Id.* The defendant pleaded no contest to the charge and stipulated that the factual basis for his plea was "based on the preliminary hearing transcript," which described multiple instances of the defendant resisting. *Id.* Meanwhile, the defendant filed a § 1983 claim against the officer for excessive force in using the police dog. *Id.*

Relying on *Yount*, we rejected the defendant's argument that his § 1983 claim was not *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. *Id.* at 972–73. Because the dog bite was part of the section 148(a)(1) conviction's factual basis, it was necessarily lawful for purposes of the *Heck* analysis. *Id.* at 972. While Sanders involved a plea rather than a jury trial, its logic applies with equal force here—we may not "slice up the factual basis of a § 148(a)(1) conviction to avoid the *Heck* bar." *Id.*

* * *

"[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. *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

Nevertheless, the majority engages in the "temporal hair-splitting" cautioned against by courts time and again in search of a distinct break between Lemos's criminal act and Deputy Holton's alleged use of force where none meaningfully exists. *See Fetters v. Cnty. of Los Angeles*, 196 Cal. Rptr. 3d 848, 861 (Cal. Ct. App. 2016). Because no such break exists, Lemos could only have been convicted if the jury found that Deputy Holton did not use excessive force throughout the interaction, an element of the conviction which the jury was instructed on. But Lemos can only prevail on her § 1983 claim if she proves that Deputy Holton did use excessive force during that same interaction. Thus, allowing Lemos's § 1983 action to proceed violates the

holding of *Heck* and creates conflicting resolutions arising out of a single event.

Because the majority opinion "expand[s] opportunities for collateral attack" on criminal convictions despite clear Supreme Court guidance to the contrary, I respectfully dissent. *Heck*, 512 U.S. at 484–85.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABBI LEMOS, *Plaintiff-Appellant*, v. COUNTY OF SONOMA; STEVE FREITAS; MARCUS HOLTON, *Defendants-Appellees.*	No. 19-15222 D.C. No. 4:15-cv-05188-YGR ORDER

Filed January 21, 2022

ORDER

MURGUIA, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion is vacated.

Judge Koh did not participate in the deliberations or vote in this case.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABBI LEMOS, *Plaintiff-Appellant*, v. COUNTY OF SONOMA; STEVE FREITAS; and MARCUS HOLTON, *Defendants-Appellees.*	No. 19-15222 D.C. No. 4:15-cv-05188-YGR OPINION

Appeal from the United States District Court
For Northern California, Oakland
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted May 22, 2020
San Francisco, California

Filed July 16, 2021

Before: Marsha S. Berzon and Sandra S. Ikuta, Circuit Judges, and Ivan L.R. Lemelle,* District Judge.

Opinion by Judge Lemelle;
Dissent by Judge Berzon

COUNSEL

Izaak D. Schwaiger (argued), Schwaiger Law Firm, Sebastopol, California; John Houston Scott and Lizabeth

* The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

N. de Vries, Scott Law Firm, San Francisco, California; for Plaintiff-Appellant.

Richard W. Osman (argued) and Sheila D. Crawford, Bertrand Fox Elliott Osman & Wenzel, San Francisco, California, for Defendants-Appellees.

OPINION

LEMELLE, District Judge:

Appellant Gabbi Lemos appeals the district court's order granting appellee County of Sonoma, Sheriff Steve Freitas, and Deputy Marcus Holton's motion for summary judgment. Appellant argues that her conviction after jury trial for violations of California Penal Code § 148(a)(1) and her 42 U.S.C. § 1983 claim are not necessarily based on the same transaction, and as a result the district court erred in ruling that the § 1983 claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 13, 2015, Deputy Holton, after seeing a pickup truck blocking a lane of traffic and hearing screaming, stopped at the home of Gabbi Lemos to investigate what he believed was a domestic dispute involving Karli Labruzzi and Darien Balestrini. After speaking with Balestrini, outside of the vehicle, Holton walked around to the passenger side where he encountered Labruzzi, Gabbi Lemos, Lemos's mother, and

Lemos's sister. Holton asked Lemos, her mother, and sister to step away from the vehicle so that Holton could speak with Labruzzi.

While speaking with Labruzzi, Holton attempted to open the truck door. Lemos then inserted herself between Holton and the open truck door while pointing her finger at Holton and yelling that Holton was not allowed to go in the truck. Holton then pushed Lemos away from him with his right hand. After closing the truck door and repeatedly ordering Lemos, Lemos's mother and Lemos's sister to calm down to which the parties did not comply, Holton requested backup.

Following backup's arrival, Lemos and others continued to be uncooperative. Holton then separated Lemos's mother from the group to explain the investigation, but Lemos's mother returned to the group and continued to be uncooperative. Subsequently, Lemos's mother told Lemos to go into the house at which point Lemos turned to walk toward the house. As Lemos walked past Holton, Holton told her, "Hey, come here. Hey." Lemos did not respond and continued to walk away. Holton then ran up behind Lemos, grabbed her, and brought her to the ground.

On November 12, 2015, Lemos filed a complaint in the district court asserting an excessive force claim under 42 U.S.C. § 1983 arising out of the June 13, 2015 incident. Lemos claimed Holton used excessive force in stopping her from fleeing as he attempted to arrest her. On April 18, 2016, the district court stayed the federal action during pendency of state criminal proceedings

against Lemos, in which Lemos had been charged with resisting, obstructing, or delaying a peace officer in violation of California Penal Code § 148(a)(1).[1]

On August 31, 2016, a jury was instructed Lemos could be found guilty of violating California Penal Code § 148(a)(1). The jury was instructed to find each of the following elements beyond a reasonable doubt: (1) "Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer," (2) "[Lemos] willfully resisted, obstructed or delayed Deputy Marcus Holton in the performance or attempted performance of those duties," and (3) "[w]hen [Lemos] acted, she knew, or reasonably should have known, that Deputy Marcus Holton was a peace officer performing or attempting to perform his duties." As to the first element, the jury was instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." With respect to the second element, the jury was instructed that Lemos could be found guilty based on four theories of liability: Lemos (1) made physical contact with Holton as he was trying

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[1] California Penal Code § 148(a)(1) provides, "Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

to open the truck door; (2) placed herself between Holton and Ms. Labruzzi; (3) blocked Holton from opening the truck door and seeing or speaking to Ms. Labruzzi; or (4) pulled away from Holton when Holton attempted to grab her. Lemos was convicted by a jury for violating California Penal Code Section 148(a)(1) when Lemos resisted, delayed, or obstructed Deputy Holden while he was conducting his duties as an officer on June 13, 2015.

On May 24, 2018, the district court lifted the stay. On November 8, 2018, all defendants filed a motion for summary judgment. The district court issued its order granting defendant's motion for summary judgment on January 29, 2019. Lemos timely filed a notice of appeal.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

We review *de novo* the district court's grant of summary judgment. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). We must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist." *Id.* We will affirm only if no "reasonable jury viewing the summary judgment record could find by a preponderance of the evidence that the plaintiff is entitled to a favorable verdict." *Narayan v. EGL, Inc.*, 616 F.3d 895, 899 (9th Cir. 2010). "If a rational trier of fact could

resolve a genuine issue of material fact in the nonmoving party's favor," summary judgment is inappropriate. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." *Id.* (quoting *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009)).

Lemos contends that jurors in the criminal trial were instructed she could be found guilty of violating § 148(a)(1) based on four theories of liability, and the jury was given a general verdict form. The verdict form did not indicate whether the jury found Lemos guilty of one or all of the instances given in the jury instructions. Lemos contends that if the jury did not find her guilty of pulling away from Holton when he attempted to restrain her (the fourth theory of liability), then her § 1983 claim is not barred by *Heck*.

Excessive force claims are analyzed under the objective reasonableness standard of the Fourth Amendment as enunciated in *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). *See Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1115 (9th Cir. 2005). For assigned reasons below, we discern no material factual disputes from this record. The sole issue remaining on appeal is a basic *Heck* question—whether success on Lemos's § 1983 excessive force claim "would 'necessarily imply' or 'demonstrate' the invalidity" of Lemos's state court conviction under California Penal Code § 148(a)(1).

THE HECK PRECLUSION DOCTRINE

In *Heck v. Humphrey*, the United States Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. . . . A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is *not* cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed. . . .

512 U.S. 477, 486 (1994). Under *Heck*, "[w]hen a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, 'the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'" *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1130 (9th Cir. 2011) (quoting *Heck*, 512 U.S. at 487). If it would, the civil action is barred. *Id.*; *cf. Yount v. City of Sacramento*, 43 Cal. 4th 885, 902 (2008)

(extending *Heck* to California state law claim for battery). *Heck* instructs that "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (per curiam). However, a plaintiff's allegation of excessive force by a police officer is not barred by *Heck* if the officer's conduct is "distinct temporally or spatially from the factual basis for the [plaintiff's] conviction." *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012) (citing *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir. 2005) (en banc)).

In *Beets*, we rejected an attempt to separate a deputy's action from the criminal activity underlying the § 1983 plaintiffs' excessive-force claim. The § 1983 plaintiffs in *Beets*, like Lemos here, argued that there were several possible factual bases for the relevant criminal conviction. *Id.* at 1045. Therefore, they argued, the conviction was not necessarily based on the same factual basis as the alleged civil rights violations. *Id.* In *Beets*, as here, the jury instructions in the criminal case required that to convict the defendant, the jury had to find she acted willfully against a police officer who was "lawfully performing his duties as a peace officer," and that the officer was not "using unreasonable or excessive force in his or her duties." *Id.*

Beets reaffirmed and relied on *Smith* to conclude that the jury necessarily determined that during the entire course of the deputy's conduct, he "acted within the scope of his duties and did not use excessive force."

