NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL CALHOUN ARRINGTON, individually, and through his next best friend, AURELIA CLEO BATTLE, Plaintiff-Appellant, v. CITY OF LOS ANGELES; DANIEL PENNINGTON; RUSS GRAYBILL; JOHNATHAN JORDAN; CHRISTIAN ARRUE; ERIC OLIVE; DOES, 1-10, inclusive, Defendants-Appellees.	No. 16-56755 D.C. No. 2:12-cv-04698-GW-AGR MEMORANDUM* (Filed Sep. 14, 2021)

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted September 13, 2019
Pasadena, California

Before: BERZON, R. NELSON, and BADE, Circuit Judges.

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

Plaintiff Samuel Arrington appeals the district court's dismissal of his false arrest and false imprisonment claim against the City of Los Angeles and five Los Angeles Police Department officers (collectively, "defendants"). Additionally, Arrington asserts that during the trial on his excessive force claim against defendants, the district court improperly instructed the jury regarding Arrington's *nolo contendere* plea to resisting, delaying, or obstructing arrest. Finally, Arrington challenges the district court's grant of judgment as a matter of law on his Bane Act claim. We affirm the judgment in all respects.

1. The district court correctly held that under *Heck v. Humphrey*, 512 U.S. 477 (1994), Arrington's conviction under California Penal Code section 148(a)(1) for resisting, delaying, or obstructing an officer precludes his claim under 42 U.S.C. § 1983 for false arrest and false imprisonment. As a matter of California law, Arrington's conviction on a section 148(a)(1) charge establishes both that defendants had a lawful basis for, at a minimum, detaining Arrington to investigate whether he was the person reported to have committed a battery, and also that defendants had a lawful basis for ultimately arresting him. *See Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (en banc) (noting that "[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"). Success on Arrington's false arrest and false imprisonment claim "would necessarily imply the invalidity of his conviction." *Heck*, 512 U.S. at 487. That

claim is therefore barred by *Heck*. *See Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (per curiam); *Guerrero v. Gates*, 442 F.3d 697, 703–05 (9th Cir. 2006); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (per curiam).

That Arrington's conviction is based on a *nolo contendere* plea rather than a guilty plea or jury verdict does not change the *Heck* analysis with regard to the false arrest and false imprisonment claim. *See Smithart*, 79 F.3d at 952. Arrington's conviction was not admitted "against" him as an evidentiary admission. Fed. R. Evid. 410. The *Heck* issue was decided as a matter of law by the district court—properly so, as the legal consequences of the conviction preclude him from having a cognizable section 1983 claim for false arrest and false imprisonment under *Heck*. *See* 512 U.S. at 487.

2. Although Arrington now challenges the district court's instruction to the jury regarding his *nolo contendere* plea and conviction, he did not object to the instruction when the district court gave him an opportunity to do so. In the absence of a timely objection under Federal Rule of Civil Procedure 51(c), we review a challenge to jury instructions for plain error. *C.B. v. City of Sonora*, 769 F.3d 1005, 1016 (9th Cir. 2014) (en banc). We consider "whether (1) there was an error; (2) the error was obvious; and (3) the error affected substantial rights." *Id.* at 1018 (citations omitted). Ordinarily, an error affects substantial rights if "it affected the outcome of the district court proceedings." *United States v. Lapier*, 796 F.3d 1090, 1096 (9th Cir. 2015)

(quoting *United States v. Marcus*, 560 U.S. 258, 262 (2010)).

Here, we need not resolve the question whether the instruction was erroneous because we conclude that any error did not affect Arrington's substantial rights. Arrington himself introduced his plea and conviction repeatedly, both in his opening statement and on direct examination. Additionally, Arrington's case depended almost entirely on his credibility. Arrington's own testimony severely undermined his credibility because it was inconsistent with both the testimony of his witnesses and his prior deposition testimony. For example, Arrington testified that there were "about 10, 12 police cars, at least, chasing me, trying to run me over," while one of his witnesses testified that there were two police cars on the scene. Finally, Arrington's counsel argued in closing that Arrington disobeyed Sergeant Graybill's lawful order to stop by getting on his bicycle and riding away, and suggested that that was the incident that gave rise to Arrington's plea. The jury instruction, which indicated that Arrington had unlawfully resisted, delayed, or obstructed the officers at some point during the encounter but did not specify when or how he had done so, was therefore consistent with Arrington's theory of the case and could not have prejudiced him.

Arrington has not demonstrated any realistic possibility that, had the instruction not been given, the jury would have believed his version of events and

found that the officers had used excessive force.[1] *See id.*

3. Defendants concede that the district court's grant of judgment as a matter of law on Arrington's claim under the Bane Act, California Civil Code section 52.1, was in error, as it was based on an analysis that has since been abrogated by Ninth Circuit precedent. *See Reese v. County of Sacramento*, 888 F.3d 1030, 1043 (9th Cir. 2018) (citing *Cornell v. City & County of San Francisco*, 17 Cal. App. 5th 766, 799 (2017)). We agree with defendants that the error was harmless, as the Bane Act claim was based on the same facts as the excessive force claim, and the jury found for defendants on the excessive force claim. The jury could not have found for defendants on the excessive force claim and for Arrington on the Bane Act claim. *See Reynolds v. County of San Diego*, 84 F.3d 1162, 1170–71 (9th Cir. 1996), *overruled on other grounds by Acri v. Varian Assocs., Inc.*, 114 F.3d 999 (9th Cir. 1997); *see also Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014) (stating that the "elements of the excessive force claim under § 52.1 are the same as under § 1983" (citation omitted)). The district court's failure to submit the Bane Act claim to the jury was therefore

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[1] To the extent Arrington has also asserted evidentiary error based on the admission of the *nolo contendere* plea, any such error does not warrant reversal because we discern no prejudice in light of Arrington's repeated references to the plea. *See Boyd v. City & County of San Francisco*, 576 F.3d 938, 949–50 (9th Cir. 2009) (explaining that evidentiary error did not warrant reversal because "it is more probable than not that the jury would have" reached the same verdict regardless of the evidentiary error).

harmless. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1533 (9th Cir. 1995), *as amended* (Apr. 24, 1995).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SAMUEL CALHOUN ARRINGTON, individually, and through his next best friend, AURELIA CLEO BATTLE,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a public entity; DANIEL PENNINGTON, an individual; RUSS GRAYBILL, an individual; JOHNATHAN JORDAN, an individual; ERIC OLIVE, an individual; CHRISTIAN ARRUE, an individual; AND DOES 1 THROUGH 10, inclusive,

Defendants.

CASE NO. CV 12-4698-GW(AGRx)
(Hon. George Wu, District Judge)
(Hon. Alicia G. Rosenberg, Magistrate Judge)

JUDGMENT

(Filed Oct. 26, 2016)

This action came on regularly for trial on October 13, 2016, in Courtroom "10" of the United States District Court, Central District of California, Central Division, the Honorable George Wu, Judge Presiding. The Plaintiff SAMUEL CALHOUN ARRINGTON, was represented by attorney Nazareth M. Haysbert. The Defendants CITY OF LOS ANGELES, DANIEL PENNINGTON, RUSSELL GRAYBILL, JOHNATHAN JORDAN, ERIC OLIVE and CHRISTIAN ARRUE

were present and represented by attorneys Colleen R. Smith and Cory M. Brente.

The trial was bifurcated, with phase I addressing liability and compensatory damages only.

A jury of 8 persons was regularly impaneled and sworn on October 13, 2016. Witnesses were sworn and testified. On October 24, 2016, following the presentation of evidence and argument during a jury trial which concluded October 24, 2016, the jury, in the above-entitled action, UNANIMOUSLY found as follows:

JUDGMENT ON SPECIAL VERDICT

WE, THE JURY in the above-entitled action, unanimously find as follows on the questions submitted to us:

QUESTION NO. 1: Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants violated his Fourth Amendment Constitutional Rights by using excessive force against him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO✓
OFFICER DANIEL PENNINGTON	YES___	NO✓
OFFICER JOHNATHAN JORDAN	YES___	NO✓
OFFICER ERIC OLIVE	YES___	NO✓
OFFICER CHRISTIAN ARRUE	YES___	NO✓

If you answered "No" as to each of the Defendants, skip to Question No. 5.

