No. _____

In the Supreme Court of the United States

KEISCHA WILSON AND MICHAEL WILSON, SR.,
Petitioners,

v.

CITY OF LONG BEACH, HARRY HAMPTON, JUSTIN KRUEGER AND BRIAN NYSTEDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Heck* Bar Apply to Section 1983 Claims for Unreasonable Seizures Predicated on the Use of Excessive Force by Police Officers?

2. If a Person is Convicted of Violating a California Statue Which Criminalizes Deterring or Preventing an Executive Officer From Performing any Duty Imposed Upon Such Officer by Law, If Multiple Acts of Resistance Could Form the Basis For the Conviction, and the Record is Not Clear As To Which Act(s) Formed The Basis Of The Conviction, Would Success in a Subsequent § 1983 Action "Necessarily Imply" the Invalidity of the Conviction Such That It Must Be Barred By *Heck v. Humphrey*?

3. Should The Heck *Bar* Be Applied Differently If The Underlying Conviction Was Based On A Jury Verdict Rather Than A Plea?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Not applicable. Petitioners are individuals.

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INTRODUCTION

The "Heck" Bar

In *Heck*, the Supreme Court held that a civil litigant's claim for damages under 42 U.S.C. §1983 is barred if "a judgment in favor of the civil plaintiff would necessarily imply the invalidity of his criminal conviction or sentence," unless his conviction has already been invalidated. *Heck v. Humphrey* (1994) 512 U.S. 477, 487. To properly apply *Heck's* bar against certain damage actions, a district court must analyze the relationship between the plaintiff's §1983 claim and the charge on which he was convicted. As the Supreme Court explained, the relevant question is whether success in a subsequent §1983 action would "necessarily imply" or "demonstrate" the invalidity of the earlier conviction. *Id*. The Court then provided an example of the type of §1983 action which would render a prior conviction invalid, and set forth in Footnote 6, the grounds for the *Heck* Bar, with the following hypothetical:

> "A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. (This is the common definition of that offense. [citations omitted]) He then brings a §1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this §1983 action, he would have to negate an element of the offense of which he had been convicted . . . . [Thus] the §1983 action will not lie. *Heck*, at 486-487 n.6 (*emphasis in original*)

> *citing*, *People v. Peacock*, 68 N.Y.2d 675, 496 N.E.2d 683, 505 N.Y.S.2d 594 (1986); 4 C. Torcia, Wharton's Criminal Law § 593, p. 307 (14th ed. 1981).) (*emphasis in original*)

Hence, the *Heck* Bar holds that if a civil judgment in favor of the plaintiff would "necessarily imply" the invalidity of that plaintiff's prior criminal conviction, that plaintiff's suit is barred *Heck,* 512 U.S. at 487.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Central District of California is reported at *Wilson v. City of Long Beach*,____ F. App'x____, 2014 U.S. App. LEXIS 6118, 2014 WL 1303594 (9th Cir. Cal. Apr. 2, 2014); Petitioners' Appendix ("App.") A at 1-6.

The opinions of the District Court in this matter, *Keischa Wilson and Michael Wilson, Sr. v. City of Long Beach*, Case Number 2:09-cv-03544-PJW, for which this petition is filed are: the Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment (Docket No. 35; App. F at 22-33) and the Judgment on the Verdict for Defendant(s) (Docket No. 68-1; App B at 7-8).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 2, 2014. The Wilsons then filed a timely Petition for Rehearing En

Banc which was denied on May 13, 2014. App. C at 9-10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reprinted in Petitioners' Appendix:

1. 42 U.S.C. § 1983 (App. D at 11);
2. California Penal Code § 69 (App. D at 11);
3. California Penal Code § 148(a)(1) (App. D at 12-15);
4. New York Consolidated Laws Service Penal § 205.30 (App. D at 15);
5. Burns Indiana Statutes Annotated § 35-44.1-3-1(a) (App. D at 15-18).

Additionally, and not listed in the Appendix, Pennsylvania Consolidated Statutes § 5104 states:

> A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means of justifying or requiring substantial force to overcome the resistance.

STATEMENT OF THE CASE

This Petition presents the issue of whether the "*Heck* Bar" should be applied to bar §1983 actions for unreasonable seizures predicated on the use of

excessive force by litigants who have been convicted of criminal statutes sounding in "resisting arrest."

There is a significant divergence of authority among the circuits, as well as a significant internal inconsistency within the Ninth Circuit as to the extent to which *Heck* bars §1983 actions for unreasonable seizures predicated on the use of excessive force. This divergence of authority is rooted in a fundamental lack of consensus in the circuits on the issue of whether it is possible for a finding that a defendant resisted a lawful arrest to coexist with a finding that the police used excessive force to subdue him.

Specifically, this case presents the issue whether the "Heck Bar" should be applied to bar the 1983 actions of petitioners Keischa and Michael Wilson, who suffered severe personal injuries from blunt force trauma inflicted by Long Beach Police Department officers at the conclusion of a convoluted 5-7 minute encounter with police officers, which resulted in the Wilsons' arrest. The Ninth Circuit held that because the Wilsons' were convicted by a jury of violating California Penal Code Section 69, commonly known as using "threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law...," the Wilsons' were properly barred under *Heck* from being able to recover under section 1983 for excessive force inflicted upon them prior to the time at which their arrest had been effectuated.

The Ninth Circuit's decision warrants review because the *Heck* Bar is fundamentally misapplied to Section 1983 claims for unreasonable seizures predicated on the use of excessive force by police

officers, and in misapplying *Heck* in this manner, the Ninth Circuit is in direct conflict with the California Supreme Court, which has specifically ruled that success in a plaintiff's §1983 action does not imply the invalidity of that plaintiff's conviction for resisting arrest, reasoning that "a defendant might resist a lawful arrest to which the officers might respond with excessive force to subdue him." *Yount v. City of Sacramento* (2008) 43 Cal. 4th 885.

Moreover, because it is undisputed that multiple acts could have given rise to the Wilsons' convictions, and the record does not reflect which acts gave rise to the Wilsons' convictions, success in the Wilsons' 1983 Claims would not necessarily imply the invalidity of their convictions warranting review of the Ninth Circuit's misapplication of the *Heck* bar in this instance.

FACTUAL BACKGROUND

The Underlying Incident

This case arises out of allegations of Civil Rights violations which occurred during the course of an encounter between Plaintiffs/Petitioners, Keischa Wilson and Michael Wilson, Sr. and law enforcement. Specifically, the Wilsons sustained physical injuries from blunt force trauma and baton strikes which occurred during an altercation with Defendants, Long Beach Police Officers Harry Hampton, Bryan Nystedt, and Justin Krueger on May 9, 2008, who responded to a call regarding a complaint of loud music at a party at the Wilsons' residence and, after the altercation, arrested the Wilsons.

The altercation between Micheal and Keischa Wilson and law enforcement officers lasted for approximately 5-7 minutes and involved various acts of resistance on the part of the Wilsons and force on the part of the officers. Although the versions of events related by the Wilsons and the involved Officers are contradictory, the following analysis of the Officers' versions of the events, reveals numerous acts of alleged physical resistance attributable to Keischa and Michael Wilson that could have given rise to their convictions for a violation of *Penal Code* Section 69, including the following acts:

1. According to Officer Hampton, during their initial conversation, he told Keischa Wilson that he was giving her a "warning" and she responded by pushing Officer Hampton in his chest and later punching him prior to any substantial force being used against her. (Record ("R.") at 198:24-201:16.[1]

2. Both Officers Hampton and Nystedt testified that Michael Wilson Sr. pushed Officer Nystedt in the street, while Officer Nystedt was attempting to arrest Michael Wilson Jr. (the Wilsons' son), prior to any substantial force being used against Michael Wilson Sr. (R. at 206:5-208:2; R. at 234:13-235:18.)

3. Both Officers Hampton and Nystedt testified that Michael Sr. engaged in numerous confrontational acts, and violent acts of resistance in the street while

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[1] All Citations to the "Record" ("R.") may be found in the Appellants' Excerpts of Record, filed on August 27, 2013, with the Ninth Circuit in the matter of *Wilson v. City of Long Beach*, Case: 12-55700, Docket 24.

attempting to interfere with their efforts to arrest his son. (R. at 206:5-211:17; R. at 234:13-237:19.)

4. Both Officers Hampton and Nystedt testified that after the altercation in the street, Michael Sr. evaded arrest by running down the alley adjacent to the apartment complex. (R. at 210:20-214:4; R. at 238:20-240:2.)

5. Officer Hampton testified, that while in the alley, Mr. Wilson turned towards him in a "fighting stance" necessitating Hampton's further use of force. (R. at 211:18-212:25.)

6. Officer Hampton testified that while in the carport, Mrs. Wilson attempted to interfere with Officer Nystedt's' arrest of her husband by jumping on Nystedt's back, and later tried to punch officer Hampton, necessitating a further use of force. Officer Nystedt testified that at this time, Mrs. Wilson was pulling him back. (R. at 218:1-221:22; R. at 241:17-242:3.)

7. Officer Krueger testified that while in the carport, Mrs. Wilson forcibly interfered with their efforts to arrest her husband by embracing Mr. Wilson. (R. at 255:14-258:9.)

8. Officers Krueger and Nystedt testified that while in the carport, Michael Sr. used force to prevent their efforts to detain him by trying to get up after laying prone on the ground. (R. at 243:7-244:22; R. at 258:20-259:14.)

After these events, the Wilsons were tightly handcuffed. Force was used at multiple intervals during the aforementioned events and culminated in a

broken arm, wrist and finger, suffered by Keischa Wilson, and a fractured elbow, head and face injuries suffered by Michael Wilson. Additionally, Michael Wilson was subjected to deadly force when he was struck in the head by batons.

The Criminal Convictions

As a result of the aforementioned incident on May 9, 2008, the Wilsons were each charged with violating *California Penal Code* section 69 requiring a finding that the Wilsons: (1) willfully and unlawfully used violence or a threat of violence to try to prevent or deter an executive officer from performing the officer's lawful duty; and (2) intended to prevent or deter the executive officer from performing the officer's lawful duty. The Wilsons elected to proceed with a jury trial rather than plead guilty to the charge. On April 16, 2009 following a jury trial, the Wilsons were convicted of violating *California Penal Code* section 69 during the altercation.

The following is a verbatim account of the instructions that were actually given to the jury in *People v. Wilson*, *et al*., Case No. NA 078345:

> "The defendants are charged in counts 2 through 4 with trying to prevent or deter an executive officer from performing that officer's duty, in violation of penal code section 69.
>
> To prove that the defendant is guilty of this crime, the people must prove that:
>
> 1. The defendant willfully and unlawfully used violence or a threat of violence to try to prevent

> or deter an executive officer from performing the officer's lawful duty; and
>
> 2. When the defendant acted, he or she intended to prevent or deter the executive officer from performing the officer's lawful duty.
>
> Someone commits an act willfully when he or she does it willingly or on purpose.
>
> An executive officer is a government official who may use his own discretion in performing his job duties. A Long Beach police officer is an executive officer.
>
> A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.
>
> Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act.
>
> The duties of a long beach police officer include detaining and arresting subjects and issuing a citation or warning.
>
> A peace officer is not lawfully performing his duties if he is unlawfully arresting or detaining someone or using unreasonable or excessive force in his duty." Docket 34, 1:9-2:16, citing, Volume 6, pages 1852, line 12 through 1853, line21; App. G at 54-56. (*emphasis added*)

Although the term "excessive force" was later defined for the jury, the jury was not instructed that <u>*any*</u> finding of excessive force by the involved Officers constituted a complete defense to the charged crime.

App. G at 34-63. Rather, the jury was told that a conviction for a violation of Penal Code §69 required merely a finding that the Wilsons: (1) willfully and unlawfully used violence or a threat of violence to try to prevent or deter an executive officer from performing the officer's lawful duty; and (2) intended to prevent or deter the executive officer from performing the officer's lawful duty. Those "duties" included issuing a citation/warning and detaining/arresting a subject.

The Court prefaced these instructions by admonishing the jury: "[y]ou must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." App. G at 38. Additionally, after reading all of the instructions, the Court again repeated, "[t]he attorneys will present their arguments now. ... Whatever they say now is not evidence." App. G at 63.

The record fails to show which acts formed the basis of the Wilsons' convictions.

The Civil Lawsuit

On May 19, 2009, the Wilsons filed a civil lawsuit in the United States District Court for Federal Civil Rights violations under 42 U.S.C. § 1983 arising out of violations of excessive force used during the aforementioned altercation. (Docket No. 1.) The Wilsons also alleged pendant state law claims for battery. (*Id*.)

The Summary Judgment Ruling

On December 30, 2010, the City of Long Beach moved for Summary Judgment on the grounds that the

Wilsons' claims under section 1983 and claims under state law battery were barred pursuant to *Heck v. Humphrey* (1994) 512 U.S. 477 ("Heck") as a result of their convictions on April 16, 2009. The Wilsons opposed the Motion on January 21, 2011, on the grounds that numerous acts could have given rise to the Penal Code §69 conviction, and on the grounds that success in their §1983 claims would not "necessarily imply" the invalidity of their prior convictions under Penal Code §69.

The District Court granted the Motion for Summary Judgment in part and denied it in part. App. F at 22-23. Specifically, the U.S. District Court Judge, the Honorable Patrick J. Walsh ("Judge Walsh") ruled that the Wilsons' Civil Rights action for Excessive Force was barred by *Heck* "up to the time [they] were arrested and handcuffed." App. F at 28. Judge Walsh additionally ruled that "Plaintiffs' claims regarding the excessive force following their 'arrests', ... were not resolved by the jury in the criminal case and, therefore, are not barred under Heck." App. F at 23. Hence, the Court held that pursuant to the criminal convictions under *California Penal Code* section 69, the Wilsons were barred from seeking damages arising out of the use of excessive force during the entire altercation prior to the times at which they were handcuffed.

The Wilsons additionally alleged that after the time they were handcuffed, the Long Beach police officers continued to use excessive force against them. The Court ruled that the *Heck* bar did not encompass allegations of excessive force used after the Wilsons were handcuffed, and allowed the Wilsons to proceed to

trial only on their allegations of excessive force after they had been handcuffed. App. F at 31.

The Limited Scope of the Civil Trial

On February 21, 2012, the Wilsons proceeded to trial. The Wilsons, the involved officers and expert witnesses on both sides provided testimony. Over the Plaintiffs/Appellants' objections, the only issue presented to the jury was whether excessive force was used by the officers *after* the Wilsons had been handcuffed.

The Disputed Jury Instruction Number 17 and the Verdict Form

Over the Wilsons' objection, the Court instructed the jury as follows concerning the determination of the allowable damages under section 1983:

"In the aftermath of the incident with Defendant Long Beach Officers Hampton, Nystedt, and Krueger on May 9, 2008, Plaintiffs Keischa Wilson and Michael Wilson, Sr., were charged with obstructing or resisting the officers in the performance of their duties. Plaintiffs went to trial and were convicted by a jury. In reaching this verdict, the jury *necessarily concluded* that the officers were not using excessive force against the Wilsons at the time the Wilsons were obstructing or resisting them. Thus, this issue having already been resolved, it is not for you to decide whether excessive force was used prior to the time that the officers began the process of handcuffing the Wilsons. You are being asked to determine whether the officers used excessive force from that point forward." R. at 76, as modified by the Court, see, R. at 68: 9-17, see also, R. at 82-83. (*emphasis added*) *See also*, App. E at 20-21, Instruction

No. 17 (however, the Court modified this instruction as quoted herein).

