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July 11, 2018

Hon. Eileen C. Moore, Acting P.J.
Hon. Richard M. Aronson
Hon. Raymond J. Ikola
California Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, California 92701

Re: Request for Publication of *Roe v. City of Fountain Valley*
Case No. G054434

Dear Justices Moore, Aronson, and Ikola:

Pursuant to California Rules of Court, rule 8.1120, the League of California Cities® ("League") respectfully requests that the Court publish its June 29, 2018 opinion in *Roe v. City of Fountain Valley, et al.*, Case No. G054434.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities. The Committee identifies those cases that are of statewide significance to its members. The Committee has identified this case as having such significance.

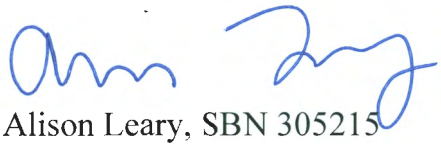
The League is particularly interested in this case for the same reason stated by the City of Fountain Valley in its July 6, 2018 Letter Requesting Publication of this opinion – that is, all local agencies in this State have a strong interest in legal certainty surrounding the application of the collateral bar rule as applied in civil rights actions brought against local agencies and their officers or employees pursuant to 42 U.S.C. § 1983.

The League believes publication of the opinion is warranted for the same reasons set forth by the City of Fountain Valley. Specifically, the Court of Appeal's opinion (1) reaffirms and explains the collateral bar rule set forth in *Heck v. Humphrey* (1994) 512 U.S. 477 and its progeny; (2) involves a legal issue of continuing public interest—tort liability for police agencies and peace officers; and (3) makes a significant contribution to legal literature by reviewing the development of a common law rule; and (4) involves a

legal issue of continuing public interest. The City of Fountain Valley explains in its Letter Requesting Publication why these standards set forth in California Rules of Court, rule 8.1105(c) are met, and the League does not seek to duplicate the points already raised.

The League of California Cities, therefore, respectfully requests that the Court publish the opinion for the reasons set forth by the City of Fountain Valley in its July 6, 2018 Letter Requesting Publication.

Respectfully submitted,



Alison Leary, SBN 305215
Deputy General Counsel
League of California Cities®

Attachments:

Attachment 1 - City of Fountain Valley's July 6, 2018 Letter Requesting Publication
Attachment 2 - Opinion dated June 29, 2018
Proof of Service

***BOYD ALLYN ROE V. CITY OF FOUNTAIN VALLEY, ET AL*. (G054434)**

Attachment 1 - City of Fountain Valley's July 6, 2018 Letter Requesting Publication

Carpenter, Rothans & Dumont, LLP

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July 6, 2018

VIA TRUE-FILING & U.S. Mail

Hon. Eileen C. Moore, Acting P.J.
Hon. Richard M. Aronson
Hon. Raymond J. Ikola
California Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, California 92701

RE: BOYD ALLYN ROE v. CITY OF FOUNTAIN VALLEY, et al.
Case No: G054434
Date of Opinion: June 29, 2018

Dear Acting P.J. Moore and Honorable Justices:

Pursuant to California Rules of Court, 8.1105 and 8.1120, I write to respectfully request that the Court order that the unpublished opinion issued in *Roe v. City of Fountain Valley, et al.* (Case No. G054434) on June 29, 2018, be certified for publication.

The opinion in this case offers a comprehensive and robust analysis of virtually all seminal California state cases that have interpreted the collateral bar rule set forth in *Heck v. Humphrey* (1994) 512 U.S. 477. Specifically, the opinion explains the *Heck* rule, which is an important and existing rule of law in both federal and state jurisprudence, especially with respect to civil rights actions brought in state court pursuant to 42 U.S.C. § 1983. See Cal. Rules Ct., 8.1105(c)(3).

As proof, the Court's opinion in this case does not simply offer passing reference to an important lineage of cases. Rather, the opinion provides an in-depth analysis of the decisions in *Yount v. City of Sacramento* (2008) 43 Cal.4th 885; *Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210; *Truong v. Orange County Sheriff's Dept.* (2005) 129 Cal.App.4th 1423; *Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825; *Smith v. Hemet* (9th Cir. 2005) 394 F.3d 689; and *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401. For that reason alone, publication is warranted because the opinion explains and comprehensively analyzes an existing, and indeed important, rule of law. Cal. Rules Ct., 8.1105(c)(3).

