FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

Argued and Submitted May 22, 2020
San Francisco, California

Filed July 16, 2021

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

Opinion by Judge Lemelle;
Dissent by Judge Berzon

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

SUMMARY[**]

42 U.S.C. § 1983 / *Heck v. Humphrey*

The panel affirmed the district court's order on summary judgment holding that appellant's 42 U.S.C. § 1983 claim for excessive force was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

Appellant argued that her conviction after jury trial for violations of California Penal Code § 148(a)(1) (resisting, obstructing, or delaying a peace officer), and her § 1983 claim were not necessarily based on the same transaction, and therefore not barred by *Heck*.

The panel held that the relevant inquiry in applying *Heck* is whether the record contained factual circumstances that supported the underlying conviction under § 148(a)(1), and not whether the conviction was obtained by a jury verdict or a guilty plea. The panel held further that, based on the jury instructions and evidence of record before it, the jury verdict established that appellant resisted and the deputy's conduct was lawful throughout the encounter. Furthermore, in California, the lawfulness of an officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer. The panel held that the record compelled a finding the jury determined that the arresting deputy acted within the scope of his duties without the use of excessive force, and that appellant sought to show that the same conduct constituted excessive force. The district court

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

appropriately considered summary disposition of remaining legal issues under *Heck* and its progeny. In reliance, the panel found that *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005 (en banc), and *Beets v. City of Los Angeles*, 669 F. 3d 1038 (9th Cir. 2012), controlled application of the *Heck* bar as found by the district court.

Judge Berzon dissented. She wrote that the jury was instructed that there were four possible factual bases on which it could convict appellant, and three of the factual bases pertained to acts not an issue in appellant's section 1983 claim. Success on appellant's section 1983 claim therefore did not necessarily imply that her conviction was invalid. In concluding that *Heck* barred appellant's excessive force claim, the majority fundamentally erred.

COUNSEL

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

OPINION

LEMELLE, District Judge:

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

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

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

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

On November 12, 2015, Lemos filed a complaint in the district court asserting an excessive force claim under 42 U.S.C. § 1983 arising out of the June 13, 2015 incident. Lemos claimed Holton used excessive force in stopping her from fleeing as he attempted to arrest her. On April 18, 2016, the district court stayed the federal action during pendency of state criminal proceedings against Lemos, in which Lemos had been charged with resisting, obstructing, or delaying a peace officer in violation of California Penal Code § 148(a)(1).[1]

On August 31, 2016, a jury was instructed Lemos could be found guilty of violating California Penal Code § 148(a)(1). The jury was instructed to find each of the following elements beyond a reasonable doubt: (1) "Deputy

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

Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer," (2) "[Lemos] willfully resisted, obstructed or delayed Deputy Marcus Holton in the performance or attempted performance of those duties," and (3) "[w]hen [Lemos] acted, she knew, or reasonably should have known, that Deputy Marcus Holton was a peace officer performing or attempting to perform his duties." As to the first element, the jury was instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." With respect to the second element, the jury was instructed that Lemos could be found guilty based on four theories of liability: Lemos (1) made physical contact with Holton as he was trying to open the truck door; (2) placed herself between Holton and Ms. Labruzzi; (3) blocked Holton from opening the truck door and seeing or speaking to Ms. Labruzzi; or (4) pulled away from Holton when Holton attempted to grab her. Lemos was convicted by a jury for violating California Penal Code Section 148(a)(1) when Lemos resisted, delayed, or obstructed Deputy Holden while he was conducting his duties as an officer on June 13, 2015.

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

JURISDICTION AND STANDARD OF REVIEW

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

We review *de novo* the district court's grant of summary judgment. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). We must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist." *Id.* We will affirm only if no "reasonable jury viewing the summary judgment record could find by a preponderance of the evidence that the plaintiff is entitled to a favorable verdict." *Narayan v. EGL, Inc.*, 616 F.3d 895, 899 (9th Cir.2010). "If a rational trier of fact could resolve a genuine issue of material fact in the nonmoving party's favor," summary judgment is inappropriate. *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir.2011). "[C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." *Id.* (quoting *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir.2009)).