The Appeal to the Ninth Circuit

The Wilsons lost their trial and filed a timely appeal to the Ninth Circuit. The majority held in pertinent part:

> "...We agree with the conclusion of the district court. The jury in the state court criminal case was instructed that it could convict the Wilsons of resisting arrest only if it found the police were acting lawfully, and lawful was defined to include the absence of excessive force. The jury convicted and that judgment still stands. This case is materially the same as *Beets v. County of Los Angeles*, 669 F.3d 1038 (2012), where the criminal jury convicted after being instructed that it could not do so unless the officer acted lawfully and did not use excessive force. ..." App. A at 2.

However, in his five page dissent, Justice Watford pointed out the flaws in the majority's logic. The first of which being the assumption that the jury convicted the Wilsons for *all* conduct occurring throughout their *entire encounter* with the officers.

> "The majority's disposition of this case rests on the unstated assumption that the jury in the Wilsons' criminal trial necessarily determined the lawfulness of the officers' actions throughout the whole course of their encounter with the Wilsons. The majority's assumption could be true only if the jury had actually been instructed that, to convict, it had to find that the officers

> acted lawfully throughout the whole course of their encounter with the Wilsons. But the jury in the Wilsons' criminal trial never received such an instruction. [¶] The jury never received that instruction because it's not an accurate statement of California law." App. A at 3.

The second flaw in the majority's reasoning, analyzed in depth by Justice Watford, is:

> "For reasons that remain a mystery to [Justice Watford], [the Court] suggested in *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) (en banc), that the analysis is different when the defendant's conviction results from a jury verdict rather than a guilty plea." App. A at 4.

Justice Watford went on to point out first, that this "suggestion" in *Smith* (contained in a footnote) is dicta, and second, that the authority cited by the *Smith* Court to support such a statement was inaccurate and misplaced. App. A 4-5. "The only authority *Smith* cited for that proposition was *Susag* [*v. City of Lake Forest*, 115 Cal. Rptr. 2d 269, 274 (Ct. App. 2002)], but that case holds no such thing." App. A at 5.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE *HECK* BAR IS FUNDAMENTALLY MISAPPLIED TO SECTION 1983 CLAIMS FOR UNREASONABLE SEIZURES PREDICATED ON THE USE OF EXCESSIVE FORCE BY POLICE OFFICERS.

In establishing a bar against 1983 claims that call into question the lawfulness of a civil plaintiff's prior criminal conviction, *Heck* set forth the analogy of a

defendant convicted of resisting a lawful arrest who subsequently would seek to bring a section 1983 action based on the common law cause of action for malicious prosecution. The common law action for malicious prosecution includes as an element, the termination of the prior criminal proceeding in favor of the accused. Clearly in such a case, a determination that the defendant had been lawfully arrested, would preclude a finding that the criminal proceedings terminated in favor of the accused and the 1983 action could not lie. *Heck,* 512 U.S. at pp. 487 fn.6. Hence, the *Heck* bar is premised on the analogy of a civil claim of *malicious prosecution* that is barred upon a determination that the civil litigant has been lawfully arrested. Conversely, post-*Heck*, 1983 claims for unreasonable seizures predicated on *excessive force* claims are not automatically precluded by criminal convictions that establish the lawfulness of a defendant's arrest, because a factual determination that a defendant was resisting a lawful arrest can coexist with a finding that the police used excessive force to subdue that defendant.

The Ninth Circuit's ruling rests on the presumption that the Wilsons' conviction for violating California Penal Code Section 69 rendered the officers' uses of force against them inherently lawful throughout their entire 5-7 minute encounter with Long Beach Police Officers. This presumption rests on the following premise, which is essential to understanding the Ninth Circuit's misapplication of *Heck* in this case: **The Ninth Circuit has fundamentally failed to recognize that a lawful arrest can be effectuated through the unreasonable use of force by police officers.** As will be discussed in Part V,. *infra.*, in

direct contrast to the Ninth Circuit, the California Supreme Court has recognized this inherent flaw in the application of *Heck* to excessive force cases. *Yount v. City of Sacramento,* (2008) 43 Cal 4th 885, 899. Put another way, as affirmed by the Third Circuit, (discussed in Part III., infra.), it is possible for a factual determination that a defendant was resisting arrest to coexist with a finding that the police used excessive force to subdue that defendant. *Nelson v. Jashurek* (3d Cir. 1997) 109 F.3d 142, 146. As the California Supreme Court reasons:

> "A claim alleging that [a police officer's] use of deadly force was not a reasonable response to [a 1983 plaintiff's] criminal acts of resistance does not 'implicitly question the validity of [his] conviction' for resisting the officers in this instance (*Muhammad v. Close* (2004) 540 U.S. 749, 751 [158 L. Ed. 2d 32, 124 S. St. 1303] and thus is not barred by *Heck.* (*McCann v. Neilsen, supra*, 466 F.3d at pp. 622-623; *Gregory v. Oliver* (N.D.Ill. 2002) 226 F.Supp. 2d 943, 952. ['in some instances a Section 1983 claim does not contradict the events that resulted in a plaintiff's convictions – two obvious examples would be an officer's unjustified imposition of excessive force in an overreaction to an arrestee's assault, or the imposition of excessive force after the event that led to a resisting-arrest conviction. . .'(fn. omitted]… ." *Yount*, 43 Cal 4th at 899.

As the California Supreme Court further reasoned,

> "[A] defendant might resist a lawful arrest, to which the arresting officers might respond with

> excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to liability on the part of the arresting officer." *Id*.

Hence, in addition to failing to recognize that multiple acts could have given rise to the Wilsons' convictions, the Ninth Circuit has fundamentally misapplied *Heck* by failing to recognize that success in the Wilsons Section 1983 claims would not necessarily render their convictions invalid, because a finding that the officers used excessive force could coexist with a determination that such uses of force were an overreaction to the Wilsons' violations of Cal. Pen. Code Section 69.

II. THE NINTH CIRCUIT'S ERRONEOUS DECISION CANNOT BE RECONCILED WITH *HECK V. HUMPHREY*.

A. Because Multiple Acts Could Have Given Rise to Wilsons' Convictions, and the Record Does Not Reflect Which Acts Gave Rise to Wilsons' Convictions, Success in their 1983 Claims Would Not Necessarily Imply the Invalidity of their Convictions.

In *Heck*, the Supreme Court held that a civil litigant's claim for damages under 42 U.S.C. §1983 is

barred if "a judgment in favor of the civil plaintiff would necessarily imply the invalidity of his criminal conviction or sentence," unless his conviction has already been invalidated. *Heck v. Humphrey* (1994) 512 U.S. 477, 487. To properly apply *Heck's* bar against certain damage actions, a district court must analyze the relationship between the plaintiff's §1983 claim and the charge on which he was convicted. As the Supreme Court explained, the relevant question is whether success in a subsequent §1983 action would "necessarily imply" or "demonstrate" the invalidity of the earlier conviction.

In the Wilsons' criminal trial, the jury evaluated a 5-7 minute encounter involving Michael and Keischa Wilson and three Long Beach Police Department Officers. During that encounter, it was undisputed that multiple acts could have given rise to the Wilsons' convictions for preventing or deterring the police officers' duties, including several acts of physical resistance, "fighting stances", and attempts to flee attributable to the Wilsons, prior to the time in which severe force was used against them at the conclusion of the confrontation. See, "Statement of the Case," *supra*. Because the record is unclear as to which of the Wilsons' acts resulted in their criminal conviction, success in their 1983 action for excessive force would not necessarily imply the invalidity of their criminal conviction sufficient to impose the *Heck* bar.

B. Because the Wilsons' Criminal Jury Was Never Instructed That It Must Acquit if Excessive Force Was Used at any time During the Subject Incident, the Record is Unclear as to Which Act(s) Gave Rise to the Criminal Convictions

As set forth above, it is undisputed that multiple acts could have given rise to the Wilsons' convictions, and the jury in the Wilsons' criminal case could easily have convicted them of violating California Penal Code Section 69 before *any* force was used by any officer. However, the *Wilson* majority erroneously held that:

> "The jury in the state court criminal case was instructed that it could convict the Wilsons of resisting arrest only if it found the police were acting lawfully, and lawful was defined to include the absence of excessive force. The jury convicted and that judgment still stands." App. A at 2.

As the majority failed to consider, the jury in the criminal trial was never instructed that it had to acquit the Wilsons if, at any time during the encounter, excessive force was used. App. G at 34-63.

In his five page dissent, Justice Watford clearly points out this flaw in the majority's logic: the assumption that the jury convicted the Wilsons for *all* conduct occurring throughout their entire encounter with the officers, without being so instructed:

> "The majority's disposition of this case rests on the unstated assumption that the jury in the Wilsons' criminal trial necessarily determined the lawfulness of the officers' actions throughout

> the whole course of their encounter with the Wilsons. The majority's assumption could be true only if the jury had actually been instructed that, to convict, it had to find that the officers acted lawfully throughout the whole course of their encounter with the Wilsons. But the jury in the Wilsons' criminal trial never received such an instruction. [¶] The jury never received that instruction because it's not an accurate statement of California law." App. A at 3.

III. THE NINTH CIRCUIT'S ERRONEOUS DECISION CANNOT BE RECONCILED WITH OTHER CIRCUITS' RULINGS ON THE HECK BAR.

A. The Ninth Circuit Opinion Directly Conflicts With the Opinion in *Nelson v. Jashurek*, Third Circuit, 1997.

The Ninth Circuit opinion in *Wilson* conflicts with the Third Circuit case, *Nelson v. Jashurek* (3d Cir. 1997) 109 F.3d 142, in which Mr. Nelson was convicted by a jury for resisting arrest. In *Nelson*, the Court allowed Nelson's § 1983 action to proceed even though a jury convicted Nelson for the crime of resistance. In *Nelson*, the plaintiff ("Nelson") "disobeyed [the arresting officer,] Jashurek's orders to halt and instead ran away." *Id*. at 144. The two struggled and finally, Nelson sat in a chair. *Id*. "Nelson claims that ... when he later got up from the chair, Jashurek beat him with a flashlight and used excessive and malicious force to subdue him." *Id*.

The criminal jury found the Defendant, Nelson, guilty of violating 18 Pa. Cons. Stat. Ann. § 5104

"preventing a public servant from effecting a lawful arrest" by creating a "substantial risk of bodily injury to the public servant... or employ[ing] means justifying or requiring *substantial force* to overcome the resistance." *Id*. at 145 (*emphasis in original*). This statute is substantially similar to California's Penal Code §69, using "threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law." Although the statutes are basically the same, they are afforded different treatment by the Ninth Circuit and the Third Circuit when analyzing and/or applying *Heck*. Specifically, the Ninth Circuit applied the *Heck* Bar and the Third Circuit did not, resulting in two decisions that are directly at odds with each other.

The Third Circuit in *Nelson* noted that the criminal court "told the jury that if Nelson's actions 'did not justify substantial force by [Jashurek], you must find Mr. Nelson not guilty.'" *Nelson*, 109 F.3d at 145. Since Nelson was convicted, the Third Circuit reasoned that the jury "... must have concluded that Jashruek was justified in using 'substantial force' ... ." *Id*. Yet, the Third Circuit ultimately held that:

> "... a finding that Jashurek used excessive 'substantial force' would not imply that the arrest was unlawful and thus the Supreme Court's example of how *Heck v. Humphrey* can bar a civil action is not applicable here." *Id*.

The Third Circuit explained that, in footnote six of *Heck*, the U.S. Supreme Court intended to demonstrate that a civil suit for an unreasonable seizure predicated on a *false* arrest would be barred so long as a conviction for resisting the same arrest remained unimpaired.

Nelson, 109 F.3d at 145. As the Third Circuit reasoned, under the Supreme Court's hypothetical, the *lawfulness* of the arrest is a necessary element of the criminal offense of resisting arrest. Thus, to prevail in a §1983 action for false arrest, the plaintiff would have to negate the "lawfulness" element of the resisting arrest offense. *Id*. The same may not be said, however, in a civil suit for an unreasonable seizure predicated on the use of excessive force. In that case, a plaintiff would not necessarily have to negate the element of the arrest's lawfulness to prevail. *Id*. ("[T]his case is different because [the plaintiff] does not charge that [the defendant officer] falsely arrested him. Instead, [the plaintiff] charges that [the defendant officer] effectuated a lawful arrest in an unlawful manner.") *Id*. (*Emphasis added*.)

Conversely, and over a vehement dissent, the Ninth Circuit came to an exact opposite conclusion in *Wilson*. In *Wilson*, the Ninth Circuit held that "[t]he jury in the state court criminal case was instructed that it could convict the Wilsons of resisting arrest only if it found the police were acting lawfully, and lawful was defined to include the absence of excessive force. The jury convicted and that judgment still stands." App. A at 2.

As evidenced by the stark contrast between the Third and Ninth circuits, the circuit split as to whether to apply the *Heck* bar to unreasonable seizures predicated on the use of excessive force is in need of resolution.

B. The Ninth Circuit Opinion Directly Conflicts With the Opinion in *Martinez v. City of Albuquerque*, Tenth Circuit, 1999.

The *Nelson* trend caught on and a couple of years later, its reasoning was affirmed in *Martinez v. City of Albuquerque*, 184 F.3d 1123 (10th Cir. 1999). In *Martinez*, a §1983 plaintiff, Candido Martinez, had attempted to solicit sex from an undercover police officer. *Id*. at 1124. Upon being approached by surveillance officers, he began to flee in his vehicle and was chased by the officers. *Id*. "A few seconds later, Martinez stopped his vehicle, locked the doors, and rolled down the window." *Id*. Martinez then claimed he did nothing wrong and refused to get out of the car. *Id*. One of the officers reached in the window and Martinez apparently rolled it up on the officer's arm. *Id*. "Another officer struck Martinez in the face and unlocked the vehicle. The officers then arrested Martinez." *Id*. These events took place in only two to three minutes. *Id*.