Additionally, the opinion in this case involves a legal issue of continuing public interest. This is especially true with respect to public agencies and police departments throughout the state of California. The issue of a suspect's prior criminal conviction(s) constituting a collateral bar against subsequent section 1983 claims—and affiliated state torts—brought in state court is an important and seminal doctrine. Critically, it is a doctrine that has implications for criminal prosecutions, and subsequent tort liability for police agencies and peace officers in civil courts of law. Cal. Rules Ct., 8.1105(c)(6).

Next, the opinion makes a significant contribution to legal literature by reviewing the development of *Heck*, as the doctrine has evolved throughout the state appellate courts. Cal. Rules Ct., 8.1105(c)(7). As noted previously, the Court's opinion in this case synthesizes and analyzes each of the major published decisions regarding the *Heck* doctrine in California. For this reason, this opinion serves as an important tool for future courts to review, analyze, and assess the application of *Heck* doctrine.

Lastly, from a policy standpoint, this legal issue is not aberrant, fleeting, nor isolated. Rather, it is an issue of public significance which will undoubtedly emerge in future iterations, and in various factual permutations. Therefore, this opinion is important for the development of the law regarding the *Heck* doctrine in the state of California.

I respectfully request the Court to certify this opinion for publication. Thank you for your kind consideration of this request.

Very truly yours,

JUSTIN READE SARNO

JRS:mdr

PROOF OF SERVICE

(Code Civ. Proc., §§ 1013a, 2015.5)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within entitled action. My business address is 888 South Figueroa Street, Suite 1960, Los Angeles, California 90017.

On July 6, 2018, I served the foregoing document(s) described as:

REQUEST FOR CERTIFICATION OF OPINION IN *BOYD ALLYN ROE V. CITY OF FOUNTAIN VALLEY, ET AL.*, CASE NO. G054434

upon the interested parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed to the following persons:

*****See Attached Service List*****

BY MAIL

__X__ I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

__X__ I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 6, 2018, at Los Angeles, California.

STATE

__X__ I declare, under penalty of perjury under the laws of the State of California that the above is true and correct.

Gabrielle Duran 

(Signature)

ATTACHED SERVICE LIST

Clerk of the Court
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Fourth Appellate District, Division Three
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Santa Ana, California 92701
E-Filed with the Fourth District Court of Appeal, Division 3

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BOYD ALLYN ROE V. CITY OF FOUNTAIN VALLEY, ET AL. **(G054434)**

Attachment 2 - Opinion dated June 29, 2018

Filed 6/29/18 Roe v. City of Fountain Valley CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BOYD ALLYN ROE, Plaintiff and Appellant, v. CITY OF FOUNTAIN VALLEY et al., Defendants and Respondents.	G054434 (Super. Ct. No. 30-2015-00773657) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Christopher J. Hennes for Plaintiff and Appellant.

Carpenter, Rothans & Dumont, Justin Reade Sarno and Johnny Rundell for Defendants and Respondents.

* * *

Plaintiff Boyd Allyn Roe appeals from the judgment entered after the trial court granted the motion of defendants City of Fountain Valley (City), Officer Oscar Cabrera (Cabrera) and Officer Nick Nance (Nance) for summary judgment. Defendants argue Roe's claims are barred under *Heck v. Humphrey* (1994) 512 U.S. 477 (*Heck*) because they call into question the validity of his conviction for resisting, delaying or obstructing an officer. Although this issue was raised in defendants' motion, and addressed by Roe in his opposition, the trial court granted summary judgment on a different ground. Nevertheless, we agree with defendants that Roe's claims are barred under *Heck* and affirm the judgment.[1]

I

FACTS AND PROCEDURAL BACKGROUND

"'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] . . . We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the

---

[1] We recognize Code of Civil Procedure section 437c, subdivision (m)(2), requires an appellate court to provide the parties an opportunity to submit supplemental briefs presenting their views before the court affirms an order granting summary judgment on a ground not relied upon by the trial court. But supplemental briefing is not required where, as here, "[d]efendants directly addressed the issue in their briefs," "plaintiff[] addressed it in [his] reply brief," and thus "the parties have already been provided 'an opportunity to present their views.'" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 471, fn. 39.)