Beets, 669 F.3d at 1045.[2] In *Smith*, we distinguished such a jury verdict from a guilty plea: "[W]here a § 1983 plaintiff has pled guilty or entered a plea of nolo contendere . . . it is *not* necessarily the case that the factual basis for his conviction included the whole course of his conduct." 394 F.3d at 699 n.5. *Beets* reaffirmed this distinction. 669 F.3d at 1045. Because the jury's verdict in the criminal case necessarily found that the deputy did not use excessive force at any time during the "course of the defendant's conduct," *id.* (quoting *Smith*, 394 F.3d at 699 n.5), a verdict in the plaintiffs' favor on their § 1983 excessive-force claim would have necessarily implied that the underlying criminal conviction was invalid. Therefore, the claim was barred by *Heck*. *Id.*

Although *Beets* relied on *Smith* in determining the officer acted within the scope of his duties during the entire course of conduct, it was one of two independent grounds on which *Beets* rejected the plaintiffs' argument that the relevant conviction was not barred

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[2] Reliance on *Beets* and *Smith* is criticized in a well-reasoned dissent to an unpublished disposition in *Wilson v. City of Long Beach*, 567 F. App'x 485 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1154 (2015). While positing certain record deficiencies in the factual and legal outcomes, the dissent also emphasized that the ruling in *Beets*, and footnote 5 in *Smith*, on which *Beets* relies, are non-binding dicta. We note however when the circuit was sitting en banc, as in *Smith*, even dicta is binding on subsequent panels. An en banc panel announces "binding legal principle[s] for three-judge panels and district courts to follow even though the principle[s] [may be] technically unnecessary to the . . . disposition of the case." *Barapind v. Enomoto*, 400 F.3d 744, 751 n.8 (9th Cir. 2005) (en banc) (per curiam).

by *Heck*; indeed, *Beets* made clear that the argument failed "on two counts." *Id.* Nevertheless, "[i]t is well-established that 'where a decision rests on two or more grounds [as in *Beets*], none can be relegated to the category of obiter dictum.'" *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1016 n.5 (9th Cir. 2013) (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949)).

This comparative analysis of jury verdicts and guilty pleas does not support the proposition, as grossly mischaracterized by the dissent, that this opinion serves as an open invitation for police overreaction, provided that the prosecutor secures a guilty jury verdict as opposed to a guilty plea. Whether the accused wishes to proceed to trial or enter a guilty plea is not the defining factor of *Heck*'s application. Instead, the relevant inquiry is whether the record contains factual circumstances that support the underlying conviction under § 148(a)(1), *not* whether the conviction was obtained by a jury verdict or a guilty plea. *Beets*, 669 F.3d at 1045; *Yount*, 43 Cal. 4th at 891.

Yount involved an incident wherein the plaintiff consistently resisted the officers' attempts to place him in the patrol car until one officer mistakenly fired his pistol, instead of his taser, to subdue the plaintiff. *Yount*, 43 Cal. 4th at 888. In pleading no contest to a violation of § 148(a)(1) for his conduct leading up to the gunshot, Yount stipulated to a factual basis "without any explicit recitation of what those facts were." *Id.* at 895. Upon review of Yount's conviction, his subsequent admission to its underlying facts, and eyewitness

testimony at the *Heck* hearing, the Supreme Court of California found that *Heck* barred his § 1983 claims pertaining to the force used by the officers in response to Yount's violent resistance. *Id.* at 898. However, the court found that *Heck* did not bar Yount's claims regarding the use of deadly force thereafter because there was nothing within the criminal record that provided a justification for such force. *Id.*

To the extent that the dissent mischaracterizes our opinion to imply that a guilty plea to § 148(a)(1) will lack factual support to bar a § 1983 claim under *Heck*, *Yount* demonstrates that such is untrue. Rather, as established in *Yount*, so long as evidentiary support for the § 148(a)(1) conviction exists in the record, plea agreements, just like guilty jury verdicts, may establish the criminal defendant's resistance toward the officers and the officer's lawful conduct in response.

We further acknowledge that *Heck* would not necessarily bar a § 1983 claim for excessive force when the defendant enters into a plea agreement and the conviction and the § 1983 claim are based on different actions taken during one continuous transaction. *See Hooper v. County of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) (excessive force used after an arrest is made does not destroy the lawfulness of the arrest). In *Hooper*, the complainant struggled briefly with the arresting officer after they were on the ground by "jerking side to side." The officer restrained Hooper's hands behind her back, and she allegedly stopped resisting when instructed to do so by the officer. Thereafter, and in response to a gathering of spectators, the

officer allegedly screamed "Get away from my car. Get away from my car. Come here, Kojo." The officer's German Shepherd ran up to and bit Hooper's head and held her head until backup arrived. The dog's bites caused significant injuries to Hooper. She pled guilty to resisting a peace officer under California Penal Code § 148(a)(1). Hooper neither disputed the lawfulness of the arrest nor her resistance. *Id.* at 1129. However, she contends that the officer used excessive force after her resistance ended. The material facts in *Hooper* are distinguishable from the material facts in *Lemos*. Significantly, Hooper entered into a plea agreement—as opposed to being convicted by a jury—so it was not necessarily determined that the officer acted lawfully "throughout the whole course of [Hooper's] conduct," *Smith*, 394 F.3d at 699 n.5, and she reportedly stopped resisting before the alleged use of excessive force by the canine, while Lemos' resistance was clearly viewed by her trial jury as continuous throughout the entire transaction of events leading up to and including all subsequent physical contacts with the arresting deputy. The jury instructions required that the jury find that Deputy Holton was "lawfully performing or attempting to perform his duties as a peace officer," and the instructions explained that an officer "is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." Therefore, based on the jury instructions and evidence of record before it, the jury verdict established Lemos resisted and the deputy's conduct was lawful throughout the encounter. *See Beets*, 669 F.3d at 1045; *cf. Yount*,

43 Cal. 4th at 896–97 (holding that plaintiff's unlimited no contest plea established his culpability for resisting an officer during the entire incident).

Furthermore, in California, the lawfulness of an officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer. *In re Muhammed C.*, 95 Cal. App. 4th 1325, 1329 (2002). For the § 148(a)(1) conviction to be valid, a criminal defendant must have "resist[ed], delay[ed], or obstruct[ed]" a police officer in the *lawful* exercise of his duties. *Id.* This circuit further explained in *Smith*:

> Excessive force used by a police officer at *the time of the arrest* is not within the performance of the officer's duty. *Id.; People v. Olguin*, 119 Cal.App.3d 39, 45–46, 173 Cal.Rptr. 663 (Cal.Ct.App.1981) ("*[A]n arrest made with excessive force* is equally unlawful. '[It] is a public offense for a peace officer to use unreasonable and excessive force *in effecting an arrest.*' ") (citation omitted) (emphasis added); *People v. White*, 101 Cal.App.3d 161, 167, 161 Cal.Rptr. 541 (Cal.Ct.App.1980) ("Thus, in the present case it becomes essential for the jury to be told that if they found the *arrest was made with excessive force*, the arrest was unlawful and they should find the defendant not guilty of those charges which required the officer to be lawfully engaged in the performance of his duties ([Cal.Penal Code] §§ 245, subd. (b), 243 and 148).") (emphasis added).
>
> Under the definitions set forth in the California cases listed above, "the time of the arrest"

> does not include previous stages of law enforcement activities that might or might not lead to an arrest, such as conducting an investigation; it includes only the time during which the arrest is being *effected.* A conviction for resisting arrest under § 148(a)(1) may be lawfully obtained only if the officers do not use excessive force *in the course* of making that arrest. A conviction based on conduct that occurred *before* the officers commence the process of arresting the defendant is not "necessarily" rendered invalid by the officers' subsequent use of excessive force in making the arrest. For example, the officers do not act unlawfully when they perform investigative duties a defendant seeks to obstruct, but only afterwards when they employ excessive force in making the arrest. Similarly, excessive force used *after* a defendant has been arrested may properly be the subject of a § 1983 action notwithstanding the defendant's conviction on a charge of resisting an arrest that was itself lawfully conducted. *See, e.g., Sanford v. Motts*, 258 F.3d 1117, 1119–20 (9th Cir.2001) (explaining that a successful § 1983 suit based on excessive force would not necessarily imply the invalidity of Sanford's conviction under § 148(a)(1) because the officer's use of excessive force occurred subsequent to the conduct for which Sanford was convicted under § 148(a)(1)).

Smith, 394 F.3d at 695–696.

Thus, the dissent is correct in stating that a valid § 148(a)(1) conviction does not necessarily implicate

the lawfulness of the officer's conduct throughout the entirety of his encounter with the arrestee. Dis. Op. at 26. Simply put, a conviction under § 148(a)(1) is valid only when "the officer was acting lawfully *at the time the offense against the officer was committed*." *People v. Williams*, 26 Cal. App. 5th 71, 82 (2018) (emphasis added); *Smith*, 394 F.3d at 699. While we do not dispute the dissent's position as a general statement of law, it does not change the fact that the jury unanimously found that Holton acted lawfully throughout the continuous chain of events on June 13, 2015, even when he placed Lemos under arrest.

In cases like *Lemos* involving several potential grounds for a § 148(a)(1) violation within a continuous chain of events, courts often take into account certain temporal considerations regarding the individual's resistance and the officer's use of force. *Williams*, 26 Cal. App. 5th at 86; *see Yount*, 43 Cal. 4th at 899 ("Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." (citation omitted)); *see also Hooper*, 629 F.3d at 1131 ("[A] conviction under § 148(a)(1) can be valid, even if, during a single continuous chain of events, some of the officer's conduct was unlawful."). However, contrary to the dissent's interpretation, the statute does not require jurors to isolate each potential basis for a § 148(a)(1) violation and make piecemeal determinations of the officer's lawful conduct at each event, as previously acknowledged by

this Court. *See Hooper*, 629 F.3d at 1132 ("Section 148(a)(1) does not require that an officer's lawful and unlawful behavior be divisible into two discrete 'phases,' or time periods, as we believed when we decided *Smith*."). Accordingly, California jurisprudence advises against so-called "temporal hair-splitting" in search of a distinct break between the criminal act and the use of force where none meaningfully exists. *Fetters v. County of Los Angeles*, 243 Cal. App. 4th 825, 841 (2016); *Truong v. Orange County Sheriff's Dept.*, 129 Cal. App. 4th 1423, 1429 (2005).

The dissent nevertheless claims that the jury instructions here specifically directed the jurors to "distinguish among [each factual basis], unanimously." Dis. Op. at 31. In *Smith*, the court stated:

> Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction. . . . Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would *necessarily* imply the invalidity of his conviction.