Martinez was subsequently convicted of "resisting arrest," defined in part under the New Mexico statue as "resisting or abusing any . . . peace officer in the lawful discharge of his duties." *Martinez*, 184 F.3d 1123, at 1126. In determining that a criminal conviction under that aspect of the New Mexico statute would not preclude the Martinez's excessive force action under §1983, the Tenth Circuit reasoned as follows:

> "Presumably in that case, Martinez' state court conviction would be based on the fact that he resisted arrest by failing to heed the arresting officer's instructions and closing his vehicle's

> window on the arm of one of the arresting officers. That might justify the officers' use of reasonable force to effectuate Martinez' arrest, but would not authorize the officer to employ excessive or unreasonable force in violation of Martinez' Fourth Amendment rights. Thus, whether Martinez resisted arrest by failing to heed instructions and closing his vehicle's window on the officer's arm is likewise a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest. The state court's finding that Martinez resisted a lawful arrest . . . . may coexist with a finding that the police officers used excessive force to subdue him. [*Citation*] In other words, a jury could find that the police officers effectuated a lawful arrest of Martinez in an unlawful manner." *Martinez v. City of Albuquerque*, 184 F.3d 1123, at 1126-1127; *citing*, *Nelson*, *supra*, 109 F.3d at 145-146. 2014 U.S. App. LEXIS 6118.[2]

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[2] Likewise, the Fourth Circuit in *Riddick v. Lott* (4th Cir. S.C. 2006) 202 Fed. Appx. 615, relying on *Smith v. Hemet*, *supra*, and *Martinez v. City of Albuquerque*, *supra*, reversed the lower court's dismissal of Plaintiff Michael Riddick's § 1983 claim. The Court held that the timing of events was unclear and must be examined because "[i]f ... there is no legal nexus between the officer's alleged punch and Riddick's resistance and assault; that is, the alleged punch occurred, independently, either before Riddick resisted arrest, or after his resistance had clearly ceased, then a successful § 1983 suit for excessive force would not imply invalidity of the conviction." *Riddick v. Lott*, 202 Fed. Appx. at 616.

The criminal statute in *Martinez* is very similar to the statute at issue in *Nelson*, and to California Penal Code §69 in that "lawfulness" is an element of each of the crimes. However, similar to the Third circuit, the Tenth circuit understood that the *Heck* bar was not meant to eliminate §1983 actions for unreasonable seizure predicated on the use of excessive force. The Tenth circuit correctly held that the crime of resistance may coexist with the officer's use of excessive force without subjecting the conviction to jeopardy.

C. The Ninth Circuit Opinion Directly Conflicts With the Opinion in *Van Gilder v. Baker*, Seventh Circuit, 2006.

The soundness of the reasoning in *Nelson* and *Martinez* was later also upheld in the Seventh Circuit in the case of *Van Gilder v. Baker* (7th Cir., 2006) 435 F.3d 689. In *Van Gilder*, a plaintiff ("Van Gilder") involved in an altercation with a police officer in an emergency room was ultimately convicted of misdemeanor charges of resisting a law enforcement officer. *Id.* at 692. Van Gilder violently resisted arrest resulting in the Officer (Baker) punching Van Gilder and Van Gilder kicking Officer Baker in the head while Van Gilder was handcuffed to a gurney. Officer Baker responded to the kick by punching Van Gilder "repeatedly in the face with a closed fist." *Id*. As a result, Van Gilder suffered bruises and broken bones around his eyes. *Id*. In determining that *Heck* was not a bar to the Plaintiff's civil action under §1983, the Seventh Circuit reasoned as follows:

> "Van Gilder does not collaterally attack his conviction, deny that he resisted Baker's order to comply with the blood draw, or challenge the

> factual basis presented at his change of plea hearing. Rather, Van Gilder claims that he suffered unnecessary injuries because Baker's response to his resistance -- a beating to the face that resulted in bruises and broken bones -- was not, under the law governing excessive use of force, objectively reasonable. *See Graham v. Connor*, 490 U.S. 386, 397 (1989)[*other citations omitted*]
>
> Were we to uphold the application of *Heck* in this case, it would imply that once a person resists law enforcement, he had invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as the wanted -- and be shielded from accountability under civil law -- as long as the prosecutor could get the plaintiff convicted on a charge of resisting. This would open the door to undesirable behavior and gut a large share of the protections provided by §1983." *Van Gilder v. Baker*, 435 F.3d at 692.

Thus, directly at odds with the Ninth Circuit, the Seventh circuit, preceded by the Tenth and Third circuits, furthers the premise that *Heck* does not bar §1983 actions predicated on the use of excessive force even when a person is convicted of resisting law enforcement.

D. The Ninth Circuit Opinion Directly Conflicts With the Opinion in *Dyer v. Lee*, Eleventh Circuit, 2007.

Dyer v. Lee, Eleventh Circuit, 2007

The Eleventh Circuit, citing *Van Gilder*, came to ultimately the same conclusion in the case of *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007). In *Dyer*, plaintiff Ruth Dyer left a restaurant intoxicated. *Id*. at 877. She sat in her boyfriend's car awaiting his arrival to drive her home. *Id*. Three officers arrived and she explained the situation; however the officers requested that she perform field sobriety tests anyway. *Id*. Dyer refused and told officers to just arrest her. *Id*. She was handcuffed behind her back, despite requesting front handcuffs due to an arm injury. *Id*. The officers then attempted to read her Florida's implied consent notice but she kept interrupting so one of the officers put his hand over her mouth. *Id*. at 877-78. In response, Dyer kicked the officer. *Id*. at 878. Dyer then somehow slipped her cuffed hands in front of her body. *Id*. The officers responded by shoving and slamming her head into the car, kneeing her in the legs and lower back and pepper spraying her. *Id*. They then used an "unauthorized cuffing technique" to recuff her hands behind her back and placed her in the patrol car. *Id*. Without any provocation on the part of Dyer, officers then opened the door and pepper sprayed her a second time. *Id*. She "pled no contest to a single charge of resisting with violence but because of a subsequent parole violation the verdict was changed to guilty... ." *Id*.

Dyer brought a claim for excessive force against the officers. Defendants argued that, although using

excessive force does not negate an element of the crime of resisting arrest, "a successful § 1983 suit would establish what would have been an affirmative defense to the underlying offence, namely self-defense." *Id*. at 879. Defendants argued that "pleading guilty to resisting arrest with violence, the plaintiff cannot now say that her resistance was justified, which it would have been if the defendants used excessive force." *Id*.

The court was not convinced. Following the logic set forth above, the Court reasoned:

> "There is ... no argument that Dyer's initial kick could have been justified as self-defense. Even if the rest of her kicks were in direct response to the defendants' excessive force, the conviction and sentence would still be able to stand based on that initial kick." *Id*. at 882.

The Court went on compare *Dyer* to *Heck* and held "... here, as in the second example in *Heck*, there is a version of the facts which would allow the conviction to stand. That is sufficient under *Heck*, to allow the § 1983 suit to proceed." *Id.* at 883.[3]

Thus, by the Eleventh circuit's logic, when multiple acts of resistance could give rise to a conviction, a § 1983 claim predicated on the use of excessive force

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[3] *But see*, *Hudson v. Hughes*, 98 F.3d 868, 873 (5th Cir. 1996) and *Buckenberger v. Reed*, 342 Fed. Appx. 58, 2009 U.S. App. LEXIS 18648 (5th Cir. La. 2009), applying the *Heck* bar to §1983 actions for excessive force when the criminal defendant's use of self-defense would have been a justification defense to the crime at issue (battery and/or resistance).

would not necessarily invalidate that conviction and *Heck* is no bar.

IV. THE NINTH CIRCUIT'S ERRONEOUS DECISION CANNOT BE RECONCILED WITH THE NINTH CIRCUIT'S PRIOR RULINGS ON THE HECK BAR

A. The Evolution of the *Heck* Doctrine in the Ninth Circuit

Smith v. City of Hemet, Ninth Circuit (en banc), 2005

In 2005, the Ninth Circuit, en banc, decided *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. Cal. 2005). In *Smith*, the Ninth Circuit analyzed whether the *Heck* bar would apply to a section 1983 action for excessive force brought by a person convicted of violating *California Penal Code* 148.

Just like section 69, *California Penal Code* section 148 is not limited to resisting *arrest*. Rather, it reaches those who resist law enforcement in any duty, including "activities that might not lead to an arrest, such as conducting an investigation ... ." *Smith*, 394 F. 3d at 696. Thus, the *Smith* Court parsed out the facts of the underlying incident into two distinct phases: an "investigative phase" and an arrest phase. *Id*. at 698.

The court understood that, like the Wilsons' case,

> "Smith engaged in at least three or four acts in violation of § 148(a)(1) before the officers used force against him. These acts of willful resistance, delay, or obstruction occurred prior to the time that the officers had determined to

> arrest him for any criminal conduct. Indeed, they occurred in the course of the officers' *lawful* performance of their duty to investigate whether an offense had occurred." *Id*. at 696. (*emphasis in original*)

The *Smith* Court then reasoned:

> "Each of these acts constituted a violation of § 148(a)(1) sufficient to warrant the filing of a criminal charge. Each could support a conviction under that section for obstructing the criminal investigation. *See*, *e.g*., *In re Muhammed C*., 95 Cal. App. 4th at 1329-30 (holding that defendant violated § 148(a)(1) when he refused officers' repeated requests to step away from the patrol car); *People v. Green*, 51 Cal. App. 4th 1433, 1438, 59 Cal. Rptr. 2d 913 (Cal. Ct. App. 1997) (affirming § 148(a)(1) conviction in which defendant obstructed an investigating police officer by verbally intimidating a suspected victim because 'the attempt to intimidate the suspected victim *impeded the investigation*. This is the very evil which the Legislature sought to proscribe by the enactment of section 148.') (*emphasis added*)." *Id*. at 697.

The Court held that *Heck* was no bar to Smith's claim for excessive force, concluding:

> "As we have explained, a § 1983 action is not barred under *Heck* unless it is clear from the record that its successful prosecution would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid. Because on the record before us we cannot determine

> that the actions that underlay Smith's conviction upon his plea of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction." *Id*. at 699. (*emphasis in original.*)

***Hooper v. County of San Diego*, Ninth Circuit , 2011**

In flagrant conflict with *Wilson*, in *Hooper v. County of San Diego* (9th Cir. Cal. 2011) 629 F.3d 1127, the Ninth Circuit affirmed the California Supreme court in evaluating the 1983 action of the plaintiff, one Deborah Hooper, who was initially detained by a loss prevention officer at a drug store on suspicion of shoplifting... ." *Hooper*, 629 F. 3d at 1133. According to the plaintiff's allegations, she then struggled with a San Diego County Sheriff, who then deployed a police dog against her, resulting in severe head injuries to Ms. Hooper." *Id.* at 1129. Ms. Hooper later pled guilty to a violation of *California Penal Code* section 148(a)(1). *Id*. at 1130. In recognizing that an officer's use of force did not negate the lawfulness of the arrest, the *Hooper* Court affirmed *Yount*, reasoning as follows:

> It is sufficient for a valid conviction under § 148(a)(1) that at some time during a 'continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It does not matter that the officer might also, at some other time during that same 'continuous transaction,' have acted unlawfully." *Hooper*, 629 F. 3d at 1132.

The *Hooper* Court ultimately held that:

> "The chain of events constituting Hooper's arrest was, in the words of the Court in *Yount*, 'one continuous transaction.' A holding in Hooper's § 1983 case that the use of the dog was excessive force would not 'negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Hooper's] attempt to resist it [when she jerked her hand away from Deputy Terrell].'" *Id*. at 1133, *quoting*, *Yount*, *supra*, 43 Cal. 4th at 899.

Hence, the Ninth Circuit's ruling in *Wilson* absolutely cannot be reconciled with its prior ruling *Hooper*. Since the *Hooper* Court recognized that the officers' use of excessive force could coexist with their lawful arrest, affirming the ruling of the California Supreme Court on the exact same issue presented herein, (discussed directly below) the instant writ is warranted.

V. THE NINTH CIRCUIT'S ERRONEOUS DECISION DIRECTLY CONFLICTS WITH A CALIFORNIA SUPREME COURT RULING WHICH HOLDS THAT THE *HECK* BAR IS FUNDAMENTALLY MISAPPLIED TO SECTION 1983 CLAIMS FOR UNREASONABLE SEIZURES PREDICATED ON THE USE OF EXCESSIVE FORCE BY POLICE OFFICERS

As discussed in part I *supra.,* in *Yount v. City of Sacramento* (2008) 43 Cal. 4th 885, the California Supreme Court evaluated a case involving a plaintiff accidentally shot in the buttocks by the defendant

officer (Shrum) during the course of an arrest. Specifically, the shooting occurred following a protracted altercation in the parking lot of a convenience store, in which Plaintiff Yount, who was intoxicated and belligerent, kicked out the side window of a patrol car, and while resisting being placed in leg restraints, was shot by a police officer, who mistakenly believed he was deploying a taser. *Id.*, at 890-891. Plaintiff Yount was ultimately convicted of violating *California Penal Code* §148(a). *Id.* at 888. In rejecting the Defendant's argument that *Heck* barred the plaintiff's §1983 action, the California Supreme Court specifically determined that Plaintiff Yount's success in his §1983 action would not imply the invalidity of his conviction, reasoning that "a defendant might resist a lawful arrest to which the officers might respond with excessive force to subdue him", further holding:

> The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' [*citations omitted*] *Id.* at 888.

Hence, in direct conflict to the Ninth Circuit, Court of last resort in California has held that *Heck* bar is fundamentally misapplied to 1983 claims for unreasonable seizures predicated on the use of excessive force by police officers.

VI. THE NINTH CIRCUIT'S RELIANCE ON THE JURY VERDICT AS A REASON FOR APPLYING THE HECK BAR IS ERRONEOUS, AND CANNOT BE RECONCILED WITH THIRD CIRCUIT PRECEDENT

In analyzing whether the *Heck* bar should apply, a conviction based on a jury verdict is no different than a conviction based on a plea. *See, e.g.*, *Nelson*, *supra*, 109 F.3d 142. As expressed above and by Justice Watford in his dissenting opinion, "[f]or reasons that remain a mystery to me, [the Court] suggested in *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) (en banc), that the [*Heck*] analysis is different when the defendant's conviction results from a jury verdict rather than a guilty plea." App. A, at 4.

The *Smith* Court, in dictum in footnote 5, misplacing reliance on *Susag*, and contrary to its sister Circuits, stated:

> "Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction. [*citation*] Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would '*necessarily* imply the invalidity of his conviction." *Smith*, 394 F. 3d at 699, fn.5, *citing*, *People v. McIntyre*, 115 Cal. App. 3d 899, 910-11; also citing, *Susag*, *supra*, 94 Cal App 4th at 1410. (*emphasis in original*)

This statement does not logically follow because, if multiple acts could give rise to a conviction and a jury does not determine which specific facts form the basis of that conviction, then it cannot be said that a subsequent civil action would *necessarily* imply the invalidity of the conviction simply because it is based on a jury verdict. *See e.g.*, *Yount*, *supra*, 43 Cal. 4th 885; *see also*, *Hooper*, *supra*, 629 F.3d 1127.

Regardless, the dictum, in *Smith* is an incorrect statement of California law as set forth above. A jury does not consider the *entire* transaction and is forced to convict based on any one act of resistance to an officer in lawful performance of any duty. A jury is never instructed that it cannot convict if the officer engaged in excessive force at *any time* during the entire encounter. *See*, App. A at 3 (Watford, J., dissenting.)