Here, as noted, defendants raised the issue of the *Heck* bar in their summary judgment motion, and elaborated on the argument in their respondents' brief. Roe responded to the argument in his opposition to the motion, and in his reply brief on appeal, though he asserts he must be permitted an opportunity to file supplemental briefing. Supplemental briefing is not required because "[t]he purpose of [Code of Civil Procedure] section 437c, subdivision (m)(2) has thus been fully met. [Citation.]" (*Bains v. Moores, supra*, 172 Cal.App.4th at p. 471, fn. 39; see *Byars v. SCME Mortgage Bankers, Inc*. (2003) 109 Cal.App.4th 1134, 1147, fn.7 [concluding supplemental briefing not required pursuant to Code of Civil Procedure section 437c, subdivision (m)(2), where issue was raised below and on appeal].)

evidence in favor of that party. [Citations.]'" (*Wilson v. 21 Century Ins. Co*. (2007) 42 Cal.4th 713, 716-717.)

The summary judgment record reflects the following undisputed facts: Roe lived with his wife and stepson. On the day of the incident, Roe had consumed one and a half bottles of wine between 12:00 p.m., and 6:30 p.m. During that time, he had exchanged words with his stepson, resulting in his stepson placing Roe in a bear hug. Roe's stepson told Roe's wife about the altercation and advised her to hide Roe's guns. It was believed Roe kept two handguns under his bed, but only one was found. Concerned about Roe's depression and safety, and at her son's urging, Roe's wife called 911.

Dispatch provided the following information to responding officers: Roe's wife had reported that Roe was a retired police officer who had been drinking, had taken pills, and had stated he wanted to take his life. Additionally, Roe normally kept two firearms under his bed but one of them, a .25 caliber handgun, was missing. Roe also possessed large samurai swords and brass knuckles. Roe was in the garage, while his wife, his daughter and his daughter's infant were in the back of the residence.

Responding in separate patrol cars, Officers Cabrera and Nance met up to formulate a plan. Cabrera knew Roe from a prior encounter, during which they discussed Roe's police career, knowledge of tactics and training, and the weapons he had in the garage, including firearms, knives, and batons. Cabrera conveyed this information to the other officers.

The officers decided Nance would carry the less lethal shotgun (i.e., the one that would shoot bean bags), while Cabrera and another officer would carry their standard firearms. The officers knocked on the garage door, identified themselves as police officers, informed Roe they wanted to speak with him but he was not in trouble, and asked him to open the garage and come out with his hands above his head.

Roe walked out of the front door of the residence and stood on the porch. The officers instructed Roe to place his hands above his head multiple times, telling him he was not in any trouble and they just wanted to talk. The officers believed Roe was angry and intoxicated.

Roe raised his hands briefly before dropping them to waist level, stating, "I don't think so." He slowly walked forward while making statements such as "make me do it," "fuck you," and "fucking shoot me motherfucker." As Roe closed the gap between himself and the officers, he placed his left hand into his left front pants pocket.

Cabrera ducked behind a car in the driveway for cover and commanded the use of "less-lethal force." In response, Nance fired a less lethal bean bag at Roe, striking him in the abdomen and causing him to fall to the ground. Roe turned his back towards the officers, with his hands near his waistband. The officers again ordered Roe to show them his hands. When Roe failed to comply, Nance fired a second bean bag, hitting Roe in the buttocks or lower back area. At that point, Roe removed his hands from his waistband area and the officers secured his arms. The officers thereafter asked Roe if he had a gun on his person, and upon searching him, discovered a pair of brass knuckles in Roe's pants pocket. It took approximately one minute from the time Cabrera knocked on the garage door to when the first bean bag was shot.

Roe was taken into custody and released that day, pending "further investigation." A few months later, Roe pleaded guilty to violating Penal Code sections 21810 (possessing metal knuckles; count one), and 148, subdivision (a)(1) (resisting a peace officer; count two). In his guilty plea, Roe admitted that on the day of the incident, he "possessed metal knuckles, knowing they were metal knuckles" and "delayed a peace officer employed by the City of Fountain Valley in the performance or attempted performance of his duties, knowing or reasonably should have known, that the peace officer was performing or attempting to perform his duties." In exchange for his guilty

plea, the court suspended imposition of sentence and placed Roe on three years' informal probation.

Thereafter, Roe sued defendants for violation of his civil rights. His first amended complaint alleges seven causes of action: (1) violation of the Tom Bane Civil Rights Act (Bane Act; Civ. Code, § 52.1); (2) assault and battery; (3) negligence; (4) elder abuse; (5) negligent hiring, training, and retention; (6) violation of 42 U.S.C. section 1983 (section 1983) based on excessive force by City; and (7) violation of section 1983 based on excessive force by Cabrera and Nance.