If you answered "Yes" as to any Defendant, proceed to Question No. 2.

QUESTION NO. 2: For each "Yes" response to Question No. 1, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was the cause of injury to him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 3.

QUESTION NO. 3: Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants committed a battery upon him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

If you answered "No" as to each of the Defendants, skip to Question No. 5.

If you answered "Yes" as to any Defendant, proceed to Question No. 4.

QUESTION NO. 4: For each "Yes" response to Question No. 3, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was a substantial factor in causing him injury?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 5.

QUESTION NO. 5: Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants negligently used excessive force against him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO✓
OFFICER DANIEL PENNINGTON	YES___	NO✓
OFFICER JOHNATHAN JORDAN	YES___	NO✓

OFFICER ERIC OLIVE	YES___	NO✓
OFFICER CHRISTIAN ARRUE	YES___	NO✓

If you answered "No" as to Questions Nos. 1 and 5, please date and sign this form where indicated below.

If you answered "Yes" as to Question Nos. 2, 4, or 5 as to any Defendant, proceed to Question No. 6.

QUESTION NO. 6: For each "Yes" response to Question No. 5, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was a substantial factor in causing him injury?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 7.

QUESTION NO. 7: *If you answered "Yes" to Question No. 1, answer the following question. If you answered "No" as to all Defendants in Question No. 1, please proceed to Question No. 9.* Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants failed to intervene to prevent a violation of Plaintiff's constitutional rights?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

If you answered "No" as to each of the Defendants, skip to Question No. 9.

If you answered "Yes" as to any Defendant, proceed to Question No. 8.

QUESTION NO. 8: For each "Yes" response to Question No. 7, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was the cause of injury to him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 9.

QUESTION NO. 9: *If you answered "Yes" as to Question Nos. 2 or 4, answer the following question. Otherwise, please proceed to the section on Damages.* Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants intentionally inflicted severe emotional distress on him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

If you answered "No" as to each of the Defendants, skip to Question No. 11.

If you answered "Yes" as to any Defendant, proceed to Question No. 10.

QUESTION NO. 10: For each "Yes" response to Question No. 9, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was a substantial factor in causing him injury?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___

OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 11.

DAMAGES

If you gave any "Yes" responses to either Question Nos. 2, 4, 6, 8 or 10, please answer the following questions. Otherwise, please date and sign this form where indicated below.

QUESTION NO. 11: What is the total amount of compensatory damages suffered by Plaintiff? $_____.

If you did not enter an amount, skip to Question No. 13.

If you entered an amount, proceed to Question No. 12.

QUESTION NO. 12: *If you answered "yes" to Question No. 5 and you entered an amount in response to Question No. 11*, what percentage of responsibility for Plaintiff's harm do you assign to each of the following person's (Do not include any Defendants for which you did not find any liability above).

PLAINTIFF SAMUEL ARRINGTON	_____%
SERGEANT RUSS GRAYBILL	_____%
OFFICER DANIEL PENNINGTON	_____%
OFFICER JOHNATHAN JORDAN	_____%

OFFICER ERIC OLIVE	_____%
OFFICER CHRISTIAN ARRUE	_____%
TOTAL	**100%**

QUESTION NO. 13: *If you answered "yes" to Question No. 1 or 7, answer the following question. If you answered "No" as to all Defendants to both Questions 1 and 7, please proceed to Question No. 14.* Has Plaintiff proved by preponderance of the evidence that any of the following Defendants acted with malice, fraud or oppression?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

QUESTION NO. 14: *If you answered "yes" to Question No. 3 or 9, answer the following question.* Has Plaintiff proved by clear and convincing evidence that any of the following Defendants acted with malice, fraud or oppression?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please date and sign below, and return this form to the Court. Thank you.

DATED: 10/24/16 /s/
FOREPERSON OF THE JURY

Based on the jury's finding for the Defendants CITY OF LOS ANGELES, DANIEL PENNINGTON, RUSSELL GRAYBILL, JOHNATHAN JORDDAN, ERIC OLIVE and CHRISTIAN ARRUE in phase I, the liability and compensatory damages phase, the Plaintiff's claims for punitive damages and *Monell* are null and void and hereby dismissed with prejudice.

By reason of dismissals, the rulings of the Court, and the special verdict, Defendants CITY OF LOS ANGELES, DANIEL PENNINGTON, RUSSELL GRAYBILL, JOHNATHAN JORDDAN, ERIC OLIVE and CHRISTIAN ARRUE are entitled to judgment against Plaintiff SAMUEL CALHOUN ARRINGTON.

Now, therefore, it is **ORDERED, ADJUDGED AND DECREED** that Plaintiff SAMUEL CALHOUN ARRINGTON, have and recover nothing by reason of each and all his claims as set forth in the Complaint

against Defendants CITY OF LOS ANGELES, DANIEL PENNINGTON, RUSSELL GRAYBILL, JOHNATHAN JORDAN, ERIC OLIVE and CHRISTIAN ARRUE and that Defendants shall recover their costs in accordance with Local Rule 54.

JUDGMENT IS HEREBY ENTERED IN FAVOR OF ALL DEFENDANTS ON ALL CLAIMS.

IT IS SO ORDERED.

DATED: October 26, 2016

/s/ George H. Wu
GEORGE H. WU,
U.S. DISTRICT JUDGE

United States Court of Appeals
for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 12/17/2021 at 1:48:58 PM PST and filed on 12/17/2021

Case Name: Samuel Arrington v. City of Los Angeles, et al

Case Number: 16-56755

Docket Text:
Filed text clerk order (Deputy Clerk: AF): Appellant's petition for panel rehearing (Dkt. [91]) is denied. [12319409] (AF)

Notice will be electronically mailed to:

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

– – –

Samuel Calhoun Arrington, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	)	NO. CV 12-4698 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

TUESDAY, OCTOBER 11, 2016

KATIE E. THIBODEAUX, CSR 9858
U.S. Official Court Reporter
312 North Spring Street, #436
Los Angeles, California 90012

* * *

[14] Now, the primary issue, I guess, is the Heck versus Humphrey issue and the effect it is on the various causes of action. It seems to the court that in light of the Heck versus Humphrey holding, and as that holding is discussed by the California Supreme Court

in the Yount, Y-O-U-N-T, decision, it seems to the court that I don't understand how the plaintiff can still have a false arrest cause of action, false arrest and false imprisonment cause of action.

MR. HAYSBERT: Your Honor, the argument that we made in our trial brief is that the false arrest, false imprisonment was as to the two counts that were eventually dropped for lack of evidence.

THE COURT: But he would have been arrested any way. And so if he is going to be arrested, he is going to be arrested. And, you know, you can't have a greater arrest as opposed to a lesser arrest. He was going to be arrested. So I don't understand that situation.

Also, insofar as the arrest is concerned, I mean, and the imprisonment is concerned, I mean, obviously, he is going to be imprisoned for the misdemeanor 148, and the 148 is closely related to the Penal Code 69 that he was arrested for.

So it is not a situation where everything was totally unrelated and someone can argue, well, there was [15] some sort of false arrest or something of that sort because he plead to a count that is, in some instances, it can be a lesser included and in this particular situation would have been a lesser included.

So he was arrested for it, and he was – he plead to it. So in that situation, I don't understand how the plaintiff can have either false arrest or a false imprisonment cause of action.

MR. HAYSBERT: Well, so I will just mention something that defense counsel mentioned last time and that is that he was arrested for resisting arrest, yeah, we understand that. But the battery and the assault on a police officer –

THE COURT: Well, I haven't gotten to that portion yet. I am just talking now about false arrest and false imprisonment.

MR. HAYSBERT: Well, your Honor, in this case, there was no probable cause to believe that my client had committed a battery. And so the very fact that the officers were following him and attempting to detain him, well, they weren't even attempting to detain him according to the facts of this case. They were just following him and took him down and because he was resisting, they arrested him. And it doesn't make any sense to me why they were going after him if they had no [16] probable cause to arrest him.