However, the *Wilson* Court relied on *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012) as support for the incorrect proposition set forth in *Smith*, *supra*. The *Wilson* Court held that "[t]his case is materially the same as *Beets*... ."[4] App. A at 2. *Beets*, relying on

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[4] *Beets* is factually distinct from *Wilson* and involved a conviction based on an assault with a deadly weapon, not a crime of "resistance" pursuant to Penal Code §69 or §148. In *Beets*, after a failed attempt to arrest the decedent, Glen Patrick Rose ("GPR"), GPR jumped into a truck and drove it straight at the officer (Deputy Winter) who, fearing for his life, shot and killed GPR. *Beets*, 669 F.3d at 1040-1041. GPR's accomplice, Morales, was then "charged and convicted of, among other things, three counts of assault with a deadly weapon (*i.e.*, the vehicle) on a peace officer." *Id*. at 1041. GPR's parents then brought a §1983 action claiming Winter used excessive force in shooting GPR. The *Beets* Court made clear that "there [were] not multiple factual basis for [the] conviction..." *Beets*, 669 F.3d at 1045.

Smith, held that the *Heck* Bar applied in that case. Although not expressly stated in *Beets*, the *Wilson* Court relied on *Beets* to further the incorrect notion, set forth in dicta in *Smith*, that, based on the same set of facts, the *Heck* bar applies if a person is convicted by a jury but not if he or she takes a plea. This is fundamentally incorrect and furthers a misapplication of the law in California. This treatment of *Heck* also furthers a state of conflict amongst the Circuits. *See, e.g.*, *Nelson*, *supra*, 109 F.3d 142 (refusing to apply the *Heck* bar to a § 1983 excessive force claim even though the Plaintiff was previously convicted by a jury for the crime of resistance).

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted.

August 8, 2014

Respectfully Submitted,

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APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-55700
D.C. No. 2:09-cv-03544-PJW

[Filed April 2, 2014]

KEISCHA WILSON; MICHAEL WILSON, Sr., as individuals,

Plaintiffs - Appellants,

v.

CITY OF LONG BEACH; HARRY HAMPTON; JUSTIN S. KRUEGER; BRIAN NYSTEDT,

Defendants - Appellees.

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Patrick J. Walsh, Magistrate Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted December 2, 2013
Pasadena, California

Before: SCHROEDER, CLIFTON, and WATFORD, Circuit Judges.

Plaintiffs Michael Wilson, Sr. and Keischa Wilson appeal the district court's judgment in favor of Defendants. We affirm.

The Wilsons challenge the district court's grant of partial summary judgment in favor of the Defendants based on its conclusion that the Wilsons' convictions barred their claims for excessive force and for battery based upon Defendants' actions up to the time of their arrests, under *Heck v. Humphrey*, 512 U.S. 477 (1994). We agree with the conclusion of the district court. The jury in the state court criminal case was instructed that it could convict the Wilsons of resisting arrest only if it found the police were acting lawfully, and lawful was defined to include the absence of excessive force. The jury convicted and that judgment still stands. This case is materially the same as *Beets v. County of Los Angeles*, 669 F.3d 1038 (2012), where the criminal jury convicted after being instructed it could not do so unless the officer acted lawfully and did not use excessive force. We held the civil case was barred by *Heck*. We must reach the same conclusion here.

The Wilsons also challenge the district court's instruction to the jury that it was not to consider evidence of excessive force "prior to the time that the officers began the process the handcuffing the Wilsons." That instruction was consistent with the conclusion that the Wilsons' claim based on alleged misconduct prior to that time was barred under *Heck*.

AFFIRMED.

WATFORD, Circuit Judge, dissenting:

The majority's disposition of this case rests on the unstated assumption that the jury in the Wilsons' criminal trial necessarily determined the lawfulness of the officers' actions throughout the whole course of their encounter with the Wilsons. The majority's assumption could be true only if the jury had actually been instructed that, to convict, it had to find that the officers acted lawfully throughout the whole course of their encounter with the Wilsons. But the jury in the Wilsons' criminal trial never received such an instruction.

The jury never received that instruction because it's not an accurate statement of California law. To be guilty of violating California Penal Code § 69, the defendant must obstruct an officer who is lawfully performing his duties. If the defendant obstructs an officer who is lawfully performing his duties, the fact that the officer subsequently uses excessive force later in the encounter doesn't negate the defendant's guilt of the earlier-committed offense. *Yount v. City of Sacramento*, 183 P.3d 471, 482 (Cal. 2008); *see also Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1132 (9th Cir. 2011). Thus, when the defendant is convicted of violating Penal Code § 69 during an encounter involving multiple acts of obstruction, some of which occurred while the officer was lawfully performing his duties but some of which occurred while the officer was using excessive force, a court asked to decide whether the bar imposed by *Heck v. Humphrey*, 512 U.S. 477 (1994), applies must determine which act (or acts) formed the basis for the conviction.

When making that determination in the context of convictions obtained by guilty plea, courts examine the record from the underlying criminal case to see whether it's clear which act or acts formed the factual basis for the plea. If the record is clear on that score, the bar imposed by *Heck* can apply. *See, e.g.*, *Sappington v. Bartee*, 195 F.3d 234, 236–37 (5th Cir. 1999) (per curiam). But when the record isn't clear, such that it's possible the defendant pleaded guilty to acts of obstruction that occurred *before* the officer used excessive force, courts have held that the *Heck* bar doesn't apply. *See, e.g.*, *Hadley v. Gutierrez*, 526 F.3d 1324, 1331 (11th Cir. 2008); *Bush v. Strain*, 513 F.3d 492, 498–500 (5th Cir. 2008); *Dyer v. Lee*, 488 F.3d 876, 882 (11th Cir. 2007); *VanGilder v. Baker*, 435 F.3d 689, 692 (7th Cir. 2006); *Sanford v. Motts*, 258 F.3d 1117, 1120 (9th Cir. 2001). In that circumstance, success on an excessive force claim under 42 U.S.C. § 1983 won't *necessarily* imply the invalidity of the defendant's conviction, as *Heck* requires. 512 U.S. at 487 n.7. Any other rule would mean that "once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages." *VanGilder*, 435 F.3d at 692.

For reasons that remain a mystery to me, we suggested in *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) (en banc), that the analysis is different when the defendant's conviction results from a jury verdict rather than a guilty plea. There, we made the sweeping assertion that, regardless of the jury instructions given in the criminal trial, "a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive

force would '*necessarily* imply the invalidity of his conviction.'" *Id.* at 700 n.5 (quoting *Susag v. City of Lake Forest*, 115 Cal. Rptr. 2d 269, 274 (Ct. App. 2002)). According to the *Smith* footnote, unlike in the guilty-plea context, we don't examine the record to determine whether the defendant might have been convicted for acts that occurred before the officer used excessive force. Instead, if the jury found the defendant guilty, we just assume that it found the officers acted lawfully throughout their entire encounter with the defendant. The only authority *Smith* cited for that proposition was *Susag*, but that case holds no such thing. We later quoted this same language from *Smith* in *Beets v. County of Los Angeles*, 669 F.3d 1038 (9th Cir. 2012), without examining the soundness of its premise. *See id.* at 1045.

I can't think of any reason why the analysis under *Heck* should proceed differently for convictions resulting from a jury verdict as opposed to a guilty plea, and neither *Smith* nor *Beets* offered any justification for that distinction. I don't think we're bound by the language from the *Smith* footnote or the quotation of that language in *Beets*, since in both cases the language was dicta. In *Smith*, it was offered as one of three independently sufficient reasons for distinguishing a case relied on by the dissent. In *Beets*, the language quoted from *Smith*'s footnote was not only surplusage but also of no relevance, because in that case there weren't multiple acts of obstruction that could have served as the basis for the criminal conviction, as is true in this case. That's why the majority is simply wrong in declaring that this case and *Beets* are "materially the same." Maj. op. at 2.

If we followed our normal mode of analysis under *Heck*, it's clear we would have to reverse. Examining the jury instructions given in the criminal trial, it's impossible to tell which acts of obstruction the Wilsons' criminal convictions were based on, so we can't say that success on their excessive force claims will *necessarily* imply that those convictions are invalid. The jury at the criminal trial wasn't instructed to find the Wilsons not guilty if the officers used excessive force at any point during the encounter. Instead, the instructions required the jury to find only that at some point during the encounter the Wilsons obstructed the officers while they were lawfully performing their duties. Mr. and Mrs. Wilson both engaged in acts of obstruction before the officers used any force against them, and for all we know their convictions were based on those acts alone. A jury in the § 1983 action could find that the officers responded to that initial obstruction with excessive force, and doing so would not in any way call into question the validity of the Wilsons' convictions. As a result, the bar imposed by *Heck* doesn't apply here. The majority has erred in holding otherwise.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NUMBER
CV 09-3544-PJW

[Filed March 20, 2012]

Keischa Wilson, et al.,	)
	)
PLAINTIFF(S)	)
	)
v.	)
	)
City of Long Beach, et al.,	)
	)
DEFENDANT(S).	)
	)

JUDGMENT ON THE VERDICT FOR DEFENDANT(S)

This action having been tried before the Court sitting with a jury, the Honorable Patrick J. Walsh, Magistrate Judge presiding; the issues having been duly tried and the jury having duly rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff(s):

Keischa Wilson and Michael Wilson, Sr. take nothing; that the action be dismissed on the merits;

Clerk, U. S. District Court

Dated: March 20, 2012 By /s/ Celia Anglon-Reed
Deputy Clerk

At: 3:40 p.m.

cc: Counsel of record

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-55700

D.C. No. 2:09-cv-03544-PJW
Central District of California, Los Angeles

[Filed May 13, 2014]

KEISCHA WILSON; MICHAEL WILSON, Sr., as individuals,	)
Plaintiffs - Appellants,	)
v.	)
CITY OF LONG BEACH; HARRY HAMPTON; JUSTIN S. KRUEGER; BRIAN NYSTEDT,	)
Defendants - Appellees.	)

ORDER

Before: SCHROEDER, CLIFTON, and WATFORD, Circuit Judges.

Judges Clifton has voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended. Judge Watford has voted to grant the petition.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing En Banc, filed on April 16, 2014, is denied.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1983. Civil action for deprivation of rights.

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

California Penal Code § 69. Resisting executive officers

Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is

punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.

California Penal Code § 148. Resisting public or peace officers or emergency medical technicians in discharge of their duties; Removal of weapon from person or presence of public or peace officer

(a)

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

(2) Except as provided by subdivision (d) of Section 653t, every person who knowingly and maliciously interrupts, disrupts, impedes, or otherwise interferes with the transmission of a communication over a public safety radio frequency shall be punished by a fine not exceeding one thousand dollars ($1,000), imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(b) Every person who, during the commission of any offense described in subdivision (a), removes or takes any weapon, other than a firearm, from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment in a county jail not to exceed one year or pursuant to subdivision (h) of Section 1170.

(c) Every person who, during the commission of any offense described in subdivision (a), removes or takes a firearm from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment pursuant to subdivision (h) of Section 1170.

(d) Except as provided in subdivision (c) and notwithstanding subdivision (a) of Section 489, every person who removes or takes without intent to permanently deprive, or who attempts to remove or take a firearm from the person of, or immediate presence of, a public officer or peace officer, while the officer is engaged in the performance of his or her lawful duties, shall be punished by imprisonment in a county jail not to exceed one year or pursuant to subdivision (h) of Section 1170.

In order to prove a violation of this subdivision, the prosecution shall establish that the defendant had the specific intent to remove or take the firearm by demonstrating that any of the following direct, but ineffectual, acts occurred:

(1) The officer's holster strap was unfastened by the defendant.

(2) The firearm was partially removed from the officer's holster by the defendant.

(3) The firearm safety was released by the defendant.

(4) An independent witness corroborates that the defendant stated that he or she intended to remove the firearm and the defendant actually touched the firearm.

(5) An independent witness corroborates that the defendant actually had his or her hand on the firearm and tried to take the firearm away from the officer who was holding it.

(6) The defendant's fingerprint was found on the firearm or holster.

(7) Physical evidence authenticated by a scientifically verifiable procedure established that the defendant touched the firearm.

(8) In the course of any struggle, the officer's firearm fell and the defendant attempted to pick it up.

(e) A person shall not be convicted of a violation of subdivision (a) in addition to a conviction of a violation of subdivision (b), (c), or (d) when the resistance, delay, or obstruction, and the removal or taking of the weapon or firearm or attempt thereof, was committed against the same public officer, peace officer, or emergency medical technician. A person may be convicted of multiple violations of this section if more than one public officer, peace officer, or emergency medical technician are victims.

(f) This section shall not apply if the public officer, peace officer, or emergency medical technician is disarmed while engaged in a criminal act.

New York Consolidated Laws Service Penal § 205.30. Resisting arrest

A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person.

Resisting arrest is a class A misdemeanor.

Burns Indiana Code Ann. § 35-44.1-3-1. Resisting law enforcement

(a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties;

(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(3) flees from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor, except as provided in subsection (b).

(b) The offense under subsection (a) is a:

(1) Level 6 felony if:

(A) the offense is described in subsection (a)(3) and the person uses a vehicle to commit the offense; or

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

(2) Level 5 felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes serious bodily injury to another person;

(3) Level 3 felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of another person; and

(4) Level 2 felony if, while committing any offense described in subsection (a), the person operates a vehicle in a manner that causes the death of a law enforcement officer while the law enforcement officer is engaged in the officer's official duties.

(c) If a person uses a vehicle to commit a felony offense under subsection (b)(1)(B), (b)(2), (b)(3), or (b)(4), as part of the criminal penalty imposed for the

offense, the court shall impose a minimum executed sentence of at least:

(1) thirty (30) days, if the person does not have a prior unrelated conviction under this section;

(2) one hundred eighty (180) days, if the person has one (1) prior unrelated conviction under this section; or

(3) one (1) year, if the person has two (2) or more prior unrelated convictions under this section.

(d) Notwithstanding IC 35-50-2-2.2 and IC 35-50-3-1, the mandatory minimum sentence imposed under subsection (c) may not be suspended.

(e) If a person is convicted of an offense involving the use of a motor vehicle under:

(1) subsection (b)(1)(A), if the person exceeded the speed limit by at least twenty (20) miles per hour while committing the offense;

(2) subsection (b)(2); or

(3) subsection (b)(3);

the court may notify the bureau of motor vehicles to suspend or revoke the person's driver's license and all certificates of registration and license plates issued or registered in the person's name in accordance with IC 9-30-4-6(b)(3) for the period described in IC 9-30-4-6(d)(4) or IC 9-30-4-6(d)(5). The court shall inform the bureau whether the person has been sentenced to a term of incarceration. At the time of conviction, the court may obtain the person's current driver's license and return the license to the bureau of motor vehicles.

(f) A person may not be charged or convicted of a crime under subsection (a)(3) if the law enforcement officer is a school resource officer acting in the officer's capacity as a school resource officer.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 09-3544 PJW

[Filed February 24, 2012]

KEISCHA WILSON and MICHAEL WILSON, Sr.,

Plaintiffs,

v.

CITY OF LONG BEACH, HARRY HAMPTON, JUSTIN KRUEGER, and BRIAN NYSTEDT,

Defendants.