394 F.3d at 699 n.5 (citation omitted); *accord Beets*, 669 F.3d at 1045.[3] While it is correct that the jury had to

[3] The dissent claims that this language in *Smith* may no longer be a correct statement of law in California in light of our *Hooper* decision. Dis. Op. at 34–35. However, *Hooper*'s reassessment

agree unanimously that Lemos committed at least one of the four violations, it was not required of the jury to expressly identify which of those bases gave rise to the § 148(a)(1) conviction, just as in *Smith*.

Viewed in light of binding circuit precedent, the record compels finding the jury determined that the arresting deputy acted within the scope of his duties without the use of excessive force, and that Lemos seeks to show that the same conduct constituted excessive force. Here, as in *Beets*, 669 F.3d at 1045, the jury was instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." And, the jury was told that it could convict Lemos only if "Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer." Lemos's jury considered all parties' evidence of relevant conduct, including the officers' body camera footage that's part of this record. Material factual disputes have been resolved by Lemos's jury. Therefore, the district court appropriately considered summary disposition of remaining legal issues under *Heck* and its progeny. In reliance, we find that *Smith* and *Beets*

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of how § 148(a)(1) should be interpreted has no bearing on the jury's ultimate determination of the defendant's guilt and the officer's lawful actions during the incident here. We remain bound by *Beets* to read the jury instructions here as compelling the determination that Holton was not using unreasonable or excessive force throughout the entire course of Lemos's conduct. *See Beets*, 669 F.3d at 1045.

control application of the *Heck* bar as found by the district court.

AFFIRMED.

BERZON, Circuit Judge, dissenting:

The majority today holds, in effect, that once a person resists law enforcement, she has invited the police to inflict any reaction or retribution they choose, as long as the prosecutor could get the plaintiff convicted by a jury—and not as the result of a plea—on a charge of resisting, delaying, or obstructing a police officer. In so holding, the majority confidently asserts that a jury's conviction of a defendant under California Penal Code section 148(a)(1)—unlike conviction under the same section by plea agreement—*necessarily* requires a determination that the officers involved were acting lawfully at all times during the course of the interaction with the defendant, and so, under *Heck v. Humphrey*, 512 U.S. 477 (1994), precludes an excessive force claim for damages under 42 U.S.C. § 1983.

But the jury instructions in this case were flatly inconsistent with that version of what a section 148(a)(1) conviction connotes. Lemos's jury was instructed that there were four possible factual bases on which it could convict Lemos, and that it could "not find the defendant guilty unless you all agree that the People have proved that the defendant committed *at least one* of the alleged acts of resisting, obstructing, or delaying a peace officer who was lawfully performing

his or her duties, *and you all agree on which act the defendant committed.*" (emphasis added). Three of the factual bases pertained to acts not at issue in Lemos's section 1983 claim. Success on her section 1983 claim therefore does not necessarily imply that her conviction is invalid.

In concluding nonetheless that *Heck* bars Lemos's excessive force claim, the majority fundamentally errs. Neither California law nor Ninth Circuit precedent supports or requires this result. And it is likely to encourage the very sort of police overreaction to minor criminal behavior that has led to public outcry and calls for reform in recent years. I emphatically dissent.

I.

Here are the relevant facts, viewed, as we must view them on review of a summary judgment order, in the light most favorable to Gabrielle Lemos, the nonmoving party, *see Tuuamalemalo v. Greene*, 946 F.3d 471, 476 (9th Cir. 2019):

On June 13, 2015, Gabrielle Lemos's family had thrown a party at their home celebrating her graduation from high school. Around 11:00 p.m. that same day, Lemos's sister, Karli Labruzzi, returned to the family home with her boyfriend, Darien Balestrini, to retrieve her cell phone. Balestrini's truck was parked on the two-lane road in front of the house, blocking one lane of traffic, when Sheriff's Deputy Holton drove by on patrol. Holton testified that he heard yelling, including a woman's voice "saying they're fighting or there's

some type of fight." He decided to investigate, activating his body camera.

Holton first spoke with the driver, Balestrini. Balestrini explained calmly that his girlfriend, Labruzzi, was drunk, had misplaced her cell phone, and was crying; he denied that anyone had been fighting. Holton next walked toward the passenger side of the truck where Labruzzi was seated, to investigate whether there had been any domestic violence or a "domestic related incident." According to Holton, a "domestic related incident is just an argument between people who have an established relationship, say a boyfriend/girlfriend, husband and wife, established relationship, they have argument, but there's no crime committed." Lemos, her mother Michelle, and her sister were standing near the passenger door when Holton approached. Holton asked the three women to step away from the vehicle so that he could speak with Labruzzi.

At that point, Labruzzi leaned out of the passenger window with her cell phone and stated that she had lost her phone and that there was no fight. Holton then opened the passenger door to see whether Labruzzi had any weapons or visible injuries on her body. Lemos loudly said, "Officer, what are you doing? You're not allowed to do that," and stepped between Holton and her sister. With his right hand Holton pushed Lemos away from him.

As Lemos and her mother continued to protest that Holton was not allowed to go into the car without a warrant, Holton closed the passenger door. He later

testified that by this time he had decided to arrest Lemos, but he did not announce that intention. Instead, he attempted to grab Lemos, but her mother and sister shielded her, repeatedly shouting, "What are you doing?" and "Leave her alone!" Holton drew his Taser and pointed it at the women, yelling that they should calm down because he was "investigating something." But the mother and daughters continued to protest, so Holton called for backup. Deputy Dillion arrived a short time later, and several other officers arrived after that.

Around when Dillion arrived, Holton asked Lemos's mother to speak with him away from the group. She followed him but continued to object, telling Holton, "You're not touching my kid again." When Holton repeated that he was investigating something, Lemos's mother reiterated that there was no "domestic" for him to investigate and complained that he had grabbed her daughter. She then returned to the group.

Dillion began talking to Lemos and her sister while Holton and Lemos's mother spoke separately. Lemos was cooperative and calm as she and her sister spoke to Dillion. She told her mother to calm down so that they could listen to Dillion. Lemos explained to Dillion that her family was upset because they believed Holton had assaulted her when he pushed her away from the car door, and she listened to Dillion's response.

As Dillion continued speaking to Lemos's sister, their mother told Lemos to go into the house. Following

her mother's advice, Lemos walked toward the house. Still not announcing an intention to arrest Lemos, Holton ran after Lemos, saying, "Hey, come here. Hey," and grabbed her left wrist. At the time, Lemos was eighteen years old, five feet tall, and weighed 105 pounds; Holton weighed approximately 250 pounds. When she twisted away from him, Lemos asserts, Holton "grabbed [her] by the back of the neck, picked her up off the ground, threw her into the ground face-first, and rubbed her face into the gravel." As Lemos and her family screamed, Holton pinned Lemos facedown on the ground and handcuffed her hands behind her back. Lemos's mother tried to pull Holton off Lemos but Dillion moved her mother away.

Holton then—finally—announced that Lemos was "under arrest for interfering," and took her to a patrol car. Her face was bloodied, and she was later taken to the hospital in an ambulance. Lemos incurred "thousands of dollars in medical expenses and was unable to leave her house for over a month following these events."

The District Attorney initially declined to prosecute Lemos. After this excessive force suit was filed, however, Lemos was charged with a violation of California Penal Code section 148(a)(1). The criminal case was tried to a jury.

The jury was instructed that Lemos was alleged to have committed four acts of resistance, delay, or obstruction, so there were four possible factual bases for concluding that Lemos had violated section 148(a)(1).

Those four alternatives, the jury was told, were that Lemos:

1. made physical contact with the Deputy as he was trying to open the truck door;
2. placed herself between the Deputy and Ms. Labruzzi;
3. blocked [the] deputy from opening the truck door and seeing or speaking with Ms. Labruzzi;
4. pulled away when [the Deputy] attempted to grab her.

The jury was further instructed:

> You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of resisting, obstructing, or delaying a peace officer who was lawfully performing his or her duties, *and you all agree on which act the defendant committed.*

(Emphasis added.) The jury returned a verdict of guilty on a general verdict form; it did not indicate which act or acts formed the basis for the conviction.

The district court granted summary judgment to the officers on Lemos's excessive force claim, concluding that, as a result of her criminal conviction, her section 1983 claim was barred under *Heck v. Humphrey*, 512 U.S. 477 (1994).

II.

A. *Heck* Framework

Heck held that a plaintiff may not use a civil suit under section 1983 to attack collaterally the validity of a criminal conviction that arises out of the same underlying facts. 512 U.S. at 486–87. If success on the section 1983 claim "would *necessarily* imply the invalidity" of the conviction, the claim is barred under *Heck*. *Id.* at 487 (emphasis added).[1]

Lemos was convicted of violating California Penal Code section 148(a)(1), a misdemeanor. A section 148(a)(1) violation is often referred to as "resisting arrest," but—importantly for this case—it encompasses more than that shorthand suggests. A person violates section 148(a)(1) if she "willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office." Cal. Penal Code § 148(a)(1). Under the statute, then, resistance is not required for a conviction, nor need the offense occur in the course of an arrest.

As a matter of California law, a conviction on a section 148(a)(1) charge establishes that there was a valid basis for the arrest, *i.e.*, the arrest was lawful. A conviction under section 148(a)(1) "requires that the

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[1] This bar does not apply if "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486–87. Lemos does not contend that her conviction has been invalidated, reversed, expunged, or impugned by the grant of a writ of habeas corpus.

officer be *lawfully* engaged in the performance of his or her duties" at the time the arrestee resists, obstructs, or delays the officer. *Yount v. City of Sacramento*, 43 Cal. 4th 885, 894 (2008). So, as we have recognized, "[i]n California, the lawfulness of the officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer." *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (en banc). The use of excessive force in an investigatory stop or during an arrest violates the Fourth Amendment's protection " 'against unreasonable . . . seizures' of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989) (alteration in original) (quoting U.S. Const. amend IV).