THE COURT: Well, there had to have been probable cause because he conceded probable cause. He conceded probable cause when he plead.

MR. HAYSBERT: To the resisting arrest charge, not to the – the whole reason –

THE COURT: I don't understand. In other words, he was charged with a 245(c), 69 and 242-243, but the 242-243 was as to assault against Sean White. So that is a little bit separate.

And he eventually plead out to the 148(a)(1) as a misdemeanor, but the resisting arrest aspect of it, you

have to have – in other words, in order for the government to establish violation of 148(a)(1), an element is that the arrest has to be lawful. In other words, it has to be based on probable cause and that the officers were not using excessive force at the time of the arrest.

So that is somewhat problematic for the plaintiff insofar as the false arrest, false imprisonment cause of action is concerned.

MR. HAYSBERT: I can see the problem, your Honor, and, you know, we are willing to concede that, you know, any claims based on a wrongful arrest which we are not alleging here are barred under Heck unless and until he [17] gets the resisting arrest charge overturned.

THE COURT: All right. So at this point in time the false arrest, false imprisonment cause of action is out.

Now, as to the issue of excessive force, the defense is arguing that Heck, under Heck, that cause of action is out. I don't see how you can make that argument in light of the applicable case law.

MS. SMITH: The argument is based on the fact that he was arrested for using force on a police officer and he plead guilty to the 148.

THE COURT: But that doesn't mean that, in other words, once he admits that he committed a crime, that doesn't necessarily mean that the officers have the right to use any amount of force against him.

MR. HAYSBERT: And he plead no contest.

THE COURT: It doesn't make any difference that he plead no contest.

MR. HAYSBERT: I just wanted to put that on the record. It wasn't guilty.

THE COURT: Thank you for throwing that in, an irrelevant point. It doesn't make any difference. He plead, but it is not going to wipe it out. However, what I need to know is this: Was there a written plea agreement? Was there a plea agreement? Was it put on

* * *

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

– – –

Samuel Calhoun Arrington, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	)	NO. CV 12-4698 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

TUESDAY, OCTOBER 18, 2016

JURY TRIAL – DAY FOUR

VOLUME II OF II, P.M. SESSION

KATIE E. THIBODEAUX, CSR 9858
U.S. Official Court Reporter
312 North Spring Street, #436
Los Angeles, California 90012

* * *

[68] THE COURT: Let me talk to counsel for a second on the record. When I made my ruling on

Heck, did either side cite me to Penal Code Section 1016?

MS. SMITH: I don't believe that we referred to Penal Code Section 1016.

THE COURT: Did plaintiff's counsel cite me to Penal Code Section 1016?

MR. HAYSBERT: Your Honor, I am not looking at it right now. It is possible. I am not sure at this point.

THE COURT: This is the issue.

Clearly Heck controls where there is a plea of no contest, nolo contendere, in the context of a felony. My question is does it also apply in the context of a no contest plea pursuant to Penal Code Section 1016, because reading the transcript his plea here was nolo contendere, as I understand it.

There are cases which say that it does, such as Nuno, N-U-N-O, versus County of San Bernardino, 58 F. Supp 2d, 1127. It is a Central District of California case, 1999. But then there are cases saying that it doesn't. For example, Ellis versus Thomas, 2015, US District, Lexis 138614. That is a Northern District of California October of 2015 case.

There is a Ninth Circuit case that says – that is Radland versus County of Orange. It is 519 [69] F. App'x, 490. It is a Ninth Circuit 2013 case that says, quote, "We have repeatedly found Heck to bar Section 1983 claims even where the plaintiff's prior

convictions were the result of guilty or nolo contendere pleas," end of quote.

But there it doesn't distinguish between nolo contendere pleas for felonies versus nolo contendere pleas for misdemeanors. And that is the where 1016 comes in, because under 1016 nolo contendere pleas are not supposed to be admissible, or to be treated as admissions by the defendant, who later becomes a plaintiff.

Yes.

MR. BRENTE: I have a question, on those cases the Court reviewed, from the Court's recollection, did any of them deal with pleading to a 148?

THE COURT: No, but 148 is a misdemeanor.

MR. BRENTE: Right. So that was my question. It is always a misdemeanor. It is not a wobbler.

THE COURT: Oh, no. Well, again, there are some cases that talk about it, but don't mention 1016.

And the argument that is raised in, for example, the Ellis case where it says Heck wouldn't apply does reference 1016.

And I mean, the arguments can be made on both sides. If the first person to find me to a Ninth Circuit [70] case that's controlling, that is the most recent one, will probably win this race. If you don't have something of that sort, then I am going to have to think about it some more.

Because, on the one hand, I mean, the Heck rule is basically a rule of federal – it is a federal – well, it is applied to the federal 1983 action.

And there is language – and Heck itself doesn't talk about the nolo contendere pleas at all, but it does say that in these types of situations, the underlying conviction – unless and until such time as the underlying conviction is somehow reversed, then you are not supposed to bring a 1983 action, which if found in favor of the plaintiff would contradict the underlying conviction. But if a nolo contendere plea is not an admission of any sort of guilt, then what is it. I mean, arguments could be made on both sides.

So that is your assignment for this evening.

Also, where is my declaration from Mr. Jordan?

MR. BRENTE: I have been here all day, your Honor. But I am told it has been filed. And if the Court looks on the PACER I am told it will be there. So I am hoping I am not wrong.

THE COURT: Let's hope you are not wrong either.

MS. SMITH: I did see that it got filed earlier

* * *

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

HONORABLE GEORGE WU

UNITED STATES DISTRICT JUDGE PRESIDING

– – –

Samuel Calhoun Arrington, PLAINTIFF, VS. County of Los Angeles, et al., DEFENDANT,	)	NO. CV 12-4698 GW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

WEDNESDAY, OCTOBER 19, 2016

JURY TRIAL – DAY FIVE

VOLUME I OF II, A.M. SESSION

KATIE E. THIBODEAUX, CSR 9858
U.S. Official Court Reporter
312 North Spring Street, #436
Los Angeles, California 90012

* * *

[4] LOS ANGELES, CALIFORNIA; THURSDAY, OCTOBER 20, 2016

8:45 A.M.

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(The following proceedings were held outside the presence of the jury:)

THE COURT: All right. Let me ask counsel: Do you have anything to present to me in regards to the 1016 of the penal code?

MS. SMITH: Yes, your Honor.

MR. HAYSBERT: Yes, your Honor.

MS. SMITH: Defendants filed a brief this morning, and we do have a courtesy copy for the court.

THE COURT: All right. Let's see if you found the correct case.

MR. HAYSBERT: Plaintiff did the same thing, and we have a courtesy copy on its way, but we also have a copy that we stapled together.

THE COURT: Okay. Does either side cite to Rodriguez versus City of Modesto? It is a 535 Fed. App. 643.

MR. HAYSBERT: Yes, your Honor.

THE COURT: Okay.

MS. SMITH: No, your Honor. Defendants did not. [5] We cited to Wetter versus City of Napa and

several other cases. And Wetter dealt directly with 1016, and found that it did not apply to Heck.

THE COURT: Oh, that is basically what Rodriguez says too. But Rodriguez says that, nevertheless, it is not a – Heck is not a total bar.

MS. SMITH: Well, I would agree with that, your Honor. Heck may not be a total bar to all claims because it may not bar the excessive force claim to some extent depending on what the nature of that claim is.

THE COURT: That's what we will discuss at the point. Let me put it this way: I originally indicated that I thought that Heck versus Humphrey would be a bar, but then neither side had cited to Penal Code Section 1016 which seems to indicate that nolos, no contest or nolo contendere pleas. And felonies are useable, but not for misdemeanors.

And, therefore, there is a question since the plaintiff here pled to a misdemeanor whether or not that would give rise to a Heck bar. And there was some cases that – well, there is a couple of cases that said it cannot be a bar, district court cases. Then there were a number of district court cases that said it can be a bar and a great majority of cases said it can still nevertheless be a bar.

[6] But there wasn't really any Ninth Circuit case that basically said one way or the other, and this Rodriguez case is a Ninth Circuit case.