JURY INSTRUCTIONS

* * *

JURY INSTRUCTION NO. 15

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 either of the plaintiffs on one or more of his or her claims, you must determine what plaintiff's damages are. The plaintiffs have the burden

of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiffs for any injury you find was caused by the defendants in the process of handcuffing and transporting the plaintiffs. You should consider the following:

(1) the nature and extent of the injuries;

(2) the disability and loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future;

(3) the mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced 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.

* * *

JURY INSTRUCTION NO. 17

In the aftermath of the incident with Defendant Long Beach Police Officers Hampton, Nystedt, and Krueger on May 9, 2008, Plaintiffs Keischa Wilson and Michael Wilson, Sr., were charged with obstructing or resisting the officers in the performance of their duties. Plaintiffs went to trial and were convicted by a jury. In reaching this verdict, the jury necessarily concluded that the officers were not using excessive force against the Wilsons at the time the Wilsons were obstructing or resisting them. Thus, this issue having already been

resolved, it is not for you to decide whether excessive force was used prior to the time that the officers subdued the Wilsons.

You are being asked to determine whether the officers used excessive force after the point when they had gained control of the Wilsons and the Wilsons were no longer obstructing or resisting the officers. It is for you to decide when that occurred.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 09-3544 PJW

[Filed March 31, 2011]

KEISCHA WILSON and MICHAEL WILSON, Sr.,

Plaintiffs,

v.

CITY OF LONG BEACH, et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

Before the Court is Defendant police officers' and the City of Long Beach's motion for summary judgment. They argue that Plaintiffs' civil rights action for excessive force is barred under *Heck v. Humphrey*, 512 U.S. 477, 478 (1994), because the jury in the underlying criminal case determined that the officers

had not used excessive force in arresting them. For the reasons set forth below, the Court agrees and holds that Plaintiffs' claims alleging excessive force up to the time of arrest are barred under *Heck*. Plaintiffs' claims regarding excessive force following their arrests, however, were not resolved by the jury in the criminal case and, therefore, are not barred under *Heck*.

II.

STATEMENT OF FACTS

On May 9, 2008, Defendant police officers responded to a complaint of a loud party. When police arrived, they made contact with Plaintiff Keischa Wilson. What transpired thereafter is in dispute. According to the police, they were simply attempting to issue a warning to the Wilsons about a loud party and, after being confronted by the Wilson family, they were compelled to use force to subdue what turned into an unruly group. Plaintiffs have a different version. In their view, the police were rude and aggressive and, without provocation, used excessive force to severely beat Plaintiffs. According to Plaintiffs, the police continued to use force even after Plaintiffs were handcuffed and not resisting.

There are some things that the parties agree on. In the melee, Plaintiff Keischa Wilson suffered broken arms, a broken wrist, and a broken finger. Plaintiff Michael Wilson, Sr.'s elbow was fractured and dislocated. He also suffered injuries to his head and face.

Following the incident, Plaintiffs were charged with violating California Penal Code § 69, Obstructing or

Resisting Executive Officers in Performance of Their Duties. This statute provides:

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

(Cal. Pen. Code § 69.)

Plaintiffs pleaded not guilty and went to trial. Though the prosecutor initially presented the case as a series of discrete acts by the Wilsons giving rise to the charges (Reporter's Transcript ("RT") 618-24), she shifted gears during trial and elected to pursue the charges as one continuous course of conduct. (RT 1801-04.) In discussions with the court regarding this new strategy, the Wilsons' counsel--the same counsel representing them in this civil case--noted that, "[T]o take that to its extreme, that means that if [one of the officers] used excessive force *at any time*, the whole 148 gets thrown out; is that correct?"[1] (RT 1804 (emphasis added).) The prosecutor agreed. (RT 1804.) As a result, the court determined that a unanimity instruction was not required. (RT 1804.)

---

[1] Counsel's reference to "148" refers to California Penal Code § 148, resisting arrest, a lesser included offense of deterring or preventing an officer under California Penal Code § 69.

At the close of the case, the jury was instructed that, in order to find the Wilsons guilty, the prosecutor had to prove beyond a reasonable doubt that they tried to prevent or deter the police officers from performing their "lawful" duties. (RT 1852.) "Lawful" was defined for the jury to include the absence of unreasonable or excessive force. (RT 1853.) The jury was instructed, "A peace officer is not lawfully performing his duties if he is unlawfully arresting or detaining someone *or using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest* or detention." (RT 1856 (emphasis added).) The jury was admonished, "[Y]ou may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him." (RT 1858-59.)

Following the instructions, the prosecutor made her closing argument to the jury, pointing out numerous times that the allegations against the Wilsons involved a continuous course of conduct and that police did not use excessive force at any time during the encounter. (RT 1861-88.) When the Wilsons' counsel was given his opportunity to argue, he explained his theory of the case. After detailing the instructions governing the charge of resisting or interfering with a police officer lawfully performing his duties, counsel argued, "[A] police officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force." (RT 1918.) Counsel went on further to explain:

> In each of these, whether we're looking at a [Penal Code] 69 or a 148, what the prosecutor doesn't want me to talk about is that in each of

> these, the officer has to be performing his lawful duty, and if the officer is using more force than necessary, he is not performing his lawful duty. If there's a disagreement, resolve it in the jury room. But regardless of what any person sitting here is being charged with, *if an officer is using excessive force at any time, you must vote not guilty because this aspect of the crime has not been satisfied*.
>
> *In order for there to be guilt, the prosecution must prove beyond a reasonable doubt* — beyond any doubt that the defendant is using — *that the officer, rather is not using excessive or unreasonable force. They have to prove that the force was reasonable. The people have the burden of proving that the force used by these officers was reasonable, and if they have not proven beyond a reasonable doubt that the force was reasonable, you must return a verdict of not guilty. And that's in the instructions*.

(RT 1918-19 (emphasis added).)

Counsel emphasized further:

> *If one officer uses excessive force, the people have not met their burden. I can't clarify that enough. The people have to prove beyond a reasonable doubt that this force used was reasonable. That's their burden*. How could it be reasonable for senior to be getting struck from both officers in the street, two strikes in the upper right leg, a single strike in the lower arm, and at the same time, numerous times in the forearm area by Harry Hampton?

(RT 1925 (emphasis added).)

Thereafter, the jury deliberated and found the Wilsons guilty of trying to prevent or deter the officers from performing their lawful duties. (RT 2402-04.)

The Wilsons then brought this civil rights action, alleging that Defendant police officers used excessive force when they arrested them. Defendant police officers and the City of Long Beach now move for summary judgment, arguing that Plaintiffs' suit is barred under *Heck* because the jury in the criminal case has already determined that the officers did not use excessive force in arresting them. They contend that a verdict in Plaintiffs' favor in the civil case--a finding that the officers did use excessive force--would undermine the verdict in the criminal case.

III.

ANALYSIS

A. Standard of Review

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A "genuine issue" exists only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party in a summary judgment motion is tasked with presenting the Court with admissible evidence that establishes that there is no genuine, material factual dispute and that he is entitled to

judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. *See Anderson*, 477 U.S. at 248. The Court views the inferences it draws from the underlying facts in a light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Plaintiffs' Claims That The Officers Used Excessive Force While Arresting Them Is Barred Under *Heck*

Defendants argue that Plaintiffs are precluded from claiming that Defendant police officers used excessive force in effectuating the arrests because the criminal jury necessarily determined that the officers had not used excessive force. In Defendants' view, if Plaintiffs prevail and establish that Defendant police officers used excessive force, the criminal convictions will be called into question. Plaintiffs disagree. They argue that the criminal charges stemmed from a series of acts, any one of which could have supported their convictions, and, therefore, a verdict in this case will not call into question the verdicts in the criminal case. For the following reasons, the Court concludes that Plaintiffs' claims regarding Defendant police officers' conduct up to the time Plaintiffs were arrested and handcuffed are barred under *Heck*.

Heck bars a civil rights suit which could call into question a criminal conviction. *Heck*, 512 U.S. at 486-87 (holding convicted prisoner cannot collaterally challenge an allegedly unconstitutional conviction in a subsequent civil rights action unless the underlying conviction has been called into question). Thus, for example, a defendant convicted of resisting arrest is, in

general, barred from bringing an excessive force claim against the police officers who arrested him because a verdict in the civil case would necessarily call into question the verdict in the criminal case. *See, e.g., id.* at 487 n.6 (explaining *Heck* bar would preclude defendant convicted of resisting arrest from suing officers for unreasonable seizure where conviction required proof that officers were making lawful arrest); *e.g., Curry v. Baca*, 371 F.App'x 733, 734 (9th Cir. 2010) ("Because [the plaintiff's] § 1983 claims, which allege that the officers used excessive force in effecting his arrest[,] necessarily imply the invalidity of his underlying assault convictions[,] they are barred by *Heck*."); *Yount v. City of Sacramento*, 183 P.3d 471, 474-75 (Cal. 2008).

To prevail in this summary judgment motion, Defendants have the burden to prove that Plaintiffs' convictions necessarily encompassed the claims Plaintiffs now bring before this Court. *Sanford v. Motts,* 258 F.3d 1117, 1119 (9th Cir. 2001) (placing the burden on the defendants to prove that the plaintiff's success in her § 1983 action would necessarily imply the invalidity of her conviction). Thus, Defendants have to prove that the issue of whether the police used excessive force has already been decided in the criminal case. *Id.* Defendants have done so. Reviewing the transcript from the criminal trial, it is clear that the jury was asked to determine whether the police officers used excessive or unreasonable force in arresting the Wilsons. As the Wilsons' counsel argued to the jury, if any officer at any time used excessive force, the Wilsons were entitled to acquittal. (RT 1918.)

Plaintiffs claim that they should not be barred from bringing an excessive force claim despite their convictions because, like the plaintiff in *Sanford*, it is not clear what the jury relied on in reaching its verdicts. (Plaintiffs' Reply Brief to Defendants' Supplemental Brief at 2-7.) Again, the Court disagrees. The plaintiff in *Sanford* pleaded nolo contendre to resisting, obstructing, or delaying an officer based on several acts, all of which could have supported the charge. *Sanford*, 258 F.3d at 1118, 1119. The record from the plea colloquy did not establish which act was the basis for the plea. *Id.* at 1119.

The Wilsons' case is different. They did not plead guilty. They went to trial and it is clear from the trial transcript exactly what course of conduct gave rise to the charges and, ultimately, the convictions. Further, the encounter was not dissected into discrete parts, as the Wilsons argue here, which may have supported an argument that it is unclear what the jury based its verdicts on. The Wilsons' acts (as well as the officers' acts) were viewed as a single, continuous course of conduct. The deliberations were premised on the understanding that everything the Wilsons did during the encounter and everything the officers did was to be considered by the jury in determining if the Wilsons were guilty. In reaching the verdicts, the jury had to determine that Defendant officers had not used excessive force. As a result, a verdict in Plaintiffs' favor in this civil trial would necessarily negate the verdict in the criminal trial because it would undermine an element of the offense, i.e., that the officers did not use excessive force.

Plaintiffs argue further that their case is akin to *Yount*. There, the California Supreme Court held that the plaintiff in that case could not sue officers for their use of force during an arrest because the plaintiff had been convicted of resisting arrest but could sue the officer who shot him after he had been handcuffed and hobbled. *Yount*, 183 P.3d at 481-84. Plaintiffs argue that, like in *Yount*, they should be allowed to pursue their excessive force claims despite their convictions. Again, the Court disagrees. The defendant officer in *Yount* conceded that the use of his gun when the plaintiff was handcuffed and hobbled was unjustified. *Id.* at 481. In fact, he had intended to use his taser at the time, not his gun, and had accidentally removed the wrong weapon from his holster. Thus, the plaintiff's nolo contendre plea to resisting arrest in that case did not serve as a bar to the plaintiff's civil rights claim against the officer who had shot him.

The case at bar is different. The jury was asked to and did decide whether the officers had used excessive force when they struck Plaintiffs. A verdict in Plaintiffs' favor in this civil rights action would directly contradict the verdict in the criminal case and its underlying finding that the officers' use of force was not excessive. For this reason, Plaintiffs are barred under *Heck* from going forward on their claims that Defendant officers used excessive force when they arrested them.

As to Plaintiffs' claims regarding Defendants' post-arrest conduct--that Defendants tightened the handcuffs too tight and used excessive force after the handcuffs were on--they are not barred by *Heck*. Defendants do not appear to be claiming that Plaintiffs

resisted the officers after they were subdued and handcuffed, nor does the transcript from the criminal trial support such an argument. As such, *Heck* does not apply to the post-arrest claims. *See*, *e.g., Yount*, 183 P.3d at 482.[2]

Finally, the Court notes that Plaintiffs' Complaint contains numerous allegations that, though not highlighted by Defendants in their motion, cannot be relitigated in this civil rights action. For example, Plaintiffs allege at ¶ 12 that Defendants "unjustifiably detained Plaintiffs without probable cause or reasonable suspicion . . . ." This allegation is barred under *Heck* because, in concluding that Plaintiffs broke the law, the jury in the criminal case has implicitly concluded that the officers were justified in detaining and arresting them. The same holds true for Plaintiffs' claims in ¶ 13 that Defendants falsely arrested and imprisoned them. That issue, too, has been implicitly resolved by the jury. So, too, has Plaintiffs' claim in ¶ 14 that they did not "obstruct or delay" the officers. These terms are synonymous with the terms from the criminal statute, i.e., "preventing or deterring" the officers, and Plaintiffs cannot relitigate this issue at trial.

---

[2] Reviewing the transcript from the sentencing hearing, there seems to be some confusion as to whether the Wilsons were arrested that night and taken into custody or whether they were detained and brought to the hospital. (RT 2706-07.) Regardless of what happened, they may present any claims they have arising after they were placed in handcuffs.

C. Plaintiffs' State Law Claims For Battery Are Also Barred By *Heck*

Defendants also request that the Court grant summary judgment on Plaintiffs' state law battery claims. Though *Heck* involves a federal rule, the principle enunciated therein is equally applicable to state battery claims. *Yount*, 183 P.3d at 484. Thus, the same analysis and same result applies here. Defendants' summary judgment motion on Plaintiffs' battery claims is hereby granted with respect to all claims regarding Defendants' conduct prior to the arrests and denied with respect to all claims following the arrests.

IV.

CONCLUSION

For all these reasons, Defendants' motion for summary judgment is granted in part and denied in part.

IT IS SO ORDERED.

DATED: March 31, 2011

/s/ Patrick J. Walsh
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

APPENDIX G

COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

NO. NA 078345

[Dated April 14, 15, 16, 2009, May 13, 2009]

THE PEOPLE OF THE STATE OF CALIFORNIA ,	)
PLAINTIFF-RESPONDENT ,	)
VS.	)
MICHAEL ED WILSON, JR., ANNIESE ALAFAIRE PARRISH, MICHAEL ED WILSON, SR., AND KIESCHA YEVETTE WILSON,	)
DEFENDANTS-APPELLANTS.	)

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE RICHARD R. ROMERO, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES :

FOR PLAINTIFF-RESPONDENT:
EDMUND G. BROWN, JR.,
STATE ATTORNEY GENERAL
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FOR DEFENDANT-APPELLANT:
IN PROPRIA PERSONA

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KAREN M. WHITE , CSR #4466
OFFICIAL REPORTER

[p. 1801]

CASE NUMBER: NA078345
CASE NAME: PEOPLE VERSUS MICHAEL WILSON, JR., ANNIESE PARRISH, MICHAEL WILSON, SR., AND KIESCHA WILSON

LONG BEACH, CALIFORNIA
TUESDAY, APRIL 14, 2009 =

DEPARTMENT SOUTH E
HON. RICHARD R. ROMERO, JUDGE

REPORTER: KAREN M. WHITE, CSR #4466

TIME: 9:40 A.M.