Critically, and, contrary to the majority's assertion, Maj. Op. at 13, whether it follows the defendant's plea or a jury's verdict, a single section 148(a)(1) conviction cannot establish that *all* of an officer's conduct throughout an extended interaction with the arrestee was lawful. More specifically, a section 148(a)(1) conviction does not necessarily establish that force used by an officer prior to or after a section 148(a)(1) arrest was reasonable and so not excessive. The California Supreme Court in *Yount*, 43 Cal. 4th 885, interpreting California law, has so held, explaining that if a defendant "resist[s] a lawful arrest" and the officers "respond with excessive force to subdue him," then

> [t]he subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of

> events, two isolated factual contexts would exist, [with only] the first giving rise to criminal liability on the part of the criminal defendant . . . .

Id. at 899 (quoting *Jones v. Marcum*, 197 F. Supp. 2d 991, 1005 n.9 (S.D. Ohio 2002)). In other words, "a conviction under § 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful." *Hooper v. County of San Diego*, 629 F.3d 1127, 1131 (9th Cir. 2011) (citing *Yount*, 43 Cal. 4th 885). In reaching this conclusion, *Yount* rejected *Susag v. City of Lake Forest*, 94 Cal. App. 4th 1401 (Cal. Ct. App. 2002), "which had . . . viewed the plaintiff's criminal conviction as encompassing all of the acts of resistance supported by the evidence." *Yount*, 43 Cal. 4th at 888–89. Under *Yount*, then, if an officer engages in lawful conduct supporting a section 148(a)(1) conviction and, separately, applies excessive force, the conviction remains valid. *See id.* at 899. Where that is the case, a finding of excessive force in a civil § 1983 action would only "necessarily imply the invalidity of the convictions," *Heck*, 512 U.S. at 487, and so, under *Heck*, preclude § 1983 liability if the excessive force claim pertained to the part of the interaction between the criminal defendant/civil suit plaintiff and the officer being sued for damages that involved lawful police conduct.

Application of *Heck* in this context is complicated when, as here, there were several possible factual bases for the section 148(a)(1) conviction, *i.e.*, more than one alleged act of resistance, delay, or obstruction, but

it is not clear from the record which particular act or acts form the basis of the conviction. Because the *Heck* bar applies only when a section 1983 claim "would *necessarily* imply the invalidity" of the conviction and not if it only *might* imply the conviction's invalidity, *id.* (emphasis added), the *Heck* bar does not apply unless the conduct challenged in the excessive force suit is necessarily the same conduct found lawful in the section 148(a)(1) conviction. *See Smith*, 394 F.3d at 699; *Hooper*, 629 F.3d at 1134.

Thus, to determine whether a plaintiff's conviction for resisting arrest bars her excessive force claim under *Heck*, our case law instructs that we must examine the record regarding the factual basis for the conviction. *See, e.g.*, *Smith*, 394 F.3d at 699; *Hooper*, 629 F.3d at 1134. Three key Ninth Circuit decisions—*Smith* and *Hooper*, which held that there was no *Heck* bar, and *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012), which held that there was—illustrate how this precept works in practice.

In *Smith*, the plaintiff refused police orders to take his hands out of his pockets, put them on his head, and turn around. 394 F.3d at 693–94. Smith subsequently physically resisted arrest, and police used physical force to subdue him: the officers ordered a police dog to bite Smith three times and pepper-sprayed him four times. *Id.* at 694. Smith pleaded guilty to the section 148(a)(1) violation, but "there [was] no information as to which of his actions constituted the basis for his plea." *Id.* at 698. Addressing this information vacuum, *Smith* concluded that "[b]ecause on the record before

us we cannot determine that the actions that underlay Smith's conviction upon his plea of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction." *Id.* at 699.

Turning to *Hooper*: In that case, the plaintiff "jerked her hand away" from an officer as he attempted to handcuff her. 629 F.3d at 1129. She then physically resisted until both she and the officer were on the ground and the officer had secured her hands behind her back. *See id.* After she had stopped physically resisting, a police dog, on the officer's command, bit Hooper's head, causing significant damage to her scalp. *Id.* Hooper pleaded guilty to a violation of section 148(a)(1). *Id.*

Hooper held the *Heck* bar inapplicable, because "holding in Hooper's § 1983 case that the use of the dog was excessive force would not 'negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Hooper's] attempt to resist it [when she jerked her hand away from Deputy Terrell].'" *Id.* at 1133 (alterations in original) (quoting *Yount*, 43 Cal. 4th at 899). *Hooper* reached this result although the entire incident "took place . . . in a span of 45 seconds." *Id.* at 1129.

Finally, in *Beets*, the plaintiffs alleged excessive force by a police officer who shot their son, Glenn Rose. 669 F.3d at 1040. Rose drove a truck "rapidly in the direction of" the officer, who, "fearing for his life, fired at [Rose] and killed him." *Id.* Rose's companion, a

passenger in the truck, was convicted of assaulting the officer with a deadly weapon, on the theory that she had aided and abetted Rose. *Id.* The criminal jury was instructed that the lawfulness of the officer's actions was an element of the crime, so it could not convict unless it found that the officer was not using excessive force at the time of the assault with a deadly weapon (the truck). *Id.* at 1041. Holding the conviction barred the excessive force claim under *Heck*, *Beets* determined that on the facts before the court in that case, "there are not multiple factual bases for [the] conviction," so the jury's verdict necessarily established that the only use of force at issue (*i.e.*, the officer's shooting Rose) was not excessive. 669 F.3d at 1045.

Beets also briefly asserted, quoting *Smith*, that, as a matter of California law, a jury verdict necessarily determines that *all* of the officer's conduct must have been lawful. 669 F.3d at 1045 (citing *Smith*, 394 F.3d at 699 n.5).[2] But *Beets* is clear that "there [were] not multiple factual bases for [the] conviction," so the jury considered the lawfulness of only one action by the officer in reaching its verdict on the charge of assault on an officer with a deadly weapon. *See* 669 F.3d at 1045. In that circumstance, the jury *did* necessarily find lawful all of the officer's conduct that it considered, and *Beets*'s recitation of *Smith*'s summary of California law was essentially an aside. And that recitation is in

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[2] At the time of the *Beets* decision, the Ninth Circuit had already recognized that this was an inaccurate description of current, post-*Smith* California law. *See Hooper*, 629 F.3d at 1131–32. See pp. 33–36, *infra*, discussing this aspect of *Beets*.

any event not relevant here, where the criminal jury was instructed precisely contrary to *Smith*'s and *Beets*'s descriptions of the scope of a section 148(a)(1) jury conviction.

In sum, the *Heck* bar does not apply if the record leaves open the possibility that the officer's lawful conduct supporting the section 148(a)(1) conviction is different from the officer's alleged unlawful application of excessive force, *see Smith*, 394 F.3d at 699; or that the officer used some force that was reasonable and some force that was excessive, *see Hooper*, 629 F.3d at 1134. The excessive force claim *is* barred if the record conclusively establishes that the conviction and the section 1983 claim are based on the same actions by the officer, as in *Beets*. *See* 669 F.3d at 1045.

B. Application of *Heck* in this case

Under this framework, *Heck* does not bar Lemos's claim that Holton used excessive force when he threw her to the ground and rubbed her face into the gravel. As instructed, the jury's verdict could well have been based on Lemos's obstruction (and Holton's corresponding lawful actions) six minutes earlier, when Lemos inserted herself between Holton and the passenger door.

Again, the jury here was specifically instructed as to four possible acts of resistance, delay, or obstruction by Lemos that could support a section 148(a)(1) conviction. The first three potential bases for the conviction were that Lemos "1. made physical contact with the

Deputy as he was trying to open the truck door; 2. placed herself between the Deputy and Ms. Labruzzi; 3. blocked [the] deputy from opening the truck door and seeing or speaking with Ms. Labruzzi." Holton is not alleged in this case to have used excessive force at any of those times. And although none of those incidents involved an arrest, section 148(a)(1), I repeat, covers obstructing or delaying a lawful investigation, which is what was alleged with regard to the first three incidents the jury was asked to consider. Only the fourth potential basis for the conviction involved the same incident as Lemos's section 1983 excessive force claim: "4. [Lemos] pulled away when [the Deputy] attempted to grab her," before she was taken to the ground, handcuffed, and, finally, arrested. The jury was further instructed that it could not render a verdict of guilty unless it unanimously agreed that Lemos had "committed at least one of the alleged acts," and it also "all . . . agree[d] on which act the defendant committed."

Thus, it is simply not true that the criminal jury *in this case* necessarily concluded that all of the officer's conduct, including the force used when she was grabbed on the way to her house, taken to the ground, and injured, was lawful—that is, not excessive. The jury, based on the instructions given, could have unanimously decided to convict because of Lemos's actions while she was at the car attempting to prevent Holton from interacting with Ms. Labruzzi.

Whether the instructions given should have been otherwise, as the outdated discussion in *Smith*,

repeated in *Beets*, would indicate, simply does not matter. The analysis appropriate under *Heck* depends on what the jury verdict necessarily *actually* determined. Here, the criminal jury was instructed to look at the twelve-minute set of events discretely, not as a whole. And the jury was specifically allowed to convict Lemos under § 148(a)(1) even if it thought Holton's actions at the time he tackled her to the ground as she was walking to the house were unlawful because the force used was excessive.

It is worth noting—although not directly relevant to the *Heck* analysis—that, if anything, a conviction on one or all of the first three incidents sent to the jury is more likely than on the fourth. The first three incidents involved little force by Holton but did, on the officers' version, present evidence of actual interference with Holton's investigation. The incident on which this case centers, in which Lemos was, on the mother's advice, trying to leave a contentious situation, did not stop as soon as told to do so, and was physically wrestled to the ground and injured by a police officer, is a poor candidate for a unanimous jury conclusion that she was resisting lawful police activity.

So, on the facts and very specific instructions given the jury here regarding discrete bases for conviction, the *Heck* bar does not apply. As in *Hooper*, a "holding in [Lemos's] § 1983 case that the [takedown] was excessive force would not 'negate the lawfulness of the initial [investigation at the car door], or negate the unlawfulness of [Lemos's] attempt to [obstruct that investigation].'" 629 F.3d at 1133 (quoting *Yount*, 43 Cal. 4th

at 899). And, just as in *Smith*, the record does not establish that Lemos's conviction was based on any particular one or combination of the four alleged acts. *See* 394 F.3d at 698. Thus, "[b]ecause we are unable to determine 'the factual basis for [Lemos's conviction],' [her] lawsuit does *not* necessarily imply the invalidity of [her] conviction and is therefore not barred by *Heck*." *Smith*, 394 F.3d at 698 (quoting *Heck*, 512 U.S. at 487).

