No. 14-151

In The Supreme Court of the United States

KEISCHA WILSON AND MICHAEL WILSON, SR.,

Petitioners,

vs.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Ninth Circuit panel majority err in concluding in an unpublished, non-precedential memorandum disposition, that under *Heck v. Humphrey*, 512 U.S. 477 (1994), petitioners were barred from asserting an excessive force claim because the record from their state court criminal trial established that the state court jury was instructed that an officer's use of excessive force was a defense to the criminal charges, petitioners' criminal defense counsel expressly argued to the jury that any use of excessive force by the officers would bar conviction, and the jury convicted petitioners?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioners and the respondents, except for the City of Long Beach, are individuals; no party is a corporate entity.

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JURISDICTION

Respondents concur that jurisdiction was proper in the lower courts and in this Court. Respondents note that following the Court's request that a response to the Petition for Writ of Certiorari ("Pet.") be filed, on October 23, 2014, the Honorable Anthony M. Kennedy granted respondents an extension of time to and including December 15, 2014 in which to file their Brief In Opposition.

STATEMENT OF FACTS

Respondents adopt those portions of the Factual Statement of the Petition that contain citations to the record setting out what occurred in the underlying state court criminal trial, and in the district court, but not those portions which lack record citation and consist of argument and characterization as to what the record demonstrates, such as petitioners' assertions about the source and nature of any injuries (Pet. 7-8) and the scope of issues decided in the state court proceedings (Pet. 9-10).

INTRODUCTION

The petition presents no issue for review by this Court. The Ninth Circuit's unpublished, non-precedential memorandum disposition correctly states the governing principles of this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) and

represents at most, a disagreement between the majority and the dissent as to how to read the facts in this particular case.

As a threshold matter, petitioners do not actually argue their first issue posited for review, namely: "Does the *Heck* Bar Apply to Section 1983 Claims for Unreasonable Seizures Predicated on the Use of Excessive Force by Police Officers?" (Pet. i.) Throughout the petition they acknowledge that *Heck* might well bar an excessive force claim where resolution of the underlying criminal proceeding was such that finding that an officer's use of force was excessive would necessarily imply the invalidity of the underlying criminal conviction – their only complaint is that the panel majority purportedly failed to properly apply *Heck* here. Notwithstanding how their first issued is phrased, they most assuredly are not asserting that *Heck* can never bar an excessive force claim, nor could they rationally do so.

Similarly, the third issue that they present for review is irrelevant to what they actually argue, and indeed manifestly not an issue in this case. Thus, they ask: "Should The *Heck* Bar Be Applied Differently If the Underlying Conviction Was Based On A Jury Verdict Rather Than A Plea?" (Pet. i.) The ostensible premise for this issue is that the Ninth Circuit purportedly applies *Heck* differently in determining whether a plea bargain forecloses a subsequent civil rights suit related to the underlying criminal plea, as opposed to when a full criminal trial may bar relitigation of an issue in a subsequent § 1983 action.

(Pet. 34-36.) Yet, as the panel dissenting opinion notes, the Ninth Circuit in fact *has not* formally adopted such a rule of differential treatment, and the most that can be said is there is dicta in some cases to that effect. (App. 5.) More significantly, the panel majority in this case did not apply any such rule or decline to make any inquiry into the nature of the underlying criminal proceedings. To the contrary, the majority made its decision, as did the district court, based upon a review of pertinent portions of the underlying criminal trial, including the specific instructions given to the jury. (App. 2.)

That brings us to the remaining issue petitioners purport to present for review, namely the panel majority's purported error in improperly interpreting the specific jury instructions and record in the underlying criminal case. The fundamental difference between the panel majority and the dissent is a disagreement about interpretation of the particular facts in this case, and not any disagreement about general application of *Heck* or even existing Ninth Circuit authority. As a matter of practice, this Court does not expend its resources in resolving factually unique cases which provide no basis for establishing rules of general application. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *NLRB v. Hendricks County Rural Elec. Membership Corp*., 454 U.S. 170, 176 n.8 (1981) (dismissing cross-petition as improvidently granted

because "we are presented primarily with a question of fact, which does not merit Court review").