APPEARANCES: (AS HERETOFORE NOTED.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: WE'RE BACK IN SESSION OUTSIDE THE JURY'S PRESENCE. COUNSEL AND DEFENDANTS ARE HERE.

AND, MS. POWELL, DID YOU DETERMINE FOR PENAL CODE SECTION 148(A) WHAT ACTS AS TO WHICH OFFICER YOU WERE GOING TO BE RELYING ON?

MS. POWELL: YOUR HONOR, I DID WRITE THEM UP IN CASE THAT DID APPLY, BUT I ALSO ADVISED MR. BARNWELL WHEN I SENT THE E-MAIL ABOUT AN HOUR AFTER WE BROKE --

MR. DUNN: MR. DUNN.

MS. POWELL: I'M SORRY. MR. DUNN.

-- ABOUT AN HOUR AFTER WE LEFT, WHILE I UNDERSTOOD THAT THEY WERE OBJECTING TO THE CONTINUOUS COURSE OF CONDUCT, THAT UPON HAVING REVIEWED THE JURY INSTRUCTIONS, I DO NOT APPEAR TO BE PRECLUDED FROM ARGUING THAT IT'S CONTINUOUS COURSE OF CONDUCT AS OPPOSED TO

[p. 1835]

MR. DUNN: NO FURTHER QUESTIONS.

THE COURT: MR. BARNWELL?

MR. BARNWELL: NO, SIR.

THE COURT: THANK YOU. YOU'RE EXCUSED AND MAY GO. PEOPLE REST?

MS. POWELL: YES, YOUR HONOR.

THE COURT: ANYTHING FURTHER FROM THE DEFENSE? ANYTHING ELSE, MR. DUNN?

MR. DUNN: I HAVE NOTHING FURTHER.

THE COURT: MR. BARNWELL, ANYTHING?

MR. BARNWELL: IF I MAY HAVE A MOMENT?

THE COURT: OF COURSE.

MR. BARNWELL: NO, SIR.

THE COURT: THAT CONCLUDES THE PRESENTATION OF EVIDENCE. WHAT REMAINS IS FOR YOU TO BE INSTRUCTED ON THE LAW AND THE ATTORNEYS TO PRESENT THEIR ARGUMENTS. I'LL INSTRUCT YOU FIRST. DEPENDING ON HOW LONG IT TAKES, WE MAY NOT TAKE A BREAK UNTIL AFTER INSTRUCTIONS, A BRIEF BREAK, AND THEN ARGUMENT.

JURY INSTRUCTIONS =

THE COURT: (READING.)

MEMBERS OF THE JURY, I WILL NOW INSTRUCT YOU ON THE LAW THAT APPLIES TO THIS CASE. I WILL GIVE YOU A COPY OF THESE INSTRUCTIONS TO USE IN THE JURY ROOM.

THIS COPY I'M READING FROM IS FROM THE COURT

[p. 1836]

WEBSITE, WHICH HAS MINOR MODIFICATIONS FROM THAT AVAILABLE TO THE ATTORNEYS.

YOU MUST DECIDE WHAT THE FACTS ARE. IT IS UP TO ALL OF YOU, AND YOU ALONE, TO DECIDE WHAT HAPPENED BASED ON THE EVIDENCE THAT HAS BEEN PRESENTED TO YOU IN THIS TRIAL.

DO NOT LET BIAS, SYMPATHY, PREJUDICE, OR PUBLIC OPINION INFLUENCE YOUR DECISION. BIAS INCLUDES, BUT IS NOT LIMITED TO, BIAS FOR OR AGAINST THE WITNESSES, ATTORNEYS, DEFENDANTS, OR ALLEGED VICTIMS, BASED ON DISABILITY, GENDER, NATIONALITY, NATIONAL ORIGIN, RACE, OR ETHNICITY, RELIGION, GENDER IDENTITY, SEXUAL ORIENTATION, AGE, OR SOCIOECONOMIC STATUS.

YOU MUST FOLLOW THE LAW AS I EXPLAIN IT TO YOU, EVEN IF YOU DISAGREE WITH IT. IF YOU BELIEVE THAT THE ATTORNEYS' COMMENTS ON THE LAW CONFLICT WITH MY INSTRUCTIONS, YOU MUST FOLLOW MY INSTRUCTIONS.

PAY CAREFUL ATTENTION TO ALL OF THESE INSTRUCTIONS AND CONSIDER THEM TOGETHER. IF I REPEAT ANY INSTRUCTION OR IDEA, DO NOT CONCLUDE THAT IT IS MORE

IMPORTANT THAN ANY OTHER INSTRUCTION OR IDEA JUST BECAUSE I REPEATED IT.

SOME WORDS OR PHRASES USED DURING

[p. 1837]

THIS TRIAL HAVE LEGAL MEANINGS THAT ARE DIFFERENT FROM THEIR MEANINGS IN EVERYDAY USE. THESE WORDS AND PHRASES WILL BE SPECIFICALLY DEFINED IN THESE INSTRUCTIONS. PLEASE BE SURE TO LISTEN CAREFULLY AND FOLLOW THE DEFINITIONS THAT I GIVE YOU. WORDS AND PHRASES NOT SPECIFICALLY DEFINED IN THESE INSTRUCTIONS ARE TO BE APPLIED USING THEIR ORDINARY, EVERYDAY MEANINGS.

SOME OF THESE INSTRUCTIONS MAY NOT APPLY, DEPENDING ON YOUR FINDINGS ABOUT THE FACTS OF THE CASE. AFTER YOU HAVE DECIDED WHAT THE FACTS ARE, FOLLOW THE INSTRUCTIONS THAT DO APPLY TO THE FACTS AS YOU FIND THEM.

DO NOT DO ANY RESEARCH ON YOUR OWN OR AS A GROUP. DO NOT USE A DICTIONARY OR THE INTERNET OR OTHER REFERENCE MATERIALS. DO NOT INVESTIGATE THE FACTS OR LAW. DO NOT CONDUCT ANY EXPERIMENTS OR VISIT THE SCENE OF ANY EVENT INVOLVED IN THIS CASE. IF YOU HAPPEN TO PASS BY THE SCENE, DO NOT STOP OR INVESTIGATE.

YOU HAVE BEEN GIVEN NOTEBOOKS AND MAY HAVE TAKEN NOTES DURING THE TRIAL. YOU MAY USE YOUR NOTES DURING

DELIBERATIONS. THE NOTES ARE FOR YOUR OWN INDIVIDUAL USE TO HELP YOU REMEMBER WHAT HAPPENED DURING THE TRIAL.

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PLEASE KEEP IN MIND THAT YOUR NOTES MAY BE INACCURATE OR INCOMPLETE. IF THERE IS A DISAGREEMENT ABOUT THE TESTIMONY AT TRIAL, YOU MAY ASK THAT THE COURT REPORTER'S RECORD BE READ TO YOU. IT IS THE RECORD THAT MUST GUIDE YOUR DELIBERATIONS, NOT YOUR NOTES.

PLEASE DO NOT REMOVE YOUR NOTES FROM THE JURY ROOM.

AT THE END OF THE TRIAL, YOUR NOTES WILL BE COLLECTED AND DESTROYED.

BECAUSE MORE THAN ONE DEFENDANT IS ON TRIAL HERE, I AM GOING TO REMIND YOU WHICH INDIVIDUALS ARE CHARGED WITH WHICH CRIMES.

MICHAEL ED WILSON, JR., ANNIESE ALAFAIRE PARRISH, AND KIESCHA YEVETTE WILSON ARE CHARGED WITH RESISTING H. HAMPTON.

MICHAEL ED WILSON, SR., AND KIESCHA YEVETTE WILSON ARE CHARGED WITH RESISTING B. NYSTEDT.

KIESCHA YEVETTE WILSON IS CHARGED WITH RESISTING J. KRUEGER.

YOU WILL HAVE THESE INSTRUCTIONS IN THE JURY ROOM.

YOU MUST SEPARATELY CONSIDER THE EVIDENCE AS IT APPLIES TO EACH DEFENDANT. YOU

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MUST DECIDE EACH CHARGE FOR EACH DEFENDANT SEPARATELY. IF YOU CAN'T REACH A VERDICT ON ALL THE DEFENDANTS OR ON ANY OF THE CHARGES AGAINST ANY DEFENDANT, YOU MUST REPORT YOUR DISAGREEMENT TO THE COURT AND YOU MUST RETURN YOUR VERDICT ON ANY DEFENDANT OR CHARGE ON WHICH YOU HAVE UNANIMOUSLY AGREED.

UNLESS I TELL YOU OTHERWISE, ALL INSTRUCTIONS APPLY TO EACH DEFENDANT.

THE FACT THAT A CRIMINAL CHARGE HAS BEEN FILED AGAINST THE DEFENDANTS IS NOT EVIDENCE THAT THE CHARGE IS TRUE. YOU MUST NOT BE BIASED AGAINST THE DEFENDANTS JUST BECAUSE THEY HAVE BEEN ARRESTED, CHARGED WITH A CRIME, OR BROUGHT TO TRIAL.

A DEFENDANT IN A CRIMINAL CASE IS PRESUMED TO BE INNOCENT. THIS PRESUMPTION REQUIRES THAT THE PEOPLE PROVE A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. WHENEVER I TELL YOU

THE PEOPLE MUST PROVE SOMETHING, I MEAN THEY MUST PROVE IT BEYOND A REASONABLE DOUBT.

PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU WITH AN ABIDING CONVICTION THAT THE CHARGE IS TRUE. THE EVIDENCE NEED NOT ELIMINATE ALL POSSIBLE DOUBT BECAUSE EVERYTHING IN LIFE IS OPEN TO SOME

[p. 1840]

POSSIBLE OR IMAGINARY DOUBT.

IN DECIDING WHETHER THE PEOPLE HAVE PROVED THEIR CASE BEYOND A REASONABLE DOUBT, YOU MUST IMPARTIALLY COMPARE AND CONSIDER ALL THE EVIDENCE THAT WAS RECEIVED THROUGHOUT THE ENTIRE TRIAL. UNLESS THE EVIDENCE PROVES THE DEFENDANTS GUILTY BEYOND A REASONABLE DOUBT, THEY ARE ENTITLED TO AN ACQUITTAL AND YOU MUST FIND THEM NOT GUILTY.

YOU MUST DECIDE WHAT THE FACTS ARE IN THIS CASE. YOU MUST USE ONLY THE EVIDENCE THAT WAS PRESENTED IN THIS COURTROOM. EVIDENCE IS THE SWORN TESTIMONY OF WITNESSES, THE EXHIBITS ADMITTED INTO EVIDENCE, AND ANYTHING ELSE I TOLD YOU TO CONSIDER AS EVIDENCE.

NOTHING THAT THE ATTORNEYS SAY IS EVIDENCE. IN THEIR OPENING STATEMENTS AND CLOSING ARGUMENTS, THE ATTORNEYS DISCUSS THE CASE, BUT THEIR REMARKS ARE

NOT EVIDENCE. THEIR QUESTIONS ARE NOT EVIDENCE. ONLY THE WITNESSES' ANSWERS ARE EVIDENCE. THE ATTORNEYS' QUESTIONS ARE SIGNIFICANT ONLY IF THEY HELP YOU TO UNDERSTAND THE WITNESSES' ANSWERS. DO NOT ASSUME THAT SOMETHING IS TRUE JUST BECAUSE ONE OF THE ATTORNEYS ASKED A QUESTION THAT SUGGESTED IT WAS TRUE.

DURING THE TRIAL, THE ATTORNEYS MAY

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HAVE OBJECTED TO QUESTIONS OR MOVED TO STRIKE ANSWERS GIVEN BY THE WITNESSES. I RULED ON THE OBJECTIONS ACCORDING TO THE LAW. IF I SUSTAINED AN OBJECTION, YOU MUST IGNORE THE QUESTION. IF THE WITNESS WAS NOT PERMITTED TO ANSWER, DO NOT GUESS WHAT THE ANSWER MIGHT HAVE BEEN OR WHY I RULED AS I DID. IF I ORDERED TESTIMONY STRICKEN FROM THE RECORD, YOU MUST DISREGARD IT AND MUST NOT CONSIDER THAT TESTIMONY FOR ANY PURPOSE.

YOU MUST DISREGARD ANYTHING YOU SAW OR HEARD WHEN THE COURT WAS NOT IN SESSION, EVEN IF IT WAS DONE OR SAID BY ONE OF THE PARTIES OR WITNESSES.

THE COURT REPORTER HAS MADE A REPORT OF EVERYTHING THAT WAS SAID DURING THE TRIAL. IF YOU DECIDE THAT IT IS NECESSARY, YOU MAY ASK THAT A COURT REPORTER'S NOTES BE READ TO YOU. YOU MUST ACCEPT THE COURT REPORTER'S NOTES AS ACCURATE.

FACTS MAY BE PROVED BY DIRECT OR CIRCUMSTANTIAL EVIDENCE OR BY A COMBINATION OF BOTH. DIRECT EVIDENCE CAN PROVE A FACT BY ITSELF. FOR EXAMPLE, IF A WITNESS TESTIFIES HE SAW IT RAINING OUTSIDE BEFORE HE CAME INTO THE COURTHOUSE, THAT TESTIMONY IS DIRECT EVIDENCE THAT IT WAS RAINING. CIRCUMSTANTIAL EVIDENCE

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ALSO MAY BE CALLED INDIRECT EVIDENCE. CIRCUMSTANTIAL EVIDENCE DOES NOT DIRECTLY PROVE THE FACT TO BE DECIDED, BUT IS EVIDENCE OF ANOTHER FACT OR GROUP OF FACTS FROM WHICH YOU MAY LOGICALLY AND REASONABLY CONCLUDE THE TRUTH OF THE FACT IN QUESTION. FOR EXAMPLE, IF A WITNESS TESTIFIES THAT HE SAW SOMEONE COME INSIDE WEARING A RAINCOAT COVERED WITH DROPS OF WATER, THAT TESTIMONY IS CIRCUMSTANTIAL EVIDENCE BECAUSE IT MAY SUPPORT A CONCLUSION THAT IT WAS RAINING OUTSIDE.

BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE ARE ACCEPTABLE TYPES OF EVIDENCE TO PROVE OR DISPROVE THE ELEMENTS OF A CHARGE, INCLUDING INTENT AND MENTAL STATE AND ACTS NECESSARY TO A CONVICTION, AND NEITHER IS NECESSARILY MORE RELIABLE THAN THE OTHER. NEITHER IS ENTITLED TO ANY GREATER WEIGHT THAN THE OTHER. YOU MUST DECIDE WHETHER A FACT IN

ISSUE HAS BEEN PROVED BASED ON ALL OF THE EVIDENCE.