C. Majority's Error

The majority's fundamental error in reaching the opposite conclusion is that it ignores the critical distinction between the criminal case underlying *Beets* and the conviction here. That distinction, of course, is that here, there was an instruction to the jury that it should *not* regard every interaction between Holton and Lemos that fateful night in June as a single incident, but instead should distinguish among them, unanimously. In *Beets*, in contrast, there was one interaction only in dispute, and no indication the criminal jury was asked to distinguish that incident from any other.

The majority substitutes for this determinative circumstance the assertion that because the criminal case underlying the *Heck* bar argument was decided by a jury and not by a guilty plea, the conviction necessarily establishes, as a matter of California law, that *all* of Deputy Holton's conduct throughout his twelve-minute interaction with Lemos and her family was deemed lawful. Maj. Op. at 10, 12–13. The distinction

between a section 148(a)(1) conviction based on a jury's verdict—apparently *any* jury verdict, including one in which the jury was specifically told to distinguish between four interactions and decide which involved obstruction of lawful police action—and one based on a plea cannot possibly bear the weight assigned to it by the majority.

The majority concludes, for example, that "Lemos' resistance was clearly viewed by her trial jury as continuous throughout the entire transaction of events leading up to and including all subsequent physical contacts with the arresting deputy." Maj. Op. at 12–13. How could we possibly know that, when the jury was instructed that it should not take that approach? We have no evidence of how the jury evaluated each of the four bases for conviction it was told independently to consider. All we know is that it unanimously concluded that Lemos had committed *at least one of the four alleged acts* of resistance, delay, or obstruction, and so entered a verdict of guilty on a general verdict form. In fact, the best evidence of what actually occurred—the officers' body-worn camera footage—reveals that for several minutes between the incident at the car door and Lemos's eventual arrest, Lemos was cooperative and calm as she spoke to Deputy Dillion. This evidence is plainly inconsistent with the majority's unfounded conclusion that the jury must have found that Lemos resisted continuously "throughout the encounter." Maj. Op. at 13.

Nor did *Beets* and *Smith* announce the rule the majority posits—that *whatever* a jury is instructed to

decide, the legal effect of a section 148(a)(1) conviction is always that the jury found *all* of the officer's conduct to be lawful. The key language that appears in *Smith* and *Beets* assumes instructions according with an outdated statement of California law, as *Hooper* explained. *See Hooper*, 629 F.3d at 1132. But even if that statement of law were accurate, the language contained in a footnote in *Smith* and repeated in *Beets* (in both instances, as explained earlier, in discussions unconnected to the facts of the case) is inapplicable to the facts of this case by its own terms.

The language in *Beets* on which the majority relies is a direct quote from a footnote in the Ninth Circuit's 2005 en banc decision in *Smith*:

> Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction. *See People v. McIntyre*, 115 Cal. App. 3d 899, 910–11 (Cal. Ct. App. 1981) ("It is only incumbent that [the jury] agree [a culpable act] occurred on that date, the exact time or sequence in relation to the [offense] is not material.") (citation omitted). Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would "*necessarily* imply the invalidity of his conviction." *Susag*, 94 Cal. App. 4th at 1410 (emphasis added).

Smith, 394 F.3d at 699 n.5 (alterations in the original); *see also Beets*, 669 F.3d at 1045 (quoting *Smith*, 394 F.3d at 699 n.5).

But the application of the *Heck* bar to this case does not depend on the abstract contours of California law. What matters instead is the specific instructions provided to Lemos's jury. Once more, those instructions told the jury to determine, unanimously, that at least one of four specific, disparate acts served as the basis for conviction. *Smith*'s assertion that under then-California law the jury did not make such a determination simply does not apply to a situation in which the jury was explicitly *told to do so*.

Although my analysis could stop there, I note that *Yount* and *Hooper*, both decided after *Smith*, explain *why* Lemos's jury may have been instructed in such a manner and also suggest that *Smith* and *Beets* do not correctly state current California law. *Yount* distinguished *Susag*, on which *Smith* relied, "which had . . . viewed the plaintiff's criminal conviction as encompassing all of the acts of resistance supported by the evidence." 43 Cal. 4th at 888. *Yount* concluded instead that a conviction for resisting arrest did not establish that *all* of the officer's actions were necessarily lawful. *See id.* at 889. As noted previously, the court clarified that "[t]hough occurring in one continuous chain of events, two isolated factual contexts [c]ould exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." *Id.* at 899 (quoting *Jones*, 197 F. Supp. 2d at 178).

We evaluated *Yount*'s effect on *Smith* in *Hooper*, in 2011, in which we explained that "*Yount* does not mean that our holding in *Smith* was wrong. But it does mean that our understanding of § 148(a)(1) was wrong." 629 F.3d at 1132. Under *Yount*'s reading of the statute, "[i]t is sufficient for a valid conviction under § 148(a)(1) that at some time during a 'continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It does not matter that the officer might also, at some other time during that same 'continuous transaction,' have acted unlawfully." *Id.*

Beets's subsequent reliance on the *Smith* footnote is in tension with *Hooper* and *Yount* and is almost surely no longer a correct statement of California law. But, crucially, the jury instructions in this case distinguish it from *Beets* and *Smith regardless of the legally correct interpretation of California law as applied to section 148(a)(1).* What matters here is that the instructions actually given to the jury in Lemos's criminal case directed the jury to convict if it unanimously concluded that during *one*—not all—of the four specified incidents Lemos resisted, delayed, or obstructed a lawful action by Holton.[3] Whether those instructions

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[3] For its interpretation of California law, *Smith* relied on the statement that, under applicable law, "[i]t is only incumbent that the jury agree a culpable act occurred on that date[;] the exact time or sequence in relation to the offense is not material." *Smith*, 394 F.3d at 699 n.5 (quoting *McIntyre*, 115 Cal. App. 3d at 910–11 (alterations adopted)). But *McIntyre* stands for a narrower rule than the language quoted in *Smith* might suggest.

properly reflected California law (they did, as explained) is of no moment in our determination of what the criminal jury *necessarily* decided, which is the core of the *Heck* inquiry.

Additionally, California law does not assign any significance to whether a conviction is based on a plea or a jury verdict. Echoing Judge Watford's analysis in a similar case, "I can't think of any reason why the analysis under *Heck* should proceed differently for convictions resulting from a jury verdict as opposed to a guilty plea, and neither *Smith* nor *Beets* offered any justification for that distinction." *Wilson v. City of Long Beach*, 567 F. App'x 485, 487 (9th Cir. 2014) (mem.) (Watford, J., dissenting).

In short, under the *specific* jury instructions here, as under the plea agreement discussed in *Smith*, "it is *not* necessarily the case that the factual basis for [Lemos's] conviction included the whole course of [her]

McIntyre affirmed that the standard California jury instruction on jury unanimity, which requires that "in order to find the defendant guilty, *all the jurors must agree that he committed the same act or acts*," is correct. 115 Cal. App. 3d at 908 (quoting Cal. Jury Instr. No. 17.01). *McIntyre* held only that it was not error to omit the instruction in a case in which the acts constituting the charged crime were part of a continuous course of conduct. *See id.* at 910; *see also People v. Muniz*, 213 Cal. App. 3d 1508, 1518–19 (Cal. Ct. App. 1989) (citing *McIntyre*, 115 Cal. App. 3d at 910). The instruction in Lemos's case is substantively the same one that the California court in *McIntyre* quoted with approval for cases that do *not* involve only one continuous course of conduct. *See* 115 Cal. App. 3d at 908.

conduct." 394 F.3d at 699 n.5. The *Heck* bar therefore does not apply.

III.

The practical result of the majority's holding is that people who are subjected to excessive force by officials in California, who want to hold those officers to account, and who are charged with misdemeanor resisting arrest under section 148(a)(1) must choose between holding the state to its burden on the criminal charge in a criminal trial and the opportunity to vindicate their rights by bringing an excessive force case. Under the majority's opinion, the only way to guarantee that an excessive force claim is not forfeited by a jury's verdict is to plead guilty on the criminal charge. The Constitution forbids police from using excessive force, and section 1983 provides an avenue to vindicate that right. The majority's opinion undercuts these protections. Because it is unjust and contrary to our case law, I dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GABBI LEMOS, Plaintiff, vs. **COUNTY OF SONOMA, ET AL.,** Defendants.	CASE NO. 15-cv-05188-YGR **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Re: Dkt. No. 60 (Filed Jan. 29, 2019)

Plaintiff Gabrielle Lemos ("Lemos") brings this action against defendants the County of Sonoma ("County"), Sheriff Steve Freitas, and Deputy Marcus Holton alleging claims for violation of her civil rights under 42 U.S.C. Section 1983 based on an incident on June 13, 2015 in which she claims Deputy Holton used excessive force as he attempted to arrest her for resisting, obstructing, or delaying a peace officer in the performance or attempted performance of his duties in violation of California Penal Code Section 148(a). Defendants now move for summary judgment on the grounds that plaintiff's claims are barred by the *Heck* doctrine, as set forth in *Heck v. Humphry*, because they necessarily implicate the invalidity of her underlying criminal conviction for violation of Section 148(a). (Dkt. No. 60 ("MSJ") at 1 (citing 512 U.S. 477 (1994)).)