As the panel majority noted, the state court criminal jury was specifically instructed that it could convict petitioners of resisting arrest only if it found that the police were acting lawfully and lawful was defined to include the absence of excessive force. (App. 2.) Petitioners' criminal defense counsel in fact expressly argued to the jury in the criminal trial that excessive force by the police officers barred conviction for *any* of the alleged acts of resistance by petitioners. (Volume 2, Supplemental Excerpt of Record ("2 SER") 190:25-27.) Not surprisingly, based on this record, the panel majority concluded that petitioners' conviction in the face of both this instruction and argument meant that success on their excessive force claim for exactly the same conduct would necessarily imply the invalidity of the criminal conviction under *Heck*.

To be sure, there is a disagreement between the panel majority and the dissenting judge concerning how a jury might have construed the applicable instruction, but again, that concerns a dispute as to an issue of fact in a particular case, and not application of any particular legal principle. At bottom, petitioners contend that the panel majority erred, but even assuming that is so (it is not), this Court does not grant review simply to correct erroneous rulings. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Ross v. Moffitt*, 417 U.S.

600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

The Ninth Circuit's unpublished, non-precedential memorandum disposition presents no issue warranting review by this Court. The petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION PRESENTS NO ISSUE CONCERNING WHETHER *HECK V. HUMPHREY* APPLIES TO EXCESSIVE FORCE CLAIMS UNDER § 1983, OR WHETHER A DIFFERENT RULE SHOULD APPLY IN DETERMINING WHETHER A PLEA BARGAIN AS OPPOSED TO A CRIMINAL CONVICTION BY TRIAL BARS A SUBSEQUENT CIVIL RIGHTS CLAIM UNDER *HECK*.

As noted, the petition purports to assert two issues for review that are simply not argued or indeed present at all in this case. The first purported question presented for review is whether *Heck* applies to bar a § 1983 claim for excessive force at all. The second question concerns whether *Heck* should be applied differently if the underlying conviction was

based on a jury verdict rather than a plea bargain. Neither question warrants review in this case.

A. The Rule Of *Heck v. Humphrey*: A Civil Rights Claim Is Barred Where Success On The Claim Would Necessarily Imply The Invalidity Of A Valid, Undisturbed Criminal Conviction.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court announced a straightforward rule strictly limiting the ability of individuals convicted of an underlying criminal offense to essentially re-litigate the criminal action in a subsequent suit under § 1983. Specifically, analogizing to the tort of malicious prosecution, this Court held that the plaintiff in *Heck* was barred from pursuing a § 1983 claim for violations of due process based upon destruction of evidence, improper presentation of evidence, and general misconduct by attorneys and law enforcement officers which had led to his state court conviction. The Court held:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of

> habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 486-87 (footnotes omitted).

Based on this Court's holding in *Heck*, petitioners present two purported issues for review that are simply not in dispute either as a general matter, or in this case in particular, and hence do not provide a basis for review by this Court.

B. Contrary To The First Issue They Posit For Review, Petitioners Do Not In Fact Argue That *Heck* Never Applies To Bar An Excessive Force Claim Under § 1983, Nor Could They Rationally Do So.

The first question presented in the petition is phrased as: "Does the *Heck* Bar Apply to Section 1983

Claims for Unreasonable Seizures Predicated on the Use of Excessive Force by Police Officers?" (Pet. i.) However, review of the petition reveals that nowhere else do petitioners attempt to assert such a broad question. Nowhere do petitioners argue that *Heck* cannot in any instance ever be applied to bar an excessive force claim. Rather, the closest petitioners come is their assertion that:

> 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.

(Pet. 15 (some emphasis in original, some emphasis added).)