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

Excessive force claims are analyzed under the objective reasonableness standard of the Fourth Amendment as enunciated in *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). *See Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1115 (9th Cir. 2005). For assigned reasons below, we discern no material factual disputes from this record. The sole issue remaining on

appeal is a basic *Heck* question—whether success on Lemos's § 1983 excessive force claim "would 'necessarily imply' or 'demonstrate' the invalidity" of Lemos's state court conviction under California Penal Code § 148(a)(1).

THE HECK PRECLUSION DOCTRINE

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

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

512 U.S. 477, 486 (1994). Under *Heck*, "[w]hen a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, 'the district court must consider whether a judgment in favor of the plaintiff would

necessarily imply the invalidity of his conviction or sentence.'" *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1130 (9th Cir. 2011) (quoting *Heck*, 512 U.S. at 487). If it would, the civil action is barred. *Id.*; *cf. Yount v. City of Sacramento*, 43 Cal. 4th 885, 902 (2008) (extending *Heck* to California state law claim for battery). *Heck* instructs that "if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir.1996) (per curiam). However, a plaintiff's allegation of excessive force by a police officer is not barred by *Heck* if the officer's conduct is "distinct temporally or spatially from the factual basis for the [plaintiff's] conviction." *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012) (citing *Smith v. City of Hemet*, 394 F.3d 689, 699 (9th Cir.2005) (en banc)).

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

Beets reaffirmed and relied on *Smith* to conclude that the jury necessarily determined that during the entire course of the deputy's conduct, he "acted within the scope of his duties

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

Although *Beets* relied on *Smith* in determining the officer acted within the scope of his duties during the entire course of conduct, it was one of two independent grounds on which *Beets* rejected the plaintiffs' argument that the relevant conviction was not barred by *Heck*; indeed, *Beets* made clear that the argument failed "on two counts." *Id.* Nevertheless, "[i]t is well-established that 'where a decision rests on two or more grounds [as in *Beets*], none can be relegated to the

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

category of obiter dictum.'" *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1016 n.5 (9th Cir. 2013) (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949)).

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

Yount involved an incident wherein the plaintiff consistently resisted the officers' attempts to place him in the patrol car until one officer mistakenly fired his pistol, instead of his taser, to subdue the plaintiff. *Yount*, 43 Cal. 4th at 888. In pleading no contest to a violation of § 148(a)(1) for his conduct leading up to the gunshot, Yount stipulated to a factual basis "without any explicit recitation of what those facts were." *Id.* at 895. Upon review of Yount's conviction, his subsequent admission to its underlying facts, and eyewitness testimony at the *Heck* hearing, the Supreme Court of California found that *Heck* barred his § 1983 claims pertaining to the force used by the officers in response to Yount's violent resistance. *Id.* at 898. However, the court found that *Heck* did not bar Yount's claims regarding the use of deadly force thereafter because there was nothing within the criminal record that provided a justification for such force. *Id.*

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

We further acknowledge that *Heck* would not necessarily bar a § 1983 claim for excessive force when the defendant enters into a plea agreement and the conviction and the § 1983 claim are based on different actions taken during one continuous transaction. *See Hooper v. City of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) (excessive force used after an arrest is made does not destroy the lawfulness of the arrest). In *Hooper*, the complainant struggled briefly with the arresting officer after they were on the ground by "jerking side to side." The officer restrained Hooper's hands behind her back, and she allegedly stopped resisting when instructed to do so by the officer. Thereafter, and in response to a gathering of spectators, the officer allegedly screamed "Get away from my car. Get away from my car. Come here, Kojo." The officer's German Shepherd ran up to and bit Hooper's head and held her head until backup arrived. The dog's bites caused significant injuries to Hooper. She pled guilty to resisting a peace officer under California Penal Code § 148(a)(1). Hooper neither disputed the lawfulness of the arrest nor her resistance. *Id.* at 1129. However, she contends that the officer used excessive force after her resistance ended. The material facts in *Hooper* are distinguishable from the material facts in *Lemos*. Significantly, Hooper entered into a plea agreement—as opposed to being convicted by a jury—so it was not

necessarily determined that the officer acted lawfully "throughout the whole course of [Hooper's] conduct," *Smith*, 394 F.3d at 699 n.5, and she reportedly stopped resisting before the alleged use of excessive force by the canine, while Lemos' resistance was clearly viewed by her trial jury as continuous throughout the entire transaction of events leading up to and including all subsequent physical contacts with the arresting deputy. The jury instructions required that the jury find that Deputy Holton was "lawfully performing or attempting to perform his duties as a peace officer," and the instructions explained that an officer "is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." Therefore, based on the jury instructions and evidence of record before it, the jury verdict established Lemos resisted and the deputy's conduct was lawful throughout the encounter. *See Beets*, 669 F.3d at 1045; *cf. Yount*, 43 Cal. 4th at 896–97 (holding that plaintiff's unlimited no contest plea established his culpability for resisting an officer during the entire incident).