Having carefully reviewed the pleadings, the papers and evidence submitted, as well as oral argument from counsel on January 8, 2019, and for the reasons

set forth more fully below, the Court **GRANTS** defendants' motion for summary judgment.[1]

I. BACKGROUND

On June 13, 2015, Deputy Holton was on patrol, dressed in his full Sheriff's uniform. (Dkt. No. 71-2 ("Def. Reply Statement") No. 1.) He wore a body camera fixed to the center of his chest. (*Id.*) At approximately 11:00 p.m. on June 13, 2015, Holton was driving on Liberty Road, which was a dark, rural, country road with one lane in each direction. (*Id.* No. 2.) The area was very dark with no streetlights. (*Id.* No. 3.) When Holton arrived at 684 Liberty Road, he saw a pickup truck with a large trailer attached carrying a race car. (*Id.* No. 4.) The truck had its headlines on, and it was stopped, blocking the southbound lane of traffic in violation of the vehicle code. (*Id.*)

Holton shined his vehicle spotlight on the truck and saw it was unoccupied. (*Id.* No. 5.) He then saw a male and another person walking towards the truck. (*Id.*) Holton rolled down his window and heard people screaming and yelling, including screaming about some type of fight. (*Id.* No. 6.) During Lemos's trial, Holton testified that because he had heard people yelling, he was obligated to investigate to determine whether a crime was in progress and if anyone needed

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[1] Accordingly, the Court **DENIES AS MOOT** parties' stipulation to continue fact and expert discovery deadlines, deadline to complete early neutral evaluation, and deadline to file dispositive motions. (Dkt. No. 73.)

assistance. (*Id.* No. 7.) Holton exited his vehicle to investigate a possible violation of law and activated his worn body camera. (*Id.* No. 8.) Once Holton encountered the parties, he wanted to separate them to speak with them individually and determine what was happening. (*Id.* No. 9.) A male later identified as Darien Balestrini sat in the driver's seat of the truck, and Holton asked him to exit the truck. (*Id.* No. 10.) Balestrini cooperated, exited the truck, provided his identification, and explained that his girlfriend was drunk, had misplaced her cell phone, and was crying. (*Id.* No. 11.) Balestrini denied that he and his girlfriend were fighting. (*Id.* No. 12.)

Police practice in such situations is to separate the parties and speak to them individually to encourage parties to speak freely without the influence of another person. (*Id.*) After speaking with Balestrini, Holton walked around to the passenger side of the vehicle and encountered three females standing outside the vehicle, later identified as plaintiff Gabrielle Lemos, her mother Michelle ("mother"), and her sister Chantal ("sister").[2] (*Id.* No. 13.) Holton asked Lemos, her mother, and her sister to step away from the vehicle so that he could speak to the female subject, later identified as Karli Labruzzi, who sat in the front seat of the truck. (*Id.* No. 15.) The door of the truck was closed, and the female subject leaned out of the window with her cell phone and stated that she had lost her cell

[2] Defendants aver that all three women started screaming at Holton. (*Id.* No. 13.) Plaintiff contends that Holton was the one yelling. (*Id.*)

phone and that there was no fight. (*Id.*) Holton could not yet determine whether a domestic related incident had occurred or who might be a suspect or a victim. (*Id.* No. 16.) Holton tried to speak with the female subject, but Lemos, her mother, and her sister continued to be very disruptive. (*Id.*)

Holton opened the truck door to speak to the female subject and to observe whether she had any weapons or visible injuries to her person. (*Id.* No. 17.) Lemos then inserted herself between Holton and the open vehicle door.[3] (*Id.* No. 18.) As Lemos inserted herself, she yelled at and pointed her finger at Holton, claiming that he could not do what he was doing. (*Id.* No. 19.) Holton responded by pushing Lemos away from him with his right hand. (*Id.* No. 20.) Lemos's mother moved Lemos away, and Holton closed the truck door. (*Id.* No. 21.) Lemos's mother and sister then shielded Lemos from Holton and refused to allow Holton to speak with her.[4] (*Id.* No. 23.) Holton could not

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[3] Defendants aver that Lemos "suddenly forced herself between Holton and the truck passenger door, smashing into Holton on the gun side of his body and stood pressed against Holton's body." (*Id.* No. 18.) They further contend that Lemos's actions were threatening to Holton because officers are trained to prevent people from being on their gun side to avoid exposing their weapon to them or allowing them an opportunity to grab their gun, and it caused Holton to believe that Lemos was going to be assaultive. (*Id.*) Plaintiff points to the difference in size and attire between Lemos and Holton to suggest that plaintiff's actions could not have threatened Holton. (*Id.*)

[4] Plaintiff asserts that her family so shielded her "after [Holton] pushed her by her neck, attempted to grab her, and drew his Taser." (*Id.* No. 23.)

determine what the three women were saying. (*Id.* No. 24.) They refused to calm down, and Holton was unable to explain the situation to them. (*Id.*) Because of their continued uncooperative behavior, Holton requested expedited backup to assist him in controlling the situation. (*Id.* No. 25.) Loud aggravated screaming could be heard in the background of Holton's transmission requesting expedited backup. (*Id.* No. 26.) During trial, Holton testified to his belief that the situation was dangerous because he was alone and outnumbered, Lemos and her family were uncooperative, the situation was volatile and still progressing, and he still did not know what was going on or whether a domestic incident had occurred.[5] (*Id.* No. 27.)

Holton repeatedly told the women to please calm down, he tried to separate the group and explain to them that he was investigating a possible domestic-related incident. (*Id.* No. 28.) Deputy Dillion arrived on the scene to assist Holton. (*Id.* No. 29.) Lemos, her mother, and her sister continued to scream and yell at Dillion. (*Id.*) Holton tried to calm the group and tried to separate the mother from the group to explain the investigation, but she kept returning to the group and yelling. (*Id.* No. 30.) Holton and Dillion could not control the group.[6] (*Id.* No. 31.) One could hear additional police sirens approaching, and it was apparent that

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[5] Plaintiff asserts that Holton did not possess such a belief. (*Id.* No. 27.)

[6] Defendants contend that the situation was therefore volatile and dangerous for the officers. (*Id.* No. 31.) Plaintiff disputes that characterization. (*Id.*)

additional officers would soon arrive on the scene. (*Id.* No. 32.)

Lemos's mother told her to go into the house at which point Lemos turned to walk away towards the house. (*Id.* No. 33.) Holton had not cleared the house.[7] (*Id.* No. 34.) As Lemos walked past Holton, he told her "Hey, come here. Hey." (*Id.* No. 35.) Lemos did not respond and continued to walk away. (*Id.*) Holton then ran up behind Lemos, grabbed her, and brought her to the ground.[8] (*Id.* No. 36.) Once Lemos was on the ground, she continued to scream and resist. (*Id.* No. 38.) She had her hands underneath her body and refused to put her hands behind her back.[9] (*Id.*) Holton managed to get on top of Lemos, straddling her with one knee on each side of her body, and finally managed

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[7] Defendants contend that Holton feared that if Lemos returned to the house she could arm herself, flee, barricade herself inside, or a myriad of other possibilities. (*Id.* No. 34.) Plaintiff disputes that Holton had a genuine, reasonable fear that Lemos would so act. (*Id.*)

[8] Plaintiffs contend that Holton grabbed Lemos by the back of the neck, picked her up off the ground, threw her into the ground face-first, and rubbed her face into the gravel. (*Id.* No. 36.) Defendants aver that Holton ran up behind Lemos and grabbed her left wrist with both of his hands, Lemos pulled her left arm to the right and twisted to get away from Holton and prevent him from handcuffing her. (*Id.* No. 36.) Defendants also aver that Lemos was taken to the ground to decrease the chance of injury to her, the offices, and others. (*Id.* No. 37.) Plaintiff argues that Holton took Lemos to the ground to hurt her. (*Id.*)

[9] Defendants aver that Holton did not know whether plaintiff had a weapon in her waistband. (*Id.* No. 38.) Plaintiff characterizes this belief as unreasonable given Lemos's attire of yoga pants. (*Id.*)

to handcuff her. (*Id.* No. 39.) Lemos's mother ran up to Holton and kicked him and grabbed the back of his collar.[10] (*Id.* No. 40.) Holton yelled "Get off me. Get back!" and pushed up to try to get her off of him. (*Id.* No. 41.) Deputy Dillion took control of plaintiff's mother and pulled her off. (*Id.*) Approximately ten minutes elapsed from the time Deputy Holton arrived and first contacted Lemos to the time Holton finally gained control of Lemos. (*Id.* No. 42.) Holton asked Lemos if she was injured and she responded with an expletive and laughed. (*Id.* No. 43.) Lemos was transported to the hospital for medical clearance, where she told Holton that she had drank three Jack Daniels and colas that night.[11] (*Id.* No. 44.) During the physical confrontation with Lemos, Holton's hat fell off and his body worn camera detached from his shirt. (*Id.* No. 45.) Because of the incident, Holton sustained injuries to his left knee and the right side of his neck. (*Id.*)

On August 31, 2016, Lemos was convicted by a jury for violating California Penal Code Section 148(a)(1). (*Id.* No. 48.) The instructions provided that

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[10] Defendants say Lemos's mother kicked Holton in the face and shoulder area and grabbed his collar to try to prevent Lemos's arrest. (*Id.* No. 40.) Plaintiff contends that her mother kicked Holton in his backside with a sandaled foot and grabbed his collar in order to pull him off of Lemos. (*Id.*)

[11] Defendants contend that Lemos also told Holton that her sister Karli, the female subject, and Balestrini were involved in a domestic-related incident, although no physical altercation appeared to have occurred. (*Id.* No. 44.) Plaintiff disputes this characterization and says that she told Holton that the couple had been "bickering" and that there had been nothing physical between them. (*Id.*)

the jury find each of the following elements beyond a reasonable doubt:

1. Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer;

2. The defendant willfully resisted, obstructed, or delayed Deputy Marcus Holton in the performance or attempted performance of those duties; AND

3. When the defendant acted, she knew, or reasonably should have known, that Deputy Marcus Holton was a peace officer performing or attempting to perform his duties.

(Dkt. No. 70-1, Exhibit A at 9-10.) With respect to the first element, the judge further instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." (*Id.* at 10.) With respect to the second element, the court provided four alternative theories by which the jury could find Lemos guilty, namely that she: (1) made physical contact with the deputy as he was trying to open the truck door; (2) placed herself between the deputy and the female subject; (3) blocked the deputy from opening the truck door and seeing or speaking with the female subject; and (4) pulled away from the deputy Holton when he attempted to grab her. (*Id.*) The court further instructed the jury that they could not find Lemos guilty unless they all agreed that

Lemos committed at least one of these alleged acts. (*Id.* No. 49.)

The jury unanimously found Lemos guilty and used a general verdict forms [*sic*], which did not require the jury to specify which theory or theories they agreed-upon with respect to the second element. (*Id.* No. 50.)