Defendants moved for summary judgment, primarily on the ground the officers' deployment of the less lethal bean bags did not constitute unreasonable or excessive use of force. The motion also asserted the *Heck* doctrine barred Roe's section 1983 and related state tort claims.

Roe's opposition argued, among other things, that *Heck* did not apply. Roe stated he would not oppose summary adjudication of the fourth (elder abuse), fifth, (negligent hiring, training, and retention), and sixth (section 1983 violation against the City) causes of action. Roe's counsel submitted a declaration indicating his intent to abandon those claims.

The court granted defendants' summary judgment motion as to the remaining four causes of action—violation of Civil Code section 52.1 , assault and battery, negligence, and violation of section 1983. It found "[t]he undisputed facts demonstrate that the officer's response in deploying two less-lethal bean bags rounds was reasonable to control a rapidly evolving and escalating situation. Specifically, even after the first round was fired, [Roe] still refused to comply with the officers' orders to show his hands. After the second round was fired, [Roe] finally removed his hands from the area of his waistband and the officers were able to secure his arms."

II

DISCUSSION

A. Standard of Review

"'A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he . . . is entitled to judgment as a matter of law." [Citation.] A defendant satisfies this burden by showing "'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense'" to that cause of action. [Citation.] "'Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.'" [Citation.] . . . In determining whether these burdens have been met, we review the record de novo. [Citation.]' [Citation.] [¶] As '"a corollary of the de novo review standard, the appellate court may affirm a summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court. [Citation.]" [Citation.]' [Citation.]" (*Lujano v. County of Santa Barbara* (2010) 190 Cal.App.4th 801, 806 (*Lujano*).)

B. Defendants' Initial Burden

As noted above, defendants had the initial burden of persuasion that *Heck* provided a complete defense to Roe's claims based on allegations of excessive force. (Code Civ. Proc., § 437c, subd. (p)(2); *Lujano*, *supra*, 190 Cal.App.4th at p. 806.) Defendants met that burden.

Under *Heck*, a civil rights claim under section 1983 that impugns or collaterally attacks the claimant's prior criminal conviction may not be maintained unless the conviction has first been vacated by direct appeal or executive action, or called into question by a federal court's issuance of a writ of habeas corpus. (*Heck*, *supra*, 512 U.S. at pp. 486-487.) If a plaintiff alleging excessive force must negate an element of the

offense for which he has already been convicted, then a section 1983 action will not lie. (*Heck*, at p. 486, fn. 6.) The test is "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 . . . . But if . . . the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ." (*Id*. at p. 487, fn. omitted.)

For *Heck* to apply, three questions must be answered: "(1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" . . . the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' [Citations.]" (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 834-835, fn. omitted (*Fetters*).)

Here, the answer to the first two questions is yes. As to question (1) plaintiff pleaded guilty to, inter alia, a charge of resisting an officer under Penal Code section 148, subdivision (a)(1), and (2) his section 1983 claim alleges his Fourth Amendment rights were violated during this same incident because the officers used excessive force. (See *Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894-895 (*Yount*) [plea of nolo contest to violating Penal Code section 148, subdivision (a)(1), related to section 1983 claim based on excessive force]; *Fetters, supra*, 243 Cal.App.4th at p. 836 ["whether the bargained-for plea is guilty or nolo contendere, it is an admission of the truth of the facts in the petition"].) And (3) there is no evidence or claim the conviction has been invalidated or otherwise favorably terminated.

As to the third question, the validity of Roe's guilty plea remains undisturbed. Thus, we consider whether a judgment for Roe in his section 1983 action would necessarily imply the invalidity of his conviction and sentence. We conclude it would. *Heck* "specifically included within its holding claims for damages 'caused by actions whose unlawfulness would render a conviction or sentence invalid,' and gave the

following example: '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.' [Citation.]" (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1221 (*Baranchik*), quoting *Heck, supra*, 512 U.S. at p. 486, fn. 6, second italics added.)

In California, the crime of resisting an officer is committed by "willfully resist[ing], delay[ing], or obstruct[ing] any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . ." (Pen. Code, § 148, subd. (a)(1).) It is well established "'that when a statute makes it a crime to commit any act against a peace officer engaged in the performance of his or her duties, part of the corpus delicti of the offense is that the officer was acting lawfully at the time the offense was committed.' [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 673; *People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [discussing "the well-established rule that when a statute makes it a crime to commit any act against a peace officer engaged in the performance of his or her duties, part of the corpus delicti of the offense is that the officer was acting lawfully at the time the offense was committed"].)