But it is a Fed. App.'s case, APPX, and, therefore, it's not precedent per se. But for two reasons I think I am going to follow it. One, it is the most recent Ninth Circuit speech on the issue. It does reference 1016 of the penal code although it doesn't give a lengthy discussion of it, it cites it.

And then it nevertheless holds that Heck can be a bar in a situation where the plaintiff in his criminal case pleads to a 148(a)(1) which is the count that the plaintiff also here pled to.

But it also goes on to discuss the Yount case and indicate that that case, the California Supreme Court said that even a plea to 148(a)(1) would not be a total bar to an excessive force claim because there is a possibility that the plaintiff could establish a basis for such a claim. And we will discuss that with counsel in just a moment.

So this Rodriguez case I think is binding. And the other thing also, in the Yount case, the Yount case is a California Supreme Court case, they didn't discuss Penal Code Section 1016, but what it did do is the California Supreme Court went through this lengthy [7] discussion of a 148(a)(1) plea, and the application of Heck and how Heck what – did pose a bar but not a complete bar, et cetera, et cetera.

The thing about it is if 1016 poses a bar – sorry, gets rid of the Heck bar for purposes of no contest pleas to misdemeanor, the whole discussion in Yount would be pointless because they could have gotten rid of the case by simply saying, well, the bar, Heck bar doesn't

apply to – under pursuant to a misdemeanor plea under 1016. So they wouldn't engage in all that discussion.

MS. SMITH: And that is what defendant cited in their brief as well, your Honor. There are so many Ninth Circuit cases that actually go forward and address the Heck bar as to excessive force claims under 148. They wouldn't have to go that far in their analysis.

THE COURT: Yeah, but sometimes the federal circuit doesn't – let's put it this way: Their clerks aren't thorough. And so therefore – yeah, you heard it here. Therefore, when you do have the California Supreme Court discussing the issue, I think that is extremely, to my mind, important because the California Supreme Court is the highest court in California as to state law matters, and if their discussion is this, then I am saying, okay, I understand, that is their position, and I [8] am willing to accept it.

And also, then, since we also have the Ninth Circuit in these Rodriguez cases adopting more or less the same approach that was taken in the Yount case, and the Ninth Circuit decision does cite to 1016, well, okay, I think the issue is resolved.

However, this is the problem I have still, and this is the problem I want the parties to address later today. I will give you some time to think about it.

You know, here – sorry, do we have the jurors all here?

THE CLERK: Yes, sir.

THE COURT: Here we have the plaintiff pled to a violation of 148(a)(1), resisting a peace officer, and as I discussed with the parties earlier, that is resisting or obstructing a peace officer in the performance of any of his duties, but it is specifically noted in the California jury instructions that a peace officer is not lawfully performing his duties if he is unlawfully arresting or detaining someone or using excessive force in the performance of his duties.

And that is consistent with the California Supreme Court cases such as In re Manuel G., 16 Cal. 4th 805 at 815, a 1997 case which says that the longstanding rule in California is that a defendant [9] cannot be convicted of an offense against a police officer engaged in the performance of his or her duties unless the officer was acting lawfully at the time of the offense against the officer was committed.

Therefore, if the officer was either attempting to arrest without probable cause or using excessive force in the attempted arrest, there could not be a violation of 148(a)(1).

However, as noted in Yount versus – the Yount case, the California Supreme Court said that a plea to a count of 148(a)(1) does not mean that the Heck bar precludes all claims of excessive force.

That court noted that to the extent that plaintiff does not deny that he resisted the officers or that the officers had the right to respond with reasonable force, he poses no challenge to his convictions to that extent.

His Section 1983 claims for damages for the use of deadly force could go forward in that situation.

However, the Yount court also said that although we hold that this portion of plaintiff's Section 1983 claim is not Heck barred, we have not been asked to decide and do not decide whether plaintiff may recover damages under Section 1983 for the officer's accidental use of deadly force. And that is in [10] Footnote 2. So that is an issue that needs to be resolved.

But at a minimum, if the case goes to the jury, there is going to have to be a verdict form which breaks these things down to, you know, what supposed – if it was excessive force, you know, when was it applied and how was it applied, and also insofar as whether or not the use of force in this particular situation as to the baton was accidental or intentional.

And another problem is that in both the Yount case and Rodriguez decisions, there is a problem of determining the meaning of the plaintiff's plea. And that is especially true in this case because here – the defense gave me a copy of the plea transcript. What happened is he was originally charged, and then at the plea hearing and while he was representing himself, he also had standby counsel that was available to him during the process.

The government indicated that what it would do is not allege a lesser included of the Count 2 which was I think Penal Code 69, but charge a new count of 148.

And the court said that was okay, but there wasn't any statement as to what the count was other than a plea to 148(a)(1). In other words, didn't say against whom, for what, you know, et cetera, et cetera. It was [11] just a 148(a)(1).

And then, the plaintiff pled to it, and the court said that there was a factual basis for the plea but never indicated what the factual basis was.

So that is a problem that I have here. The reason why that is a problem is that there are cases like the Smith case which seems to try to state that, well, a plea could have been only as to the arresting officer's exercise of his duty while he was investigating as opposed to exercising his duty of making an arrest.

Now, Yount does not say – Yount specifically says we are not adopting that decision, although Yount points it out. Because they say in Yount, the supreme court says, well, we know here because the plea transcript makes it clear what he was pleading to. But it is not clear in this case what the defendant pled to – I'm sorry, the plaintiff pled to because it was just to a violation of 148(a)(1). So that is a problem.

And also, the Yount case also questions as to whether or not there can be this division between investigation versus making a determination for probable cause versus making the arrest itself.

Specifically, the Yount case on Page 901, it says: Moreover, here, unlike in Smith, Yount's acts of resistance were part of one continuous transaction [12]

involving the officer's efforts to effect his arrest and cannot be segregated into an investigative phase and an independent arrest phase. And for that reason, the California Supreme Court concludes that Smith does not aid Yount here.

So that is an issue. So that is something I want you guys to address. But these are things that are going to have to be resolved prior to my creation of a set of jury instructions because these things are somewhat complicated matters which the parties here really haven't addressed.

Okay. I am going to bring out the jury.

MS. SMITH: Your Honor, if I have just one brief thing to mention to the court.

THE COURT: Yes.

MS. SMITH: I am not clear if we are starting at 10:00 o'clock tomorrow morning because we have an appearance with Judge Olguin at 9:30. And I just want to advise the court of that. It's a very short hearing –

THE COURT: No. I am going to be starting earlier than 10:00.

MS. SMITH: Okay. And can we ask, then, the court's assistance in contacting Judge Olguin's clerk to –

THE COURT: Sure. I will ask him to see if he can

* * *

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAMUEL CALHOUN ARRINGTON, Plaintiff, v. CITY OF LOS ANGELES, et al., Defendant.	No. CV 12-4698-GW(AGRx) **FINAL JURY INSTRUCTIONS**

FINAL JURY INSTRUCTIONS

(Filed Oct. 24, 2016)

I. Introductory Instructions

Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you as to the law in this case. Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

You must not infer from these instructions or from anything I have said or done as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes,

opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

The Plaintiff in this case is Samuel Calhoun Arrington. The Defendants are the City of Los Angeles and Los Angeles Police Officers Daniel Pennington, Russ Graybill, Johnathan Jordan, Christian Arrue and Eric Olive.

Plaintiff claims that in the evening of June 27, 2011, while he was being arrested, excessive force was used on his person by certain of the Defendant Police Officers. Plaintiff has brought the following claims against the Defendants: (1) violation of his rights under the United States Constitution and under California state law due to the use of excessive force, (2) failure to intervene to prevent constitutional injury; (3) liability of the Defendant City for conduct of its officers; (4) intentional infliction of emotional distress, and (5) negligence. Plaintiff has the burden of proving his claims and the amount of his "compensatory" damages by a "preponderance of the evidence." Plaintiff also seeks "punitive damages" which he must prove by "clear and convincing evidence."

Defendants deny that they used excessive force or otherwise engaged in any unlawful or improper conduct as to Plaintiff. They also contest his damages claims.