BEFORE YOU MAY RELY ON CIRCUMSTANTIAL EVIDENCE TO CONCLUDE THAT A FACT NECESSARY TO FIND THE DEFENDANT GUILTY HAS BEEN PROVED, YOU MUST BE CONVINCED THAT THE PEOPLE HAVE PROVED EACH FACT ESSENTIAL TO THAT CONCLUSION BEYOND A REASONABLE DOUBT.

[p. 1843]

ALSO, BEFORE YOU MAY RELY ON CIRCUMSTANTIAL EVIDENCE TO FIND THE DEFENDANT GUILTY, YOU MUST BE CONVINCED THAT THE ONLY REASONABLE CONCLUSION SUPPORTED BY THE CIRCUMSTANTIAL EVIDENCE IS THAT THE DEFENDANT IS GUILTY. IF YOU CAN DRAW TWO OR MORE REASONABLE CONCLUSIONS FROM THE CIRCUMSTANTIAL EVIDENCE, AND ONE OF THOSE REASONABLE CONCLUSIONS POINTS TO INNOCENCE AND ANOTHER TO GUILT, YOU MUST ACCEPT THE ONE THAT POINTS TO INNOCENCE. HOWEVER, WHEN CONSIDERING CIRCUMSTANTIAL EVIDENCE, YOU MUST ACCEPT ONLY REASONABLE CONCLUSIONS AND REJECT ANY THAT ARE UNREASONABLE.

THE PEOPLE MUST PROVE NOT ONLY THAT THE DEFENDANT DID THE ACTS CHARGED, BUT ALSO THAT HE OR SHE ACTED WITH A PARTICULAR INTENT. THE INSTRUCTION FOR EACH CRIME EXPLAINS THE INTENT REQUIRED.

AN INTENT MAY BE PROVED BY CIRCUMSTANTIAL EVIDENCE.

BEFORE YOU MAY RELY ON CIRCUMSTANTIAL EVIDENCE TO CONCLUDE THAT A FACT NECESSARY TO FIND THE DEFENDANT GUILTY HAS BEEN PROVED, YOU MUST BE CONVINCED THAT THE PEOPLE HAVE PROVED EACH FACT ESSENTIAL TO THAT CONCLUSION BEYOND A REASONABLE DOUBT.

[p. 1844]

ALSO, BEFORE YOU MAY RELY ON CIRCUMSTANTIAL EVIDENCE TO CONCLUDE THAT THE DEFENDANT HAD THE REQUIRED INTENT, YOU MUST BE CONVINCED THAT THE ONLY REASONABLE CONCLUSION SUPPORTED BY THE CIRCUMSTANTIAL EVIDENCE IS THAT THE DEFENDANT HAD THE REQUIRED INTENT. IF YOU CAN DRAW TWO OR MORE REASONABLE CONCLUSIONS FROM THE CIRCUMSTANTIAL EVIDENCE, AND ONE OF THOSE REASONABLE CONCLUSIONS SUPPORTS A FINDING THAT THE DEFENDANT DID HAVE THE REQUIRED INTENT, AND ANOTHER REASONABLE CONCLUSION SUPPORTS A FINDING THAT THE DEFENDANT DID NOT, YOU MUST CONCLUDE THAT THE REQUIRED INTENT WAS NOT PROVED BY THE CIRCUMSTANTIAL EVIDENCE. HOWEVER, WHEN CONSIDERING CIRCUMSTANTIAL EVIDENCE, YOU MUST ACCEPT ONLY REASONABLE CONCLUSIONS AND REJECT ANY THAT ARE UNREASONABLE.

YOU ALONE MUST JUDGE THE CREDIBILITY OR BELIEVABILITY OF THE WITNESSES. IN DECIDING WHETHER TESTIMONY IS TRUE AND ACCURATE USE YOUR COMMON SENSE AND EXPERIENCE. YOU MUST JUDGE THE TESTIMONY OF EACH WITNESS BY THE SAME STANDARDS, SETTING ASIDE ANY BIAS OR PREJUDICE YOU MAY HAVE. YOU MAY BELIEVE ALL, PART, OR NONE OF ANY WITNESS'S TESTIMONY. CONSIDER THE TESTIMONY OF EACH WITNESS AND

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DECIDE HOW MUCH OF IT YOU BELIEVE.

IN EVALUATING A WITNESS'S TESTIMONY, YOU MAY CONSIDER ANYTHING THAT REASONABLY TENDS TO PROVE OR DISPROVE THE TRUTH OR ACCURACY OF THAT TESTIMONY. AMONG THE FACTORS THAT YOU MAY CONSIDER ARE:

HOW WELL COULD THE WITNESS SEE, HEAR, OR OTHERWISE PERCEIVE THE THINGS ABOUT WHICH THE WITNESS TESTIFIED?

HOW WELL WAS THE WITNESS ABLE TO REMEMBER AND DESCRIBE WHAT HAPPENED?

WHAT WAS THE WITNESS'S BEHAVIOR WHILE TESTIFYING?

DID THE WITNESS UNDERSTAND THE QUESTIONS AND ANSWER THEM DIRECTLY?

WAS THE WITNESS'S TESTIMONY INFLUENCED BY A FACTOR SUCH AS BIAS OR

PREJUDICE, A PERSONAL RELATIONSHIP WITH SOMEONE INVOLVED IN THE CASE, OR A PERSONAL INTEREST IN HOW THE CASE IS DECIDED?

WHAT WAS THE WITNESS'S ATTITUDE ABOUT THE CASE OR ABOUT TESTIFYING?

DID THE WITNESS MAKE A STATEMENT IN THE PAST THAT IS CONSISTENT OR INCONSISTENT WITH HIS OR HER TESTIMONY?

HOW REASONABLE IS THE TESTIMONY WHEN YOU CONSIDER ALL THE OTHER EVIDENCE IN THE CASE?

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DID OTHER EVIDENCE PROVE OR DISPROVE ANY FACT ABOUT WHICH THE WITNESS TESTIFIED?

DO NOT AUTOMATICALLY REJECT TESTIMONY JUST BECAUSE OF INCONSISTENCIES OR CONFLICTS. CONSIDER WHETHER THE DIFFERENCES ARE IMPORTANT OR NOT. PEOPLE SOMETIMES HONESTLY FORGET THINGS OR MAKE MISTAKES ABOUT WHAT THEY REMEMBER. ALSO, TWO PEOPLE MAY WITNESS THE SAME EVENT YET SEE OR HEAR IT DIFFERENTLY.

IF YOU DO NOT BELIEVE A WITNESS'S TESTIMONY THAT HE OR SHE NO LONGER REMEMBERS SOMETHING, THAT TESTIMONY IS INCONSISTENT WITH THE WITNESS'S EARLIER STATEMENT ON THAT SUBJECT.

IF YOU DECIDE THAT A WITNESS DELIBERATELY LIED ABOUT SOMETHING SIGNIFICANT IN THIS CASE, YOU SHOULD CONSIDER NOT BELIEVING ANYTHING THAT WITNESS SAYS. OR, IF YOU THINK THE WITNESS LIED ABOUT SOME THINGS BUT TOLD THE TRUTH ABOUT OTHERS, YOU MAY SIMPLY ACCEPT THE PART THAT YOU THINK IS TRUE AND IGNORE THE REST.

THE CRIMES CHARGED REQUIRE PROOF OF THE UNION OR JOINT OPERATION OF ACT AND WRONGFUL INTENT.

[p. 1847]

THE FOLLOWING CRIME REQUIRES GENERAL CRIMINAL INTENT: RESISTING A PEACE OFFICER, IN VIOLATION OF PENAL CODE SECTION 148(A), A LESSER OFFENSE TO THOSE CHARGED. FOR YOU TO FIND A PERSON GUILTY OF THIS CRIME, THE PEOPLE MUST NOT ONLY PROVE THAT THE DEFENDANT COMMITTED THE PROHIBITED ACT, BUT MUST DO SO WITH WRONGFUL INTENT. A PERSON ACTS WITH WRONGFUL INTENT WHEN HE OR SHE INTENTIONALLY DOES A PROHIBITED ACT ON PURPOSE. HOWEVER, IT IS NOT REQUIRED THAT HE OR SHE INTEND TO BREAK THE LAW. THE ACT REQUIRED IS EXPLAINED IN THE INSTRUCTION FOR THAT CRIME.

THE FOLLOWING CRIME REQUIRES A SPECIFIC INTENT: RESISTING AN EXECUTIVE OFFICER, IN VIOLATION OF PENAL CODE SECTION 69. FOR YOU TO FIND A PERSON

GUILTY OF THIS CRIME, THAT PERSON MUST NOT ONLY INTENTIONALLY COMMIT THE PROHIBITED ACT, BUT MUST DO SO WITH A SPECIFIC INTENT. THE ACT AND THE SPECIFIC INTENT REQUIRED ARE EXPLAINED IN THE INSTRUCTION FOR THAT CRIME.

NEITHER SIDE IS REQUIRED TO CALL ALL WITNESSES WHO MAY HAVE INFORMATION ABOUT THE CASE OR TO PRODUCE ALL PHYSICAL EVIDENCE THAT MIGHT BE RELEVANT.

[p. 1848]

THE TESTIMONY OF ONLY ONE WITNESS CAN PROVE ANY FACT. BEFORE YOU CONCLUDE THAT THE TESTIMONY OF ONE WITNESS PROVES A FACT, YOU SHOULD CAREFULLY REVIEW ALL THE EVIDENCE.

IF YOU DETERMINE THERE IS A CONFLICT IN THE EVIDENCE, YOU MUST DECIDE WHAT EVIDENCE, IF ANY, TO BELIEVE. DO NOT SIMPLY COUNT THE NUMBER OF WITNESSES WHO AGREE OR DISAGREE ON A POINT AND ACCEPT THE TESTIMONY OF THE GREATER NUMBER OF WITNESSES. ON THE OTHER HAND, DO NOT DISREGARD THE TESTIMONY OF ANY WITNESS WITHOUT A REASON OR BECAUSE OF PREJUDICE OR A DESIRE TO FAVOR ONE SIDE OR THE OTHER. WHAT IS IMPORTANT IS WHETHER THE TESTIMONY OR ANY OTHER EVIDENCE CONVINCES YOU, NOT JUST THE NUMBER OF WITNESSES WHO TESTIFY ABOUT A CERTAIN POINT.

DURING THE TRIAL, CERTAIN EVIDENCE WAS ADMITTED FOR A LIMITED PURPOSE. YOU MAY CONSIDER THAT EVIDENCE ONLY FOR THAT PURPOSE AND FOR NO OTHER.

YOU HAVE HEARD EVIDENCE THAT THE DEFENDANT ANNIESE ALAFAIRE PARRISH MADE A STATEMENT BEFORE TRIAL. YOU MAY CONSIDER THAT EVIDENCE ONLY AGAINST HER, NOT AGAINST ANY

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OTHER DEFENDANT.

A WITNESS WAS ALLOWED TO TESTIFY AS AN EXPERT AND TO GIVE OPINIONS. YOU MUST CONSIDER THE OPINIONS, BUT YOU ARE NOT TO REQUIRED TO ACCEPT THEM AS TRUE OR CORRECT. THE MEANING AND IMPORTANCE OF ANY OPINION ARE FOR YOU TO DECIDE. IN EVALUATING THE BELIEVABILITY OF AN EXPERT WITNESS, FOLLOW THE INSTRUCTIONS ABOUT THE BELIEVABILITY OF WITNESSES GENERALLY. IN ADDITION, CONSIDER THE EXPERT'S KNOWLEDGE, SKILL, EXPERIENCE, TRAINING AND EDUCATION, THE REASONS THE EXPERT GAVE FOR ANY OPINION, THE FACT OR INFORMATION ON WHICH THE EXPERT RELIED IN REACHING THAT OPINION. YOU MUST DECIDE WHETHER INFORMATION ON WHICH THE EXPERT RELIED WAS TRUE AND ACCURATE. YOU MAY DISREGARD ANY OPINION THAT YOU FIND UNBELIEVABLE, UNREASONABLE, OR UNSUPPORTED BY THE EVIDENCE.

AN EXPERT WITNESS MAY BE ASKED A HYPOTHETICAL QUESTION. A HYPOTHETICAL QUESTION ASKS THE WITNESS TO ASSUME CERTAIN FACTS ARE TRUE AND TO GIVE AN OPINION BASED ON THE ASSUMED FACTS. IT IS UP TO YOU TO DECIDE WHETHER AN ASSUMED FACT HAS BEEN PROVED. IF YOU CONCLUDE THAT AN ASSUMED FACT IS NOT TRUE, CONSIDER THE EFFECT OF THE EXPERT'S RELIANCE ON

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THAT FACT IN EVALUATING THE EXPERT'S OPINION.

WITNESSES, WHO WERE NOT TESTIFYING AS EXPERTS, GAVE THEIR OPINIONS DURING THE TRIAL. YOU MAY BUT ARE NOT REQUIRED TO ACCEPT THOSE OPINIONS AS TRUE OR CORRECT. YOU MAY GIVE THE OPINIONS WHATEVER WEIGHT YOU THINK APPROPRIATE. CONSIDER THE EXTENT OF THE WITNESS'S OPPORTUNITY TO PERCEIVE THE MATTERS ON WHICH HIS OR HER OPINION IS BASED, THE REASONS THE WITNESS GAVE FOR ANY OPINION, AND THE FACTS OR INFORMATION ON WHICH THE WITNESS RELIED IN FORMING THAT OPINION. YOU MUST DECIDE WHETHER INFORMATION ON WHICH THE WITNESS RELIED WAS TRUE AND ACCURATE. YOU MAY DISREGARD ALL OR ANY PART OF ANY OPINION THAT YOU FIND UNBELIEVABLE, UNREASONABLE, OR UNSUPPORTED BY THE EVIDENCE.

YOU HAVE HEARD EVIDENCE THAT THE DEFENDANTS MADE ORAL STATEMENTS BEFORE THE TRIAL. YOU MUST DECIDE WHETHER OR NOT A DEFENDANT MADE ANY OF THOSE STATEMENTS IN WHOLE OR IN PART. IF YOU DECIDE THAT THE DEFENDANTS MADE SUCH STATEMENTS, CONSIDER THE STATEMENTS ALONG WITH ALL THE OTHER EVIDENCE IN REACHING YOUR VERDICT. IT IS UP TO YOU TO DECIDE HOW MUCH IMPORTANCE TO GIVE TO SUCH STATEMENTS.

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YOU MUST CONSIDER WITH CAUTION EVIDENCE OF A DEFENDANT'S ORAL STATEMENT UNLESS IT WAS WRITTEN OR OTHERWISE RECORDED.