Obviously, asserting that § 1983 claims for unreasonable seizures predicated on excessive force are not automatically precluded by criminal convictions that establish the lawfulness of a defendant's arrest, is not the same as arguing that as a blanket matter *Heck* can never be applied to a § 1983 claim based on excessive force. Indeed, virtually all of the cases petitioners cite as somehow conflicting with the Ninth Circuit majority decision here (they do not in fact conflict at all, *see infra*, § II.B), explicitly recognize that *Heck* may apply to bar an excessive force claim under appropriate circumstances. This is not

surprising, as nothing in *Heck* or its reasoning would exempt an excessive force claim from its holding. To the contrary, in *Heck*, the Court noted that in some circumstances a conviction for resisting arrest would necessarily bar a subsequent § 1983 claim. 512 U.S. at 487 n.6.[1]

Petitioners do not seriously contend otherwise, nor could they. It makes no sense to say that a plaintiff who was convicted of assault with a deadly weapon based on pointing a gun at a police officer and who was subsequently shot in self-defense by the officer, could, nonetheless, bring a subsequent § 1983 claim asserting that the officer used excessive force because he was not in fact acting in self-defense, without running afoul of *Heck*'s clear rule.

Petitioners simply present no argument, let alone authority to support the broad proposition underlying their first issue for review, namely that *Heck* never

[1] The Court noted: "[A] § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful – would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. (This is a common definition of that offense. [Citations.]) He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata . . . the § 1983 action will not lie." *Id*.

applies to bar a § 1983 claim based on excessive force. Plainly the first issue presents no basis for review by this Court.

C. The Ninth Circuit Does Not Apply *Heck* Differently Depending Upon Whether The Underlying Criminal Charges Were Resolved By Way Of Plea Bargain Or By Trial, And The Panel Majority Plainly Based Its Decision On Examination Of The Record Of The State Criminal Trial.

The third issue petitioners attempt to assert for review is: "Should The *Heck* Bar Be Applied Differently If the Underlying Conviction Was Based On A Jury Verdict Rather Than A Plea?" (Pet. i.) This is based on their contention that the Ninth Circuit applies a different, indeed higher standard when analyzing whether a plea bargain bars a subsequent civil rights claim, as opposed to when a criminal conviction following trial is asserted as a basis to bar the claim, and that the panel majority applied such a rule here. (Pet. 34-35.) Their argument does not withstand scrutiny.

First, as petitioners even acknowledge, this purported "difference" in analysis stems from dictum in *Smith v. City of Hemet*, 394 F.3d 689, 699 n.5 (9th Cir. 2005) (en banc). (Pet. 34.) In *Smith*, the court declined to apply *Heck* to bar a civil rights action for excessive force because the plaintiff's plea bargain concerning charges stemming from multiple acts of

resisting a police officer did not identify any particular act that served as the basis for the plea. 394 F.3d at 699. The *Smith* court had no occasion to, and did not in fact, expressly decide the issue of how a court was to analyze a jury verdict in a criminal trial that was subsequently urged as a bar to a later civil rights action.

The panel dissent here similarly notes that the language cited by petitioners as supposedly espousing a "different" rule in applying *Heck* in the context of convictions by a jury is nothing more than dictum. (App. 5.) Certainly petitioners cite no Ninth Circuit case expressly applying a different standard in analyzing a state court jury verdict as opposed to plea bargain for purposes of applying *Heck*. Indeed, in *Beets v. County of Los Angeles*, 669 F.3d 1038, 1048 (9th Cir. 2012), the court again analyzed state court jury instructions in determining the scope of issues resolved in a state court criminal trial for purposes of applying *Heck* to bar a subsequent excessive force suit.

Nor did the panel majority apply any such rule here. The panel majority did not simply assume that the state court conviction *ipso facto* barred the subsequent excessive force suit. Rather, as review of the panel majority decision reveals, the court squarely reviewed what was argued in the state court criminal proceedings, and more critically, how the jury was instructed, in determining whether success in the subsequent civil rights suit would necessarily imply the invalidity of that conviction. (App. 2.)