When a party has the burden of proof on any claim a "preponderance of the evidence," it means you must be persuaded by the evidence that the claim is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.

When a party has the burden of proving any claim by clear and convincing evidence, it means you must be persuaded by the evidence that the claim or defense is *highly* probable. This is a higher standard of proof than proof by a preponderance of the evidence.

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits which are received into evidence;

(3) any facts to which the lawyers have agreed; and

(4) any facts that I instruct to accept as proved.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence.

If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Some evidence has been admitted during the trial for a limited purpose only. When I instructed you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

There are rules of evidence that control what can be received into evidence. When a lawyer asked a question or offered an exhibit into evidence and a lawyer on the other side thought that it was not permitted by the rules of evidence, that lawyer objected. If I overruled the objection, the question was answered or the exhibit received. If I sustained the objection, the question should not be answered, and the exhibit not received. Whenever I sustained an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I ordered that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case and any bias or prejudice;

(5) whether other evidence contradicted the witness's testimony;

(6) the reasonableness of the witness's testimony in light of all the evidence; and

(7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

From time to time during the trial, it was necessary for me to talk with the attorneys out of the hearing of the jury at the "sidebar." The purpose of those conferences was to decide how certain evidence was to be treated under the rules of evidence and to avoid confusion and error. Do not consider my granting or denying a request for a conference, or any ruling that I may have made while at the sidebar, as any indication of my opinion of the case or of what your verdict should be.

During the trial, I allowed jurors to ask questions of the witnesses. There were some proposed questions that I did not permit, or did not ask in the wording submitted by the juror. This happened either due to the rules of evidence or other legal reason. If I did not ask a proposed question, or if I rephrased it, do not speculate as to the reasons.

Do not give undue weight to questions you or other jurors proposed. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence. Do not give undue weight to questions asked by any juror. Treat a juror's question the same as if it had been asked by one of the attorneys.

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

The depositions of certain witnesses were shown and/or read to you during the trial. You should consider deposition testimony, presented to you in court, insofar as possible, in the same way as if the witness had given that testimony in the courtroom.

In this trial, certain recordings of phone calls, dispatches and videotaped depositions were played for you. During those presentations you were provided or shown transcriptions of those recordings. However, you were instructed then (and that instruction is repeated here) that the recording is the evidence, not the transcript. If you heard something different from what appeared in a transcript, what you heard is controlling.

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give

it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

"Hearsay" is a statement, other than one made by a person while testifying at a trial or hearing, offered to prove the truth of the matter stated therein. For example, if Bob tells Mary that his sister Susan called and said that she bought a new car, that statement would be hearsay if offered to prove that in fact Susan had purchased a new automobile. While there are many "exceptions" to the hearsay rule, generally a hearsay statement cannot be admitted during a trial to prove the truth of the matters contained in the statement.

However, in certain instances, an expert witness is allowed to base his or her opinions on hearsay evidence. Hearsay evidence relied upon by expert witnesses to form their opinions are not offered at trial (and are not to be accepted) for the truth of the matters contained in such evidence, but are only to be considered in evaluating the basis of the expert's opinion. Generally, you may not assume that – because an expert witness has relied on facts contained in a statement or report made by another person – that those facts are true.

During deliberations, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial.

If you took notes during the trial, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. When you leave, your notes should be left in the jury room. No one will read your notes. They will be destroyed at the conclusion of the case.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Certain charts and summaries have been admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

As noted above, the defendants in this case are the City of Los Angeles and five individual defendant Los Angeles Police Officers who are: Daniel Pennington, Russ Graybill, Johnathan Jordan, Christian Arrue and Eric Olive. You should decide the case as to each defendant separately. Unless otherwise stated, the instructions apply to all parties.

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, Web site or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you have received all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any

investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

II. Plaintiff's Claims

A. 42 U.S.C. § 1983 – Violation of Constitutional Rights

Plaintiff's first claim is brought action under the federal statute, 42 U.S.C. § 1983, which provides that any person or persons who, under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party.

In order to prevail on his § 1983 claim against any of the individual Defendant Officers, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1) the individual Defendant Officer acted under color of law; and

2) the acts of *that* Defendant Officer deprived the Plaintiff of his particular rights under the United States Constitution as explained in later instructions.

A person acts "under color of state law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The parties have stipulated that each individual Defendant Officer was acting under color of state law in this case.

If you find Plaintiff has proved each of those elements, *and* if you find that the Plaintiff has proved by a preponderance of the evidence all the elements he is required to prove under the following Instructions in this Section II-A, your verdict should be for the Plaintiff. If, on the other hand, Plaintiff has failed to prove any one or more of the elements in this and the following Instructions in Section II-A, your verdict should be for the individual Defendant Officer where there is such a failure of proof.

In general, a seizure of a person is *unreasonable* under the Fourth Amendment if a police officer uses excessive force in making a lawful arrest and/or in defending himself or others. In order to prove an unreasonable seizure in this situation, Plaintiff must prove by a preponderance of the evidence that an individual Defendant Officer used excessive force on Plaintiff in effectuating his arrest and/or in defending himself or another person.

Under the Fourth Amendment, a police officer may only use such force as is "objectively reasonable" under

all of the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene at the time and not with the 20/20 vision of hindsight. An officer's intent or motive is not relevant to your inquiry here.

In evaluating the reasonableness of the manner in which a seizure is effected, you must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government's interests that justify the intrusion.

In determining whether an officer used excessive force in this case, consider all of the circumstances known to the individual Defendant Officer on the scene, including but not limited to:

1. the severity of the crime or other circumstances to which the individual Defendant Officer was responding;

2. Plaintiff's conduct at the time the force was used;

3. whether the Plaintiff posed an immediate threat to the safety of the Defendant Officer or to other persons;

4. whether the Plaintiff was actively resisting arrest or attempting to evade arrest by flight;

5. the amount of time and any changing circumstances during which the Officer had to determine the

type and amount of force that appeared to be necessary;

6. the type and amount of force used; and

7. the availability of alternative methods to take the plaintiff into custody and/or to subdue the Plaintiff.

The Fourth Amendment standard is reasonableness, and it is reasonable for the police to move quickly if delay would gravely endanger their lives or the lives of others. It is recognized that police officers are often forced to make split-second judgments.

In this case, the Court has taken judicial notice of (and you must accept as proved) the fact that Plaintiff plead "no contest" to a misdemeanor count charging him with a violation of California Penal Code § 148(a)(1) on June 27, 2011. § 148(a)(1) makes it a crime to"willfully resist[ ], delay[ ] or obstruct[ ] any . . . peace [or police] officer . . . in the discharge or attempt to discharge any duty of his or her office . . . "

Under California law, an essential element of a valid § 148(a)(1) conviction is that the police officer involved was acting lawfully in the discharge or attempted discharge of his duties at the time the suspect resisted, delayed or obstructed the officer. A police officer is *not* lawfully performing his duties if he arrests an individual without lawful probable cause, or if he uses unreasonable or excessive force on the individual at the time of the individual's unlawful resistance, delay or obstruction is occurring. Under applicable law, Plaintiff's § 148(a)(1) conviction establishes that at

some point during the June 27, 2011 incident, Plaintiff resisted, delayed and/or obstructed the arresting officers at a time when the officers were acting lawfully – that is, the officers had a proper basis for investigating, detaining and/or arresting the Plaintiff and were using reasonable force at the time.

Plaintiff's § 148(a)(1) conviction does not bar his § 1983 excessive force claim. However, it does limit that claim and imposes additional burdens on him. To establish a § 1983 excessive force claim in this case, Plaintiff must prove by a preponderance of the evidence either that: (1) the individual Defendant Officer used excessive force either at a time before or after Plaintiff's unlawful resistance, delay or obstruction (for example, a post-arrest use of unreasonable deadly force) or (2) though having the right to use *reasonable* force on Plaintiff because of his conduct in violation of § 148(a)(1), the individual Defendant Officer responded with *excessive* force.