Thus, "[i]n California as well, 'the lawfulness of the officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a police officer.' [Citations.]" (*Baranchik, supra*, 10 Cal.App.5th at p. 1221; *Truong v. Orange County Sheriff's Depart.* (2005) 129 Cal.App.4th 1423, 1428 (*Truong*); *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 (*Susag*).) Conversely, "[i]f the officer was not performing his or her duties at the time of the arrest, the arrest is unlawful and the

arrestee cannot be convicted under Penal Code section 148, subdivision (a). [Citations.] '[E]xcessive force by a police officer . . . is not within the performance of the officer's duty.' [Citations.]" (*Ibid*.) An officer using unreasonable force cannot possibly be lawfully exercising his or her duties within the meaning of Penal Code section 148, subdivision (a)(1). (See *Truong*, at p. 1428, citing *Sanford v. Motts* (9th Cir. 2001) 258 F.3d 1117, 1119-1120 [court concluded "a claim based on the use of excessive force after an arrest was not barred because a judgment for the plaintiff would not necessarily imply [the] conviction was invalid"].)

Heck's reasoning has been held to apply with equal force to state law tort claims arising from officers' alleged use of excessive force during arrest. (*Yount*, *supra*, 43 Cal.4th at p. 902; *Lujano*, *supra*, 190 Cal.App.4th at p. 808; *Truong*, *supra*, 129 Cal.App.4th at p. 1430; *Susag*, *supra*, 94 Cal.App.4th at pp. 1405-1406.)

Defendants thus established that Roe's claims are encompassed by the bar articulated in *Heck*: Since Roe pleaded guilty to resisting the officers, he necessarily admitted they were acting lawfully and did not use excessive force when they detained him. His prevailing on a civil claim of excessive force would therefore imply the invalidity of his plea. (See *Heck*, *supra*, 512 U.S. at p. 487; *Susag*, *supra*, 94 Cal.App.4th at pp. 1405-1406.) We conclude defendants met their initial burden to show Roe could not establish his claims because they are barred by *Heck*.

C. Roe's Burden to Show a Triable Issue of Material Fact

The burden therefore shifted to Roe to demonstrate a triable issue of material fact as to defendants' defense under *Heck*. (Code Civ. Proc., § 437c, subd. (p)(2); *Lujano*, *supra*, 190 Cal.App.4th at p. 806.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the

applicable standard of proof." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850, fn. omitted.)

In his reply brief, Roe contends *Heck* does not bar his claims because *Yount*, *supra*, 43 Cal.4th at page 898, allowed a claim alleging that the use of deadly force was an unjustified and excessive response to resistance. We are not persuaded.

In *Yount*, *supra*, 43 Cal.4th 885, our state Supreme Court considered whether, under *Heck*, a conviction for resisting an officer barred a subsequent section 1983 claim alleging the arresting officers unlawfully used deadly force. Yount was arrested, handcuffed, and placed in a patrol car. He resisted, first by refusing to get into the car, and then banging and kicking it. Other officers arrived to assist. They removed Yount from the car so they could apply an ankle restraint. His resistance escalated and he tried to bite, kick, and spit at the officers. An officer, Officer Shrum, decided to taser him but mistakenly pulled out and discharged his pistol instead. (*Yount*, at pp. 889-891.) Later, Yount pleaded no contest to one count of resisting an officer. (Pen. Code, § 148, subd. (a)(1).) He then sued Shrum under section 1983, alleging excessive force. (*Yount*, at p. 891.)

After analyzing the applicability of *Heck*, the California Supreme Court held: "Yount's claims are barred to the extent they allege that Officer Shrum was not entitled to use force *at all* in this incident. Yount's resistance justified the officers' use of reasonable force in response. [Citation.] However, as defendants concede, the use of *deadly* force was not reasonable in this instance. Yount's conviction for violating Penal Code section 148, subdivision (a)(1) did not in itself justify the use of deadly force, either. Accordingly, Yount's civil claims are not barred to the extent they challenge Officer Shrum's use of deadly force." (*Yount*, *supra*, 43 Cal.4th at p. 889.)