II. LEGAL STANDARD

Summary judgment is proper where the pleadings, discovery, and affidavits demonstrate 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). A dispute is genuine if it could reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material where it could affect the outcome of the case. *Id.*

The party moving for summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the nonmoving party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Once the movant has made this showing, the burden shifts to the nonmoving party to identify specific evidence showing there is a genuine issue of material fact for trial. *Id.* If the nonmoving party cannot do so, the movant "is entitled to . . . judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case." *Id.* (internal quotations omitted).

On summary judgment, the court draws all reasonable factual inferences in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738–39 (9th Cir. 1979).

III. ANALYSIS

Defendants aver that Lemos's excessive force claims under Section 1983 necessarily implicate the validity of her criminal conviction for violation of California Penal Code Section 148 for resisting, obstructing, or delaying Holton in the performance or attempted performance of his duties, and therefore, her claims are barred by the *Heck* doctrine. (MSJ at 8.) When a plaintiff "seeks damages in a [Section] 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.[12] *Heck*, 512 U.S. at 486-87.

[12] Notably, the Supreme Court in *Heck* cited to the following as an example of "a [Section] 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the

Therefore, "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which [S]ection 1983 damages are sought, the 1983 action must be dismissed." *Cunningham v. Gates*, 312 F.3d 1148, 1153 (9th Cir. 2002) (internal citation omitted).

Under Section 148(a)(1), "[t]he legal elements of a violation . . . are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." *In re Muhammed C.*, 95 Cal.App.4th 1325, 1329, 116 Cal.Rptr.2d 21 (2002) (citations omitted). A conviction under Section 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful. *Yount v. City of Sacramento*, 43 Cal.4th 885, 76 Cal.Rptr.3d 787, 183 P.3d 471 (2008). "It is sufficient for a valid conviction under [Section]

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plaintiff's criminal conviction was wrongful" and as a result "the [Section] 1983 action will not lie":

> An example . . . would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. . . . He then brings a § 1983 action against the arresting officer seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted.

Heck, 512 U.S. at 503 n. 6 (emphasis in original).

148(a)(1) that at some time during a `continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It does not matter that the officer might also, at some other time during that same `continuous transaction,' have acted unlawfully." *Hooper v. County of San Diego*, 629 F.3d 1127, 1132 (9th Cir. 2011).

The Ninth Circuit has "recognized that 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 (9th Cir. 2012) (citing *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005)). Stated differently, a *Heck* bar does not lie when the conviction and the Section 1983 claim are based on different actions that occurred during "one continuous transaction." *See Hooper*, 629 F.3d at 1133. Thus, in *Beets*, the Ninth Circuit found that one could not separate the criminal actions that formed the basis of the underlying conviction and the alleged use of excessive force because it was the officers' use of force "that brought an end" to the criminal activity. *Beets*, 669 F.3d at 1044-45. By contrast, in *Hooper*, the defendant officer's alleged use of excessive force occurred *after* he had already gained control over the plaintiff and had "gotten both of Hooper's hands behind her back." *Hooper*, 629 F.3d at 1129. Only after Hooper had "stopped resisting when [the officer] instructed her to do so[,]" did the officer instruct his department issue canine to "[c]ome here[,]" after which the dog bit and held Hooper's head, resulting in loss of

large portions of Hooper's scalp. *Id.* Based on this distinction, the Ninth Circuit in *Hooper* determined that the criminal conduct of the underlying conviction and the alleged use of excessive force were "different actions during one continuous transaction." *Id.* at 1134 (internal quotations omitted). Moreover, the court emphasized that a jury verdict, unlike a plea, "necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct," so that a subsequent Section 1983 excessive force action brought by the defendant "would necessarily imply the invalidity of his conviction." *Id.* at 1045 (internal quotation marks omitted).[13]

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[13] Since *Beets*, courts in this district have held that a Section 148(a)(1) conviction obtained by jury verdict barred a subsequent Section 1983 action for excessive force. *See Lozano v. City of San Pablo*, No. 14–cv–00898–KAW, 2014 WL 4386151, at *6 (N.D. Cal. Sept. 4, 2014) ("The jury verdict in the state court proceedings brings this case squarely in line with *Beets*."); *Tarantino v. City of Concord*, No. 12–cv–00579–JCS, 2013 WL 3722476, at *3 (N.D. Cal. July 12, 2013) (holding that plaintiff's convictions at trial for assault on a peace officer and violation of section 148(a)(1) barred plaintiff's excessive force claims where the jury made special findings that plaintiff "initiated a physical altercation" with the officers and "did not act in self-defense"); *Box v. Miovas*, No. 12-cv-04347-VC (PR), 2015 WL 192273317, at *6 (N.D. Cal. April 28, 2015) ("The facts in this case are like those in *Beets*. Box was found guilty of violating § 148(a)(1) by a jury. . . . Therefore, pursuant to *Beets*, Box's claim for excessive force is barred by *Heck*.") In *Kyles v. Baker*, Judge Orrick adopted this reasoning to hold that because a plaintiff was convicted by a plea of no contest, not by a jury trial, his conviction did not necessarily determine the lawfulness of the officers' actions throughout the whole course of plaintiff's conduct. 72 F.Supp.3d 1021, 1037 (2014).

Here, it is undisputed that the jury found that Holton did not use "excessive force" when he engaged in his duties, i.e. the first element of Lemos's Section 148(a) conviction. As in *Beets*, the jury that convicted Lemos was required to find "that: 1. Deputy Marcus Holton was peace officer lawfully performing or attempting to perform his duties as a peace office. . . ." (*See* Dkt. No. 70-1, Exhibit A at 9.) The jury could not so find in circumstances where Holton was "unlawfully arresting or detaining someone or using unreasonable or excessive force in his . . . duties." *See id.* at 10.[14]

Thus, a *Heck* bar would not lie if the basis for the Section 1983 claim "were distinct temporally or spatially from the factual basis for the person's conviction" or Section 1983 claim and the conviction were based on different actions that occurred during the one continuous transaction. The Court finds that the undisputed facts of this case do not support either approach.

The Court finds that plaintiff's conduct of resisting, obstructing, or delaying Holton in his performance of his duties continued for the 10-minute period, that is, it began when Lemos first inserted herself between the officer and the open vehicle door and did not cease until Holton gained control of Lemos after taking her to the ground and placing her in handcuffs. (*See* Def. Reply Statement Nos. 18-42.) Throughout the interaction Lemos continued to scream at Holton and failed repeatedly to comply with his instructions. (*See e.g.*, *id.*

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[14] *See also Beets*, 669 F.3d at 1045; *Lozano*, 2014 WL 4386151, at *6; *Tarantino*, 2013 WL 3722476, at *5; *Box*, 2015 WL 192273317, at *6.

Nos. 24, 28, 29, 31.) The situation was exacerbated by her mother's conduct and interference. Given plaintiff's and her cohorts' continuous screaming and provoking, with respect to Holton's actions, the Court finds no temporal or spatial distinction or other separation between the conduct for which Lemos was convicted, by a jury, and the conduct which forms the basis of her Section 1983 claim. Holton did not bring the situation under control until he brought Lemos to the ground and secured her hands. (*See id.* Nos. 39, 42.) Lemos has not and cannot allege that Holton used excessive force thereafter. Accordingly, for *Heck* purposes, the Court finds Holton's actions to form one uninterrupted interaction and the jury's finding that he did not use excessive force would be inconsistent with a Section 1983 claim based on an event from that same encounter. Accordingly, the Court finds that Lemos's claims are barred by the *Heck* doctrine.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** defendants' motion for summary judgment.

This Order terminates Docket Numbers 60 and 73.

IT IS SO ORDERED.

Dated: January 29, 2019 /s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GABBI LEMOS, Plaintiff, v. COUNTY OF SONOMA, STEVE FREITAS, MARCUS HOLTON, and DOES 1-25, inclusive Defendants.	Case No. **COMPLAINT FOR DAMAGES** **[UNDER 42 U.S.C. §§ 1983]** ***JURY TRIAL DEMAND*** (Filed Nov. 12, 2015)

COMES NOW PLAINTIFF, Gabbi Lemos who complains of defendants, and each of them, and alleges as follows:

JURISDICTION & VENUE

1. This action is brought pursuant to 42 U.S.C. §§ 1983 and the First and Fourth Amendments to the United States Constitution. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

2. The claims alleged herein arose in the County of Sonoma in the State of California. Venue for this action lies in the United States District Court for the Northern District of California under 28 U.S.C. §1391(b)(2).

PARTIES

3. Plaintiff Gabbi Lemos (hereinafter "Lemos" or "plaintiff") is a resident of Sonoma County, California.

4. Defendant County of Sonoma is a public entity situated in the State of California and organized under the laws of the State of California.

5. At all relevant times, defendant Steve Freitas, Sheriff of Sonoma County, was an elected official employed by the County of Sonoma.

6. At all relevant times, defendant Marcus Holton was a Deputy Sheriff and employee of the County of Sonoma.

7. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Does 1 through 25 inclusive, are unknown to the plaintiff, who therefore sues said defendants by such fictitious names. Defendants DOES 1 through 25, and each of them, were responsible in some manner for the injuries and damages alleged herein. Plaintiff is informed and believes and thereupon alleges upon information and belief that each of them is responsible, in some manner, for the injuries and damages alleged herein.

8. In doing the acts and/or omissions alleged herein, the defendants, including DOES 1 through 25, acted in concert with each of said other defendants herein.

9. At all times during the incident, the defendants acted under color of state law in the course and scope of their duties as agents and employees of the County of Sonoma.

10. Defendant Holton's conduct was authorized, encouraged, condoned and ratified by Sheriff Freitas and the County of Sonoma.

STATEMENT OF FACTS

11. On Saturday, June 6, 2015, Gabbi Lemos graduated from Petaluma High School. One week later on June 13, her mother and sisters threw a graduation party for her at their home in Petaluma that was attended by close friends and family. After a barbeque and the receiving of gifts, the party ended at about 8:00

p.m., and the family's guests began to leave. Gabbi stayed awake for another hour opening presents, then went to bed.