The Ninth Circuit does not apply a different rule when analyzing whether a plea bargain to state court charges as opposed to conviction following jury trial may bar a subsequent civil rights suit under *Heck*, and manifestly no such "different" standard was applied here. The third issue for review proffered by petitioners manifestly does not require the intervention of this Court.

II. THE UNPUBLISHED, NON-PRECEDENTIAL MEMORANDUM DISPOSITION CORRECTLY CITES THE GOVERNING LEGAL STANDARD AND RESTS ON INTERPRETATION OF THE UNIQUE FACTS OF THIS CASE, WHICH THE PANEL MAJORITY CORRECTLY CONCLUDED BARRED ANY CLAIM UNDER *HECK*, AND DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

A. The Unpublished Memorandum Correctly Cites The Governing Law And Is Based On Interpretation Of The Particular Facts Of This Case, Which The Panel Majority Correctly Found To Bar Petitioners' Action Under *Heck*.

Petitioners do not contend that the panel majority failed to identify the governing authority in this case, nor could they. The panel majority clearly cites this Court's decision in *Heck*. (App. 2.) At most, petitioners contend that the panel majority erroneously applied *Heck*; yet this Court has made it clear

that it is not a court of error, and that the mere failure of a lower court to correctly apply a well-established standard is not a proper ground for review in this Court. Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

Moreover, this case does not even concern incorrect application of an established legal standard. Rather, at most it concerns application of *Heck's* well-established principles to a particular factual situation. Indeed, the difference between the panel majority and the dissent centers upon their differing interpretations of the record from petitioners' state court criminal trial.

Petitioners were convicted of violating California Penal Code section 69 – threats or use of force to resist a peace officer. As the panel majority notes, and as petitioners concede, the jury in the state court criminal proceeding was specifically instructed that in order to convict petitioners, they would have to find that they had "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 that 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." (Pet. 8-9.) Thus, as the panel majority observed, the state court jury was specifically 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." (App. 2.) Since

the jury convicted petitioners, it therefore necessarily found that the officers acted lawfully and had not used excessive force. (*Id*.)

The dissent disagreed with the majority's interpretation of the criminal trial record, and specifically the jury instruction. The dissent contended that the petitioners had engaged in multiple acts of physical resistance against the officers, and opined that since the jury was not specifically instructed that any use of excessive force by a police officer would negate conviction on any act of resistance they might have engaged in, the jury might have concluded that the officers acted excessively in response to some acts of resistance by petitioners, but not to others. (App. 5-6.)

As a threshold matter, the dissent's conclusion that the instruction given to the jury in the state court criminal trial did not permit the jury to acquit if it found that there had been any use of excessive force by the police officers at any time, is simply mistaken. The instruction on its face contains no limitation. It did not attempt to break out any individual acts of resistance. The inference from the instruction is, on its face, that an officer is not acting lawfully when excessive force is used, and specifically informed the jury that that is an element of the offense – the officer must be acting lawfully, i.e., without excessive force.

Indeed, petitioners' criminal defense counsel – the same counsel that represents him in this Court in this action – well understood that the manner in

which the case was tried, and the instructions themselves were designed to make it clear to the jury that excessive force by any officer at any time during the course of the incident could bar a conviction. In fact, petitioners' criminal defense counsel specifically argued to the state jury that "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." (2 SER 190:1-3.) More critically, petitioners' criminal defense counsel expressly argued that "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." (2 SER 190:25-27 (emphasis added); *see also* 2 SER 193:20-21 ("If one officer uses excessive force, the People have not met their burden.").)

Not surprisingly, after reviewing the six volume state court criminal transcript, the district court concluded that the state court jury had specifically been directed to consider whether the officers used excessive force against the Wilsons at any time during the course of their acts of resistance against the police officers, and in convicting the Wilsons found that the officers had not used excessive force. *Heck* therefore barred any claim based on use of force by the officers prior to taking the petitioners into custody. The Ninth Circuit majority agreed.