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

> Excessive force used by a police officer at *the time of the arrest* is not within the performance of the officer's duty. *Id.; People v. Olguin,* 119 Cal.App.3d 39, 45–46,

173 Cal.Rptr. 663 (Cal.Ct.App.1981) ("*[A]n arrest made with excessive force* is equally unlawful. '[It] is a public offense for a peace officer to use unreasonable and excessive force *in effecting an arrest.*' ") (citation omitted) (emphasis added); *People v. White,* 101 Cal.App.3d 161, 167, 161 Cal.Rptr. 541 (Cal.Ct.App.1980) ("Thus, in the present case it becomes essential for the jury to be told that if they found the *arrest was made with excessive force,* the arrest was unlawful and they should find the defendant not guilty of those charges which required the officer to be lawfully engaged in the performance of his duties ([Cal.Penal Code] §§ 245, subd. (b), 243 and 148).") (emphasis added).

Under the definitions set forth in the California cases listed above, "the time of the arrest" does not include previous stages of law enforcement activities that might or might not lead to an arrest, such as conducting an investigation; it includes only the time during which the arrest is being *effected.* A conviction for resisting arrest under § 148(a)(1) may be lawfully obtained only if the officers do not use excessive force *in the course* of making that arrest. A conviction based on conduct that occurred *before* the officers commence the process of arresting the defendant is not "necessarily" rendered invalid by the officers' subsequent use of excessive force in making the arrest. For example, the officers do not act unlawfully when they perform investigative

> duties a defendant seeks to obstruct, but only afterwards when they employ excessive force in making the arrest. Similarly, excessive force used *after* a defendant has been arrested may properly be the subject of a § 1983 action notwithstanding the defendant's conviction on a charge of resisting an arrest that was itself lawfully conducted. *See, e.g., Sanford v. Motts,* 258 F.3d 1117, 1119–20 (9th Cir.2001) (explaining that a successful § 1983 suit based on excessive force would not necessarily imply the invalidity of Sanford's conviction under § 148(a)(1) because the officer's use of excessive force occurred subsequent to the conduct for which Sanford was convicted under § 148(a)(1)).

Smith, 394 F.3d at 695–696.

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

In cases like *Lemos* involving several potential grounds for a § 148(a)(1) violation within a continuous chain of

events, courts often take into account certain temporal considerations regarding the individual's resistance and the officer's use of force. *Williams*, 26 Cal. App. 5th at 86; *see Yount*, 43 Cal. 4th at 899 ("Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." (citation omitted)); *see also Hooper*, 629 F.3d at 1131 ("[A] conviction under § 148(a)(1) can be valid, even if, during a single continuous chain of events, some of the officer's conduct was unlawful."). However, contrary to the dissent's interpretation, the statute does not require jurors to isolate each potential basis for a § 148(a)(1) violation and make piecemeal determinations of the officer's lawful conduct at each event, as previously acknowledged by this Court. *See Hooper*, 629 F.3d at 1132 ("Section 148(a)(1) does not require that an officer's lawful and unlawful behavior be divisible into two discrete 'phases,' or time periods, as we believed when we decided *Smith*."). Accordingly, California jurisprudence advises against so-called "temporal hair-splitting" in search of a distinct break between the criminal act and the use of force where none meaningfully exists. *Fetters v. County of Los Angeles*, 243 Cal. App. 4th 825, 841 (2016); *Truong v. Orange County Sheriff's Dept.*, 129 Cal. App. 4th 1423, 1429 (2005).

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

> Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the

> basis for a conviction, a jury does not determine which specific act or acts form the basis for the conviction . . . . Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would *necessarily* imply the invalidity of his conviction.