B. Failure to Intervene to Prevent Constitutional Injury – 42 U.S.C. § 1983

Plaintiff's second claim is that certain individual Defendant Officers violated his constitutional rights under § 1983 by failing to intervene to prevent other law enforcement officers from using excessive force on him. Police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect/person through the use of excessive force. In order establish this claim against any Defendant

Officer, Plaintiff must prove by a preponderance of the evidence that:

1. The individual Defendant Officer was present when excessive force was used on the Plaintiff by a fellow police officer;

2. The individual Defendant Officer actually observed (or was aware of) the use of excessive force on the Plaintiff;

3. After observing that use of excessive force, the individual Defendant Officer was in a position where he could have realistically prevented further application of that excessive force; and

4. The individual Defendant Officer had sufficient time to so act but failed to do so.

For purposes of this claim, "excessive force" as used here has the same definition as set out in the above instructions for Plaintiff's § 1983 excessive force claim (see page 6 above). Additionally, the instruction as to effect of Plaintiff's § 148(a)(1) conviction cited above at pages 6 and 7 is also applicable to this claim.

C. Battery by a Police Officer

Plaintiff's third claim is that tone or more of the individual Defendant Officers harmed him by using unreasonable force to arrest him or to overcome his resistance. To establish this claim against any Defendant Officer, Plaintiff must prove all of the following by a preponderance of the evidence:

1. That individual Defendant Officer intentionally touched Plaintiff or caused him to be touched;

2. That individual Defendant Officer used unreasonable force to arrest or overcome his resistance;

3. That Plaintiff did not consent to the use of that force;

4. That Plaintiff was harmed; and

5. That the individual Defendant Officer's use of unreasonable force was a substantial factor in causing Plaintiff 's harm.

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

A police officer may use reasonable force to arrest or detain a person when he or she has reasonable cause to believe that that person has committed a crime. Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force.

A police officer who makes or attempts to make an arrest is not required to retreat or cease from his or her efforts because of the resistance or threatened resistance of the person being arrested.

The standard as to what constitutes reasonable or unreasonable force is the same for both the § 1983 claim and for a claim of battery by a police officer.

Therefore, you can apply the same jury instructions on that topic (see page 6 above) to this claim. Also, the instruction as to effect of Plaintiff's § 148(a)(1) conviction cited above at pages 6 and 7 is also applicable to this claim.

D. Negligence

Plaintiffs fifth claim is that one or more of the individual Defendant Officers were negligent and as a result he was injured. To establish this claim against any Defendant Officer, Plaintiff must prove all of the following by a preponderance of the evidence:

1. That the individual Defendant Officer was negligent;

2. That Plaintiff was harmed; and

3. That the individual Defendant Officer's negligence was a substantial factor in causing Plaintiff's harm.

Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in the individual Defendant Officer's situation.

A law enforcement officer may use reasonable force to detain and/or arrest a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the detention and/or arrest.

Plaintiff claims that one or more of the individual Defendant Officers used unreasonable force in detaining and/or arresting him. To establish this claim, Plaintiff must prove all of the following:

1. That the individual Defendant Officer used force in detaining and/or arresting Plaintiff;

2. That the amount of force used by that individual Defendant Officer was unreasonable;

3. That Plaintiff was harmed; and

4. That the individual Defendant Officer's use of unreasonable force was a substantial factor in causing Plaintiff's harm.

In deciding whether the individual Defendant Officer used unreasonable force, you must consider all of the circumstances of the detention and arrest, and determine what force a reasonable police officer in Defendant's position would have used under the same or similar circumstances. Among the factors to be considered are the following:

1. Whether Plaintiff reasonably appeared to pose an immediate threat to the safety of the individual Defendant Officer or others;

2. The seriousness of the crime at issue;

3. Whether Plaintiff was actively resisting or attempting to avoid arrest by flight; and

4. The individual Defendant Officer's tactical conduct and decisions before using force on Plaintiff.

Additionally, you may also consider the factors listed on page 6 in evaluating the use of force. Also, the instruction as to effect of Plaintiff's § 148(a)(1) conviction cited above at pages 6 and 7 is also applicable to this claim.

As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the "most reasonable" action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.

A police officer's use of deadly force is reasonable if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

E. Intentional Infliction of Emotional Distress

Plaintiff's sixth claim is that one or more of the individual Defendant Officers acted intentionally to caused him to suffer *severe* emotional distress. To establish this claim against any individual Defendant,

the Plaintiff must prove all of the following by a preponderance of the evidence that:

1. The conduct of that individual Defendant Officer was outrageous;

2. The Defendant Officer intended to cause Plaintiff emotional distress; or that Defendant acted with reckless disregard of the probability that Plaintiff would suffer emotional distress, knowing that Plaintiff was present when the conduct occurred;

3. The Plaintiff suffered severe emotional distress; and

4. The Defendant's conduct was a substantial factor in causing Plaintiff's severe emotional distress.

"Outrageous conduct" is conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

In deciding whether the individual Defendant Officers's conduct was outrageous, you may consider, among other factors, the following:

1. Whether the individual Defendant Officer abused a position of authority or a relationship that gave him real or apparent power to affect Plaintiff's interests;

2. Whether that Defendant knew that Plaintiff was particularly vulnerable to emotional distress; and

3. Whether Defendant knew that his conduct would likely result in harm due to mental distress.

It is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances.

A defendant acted with reckless disregard in causing a plaintiff emotional distress if:

1. The defendant knew that emotional distress would probably result from his conduct; or

2. The defendant gave little or no thought to the probable effects of his conduct.

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame.

"Severe emotional distress" is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it. Plaintiff is not required to prove physical injury to recover damages for severe emotional distress.

To the extent that Plaintiff's claim for intentional infliction of emotional distress rests on the use of force that any individual Defendant Officer used on him on June 27, 2011, the jury is instructed that a Defendant Officer's use of *reasonable* force in the context of a

detention or arrest situation cannot constitute "outrageous conduct" or action in reckless disregard of Plaintiff's interests/rights.

III. Damages

A. Compensatory and Nominal Damages

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the Plaintiff on any of his claims, you must determine his damages. Plaintiff has the burden of proving "compensatory" damages by a preponderance of the evidence. Compensatory damages means the amount of money that will reasonably and fairly compensate the Plaintiff for any injury you find was caused by a Defendant. You should consider the following:

1. The nature and extent of the injuries;

2. The loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future;

3. The mental or emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

4. The reasonable value of necessary medical care, treatment, and services received to the present time;

5. The reasonable value of necessary medical care, treatment, and services that with reasonable probability will be required in the future;

6. The reasonable value of wages, employment or business opportunities lost up to the present time;

7. The reasonable value of wages, employment or business opportunities that with reasonable probability will be lost in the future;

8. The reasonable value of necessary household help, services other than medical, and expenses required up to the present time; and/or

9. The reasonable value of necessary household help, services other than medical, and expenses that with reasonable probability will be required in the future.

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial.

The law which applies to this case authorizes an award of nominal damages as to Plaintiffs § 1983 claim. If you find for the Plaintiff but you find that the Plaintiff has failed to prove compensatory damages as

defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

B. Punitive Damages

If you find for the Plaintiff on his § 1983 or any other of his claims (other than for negligence) as to any individual Defendant Officer, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

Plaintiff has the burden of proving by *clear and convincing evidence* that punitive damages should be awarded, and, if so, the amount of any such damages. The clear and convincing evidence standard is higher than the preponderance of the evidence standard. To meet the clear and convincing standard, the Plaintiff must offer evidence that persuades you that his claim or contention is *highly probable.*

You may award punitive damages only if you find that the Defendant's conduct that harmed the Plaintiff was malicious, oppressive or in reckless disregard of the Plaintiffs rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is *mainly* for the purpose of injuring the Plaintiff. Conduct is in reckless disregard of the Plaintiff's rights if, under the circumstances, it reflects complete indifference to the Plaintiffs safety or rights, or if the Defendant acts in the face of a perceived risk that its actions will violate the Plaintiff's rights under federal law. An act or omission

is oppressive if the Defendant injures or damages or otherwise violates the rights of the Plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the Plaintiff.

You may impose punitive damages against one of the Defendants and not the others. Punitive damages may be awarded even if you award plaintiff only nominal, and not compensatory, damages.