The dissenting opinion does not mention any of these salient facts. Rather, the dissent asserts that an instruction advising the jury that they could acquit if they found that any officer used excessive force at any

point in the confrontation, would be contrary to California law. (App. 3.) As a threshold matter, the cases the dissent cites as establishing California law for this proposition – *Yount v. City of Sacramento*, 183 P.2d 471 (Cal. 2008) and *Hooper v. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011) – both involve interpretation of California Penal Code section 148 (interference with a police officer) and not the criminal charge at issue here, resisting arrest through threats or violence under California Penal Code section 69.

Moreover, even if the state trial court judge incorrectly instructed the jury in petitioners' criminal case, so what? If anything, the error redounded to petitioners' advantage in the state court criminal proceedings as it provided them a possible basis for acquittal that they were happy to assert then, although they now belatedly disclaim it for purposes of financial gain in their civil suit.

The difference between the panel majority and the dissenting opinion is nothing more than a disagreement about how to interpret a six volume state court criminal trial transcript. It does not involve any dispute as to any applicable legal principle, creates no new precedent, indeed no precedent at all given that it is an unpublished disposition, and manifestly does not warrant review by this Court.

B. The Unpublished, Non-Precedential Memorandum Disposition Does Not Conflict With The Decisions Of The Ninth Circuit, Any Other Circuit, Or The California Supreme Court.

In an effort to manufacture some ground for review, petitioners assert that the Memorandum Disposition conflicts with the decisions of the Ninth Circuit, other circuits and the California Supreme Court. (Pet. 20-33.) Not so.

As review of the cited cases reveals, each turns upon facts different than those present in this case, and at most each court simply came to a different conclusion concerning whether the excessive claim was barred by *Heck* based upon those different facts.

1. The Memorandum does not conflict with any Ninth Circuit decision.

Petitioners assert that the Memorandum conflicts with the Ninth Circuit's decisions in *Smith v. City of Hemet*, 394 F.3d 689 and *Hooper v. County of San Diego*, 629 F.3d 1127. (Pet. 29-32.) Yet, those cases involved an entirely different California criminal statute, Penal Code section 148, not California Penal Code section 69, the provision under which petitioners were convicted. As the court expressly noted in *Hooper*: "To the extent the state law under which a conviction is obtained differs, the answer to the *Heck* question could also differ." 629 F.3d at 1133.

In addition, *Smith* involved interpretation of a plea bargain, not a jury verdict, with the court concluding that because the plea documents were silent as to the particular acts of force that formed the basis of the plea, the plaintiffs' excessive force case was not foreclosed by *Heck*.[2] As previously noted, the *Smith* court observed that the *Heck* determination could turn out differently depending upon whether a case went to a jury. 394 F.3d at 699 n.5.

Hooper, too, is a plea bargain case, with the court following *Smith*, and finding that since the plaintiff's guilty plea to violation of California Penal Code section 148 did not specify any particular act as a basis for the plea, *Heck* would not bar the subsequent excessive force claim. 629 F.3d at 1133-34.

There is simply no conflict between this case and *Hooper* and *Smith*. The latter cases involve the entirely different situation of courts construing plea bargains to charges under California Penal Code section 148, not, as here, review of state court jury trial proceedings concerning a charge for resisting arrest through threat or violence under California Penal Code section 69.

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[2] The court noted: "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. Accordingly, the defendants are not entitled to summary judgment on the basis of *Heck v. Humphrey*." 394 F.3d at 699 (emphasis added).

2. The Memorandum does not conflict with the decisions of other circuits.

Petitioners' contention that the Memorandum conflicts with the decisions of other circuits is also baseless. Like *Smith* and *Hooper*, *Dyer v. Lee*, 488 F.3d 876 (11th Cir. 2007) and *Van Gilder v. Baker*, 435 F.3d 689 (7th Cir. 2006) involve interpretation of plea bargains, with the court in each case concluding that because the plea agreement was silent as to the specific factual basis for the plea, the fact that multiple acts might have served as a basis for the plea bargain meant that the plaintiff's excessive force claim was not barred by *Heck*. *Dyer*, 488 F.3d at 878, 881-82; *Van Gilder*, 435 F.3d at 692.