In arriving at this conclusion, the court clarified that under the circumstances, where "Yount was kicking, spitting, and refusing to cooperate with the officers just prior to the shooting . . . . Officer Shrum was justified in responding with

reasonable force. [Citations.] Hence, to the extent that Yount's section 1983 claim alleges that he offered no resistance, that he posed no reasonable threat of obstruction to the officers, and that the officers had no justification to employ *any* force against him at the time he was shot, the claim is inconsistent with his conviction for resisting the officers and is barred under *Heck*. [Citations.]" (*Yount, supra*, 43 Cal.4th at p. 898.) "However, to the extent Yount's section 1983 claim alleges simply that Officer Shrum's use of *deadly* force was an unjustified and excessive response to Yount's resistance, the claim is not barred. As defendants have conceded, the record . . . did not support the use of deadly force against Yount, nor did the criminal conviction in itself establish a justification for the use of deadly force. [Citations.] A claim alleging that Officer Shrum's use of deadly force was not a reasonable response to Yount's criminal acts of resistance does not 'implicitly question the validity of [his] conviction' for resisting the officers in this instance [citation] and thus is not barred by *Heck*. [Citations.]" (*Id*. at pp. 898-899, fn. omitted.)

Rejecting the defendants argument that *Heck* should be applied "because the shooting was part of a continuous transaction arising from Yount's resistance as well as 'a consequence flowing directly from Yount's criminal conduct,'" they reasoned "[t]he use of deadly force in this situation . . . requires a separate analysis." (*Yount, supra*, 43 Cal.4th at p. 899.) As a result of the deadly force, *Yount* held that the overall event had to be split into "'two isolated factual contexts . . . , the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' [Citations.]" (*Ibid*.) Here, by contrast, the only force used by the officers was nonlethal force. Thus, unlike in *Yount*, the criminal conviction *necessarily* determined the officers' use of nonlethal force was reasonable.

That *Yount, supra*, 43 Cal.App.4th at page 899, turned on timing is shown by an example it gave that emphasized the sequence of events: "'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with

excessive force to subdue him. The *subsequent* use of excessive force would not negate the lawfulness of the *initial* arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it.'" (Italics added.) The present case, if anything, would fall within the first sentence of the example, which the second sentence describes as lawful.

The temporal distinction was discussed further in *Fetters*, *supra*, 243 Cal.App.4th 825. *Fetters* noted that *Yount* was "[b]uilding off the notion of a temporal distinction" when it found """two isolated factual contexts""" arising from a """continuous chain of events."""" (*Fetters*, at p. 839.) *Fetters* stated, "In recognizing the role that temporality plays in the *Heck* analysis, . . . *Yount* . . . relied upon *Susag* . . . . In *Susag*, the court affirmed summary judgment for the deputies and the municipalities because the plaintiff, who was convicted of resisting arrest, 'alleged no claims of excessive force that took place *after* he was finally subdued and placed in the patrol car.' [Citation.] As a result, the plaintiff's allegations that he was subjected to excessive force, if proven, would necessarily imply the invalidity of his conviction for resisting an officer. [Citation.] In *Susag*, as in *Yount*, the court identified several public policy concerns that compelled its holding: Susag could not profit from his own illegal act and should bear the sole responsibility for the consequences of his act, and a determination contrary to the result in the criminal proceedings would engender disrespect for the courts and discredit the administration of justice. [Citation.]" (*Id.* at pp. 839-840.)[2]

In *Fetters*, *supra*, 243 Cal.App.4th at page 829, the plaintiff was shot while playing "'cops and robbers'" with friends using an imitation firearm. Two deputies responded and approached the plaintiff. It was disputed whether the plaintiff complied

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[2] Roe contends *Susag* "is not viable to the extent it is inconsistent with . . . *Yount*." He fails to explain in what manner the two cases are inconsistent. When an appellant raises an issue "but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

with the deputies orders to drop the imitation firearm or turned toward them with the replica in his hand. Regardless, one of the deputies, Deputy Sorrow, fired a shot at Fetters, hitting him in the chest. The entire encounter took no more than 30 seconds. (*Id*. at pp. 829, 832-833.) Fetters pleaded guilty to three misdemeanor counts of brandishing an imitation firearm[3] and was placed on informal probation. After successfully completing probation, Fetters sued the deputies and the County of Los Angeles, alleging a violation of his rights under section 1983. (*Fetters*, at p. 829.)