IV. Concluding Instructions

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors. Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision.

Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone – including me – how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

A verdict form has been prepared for you. Please follow the instructions on the verdict form with care. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.

You will be permitted to separate at the recesses. During your absence, the courtroom may be locked although you can get access to the jury room. During any recess, you are not to talk about the case with anyone, and you are not to deliberate until all eight of you are back together in the jury room. While you are in

deliberations, the starting time each morning will be 8:45 a.m. and the stopping time will be 5:15 p.m.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SAMUEL CALHOUN ARRINGTON, individually, and through his next best friend, AURELIA CLEO BATTLE,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a public entity; DANIEL PENNINGTON, an individual; RUSS GRAYBILL, an individual; JOHNATHAN JORDAN, an individual; ERIC OLIVE, an individual; CHRISTIAN ARRUE, an individual; AND DOES 1 THROUGH 10, inclusive,

Defendants.

CASE NO.CV12-4698 GW(AGRx)
(Hon. George Wu, District Judge)
(Hon. Alicia G. Rosenberg, Magistrate Judge)

SPECIAL VERDICT FORM

(Filed Oct. 24, 2016)

WE, THE JURY in the above-entitled action, unanimously find as follows on the questions submitted to us:

QUESTION NO. 1: Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants violated his Fourth Amendment Constitutional Rights by using excessive force against him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO✓
OFFICER DANIEL PENNINGTON	YES___	NO✓
OFFICER JOHNATHAN JORDAN	YES___	NO✓
OFFICER ERIC OLIVE	YES___	NO✓
OFFICER CHRISTIAN ARRUE	YES___	NO✓

If you answered "No" as to each of the Defendants, skip to Question No. 5.

If you answered "Yes" as to any Defendant, proceed to Question No. 2.

QUESTION NO. 2: For each "Yes" response to Question No. 1, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was the cause of injury to him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 3.

QUESTION NO. 3: Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants committed a battery upon him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

If you answered "No" as to each of the Defendants, skip to Question No. 5.

If you answered "Yes" as to any Defendant, proceed to Question No. 4.

QUESTION NO. 4: For each "Yes" response to Question No. 3, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was a substantial factor in causing him injury?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 5.

QUESTION NO. 5: Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants negligently used excessive force against him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO ✓
OFFICER DANIEL PENNINGTON	YES___	NO ✓
OFFICER JOHNATHAN JORDAN	YES___	NO ✓
OFFICER ERIC OLIVE	YES___	NO ✓
OFFICER CHRISTIAN ARRUE	YES___	NO ✓

If you answered "No" as to Questions Nos. 1 and 5, please date and sign this form where indicated below.

If you answered "Yes" as to Question Nos. 2, 4, or 5 as to any Defendant, proceed to Question No. 6.

QUESTION NO. 6: For each "Yes" response to Question No. 5, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was a substantial factor in causing him injury?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 7.

QUESTION NO. 7: *If you answered "Yes" to Question No. 1, answer the following question. If you answered "No" as to all Defendants in Question No. 1, please proceed to Question No. 9.* Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants failed to intervene to prevent a violation of Plaintiff's constitutional rights?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

If you answered "No" as to each of the Defendants, skip to Question No. 9.

If you answered "Yes" as to any Defendant, proceed to Question No. 8.

QUESTION NO. 8: For each "Yes" response to Question No. 7, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was the cause of injury to him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___

OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 9.

QUESTION NO. 9: *If you answered "Yes" as to Question Nos. 2 or 4, answer the following question. Otherwise, please proceed to the section on Damages.* Has Plaintiff proved by a preponderance of the evidence that any of the following Defendants intentionally inflicted severe emotional distress on him?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

If you answered "No" as to each of the Defendants, skip to Question No. 11.

If you answered "Yes" as to any Defendant, proceed to Question No. 10.

QUESTION NO. 10: For each "Yes" response to Question No. 9, do you find that Plaintiff has proved by a preponderance of the evidence that the Defendant's conduct was a substantial factor in causing him injury?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please proceed to Question No. 11.

DAMAGES

If you gave any "Yes" responses to either Question Nos. 2, 4, 6, 8 or 10, please answer the following questions. Otherwise, please date and sign this form where indicated below.

QUESTION NO. 11: What is the total amount of compensatory damages suffered by Plaintiff? $_____.

If you did not enter an amount, skip to Question No. 13.

If you entered an amount, proceed to Question No. 12.

QUESTION NO. 12: *If you answered "yes" to Question No. 5 and you entered an amount in response to Question No. 11*, what percentage of responsibility for Plaintiff's harm do you assign to each of the following person's (Do not include any Defendants for which you did not find any liability above).

PLAINTIFF SAMUEL ARRINGTON	_____%
SERGEANT RUSS GRAYBILL	_____%
OFFICER DANIEL PENNINGTON	_____%
OFFICER JOHNATHAN JORDAN	_____%
OFFICER ERIC OLIVE	_____%
OFFICER CHRISTIAN ARRUE	_____%
TOTAL	**100%**

QUESTION NO. 13: *If you answered "yes" to Question No. 1 or 7, answer the following question. If you answered "No" as to all Defendants to both Questions 1 and 7, please proceed to Question No. 14.* Has Plaintiff proved by preponderance of the evidence that any of the following Defendants acted with malice, fraud or oppression?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

QUESTION NO. 14: *If you answered "yes" to Question No. 3 or 9, answer the following question.* Has Plaintiff proved by clear and convincing evidence that any of the following Defendants acted with malice, fraud or oppression?

Answer (check "Yes" or "No") following the name of each Defendant:

SERGEANT RUSS GRAYBILL	YES___	NO___
OFFICER DANIEL PENNINGTON	YES___	NO___
OFFICER JOHNATHAN JORDAN	YES___	NO___
OFFICER ERIC OLIVE	YES___	NO___
OFFICER CHRISTIAN ARRUE	YES___	NO___

Please date and sign below, and return this form to the Court. Thank you.

DATED: 10-24-2016

REDACTED
FOREPERSON OF THE JURY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Dept. North Valley I Hon. Haydn Zacky, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. SAMUEL CALHOUN ARRINGTON, DEFENDANT.	)))))))))	No. PA070853

San Fernando, California;
Wednesday, January 30, 2013

A.M. session

Upon the above date, defendant Samuel Arrington being present, appearing in propria persona; the people being present and represented by Guy Shirley, Deputy District Attorney, the following proceedings were held:

(Paige Moser, CSR 2669, official reporter.)

[2] Case Number:	PA070853
Case Name:	People vs. Samuel Arrington
San Fernando, CA	Wednesday, January 30, 2013
Dept. North Valley I	Haydn Zacky, Judge
Reporter:	Paige Moser, C.S.R. No. 2669
Time:	A.M. session

THE COURT: PA070853, people versus Samuel Calhoun Arrington.

Is that you, sir?

DEFENDANT ARRINGTON: Yes, it is.

THE COURT: Good afternoon.

And he's present, representing himself in pro per. We have stand-by counsel Arlene Binder present as well, and Guy Shirley is here for the people.

What are we today? Six of ten?

MR. SHIRLEY: Yes.

THE COURT: The matter was transferred here for trial.

Mr. Arrington, I want to see what we can do to settle this thing before trial. Okay?

DEFENDANT ARRINGTON: Sir, I've never been cuffed in court before today. It's a major problem.

THE COURT: Listen for a minute.

[3] DEFENDANT ARRINGTON: Okay.

THE COURT: I want to talk to you and see what we can do to settle this thing, because trials are very time-consuming and extremely costly, and, you know, if there's a way to settle this before trial, that certainly is something that I would like to explore with you.

I understand just, you know, given the nature of the charges, and in my brief conversation with Ms. Binder and Mr. Shirley – I understand what's going on here. Okay?

I also understand that the people have offered you a misdemeanor for time served, and I know that you've thought about that and considered that.

DEFENDANT ARRINGTON: Right.

THE COURT: Now, based on the nature of the charges, it may be your intention at some future point, if it hasn't already been done, you know, to file a civil lawsuit against the officer –

DEFENDANT ARRINGTON: It's already done, sir.