In *Martinez v. City of Albuquerque*, 184 F.3d 1123 (10th Cir. 1999), the plaintiff had been convicted in a bench trial for the misdemeanor of resisting arrest by fleeing a police officer. In holding that *Heck* did not bar the plaintiff's subsequent excessive force claim, the Tenth Circuit reviewed the underlying criminal proceedings, and noted that the state court judge had expressly stated that in finding that the plaintiff had resisted arrest: "*whether the officers overreacted or not is really not my concern, and I will not offer any opinions or decisions in that regard.*" *Id*. at 1126 (emphasis in original). In short, because the state court judge made it clear that the use of force issue was not addressed at all in the state criminal proceeding, *Heck* did not apply.

Similarly, in *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997), in determining whether *Heck* barred the plaintiff's civil rights claim for excessive force, the Third Circuit closely examined the state court trial proceedings, including both the nature of the specific charge and the applicable jury instructions. The court found that *Heck* did not bar the plaintiff's excessive force claim because in the state court proceedings the jury was not instructed with respect to excessive force, but simply asked whether the officer was justified in using *substantial force*, a term of art with respect to the underlying criminal charge. *Id.* at 145-46.

In sum, while *Nelson* and *Martinez* come to different conclusions as to whether the civil rights claims in those cases were barred by *Heck*, they ultimately apply exactly the same standards and methods employed by the panel majority here – review of the underlying state court criminal proceedings. That they come to a different result merely reflects the vastly different factual records and applicable criminal charges in each of the cases.

Nothing in the panel majority memorandum conflicts with the decision of any other circuit court.

3. The Memorandum does not conflict with the decision of the California Supreme Court in *Yount v. City of Sacramento*.

Finally, petitioners contend that the unpublished panel memorandum conflicts with the California Supreme Court's decision in *Yount v. City of Sacramento*, 183 P.2d 471. But *Yount* is flatly distinguishable from the present case.

Like *Smith* and *Hooper*, *Yount* involved the issue of whether a guilty plea to a charge of resisting an officer under California Penal Code section 148 automatically barred a subsequent excessive force claim under *Heck*. 183 P.2d at 474-75. Specifically, the plaintiff, after being arrested for driving under the influence of alcohol, was being transported to jail and despite being in handcuffs and in leg restraints, was struggling and threatening the officers. *Id*. at 474. The plaintiff was accidentally shot by an officer when the officer accidentally drew a pistol instead of a Taser in an attempt to subdue him. *Id*. The Supreme Court noted that given the fact that there were multiple acts of resisting arrest by the plaintiff, and the plea agreement was silent as to any particular act that might have formed the basis of the plea, it could not be said under *Heck* that success on the excessive force claim would necessarily imply the invalidity of the criminal conviction. *Id.* at 474, 481-82. Indeed, as the court noted, it was undisputed that none of the acts of resistance involved in the case would have justified the use of deadly force. *Id.* at 481. (Not a

surprising concession by defendants, given that the police officer had not intended to use deadly force in the first place, but had inadvertently drawn his pistol instead of his Taser.)

Thus, as with *Hooper* and *Smith*, the California Supreme Court had no occasion to interpret *Heck* in light of the provisions of California Penal Code section 69, nor address the analysis used when evaluating a conviction following a jury trial, as opposed to a plea bargain. Nothing in *Yount* is remotely inconsistent with either the analysis used by the Ninth Circuit based upon the specific facts in the record here, or the governing legal principles cited by the panel majority.

None of the decisions cited by petitioners conflicts with the Ninth Circuit's decision here, and accordingly, there is no basis for review by this Court.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition should be denied.

Respectfully submitted,

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