A DEFENDANT MAY NOT BE CONVICTED OF ANY CRIME BASED ON HIS OR HER OUT-OF-COURT STATEMENT ALONE. YOU MAY ONLY RELY ON THE DEFENDANT'S OUT-OF-COURT STATEMENT TO CONVICT HIM OR HER IF YOU CONCLUDE THAT OTHER EVIDENCE SHOWS THAT THE CHARGED CRIME OR LESSER INCLUDED OFFENSE WAS COMMITTED.

THAT OTHER EVIDENCE MAY BE SLIGHT AND NEED ONLY BE ENOUGH TO SUPPORT A REASONABLE INFERENCE THAT A CRIME WAS COMMITTED.

THE IDENTITY OF THE PERSON WHO COMMITTED THE CRIME MAY BE PROVED BY THE DEFENDANT'S STATEMENT ALONE.

YOU MAY NOT CONVICT THE DEFENDANT UNLESS THE PEOPLE HAVE PROVED HIS OR HER GUILT BEYOND A REASONABLE DOUBT.

THE PEOPLE ARE NOT REQUIRED TO PROVE THAT A DEFENDANT HAD A MOTIVE TO COMMIT ANY OF THE CRIMES CHARGED. IN REACHING YOUR VERDICT, YOU MAY, HOWEVER, CONSIDER WHETHER A DEFENDANT HAD A MOTIVE. HAVING A MOTIVE MAY BE A FACTOR TENDING TO SHOW THE DEFENDANT IS GUILTY. NOT HAVING A MOTIVE MAY BE A FACTOR

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TENDING TO SHOW THE DEFENDANT IS NOT GUILTY.

IF A DEFENDANT FLED OR TRIED TO FLEE IMMEDIATELY AFTER A CRIME WAS COMMITTED, THAT CONDUCT MAY SHOW THAT HE WAS AWARE OF HIS GUILT. IF YOU CONCLUDE THAT A DEFENDANT FLED OR TRIED TO FLEE, IT IS UP TO YOU TO DECIDE THE MEANING AND IMPORTANCE OF THAT CONDUCT. HOWEVER, EVIDENCE THAT THE DEFENDANT FLED OR TRIED TO FLEE CANNOT PROVE GUILT BY ITSELF.

THE DEFENDANTS ARE CHARGED IN COUNTS 2 THROUGH 4 WITH TRYING TO PREVENT OR DETER AN EXECUTIVE OFFICER FROM PERFORMING THAT OFFICER'S DUTY, IN VIOLATION OF PENAL CODE SECTION 69.

TO PROVE THAT THE DEFENDANT IS GUILTY OF THIS CRIME, THE PEOPLE MUST PROVE THAT:

1. THE DEFENDANT WILLFULLY AND UNLAWFULLY USED VIOLENCE OR A THREAT OF VIOLENCE TO TRY TO PREVENT OR DETER AN EXECUTIVE OFFICER FROM PERFORMING THE OFFICER'S LAWFUL DUTY; AND

2. WHEN THE DEFENDANT ACTED, HE OR SHE INTENDED TO PREVENT OR DETER THE EXECUTIVE OFFICER FROM PERFORMING THE OFFICER'S LAWFUL DUTY.

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SOMEONE COMMITS AN ACT WILLFULLY WHEN HE OR SHE DOES IT WILLINGLY OR ON PURPOSE.

AN EXECUTIVE OFFICER IS A GOVERNMENT OFFICIAL WHO MAY USE HIS OWN DISCRETION IN PERFORMING HIS JOB DUTIES. A LONG BEACH POLICE OFFICER IS AN EXECUTIVE OFFICER.

A THREAT MAY BE ORAL OR WRITTEN AND MAY BE IMPLIED BY A PATTERN OF CONDUCT OR A COMBINATION OF STATEMENTS AND CONDUCT.

SOMEONE WHO INTENDS THAT A STATEMENT BE UNDERSTOOD AS A THREAT DOES NOT HAVE TO ACTUALLY INTEND TO CARRY OUT THE THREATENED ACT.

THE DUTIES OF A LONG BEACH POLICE OFFICER INCLUDE DETAINING AND ARRESTING SUBJECTS AND ISSUING A CITATION OR WARNING.

A PEACE OFFICER IS NOT LAWFULLY PERFORMING HIS DUTIES IF HE IS UNLAWFULLY ARRESTING OR DETAINING SOMEONE OR USING UNREASONABLE OR EXCESSIVE FORCE IN HIS DUTY. INSTRUCTION 2670, WHICH FOLLOWS, EXPLAINS WHEN AN ARREST OR DETENTION IS UNLAWFUL AND WHEN FORCE IS UNREASONABLE OR EXCESSIVE.

IF ALL OF YOU FIND THAT A DEFENDANT IS NOT GUILTY OF THE GREATER CHARGED CRIME, PENAL CODE SECTION 69, YOU MAY FIND HIM OR HER

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GUILTY OF A LESSER CRIME, PENAL CODE SECTION 148(A), IF YOU ARE CONVINCED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF THAT LESSER CRIME. A DEFENDANT MAY NOT BE CONVICTED OF BOTH A GREATER AND LESSER CRIME FOR THE SAME CONDUCT.

NOW I WILL EXPLAIN TO YOU WHICH CHARGES ARE AFFECTED BY THIS INSTRUCTION:

RESISTING A PEACE OFFICER, IN VIOLATION OF PENAL CODE SECTION 148(A), IS A LESSER

CRIME OF RESISTING AN EXECUTIVE OFFICER, IN VIOLATION OF PENAL CODE SECTION 69.

IT IS UP TO YOU TO DECIDE THE ORDER IN WHICH YOU CONSIDER EACH CRIME AND THE RELEVANT EVIDENCE, BUT I CAN ACCEPT A VERDICT OF GUILTY OF A LESSER CRIME —

LET ME START THAT OVER.

IT IS UP TO YOU TO DECIDE THE ORDER IN WHICH YOU CONSIDER EACH CRIME AND THE RELEVANT EVIDENCE, BUT I CAN ACCEPT A VERDICT OF GUILTY OF A LESSER CRIME ONLY IF YOU HAVE FOUND THE DEFENDANT NOT GUILTY OF THE CORRESPONDING GREATER CRIME.

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THE DEFENDANT IS CHARGED AS A LESSER CRIME WITH RESISTING OR OBSTRUCTING OR DELAYING A PEACE OFFICER IN THE PERFORMANCE OR ATTEMPTED PERFORMANCE OF HIS DUTIES, IN VIOLATION OF PENAL CODE SECTION 148(A).

TO PROVE THAT THE DEFENDANT IS GUILTY OF THIS CRIME, THE PEOPLE MUST PROVE THAT:

1. H. HAMPTON, B. NYSTEDT, AND J. KRUEGER WERE PEACE OFFICERS LAWFULLY PERFORMING OR ATTEMPTING TO PERFORM THEIR DUTIES AS A PEACE OFFICER;

2. THE DEFENDANT WILLFULLY RESISTED OR OBSTRUCTED OR DELAYED H. HAMPTON, B.

NYSTEDT, J. KRUEGER IN THE PERFORMANCE OR ATTEMPTED PERFORMANCE OF THOSE DUTIES; AND

3. WHEN THE DEFENDANT ACTED, HE OR SHE KNEW OR REASONABLY SHOULD HAVE KNOWN THAT H. HAMPTON, B. NYSTEDT, J. KRUEGER WERE PEACE OFFICERS PERFORMING OR ATTEMPTING TO PERFORM THEIR DUTIES.

THE TERMS WILLFULLY, PEACE OFFICER, DUTIES OF A PEACE OFFICER, AND LAWFULLY PERFORMING DUTIES ARE DEFINED IN A PRIOR INSTRUCTION TO WHICH YOU SHOULD REFER.

[p. 1856]

THE FOLLOWING INSTRUCTION APPLIES TO BOTH THE CHARGED CRIME AND THE LESSER CRIME:

THE PEOPLE HAVE THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT H. HAMPTON, B. NYSTEDT, AND J. KRUEGER WERE LAWFULLY PERFORMING THEIR DUTIES AS PEACE OFFICERS. IF THE PEOPLE HAVE NOT MET THIS BURDEN, YOU MUST FIND THE DEFENDANTS NOT GUILTY OF ANY OF THE CHARGED OFFENSES OR LESSER OFFENSES.

A PEACE OFFICER IS NOT LAWFULLY PERFORMING HIS DUTIES IF HE IS UNLAWFULLY ARRESTING OR DETAINING SOMEONE OR USING UNREASONABLE OR EXCESSIVE FORCE WHEN MAKING OR ATTEMPTING TO MAKE AN OTHERWISE LAWFUL ARREST OR DETENTION.

A PEACE OFFICER MAY LEGALLY DETAIN SOMEONE IF:

1. SPECIFIC FACTS KNOWN OR APPARENT TO THE OFFICER LEAD HIM TO SUSPECT THAT THE PERSON TO BE DETAINED HAS BEEN OR IS ABOUT TO BE INVOLVED IN ACTIVITY RELATING TO CRIME;

2. A REASONABLE OFFICER WHO KNEW THE SAME FACTS WOULD HAVE THE SAME SUSPICION.

ANY OTHER DETENTION IS UNLAWFUL.

IN DECIDING WHETHER THE DETENTION

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WAS LAWFUL, CONSIDER EVIDENCE OF THE OFFICER'S TRAINING AND EXPERIENCE AND ALL THE CIRCUMSTANCES KNOWN BY THE OFFICER WHEN HE DETAINED THE PERSON.

A PEACE OFFICER MAY LEGALLY ARREST SOMEONE IF HE HAS PROBABLE CAUSE TO MAKE THE ARREST.

ANY OTHER ARREST IS UNLAWFUL.

PROBABLE CAUSE EXISTS WHEN THE FACTS KNOWN TO THE ARRESTING OFFICER AT THE TIME OF THE ARREST WOULD PERSUADE SOMEONE OF REASONABLE CAUTION THAT THE PERSON TO BE ARRESTED HAS COMMITTED A CRIME.

IN DECIDING WHETHER THE ARREST WAS LAWFUL, CONSIDER EVIDENCE OF THE

OFFICER'S TRAINING AND EXPERIENCE AND ALL THE CIRCUMSTANCES KNOWN BY THE OFFICER WHEN HE ARRESTED THE PERSON.

IN ORDER FOR AN OFFICER TO ENTER A HOME TO ARREST SOMEONE WITHOUT A WARRANT:

1. THE OFFICER MUST HAVE PROBABLE CAUSE TO BELIEVE THAT THE PERSON TO BE ARRESTED COMMITTED A CRIME AND IS IN THE HOME; AND

2. EXIGENT CIRCUMSTANCES REQUIRE THE OFFICER TO ENTER THAT HOME WITHOUT A WARRANT.

THE TERM "EXIGENT CIRCUMSTANCES" DESCRIBES AN EMERGENCY SITUATION WHICH REQUIRES

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SWIFT ACTION TO PREVENT, ONE, IMMINENT DANGER TO LIFE OR SERIOUS DANGER TO DAMAGED PROPERTY, OR, TWO, THE IMMINENT ESCAPE OF A SUSPECT OR DESTRUCTION OF EVIDENCE.

THE OFFICER MUST TELL THAT PERSON THAT THE OFFICER INTENDS TO ARREST HIM, WHY THE ARREST IS BEING MADE, AND THE AUTHORITY FOR THE ARREST. THE OFFICER DOES NOT HAVE TO TELL THE ARRESTED PERSON THESE THINGS IF THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THE PERSON IS COMMITTING OR ATTEMPTING TO

COMMIT A CRIME, IS FLEEING IMMEDIATELY AFTER HAVING COMMITTED A CRIME, OR HAS ESCAPED FROM CUSTODY. THE OFFICER MUST ALSO TELL THE ARRESTED PERSON THE OFFENSE FOR WHICH HE IS BEING ARRESTED IF HE ASKS FOR THAT INFORMATION.

A PEACE OFFICER MAY USE REASONABLE FORCE TO ARREST OR DETAIN SOMEONE, TO PREVENT ESCAPE, TO OVERCOME RESISTANCE, OR IN SELF-DEFENSE.

IF A PERSON KNOWS OR REASONABLY SHOULD KNOW THAT A PEACE OFFICER IS ARRESTING OR DETAINING HIM OR HER, THE PERSON MUST NOT USE FORCE OR ANY WEAPON TO RESIST AN OFFICER'S USE OF REASONABLE FORCE. HOWEVER, YOU MAY NOT FIND THE DEFENDANT GUILTY OF RESISTING ARREST IF THE ARREST WAS UNLAWFUL, EVEN IF THE DEFENDANT KNEW OR REASONABLY SHOULD HAVE KNOWN

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THAT THE OFFICER WAS ARRESTING HIM.

IF A PEACE OFFICER USES UNREASONABLE OR EXCESSIVE FORCE WHILE ARRESTING OR ATTEMPTING TO ARREST OR DETAINING OR ATTEMPTING TO DETAIN A PERSON, THAT PERSON MAY LAWFULLY USE REASONABLE FORCE TO DEFEND HIMSELF OR HERSELF.

A PERSON BEING ARRESTED USES REASONABLE FORCE WHEN HE OR SHE:

1. USES THAT DEGREE OF FORCE THAT HE OR SHE ACTUALLY BELIEVES IS REASONABLY NECESSARY TO PROTECT HIMSELF, HERSELF, OR ANOTHER FROM THE OFFICER'S USE OF UNREASONABLE OR EXCESSIVE FORCE; AND

2. USES NO MORE FORCE THAN A REASONABLE PERSON IN THE SAME SITUATION WOULD BELIEVE IS NECESSARY FOR HIS, HER, OR ANOTHER'S PROTECTION.

EACH OF THE COUNTS CHARGED IN THIS CASE IS A SEPARATE CRIME. YOU MUST CONSIDER EACH COUNT SEPARATELY AND RETURN A SEPARATE VERDICT FOR EACH ONE.

WE'LL TAKE A 15-MINUTE BREAK AT THIS POINT AND THEN HEAR THE ATTORNEYS' ARGUMENTS. YOU'VE HEARD ALL THE OTHER EVIDENCE, MOST OF THE LAW. DON'T MAKE ANY DECISIONS KEEP AN OPEN MIND UNTIL YOU'VE HEARD THE ARGUMENTS AND

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DELIBERATE.

WE WILL SEE YOU BACK IN 15 MINUTES.

(A RECESS WAS TAKEN.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUT OF THE PRESENCE OF THE JURY:)

THE COURT: BACK IN SESSION OUTSIDE THE JURY'S PRESENCE. ALL COUNSEL AND THE DEFENDANTS ARE HERE.

READY FOR OUR JURORS.

MS. POWELL: JUST A SECOND. WE JUST GOT THESE.

(PAUSE IN THE PROCEEDINGS.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: BACK IN SESSION WITH THE JURORS, ALTERNATES, COUNSEL, DEFENDANT.

THE ATTORNEYS WILL PRESENT THEIR ARGUMENTS NOW. THE PROSECUTOR ARGUES FIRST, THEN DEFENSE COUNSEL. THE PROSECUTOR HAS A REBUTTAL ARGUMENT THAT THE DEFENSE IS NOT ENTITLED TO RESPOND TO. WHATEVER THEY SAY NOW IS NOT EVIDENCE.

PROCEED.