Fetters, *supra*, 243 Cal.App.4th at page 840, held that a judgment for Fetters would necessarily imply the invalidity of his conviction: "Here, specific factual allegations in Fetters's complaint (Sorrow used 'excessive and unreasonable force') are necessarily inconsistent with the validity of his admission in his criminal proceeding that he brandished the imitation firearm in a threatening manner against Sorrow in such a way as to cause 'a reasonable person apprehension and fear of bodily harm.' In his civil complaint and in his testimony at the *Heck* hearing, Fetters denied brandishing the imitation firearm in any way against Sorrow. Put a little differently, Fetters's admissions in his criminal proceeding established a justification for Sorrow's split-second use of deadly force—he admitted brandishing an imitation firearm that put Sorrow in reasonable fear of his life." (*Ibid*.)

Fetters, *supra*, 243 Cal.App.4th at pages 840-841, distinguished itself from *Yount*. "[U]nlike in *Yount*, there were not two isolated factual contexts, but one continuous and very brief factual situation that lasted just seconds. To try to parse the relevant facts at issue here into two separate and distinct incidents, as Fetters attempts to do, would be to engage in the kind of 'temporal hair-splitting' that California and other courts correctly refuse to perform." (*Fetters*, at pp. 840-841.)

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[3] The counts were identical aside from the names of the victims: the two responding deputies and a third person at whom Fetters had pointed the imitation firearm earlier in the day. (*Fetters*, *supra*, 243 Cal.App.4th at pp. 830, 832, fn. 4.)

Fetters, *supra*, 243 Cal.App.4th at page 840, relied, in part, on this court's opinion in *Truong*, *supra*, 129 Cal.App.4th at page 1429. In *Truong*, the plaintiff was arrested and booked for shoplifting. During booking, she resisted an order to disrobe and shower with the other inmates. Truong alleged that when additional officers arrived she attempted to comply by beginning to remove her sweater, but was assaulted by deputies who fractured her arm and placed her in a holding cell without medical care. As relevant here, Truong pleaded guilty to one count of violating Penal Code section 148, subdivision (a)(1). Truong then filed a civil lawsuit with causes of action based on the deputies' alleged excessive use of force. (*Troung*, at pp. 1425-1426.)

Truong contended her civil claim was not barred under *Heck* because her failure to obey a lawful order ended when she began removing her sweater, and therefore took place before the officers began using excessive force against her. (*Truong*, *supra*, 129 Cal.App.4th at p. 1429.) Rejecting Truong's argument, we explained, "A chain of events began when Truong refused the lawful order that did not end until she was disrobed. This was not a case where the acts alleged to be violations of the plaintiff's civil rights occurred hours, or even minutes, after the act which led to the plaintiff's conviction; the acts occurred mere moments later. Asserting that the crime was somehow over because the plaintiff changed her mind and started to remove her sweater is temporal hair-splitting, and would place deputies in untenable situations, where they are required to guess the mindset of the arrestee. We agree with the trial court that Truong's refusal to obey the lawful order and the events that led to her injuries are part of an unbreakable chain of events. Therefore, the limit set forth in *Heck* applies here, and Truong's civil rights claim cannot be maintained." (*Ibid*.)

Fetters, *supra*, 243 Cal.App.4th at page 840, also noted that in "*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689[, 697-698 (*Smith*)], the Ninth Circuit recognized that an allegation of excessive force by a police officer would not be barred by *Heck* . . . if it were distinct temporally (or spatially) from the factual basis for the

person's conviction. [Citation.] For example, the *Smith* court noted that 'Smith would be allowed to bring a § 1983 action . . . if the use of excessive force occurred *subsequent* to the conduct on which his conviction was based.' [Citation.]"[4]

Fetters, supra, 243 Cal.App.4th at pages 840-841, explained: "In other words, where there is 'no break' between a plaintiff's 'provocative act . . . and the police response that he claims was excessive,' section 1983 claims are barred under *Heck* because such claims would necessarily call into question the criminal conviction. (*Cunningham v. Gates* (9th Cir. 2002) 312 F.3d 1148, 1155; see *Beets v. County of Los Angeles* (9th Cir. 2012) 669 F.3d 1038, 1044-1045 [affirming *Heck* preclusion because 'no separation' between criminal actions and alleged 'excessive force'].) Here, there was no meaningful temporal break between the provocative act that Fetters admitted to in his criminal proceeding—brandishing an imitation firearm so as to put Sorrows in reasonable fear of his life—and the use of force by Sorrows that Fetters claims was excessive and unreasonable."