THE COURT: – and the department.

DEFENDANT ARRINGTON: That's why they're trying to force me to plead.

THE COURT: Let me explain something to you.

DEFENDANT ARRINGTON: Okay.

[4] THE COURT: I think that there may be a way for you to resolve this case before trial while still protecting your interests in terms of filing a civil lawsuit. If you want to, I'll even let you speak to Ms. Binder about this – what I'm going to say.

DEFENDANT ARRINGTON: Okay.

THE COURT: If you were to enter a no contest plea to a misdemeanor pursuant to what we call People versus West –

DEFENDANT ARRINGTON: Okay.

THE COURT: Are you familiar with that?

DEFENDANT ARRINGTON: No, sir, I'm not.

THE COURT: What that means is, is that your no contest plea cannot be used against you in a civil lawsuit, number one. And, number two, People versus West is a case that says that you will be entering into your plea because it's in your best interest to do so; your best interest being to get out of jail.

DEFENDANT ARRINGTON: Right.

THE COURT: And you could ask Ms. Binder. I know she's familiar with People versus West and she could explain it to you.

But a lot of times, people here in the court will say we're entering into this plea pursuant to People versus West because it's in their best [5] interest to do it. They want to the resolve this case. It's almost without admitting guilt, just let's get out of this case and move on with our life and the fact that you'd enter a no contest plea could not be used against you in a civil lawsuit.

DEFENDANT ARRINGTON: So can I vacate that plea at a later time?

THE COURT: Well, frankly, you could probably file a request to dismiss pursuant to 1203.4 at some future time, yes.

DEFENDANT ARRINGTON: Okay.

THE COURT: Because I think the offer is no probation and time served.

DEFENDANT ARRINGTON: Yes. Just straight out the door, nothing.

MR. SHIRLEY: He could probably file to have it expunged immediately, I would guess, just because there's no probation.

THE COURT: That's kind of what I was thinking. Because, typically, when a person files a request for dismissal under 1203.4 of the penal code, it's usually done after the period of probation expires, and the judge would look at your request and say: Has this person ever violated probation or have they picked up any new cases after the conviction?

[6] But you're not going to be placed on probation, so you wouldn't be in jeopardy of ever violating probation. So I can't really see any – anything that would prevent you from filing that almost immediately.

But, again –

I'll let you speak to Ms. Binder if you want. She is stand-by counsel. Normally I don't allow that, but as a friend of the court, she can explain to you what I'm saying. So you don't think that I'm, you know, trying to pull a fast one on you.

DEFENDANT ARRINGTON: Actually, did you come from Palmdale, Lancaster?

THE COURT: Yes.

DEFENDANT ARRINGTON: Anyway, I've heard nothing but good things about you, sir, so –

THE COURT: That's nice to hear.

DEFENDANT ARRINGTON: – that's a start. That's all I can say right there.

THE COURT: You've done your research.

DEFENDANT ARRINGTON: Yeah. Anyway, I've seen a few cases on the computer.

Anyway, my main point was bringing up on the record U.S. versus Cellitti. That's a 7th Circuit 2004 case, and it's 387 F.3rd 618.

[7] THE COURT: What is that case?

DEFENDANT ARRINGTON: Anyway, the situation with this case was it's a nine-person violent altercation, where the policemen showed up and he was the one standing, so they arrested him without doing any investigation first.

Anyway, it was no probable cause for the arrest, because they didn't see him committing a crime. He was just where a crime had been committed.

And the same situation with my case, is when the officer – that's why I have the transcript here. I marked certain –

THE COURT: Can I –

DEFENDANT ARRINGTON: I'm not going to get into all that.

THE COURT: I just want to ask you a question, because it almost seems to me that what you're getting at – correct me if I'm wrong – but you're getting at whether or not there is probable cause to ever detain you. Is that what you're getting at?

DEFENDANT ARRINGTON: Exactly. Because in my transcript, sir, on line 18 –

Anyway, I can't get to it as easily as I can –

THE COURT: Let me just –

[8] DEFENDANT ARRINGTON: I can basically tell you what's up.

This officer says in his statement, when he said he was 30 yards away and I was on the sidewalk, when he first recognized me standing next to my bike, not doing any type of crimes, not running around in traffic, like they said I was doing –

Anyway, he listened to me. I said, "These guys stole my bike earlier. Now you call the cops on me." The officer stated he was 30 yards away. He almost hit me with his vehicle, which was right in front of the Comfort Inn, and it has a camera right there.

But he changed his story to being 30 yards away, which I'm not threatening to him. But he said also he

didn't give me any direct commands. He doesn't remember what he said to me. That's in the transcript.

THE COURT: Okay.

DEFENDANT ARRINGTON: So it's not consensual. He doesn't ask me to do anything. I keep riding my bike with my earplugs on.

THE COURT: Hold on. Let me stop you for a minute, only because it sounds to me that you're getting into the probable cause, whether to stop and [9] detain you, which is really a 1538.5 motion to suppress.

DEFENDANT ARRINGTON: Right. I understand.

THE COURT: But that's not why we're here today. I don't know if one of those has already been litigated and heard by Judge Giss. That I don't know.

But let me just jump ahead for a second. Because hearing what you're saying – and I understand your wish –

DEFENDANT ARRINGTON: Right.

THE COURT: – that type of motion needs to be properly noticed.

That's not why we're here today.

DEFENDANT ARRINGTON: I understand that.

THE COURT: So my intent is I want to try and settle this thing.

DEFENDANT ARRINGTON: Right.

THE COURT: Now, my question is, do you want a moment to speak to Ms. Binder –

DEFENDANT ARRINGTON: I'll converse with Ms. Binder.

THE COURT: And remember what I said. A no contest plea cannot be used against you in a civil case, and you can enter your plea pursuant to People [10] versus West, and there's –

DEFENDANT ARRINGTON: When I talk to you, I say People versus West.

THE COURT: I'll even mention it to you during the plea if you want to take a deal, if you want to settle it today. I'll say: "Are you entering into this plea freely and voluntarily because it's in your best interest to do so pursuant to People versus West?"

DEFENDANT ARRINGTON: Okay.

THE COURT: "And do you agree there is a factual basis based only on the charging document pursuant to people versus Holmes?" I think that protects you in a civil lawsuit.

Do you want a moment with Ms. Binder?

DEFENDANT ARRINGTON: One second. Can I get a copy of this conversation today possibly? It's very short.

THE COURT: I can't order transcripts all the time, but I'll write down the cases for you.

DEFENDANT ARRINGTON: Okay. And I'll get the minutes, of course.

THE COURT: Yes. Do you want to talk to Ms. Binder?

DEFENDANT ARRINGTON: Yes.

[11] THE COURT: Do you want to leave your stuff here or take it with you?

DEFENDANT ARRINGTON: Am I leaving the courtroom?

THE COURT: You can talk to her right there unless you'd rather talk in private. You tell me, Mr. Arrington.

DEFENDANT ARRINGTON: That's fine. Because I'm all cuffed up, it's kind of inconvenient.

THE COURT: I'll be out in a minute.

(Recess taken.)

THE COURT: This is PA070853, people versus Arrington, and he is present with stand-by counsel, Mr. Shirley for the people.

The court has just had a consideration with Mr. Arrington in the presence of counsel about resolving the case, and the people have offered a misdemeanor no probation time-served offer.

Correct, Mr. Shirley?

MR. SHIRLEY: Yes.

THE COURT: And would it be a reduction of count 2 or an added count 3?

MR. SHIRLEY: I think it would be better to add a count 3.

THE COURT: 148(a)(1)?

MR. SHIRLEY: Correct.

[12] THE COURT: So it will be 148(a)(1) of the penal code, which is a straight misdemeanor, which is resisting, delaying, or obstructing a peace officer.

DEFENDANT ARRINGTON: All right.

THE COURT: Mr. Arrington will be entering a no contest plea to that added count pursuant to People versus West and People versus Holmes.

The court also discussed penal code section 1016(3) with Mr. Arrington, and People versus West, which is 3 Cal.3d 995, which both state that the legal . . .

(The court reporter's archived notes were incomplete, and this is where it concluded.)