394 F.3d at 699 n.5 (citation omitted); *accord Beets*, 669 F.3d at 1045.[3] While it is correct that the jury had to agree unanimously that Lemos committed at least one of the four violations, it was not required of the jury to expressly identify which of those bases gave rise to the § 148(a)(1) conviction, just as in *Smith*.

Viewed in light of binding circuit precedent, the record compels finding the jury determined that the arresting deputy acted within the scope of his duties without the use of excessive force, and that Lemos seeks to show that the same conduct constituted excessive force. Here, as in *Beets*, 669 F.3d at 1045, the jury was instructed that "[a] peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." And,

[3] The dissent claims that this language in *Smith* may no longer be a correct statement of law in California in light of our *Hooper* decision. Dis. Op. at 34–35. However, *Hooper*'s reassessment of how § 148(a)(1) should be interpreted has no bearing on the jury's ultimate determination of the defendant's guilt and the officer's lawful actions during the incident here. We remain bound by *Beets* to read the jury instructions here as compelling the determination that Holton was not using unreasonable or excessive force throughout the entire course of Lemos's conduct. *See Beets*, 669 F.3d at 1045.

the jury was told that it could convict Lemos only if "Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties as a peace officer." Lemos's jury considered all parties' evidence of relevant conduct, including the officers' body camera footage that's part of this record. Material factual disputes have been resolved by Lemos's jury. Therefore, the district court appropriately considered summary disposition of remaining legal issues under *Heck* and its progeny. In reliance, we find that *Smith* and *Beets* control application of the *Heck* bar as found by the district court.

AFFIRMED.

BERZON, Circuit Judge, dissenting:

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

But the jury instructions in this case were flatly inconsistent with that version of what a section 148(a)(1) conviction connotes. Lemos's jury was instructed that there

were four possible factual bases on which it could convict Lemos, and that it could "not find the defendant guilty unless you all agree that the People have proved that the defendant committed *at least one* of the alleged acts of resisting, obstructing, or delaying a peace officer who was lawfully performing his or her duties, *and you all agree on which act the defendant committed*." (emphasis added). Three of the factual bases pertained to acts not at issue in Lemos's section 1983 claim. Success on her section 1983 claim therefore does not necessarily imply that her conviction is invalid.

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

I.

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

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

heard yelling, including a woman's voice "saying they're fighting or there's some type of fight." He decided to investigate, activating his body camera.

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

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

As Lemos and her mother continued to protest that Holton was not allowed to go into the car without a warrant, Holton closed the passenger door. He later testified that by this time he had decided to arrest Lemos, but he did not announce that intention. Instead, he attempted to grab Lemos, but her mother and sister shielded her, repeatedly shouting, "What are you doing?" and "Leave her alone!"

Holton drew his Taser and pointed it at the women, yelling that they should calm down because he was "investigating something." But the mother and daughters continued to protest, so Holton called for backup. Deputy Dillion arrived a short time later, and several other officers arrived after that.

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

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

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

on the ground and handcuffed her hands behind her back. Lemos's mother tried to pull Holton off Lemos but Dillion moved her mother away.

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

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

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

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

The jury was further instructed:

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

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

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

II.

A. *Heck* Framework

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

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

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

As a matter of California law, a conviction on a section 148(a)(1) charge establishes that there was a valid basis for the arrest, *i.e.*, the arrest was lawful. A conviction under section 148(a)(1) "requires that the officer be *lawfully* engaged in the performance of his or her duties" at the time the arrestee resists, obstructs, or delays the officer. *Yount v. City of Sacramento*, 43 Cal. 4th 885, 894 (2008). So, as we have recognized, "[i]n California, the lawfulness of the officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer." *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (en banc). The use of excessive force in an investigatory stop or during an arrest violates the Fourth Amendment's protection "'against unreasonable . . . seizures' of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989) (alteration in original) (quoting U.S. Const. amend IV).

Critically, and, contrary to the majority's assertion, Maj. Op. at 13, whether it follows the defendant's plea or a jury's verdict, a single section 148(a)(1) conviction cannot establish that *all* of an officer's conduct throughout an

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invalidated, reversed, expunged, or impugned by the grant of a writ of habeas corpus.

extended interaction with the arrestee was lawful. More specifically, a section 148(a)(1) conviction does not necessarily establish that force used by an officer prior to or after a section 148(a)(1) arrest was reasonable and so not excessive. The California Supreme Court in *Yount*, 43 Cal. 4th 885, interpreting California law, has so held, explaining that if a defendant "resist[s] a lawful arrest" and the officers "respond with excessive force to subdue him," then

> [t]he subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, [with only] the first giving rise to criminal liability on the part of the criminal defendant . . . .