12. At about 11:00 p.m., Gabbi awoke to flashing police lights outside her bedroom window. She walked outside barefoot in her pajamas where she was joined by her mother and sister Chantee. They observed Sonoma County Deputy Sheriff Marcus Holton contact the boyfriend of Gabbi's other sister Karli while he was parked in the in the street with his blinkers on. Deputy Holton contacted Karli's boyfriend and asked him to step out of his vehicle. The family then observed Deputy Holton question Karli's boyfriend for about five minutes before walking to the passenger side of the vehicle where Karli was seated and violently ripping the door open.

13. Deputy Holton reached into the vehicle with both hands to grab Karli. Gabbi rushed forward and complained to the deputy that he had no right to pull her sister out of the vehicle, and that he needed to ask her first. Deputy Holton then turned to face Gabbi who demanded that a female officer be present. The deputy violently shoved Gabbi, a ninety-pound, eighteen-year-old girl, backward, and yelled that no one else was coming. Stunned from the physical assault, Gabbi protested to the deputy, "You can't touch me! We have rights!"

14. Deputy Holton then shifted his entire focus to Gabbi and began advancing on her. Gabbi's mother and sisters attempted to stand between the deputy and

Gabbi, locking their arms together to try to keep the increasingly aggressive officer away from her. Gabbi's mother whispered to her to go back in the house. Gabbi turned and began walking up the driveway, when Deputy Holton bolted around the family and without a word caught Gabbi from behind around the neck in a chokehold, lifting her small body off the ground several feet before throwing her face-first onto the driveway. Deputy Holton put his knee in the back of Gabbi's head and began grinding her face into the gravel, despite her screams and her family's pleas to stop.

15. Deputy Holton yelled "Stop resisting!" as blood pooled on the ground under Gabbi's face and she cried in pain. Her entire face was covered in blood, her mouth was full of blood, and a portion of her scalp had been abraded off. Gabbi was handcuffed and placed in Deputy Holton's patrol vehicle until an ambulance arrived to transport her to the hospital. Released from her handcuffs while en route to the emergency room, Gabbi ran her fingers through her hair and a large clump of bloody hair and skin came off her head. In a matter of hours she developed two black eyes that would swell completely closed in the following days. Her whole face was covered with scrapes and bruises. The scars on her nose and forehead remain visible. Gabbi suffered severe physical and emotional trauma at the hands of Deputy Holton.

16. Gabbi was transported to the hospital and cleared for transport to the Sonoma County Main Adult Detention Facility where she was booked on charges of resisting arrest and battery on a peace

officer. Her family posted her bail and she was released. Two days later her face had swollen so large that her family transported her again to the emergency room where a doctor asked her if she would report the assault. Another sheriff's deputy was dispatched to the hospital and took a report. Gabbi returned home where she could not eat, sleep, or stop crying for days.

17. Gabbi attended criminal court four times before the district attorney's office completed their review of the police reports and the deputy's body camera footage, ultimately rejecting both charges and declining to file a case against her. Gabbi suffered thousands of dollars in medical expenses and was unable to leave her house for over a month following these events.

STATEMENT OF DAMAGES

18. As a result of the acts and/or omissions alleged herein, plaintiff suffered general damages including pain, fear, anxiety, and humiliation in an amount according to proof.

19 .Plaintiff sustained serious physical injuries and has also incurred and may continue to incur medical treatment and related expenses in amounts to be determined according to proof.

20. The acts and omissions of the individual defendants were willful, wanton, reckless, malicious, oppressive and/or done with a conscious or reckless disregard for the rights of plaintiff. Plaintiff therefore prays for an award of punitive and exemplary damages

against these individual defendants in an amount according to proof.

21. Plaintiff has retained private counsel to represent her in this matter and is entitled to an award of attorneys' fees and costs.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

[42 U.S.C. §1983 – FIRST AMENDMENT]

22. All allegations set forth in this Complaint are hereby incorporated by reference.

23. Plaintiff complained to Deputy Holton that he subjected her sister and herself to police abuse and misconduct. As a result of her protests she was attacked and seriously injured.

24. Such complaints by plaintiff involve matters of public concern and are protected by the First Amendment to the United States Constitution.

25. Defendant Holton retaliated against plaintiff for her complaint.

WHEREFORE, plaintiff also prays for relief as set forth herein.

CAUSES OF ACTION

SECOND CAUSE OF ACTION
[42 U.S.C. §1983 – FOURTH AMENDMENT]

26. Plaintiff hereby alleges and incorporates by reference as though fully set forth herein all prior paragraphs of this Complaint.

27. Defendants violated the plaintiff's clearly-established right to be free from the intentional and unreasonable use of excessive force as guaranteed by the Fourth Amendment to the United States Constitution.

28. An objectively reasonable officer would have known that the use of force upon the plaintiff was excessive and could cause serious injury.

29. Defendants acted willfully, wantonly, maliciously, oppressively, and with conscious disregard to the plaintiff's rights.

30. Defendants' misconduct was the moving force that caused plaintiff's injuries.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

THIRD CAUSE OF ACTION
[42 U.S.C. §1983 – SUPERVISORY LIABILITY AGAINST SHERIFF STEVE FREITAS]

31. Plaintiff hereby re-alleges and incorporates by reference as though fully set forth herein all prior paragraphs of this Complaint.

32. Plaintiff enjoys the right to be free from excessive force under the Fourth Amendment and of the United States Constitution as against supervisors of law-enforcement officers.

33. Defendant Holton had a history of violence and excessive force, prior to June 2015, that was known to Sheriff Freitas. The failure to properly supervise and discipline Holton, and other Deputies, was a moving force behind the brutal and violent attack on Gabbi Lemos. Based on the failure to discipline Deputies, including correctional staff, for excessive force Defendant Holton was encouraged and authorized to use excessive force knowing there would never be discipline or other administrative consequences.

34. Plaintiff alleges on information and belief that defendant Sheriff Freitas encouraged and condoned this misconduct by never disciplining deputies for the systemic use of excessive force. Accordingly, Sheriff Freitas acquiesced in plaintiff's constitutional deprivations under Fourth Amendment, and, showed a reckless or callous indifference to the rights of others.

35. Defendants acted willfully, wantonly, maliciously, oppressively, and with conscious disregard to the plaintiff's rights.

36. Defendants' misconduct was the moving force that caused plaintiff's injuries.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

FOURTH CAUSE OF ACTION
[42 U.S.C. §1983 – FAILURE TO DISCIPLINE, POLICIES/CUSTOMS, DELIBERATE INDIFFERENCE AGAINST THE COUNTY OF SONOMA]

37. Plaintiff hereby re-alleges and incorporates by reference as though fully set forth herein all prior paragraphs of this Complaint.

38. The acts or omissions alleged herein regarding the use of excessive force was, upon information and belief, caused by (1) the failure to discipline of deputies by Sheriff Freitas and the County of Sonoma and/or (2) official policies, practices or customs of Sheriff Freitas and the County of Sonoma regarding the use of force; and/or (3) the deliberate indifference of Sheriff Freitas and the County of Sonoma to the use of excessive force.

39. Plaintiff alleges on information and belief that the County of Sonoma and Sheriff Freitas knew or should have known that their acts and omissions would likely result in a violation of the Fourth Amendment right to be free from excessive force.

40. Upon information and belief, the alleged acts and omissions were the moving force that caused plaintiff's injuries.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

FIFTH CAUSE OF ACTION
[42 U.S.C. §1983 – RATIFICATION
AGAINST THE COUNTY OF SONOMA]

41. Plaintiff hereby re-alleges and incorporates by reference as though fully set forth herein all prior paragraphs of this Complaint.

42. The acts or omissions alleged herein regarding the use of excessive force, upon information and belief, were ratified by defendant Sheriff Freitas. He had final policymaking authority for the County of Sonoma concerning the acts of Deputy Marcus Holton. Plaintiff alleges on information and belief that he knew of and specifically approved of Holton's acts which violated plaintiff's Fourth Amendment right to be free from excessive force.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

PRAYER FOR RELIEF

Plaintiff prays for relief as follows:

1. For compensatory and economic damages according to proof;

2. For general damages according to proof;

3. For an award of exemplary or punitive damages against the individual defendants;

4. For an award of attorney's fees and costs as permitted by law; and

5. For such other and further relief as the Court may deem necessary and appropriate.

JURY TRIAL DEMANDED

Plaintiff hereby requests a jury trial on all issues so triable.

Dated: November 12, 2015

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GABBI LEMOS, Plaintiff, v. COUNTY OF SONOMA, STEVE FREITAS, MARCUS HOLTON, and DOES 1-25, inclusive Defendants.	Case No. CV-15-05188 YGR **STIPULATION AND [PROPOSED] ORDER TO STAY MATTER DURING THE PENDENCY OF PLAINTIFF'S CRIMINAL PROCEEDING**

WHEREAS plaintiff presently is being criminally prosecuted for her conduct during the same incident that gave rise to the present civil lawsuit,

The Parties hereby stipulate and request this matter be stayed during the pendency of plaintiff's pending criminal proceedings because of potential issues related to *Heck v. Humphrey*, 512 U.S. 477 (1994) and because plaintiff will not waive her right to assert in this civil lawsuit her 5th amendment rights against self-incrimination.

Dated: April 15, 2016

Respectfully submitted,

SCOTT LAW FIRM

By: /s/ John Houston Scott
John Houston Scott
Attorneys for Plaintiff
GABBI LEMOS

Dated: April 15, 2016

LAW OFFICES OF IZAAK D. SCHWAIGER

By: /s/ Izaak D. Schwaiger
Izaak D. Schwaiger
Attorneys for Plaintiff
GABBI LEMOS

Dated: April 15, 2016

BERTRAND, FOX, ELLIOT, OSMAN & WENZEL

By: /s/ Richard W. Osman
Richard W. Osman
Attorneys for Defendants
COUNTY OF SONOMA,
STEVE FREITAS, and
MARCUS HOLTON

ORDER

WHEREFORE, pursuant to stipulation of the parties, it is hereby ordered that this matter is stayed pending the outcome of the plaintiff's pending criminal proceedings.

Date: _____

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The Honorable Yvonne Gonzales Rogers Judge for the United States District Court Northern District of California