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

convictions," *Heck*, 512 U.S. at 487, and so, under *Heck*, preclude § 1983 liability if the excessive force claim pertained to the part of the interaction between the criminal defendant/civil suit plaintiff and the officer being sued for damages that involved lawful police conduct.

Application of *Heck* in this context is complicated when, as here, there were several possible factual bases for the section 148(a)(1) conviction, *i.e*., more than one alleged act of resistance, delay, or obstruction, but it is not clear from the record which particular act or acts form the basis of the conviction. Because the *Heck* bar applies only when a section 1983 claim "would *necessarily* imply the invalidity" of the conviction and not if it only *might* imply the conviction's invalidity, *id.* (emphasis added), the *Heck* bar does not apply unless the conduct challenged in the excessive force suit is necessarily the same conduct found lawful in the section 148(a)(1) conviction. *See Smith*, 394 F.3d at 699; *Hooper*, 629 F.3d at 1134.

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

In *Smith*, the plaintiff refused police orders to take his hands out of his pockets, put them on his head, and turn around. 394 F.3d at 693–94. Smith subsequently physically resisted arrest, and police used physical force to subdue him: the officers ordered a police dog to bite Smith three times and pepper-sprayed him four times. *Id*. at 694. Smith pleaded

guilty to the section 148(a)(1) violation, but "there [was] no information as to which of his actions constituted the basis for his plea." *Id*. at 698. Addressing this information vacuum, *Smith* concluded that "[b]ecause on the record before us we cannot determine that the actions that underlay Smith's conviction upon his plea of guilty occurred at the time of or during the course of his unlawful arrest, Smith's success in the present action would not necessarily impugn his conviction." *Id.* at 699.

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

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

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

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

Beets also briefly asserted, quoting *Smith*, that, as a matter of California law, a jury verdict necessarily determines that *all* of the officer's conduct must have been lawful. 669 F.3d at 1045 (citing *Smith*, 394 F.3d at 699 n.5).[2] But *Beets* is clear that "there [were] not multiple factual bases for [the] conviction," so the jury considered the lawfulness of only one action by the officer in reaching its verdict on the charge of assault on an officer with a deadly weapon. *See* 669 F.3d at 1045. In that circumstance, the jury *did* necessarily find lawful all of the officer's conduct that it considered, and *Beets*'s recitation of *Smith*'s summary of California law was essentially an aside. And that recitation is in any event not relevant here, where the criminal jury was instructed precisely contrary to *Smith*'s and *Beets*'s descriptions of the scope of a section 148(a)(1) jury conviction.

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

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

B. Application of *Heck* in this case

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

Again, the jury here was specifically instructed as to four possible acts of resistance, delay, or obstruction by Lemos that could support a section 148(a)(1) conviction. The first three potential bases for the conviction were that Lemos "1. made physical contact with the Deputy as he was trying to open the truck door; 2. placed herself between the Deputy and Ms. Labruzzi; 3. blocked [the] deputy from opening the truck door and seeing or speaking with Ms. Labruzzi." Holton is not alleged in this case to have used excessive force at any of those times. And although none of those incidents involved an arrest, section 148(a)(1), I repeat, covers obstructing or delaying a lawful investigation, which is what was alleged with regard to the first three incidents the jury was asked to consider. Only the fourth potential basis for the conviction involved the same incident as Lemos's section

1983 excessive force claim: "4. [Lemos] pulled away when [the Deputy] attempted to grab her," before she was taken to the ground, handcuffed, and, finally, arrested. The jury was further instructed that it could not render a verdict of guilty unless it unanimously agreed that Lemos had "committed at least one of the alleged acts," and it also "all . . . agree[d] on which act the defendant committed."

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

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

It is worth noting—although not directly relevant to the *Heck* analysis—that, if anything, a conviction on one or all of the first three incidents sent to the jury is more likely than on the fourth. The first three incidents involved little force by Holton but did, on the officers' version, present evidence of actual interference with Holton's investigation. The incident on which this case centers, in which Lemos was, on

the mother's advice, trying to leave a contentious situation, did not stop as soon as told to do so, and was physically wrestled to the ground and injured by a police officer, is a poor candidate for a unanimous jury conclusion that she was resisting lawful police activity.

So, on the facts and very specific instructions given the jury here regarding discrete bases for conviction, the *Heck* bar does not apply. As in *Hooper*, a "holding in [Lemos's] § 1983 case that the [takedown] was excessive force would not 'negate the lawfulness of the initial [investigation at the car door], or negate the unlawfulness of [Lemos's] attempt to [obstruct that investigation].'" 629 F.3d at 1133 (quoting *Yount*, 43 Cal. 4th at 899). And, just as in *Smith*, the record does not establish that Lemos's conviction was based on any particular one or combination of the four alleged acts. *See* 394 F.3d at 698. Thus, "[b]ecause we are unable to determine 'the factual basis for [Lemos's conviction],' [her] lawsuit does *not* necessarily imply the invalidity of [her] conviction and is therefore not barred by *Heck*." *Smith*, 394 F.3d at 698 (quoting *Heck*, 512 U.S. at 487).

C. Majority's Error

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

The majority substitutes for this determinative circumstance the assertion that because the criminal case underlying the *Heck* bar argument was decided by a jury and not by a guilty plea, the conviction necessarily establishes, as a matter of California law, that *all* of Deputy Holton's conduct throughout his twelve-minute interaction with Lemos and her family was deemed lawful. Maj. Op. at 10, 12–13. The distinction between a section 148(a)(1) conviction based on a jury's verdict—apparently *any* jury verdict, including one in which the jury was specifically told to distinguish between four interactions and decide which involved obstruction of lawful police action—and one based on a plea cannot possibly bear the weight assigned to it by the majority.

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

Nor did *Beets* and *Smith* announce the rule the majority posits—that *whatever* a jury is instructed to decide, the legal effect of a section 148(a)(1) conviction is always that the jury found *all* of the officer's conduct to be lawful. The key language that appears in *Smith* and *Beets* assumes instructions according with an outdated statement of California law, as *Hooper* explained. *See Hooper*, 629 F.3d at 1132. But even if that statement of law were accurate, the language contained in a footnote in *Smith* and repeated in *Beets* (in both instances, as explained earlier, in discussions unconnected to the facts of the case) is inapplicable to the facts of this case by its own terms.

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

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

> conviction." *Susag*, 94 Cal. App. 4th at 1410 (emphasis added).

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

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

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

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

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

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

McIntyre affirmed that the standard California jury instruction on jury unanimity, which requires that "in order to find the defendant guilty, *all the jurors must agree that he committed the same act or acts*," is correct. 115 Cal. App. 3d at 908 (quoting Cal. Jury Instr. No. 17.01).

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

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

In short, under the *specific* jury instructions here, as under the plea agreement discussed in *Smith*, "it is *not* necessarily the case that the factual basis for [Lemos's] conviction included the whole course of [her] conduct." 394 F.3d at 699 n.5. The *Heck* bar therefore does not apply.

III.

The practical result of the majority's holding is that people who are subjected to excessive force by officials in California, who want to hold those officers to account, and who are charged with misdemeanor resisting arrest under

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McIntyre held only that it was not error to omit the instruction in a case in which the acts constituting the charged crime were part of a continuous course of conduct. *See id*. at 910; *see also People v. Muniz*, 213 Cal. App. 3d 1508, 1518–19 (Cal. Ct. App. 1989) (citing *McIntyre*, 115 Cal. App. 3d at 910). The instruction in Lemos's case is substantively the same one that the California court in *McIntyre* quoted with approval for cases that do *not* involve only one continuous course of conduct. *See* 115 Cal. App. 3d at 908.

section 148(a)(1) must choose between holding the state to its burden on the criminal charge in a criminal trial and the opportunity to vindicate their rights by bringing an excessive force case. Under the majority's opinion, the only way to guarantee that an excessive force claim is not forfeited by a jury's verdict is to plead guilty on the criminal charge. The Constitution forbids police from using excessive force, and section 1983 provides an avenue to vindicate that right. The majority's opinion undercuts these protections. Because it is unjust and contrary to our case law, I dissent.