Baranchik, supra, 10 Cal.App.5th at page 1224, relied on *Truong* and *Fetters* to conclude "Eric's civil claim for excessive force is barred under *Heck* because the criminal jury[, in convicting Eric for resisting, obstructing, or delaying a peace officer in violation of Penal Code section 148, subdivision (a)(1),] necessarily found Officer Ho's conduct to be lawful and not an unreasonable use of force. A finding of civil liability would invalidate the jury's determination that Officer Ho acted lawfully in

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[4] In his opposition to defendants' summary judgment motion, Roe quoted, without analysis, from *Smith, supra*, 394 F.3d at pages 699, as follows: "'a § 1983 action is not barred under *Heck* unless it is clear from the record that its successful prosecution would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid.'" Roe does not mention *Smith* in his reply brief. Regardless, *Smith* does not help Roe, as Roe's allegations of excessive force are not "distinct temporally (or spatially) from the factual basis for [Roe's] conviction" (*Fetters, supra*, 243 Cal.App.4th at p. 840), and the facts of this case do not involve the use of force occurring after he was detained for resisting an officer.

detaining and arresting Eric, a result barred by *Heck*. [Citation.] During Eric's criminal jury trial, the question whether Officer Ho lawfully deployed the Taser was intertwined with the jury's decision to convict Eric of violating [Penal Code] section 148, subdivision (a)(1). Eric's conviction inherently includes a finding that Officer Ho's actions were lawful."

Applying these principles, we conclude Roe's section 1983 action based on excessive force is barred under *Heck.* Roe's admission of guilt to violating Penal Code section 148, subdivision (a)(1), necessarily admits the officers were acting lawfully in detaining him. Because only nonlethal force was used, there was only one continuous and brief[5] factual situation and not two isolated factual contexts. In other words, there was no break or separation in the chain of events arising from Roe's acts of resisting and the alleged excessive force.

Roe maintains *Yount* is factually distinguishable, particularly in that "the second bean bag round fired from near point-blank range at a subject who was already down and offering no resistance. The second shot is a stand-alone shot violation in which none of the pre-shooting considerations, including *Heck*, is particularly relevant." We disagree. First, Roe's contention that *Yount* is distinguishable on its particular facts is not persuasive, given the court's clear statement of applicable legal principles. Second, *Yount*, *supra*, 43 Cal.4th at page 896, rejected a similar argument.

Yount noted that he had engaged in multiple acts of resistance. He argued that, because his conviction for resisting an officer could have been based on one of the acts that occurred well before he was shot, a judgment under section 1983 that the

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[5] It is undisputed that the time from when the officers knocked on the door to the firing of the first bean bag shot was approximately one minute. Although the record does not disclose how long it took before the next shot was fired, we can infer from the undisputed facts that it was minimal.

shooting constituted excessive force would not necessarily be inconsistent with his conviction for resisting an officer.

Yount, supra, 43 Cal.4th at page 896, disagreed, stating: "Yount's conviction established his culpability during the entire episode with the four officers, and any civil rights claim that is inconsistent with even a portion of that conviction is barred because it would necessarily imply the invalidity of that part of the conviction. [Citation.] Otherwise, a section 1983 plaintiff could routinely circumvent the *Heck* bar through artful pleading—e.g., by filing suit against fewer than all of the potential defendants or by defining the civil cause of action to encompass fewer than all of the criminal acts of resistance . . . ." The court "conclude[d] that Yount's criminal conviction encompasses his admission that he was resisting the officers *up until the time he was shot*." (*Id*. at p. 898, italics added.)

Here, Roe was shot twice with less lethal bean bags. Both times he was shot while resisting the officers' commands.

Shortly before he was shot the first time, Roe had briefly raised his hands as ordered before dropping them to waist level and walking forward, stating, "I don't think so." Roe also made other statements, such as, "make me do it," "fuck you," and "fucking shoot me motherfucker." In addition to his verbal remarks, Roe closed the gap between himself and the officers, and placed a hand into his pants pocket.[6] At that point, Cabrera took cover behind a car in the driveway and ordered the use of less lethal force.

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[6] Roe disputed defendants' statement of fact that he reached into his pants pocket, claiming he was not "reaching." As support for his dispute, he cites his deposition testimony. At the cited deposition page, however, Roe admitted he "might have put [his] hand there." Additionally, at the very next page of his deposition, Roe conceded his "left hand had come down . . . into my pocket." The distinction is immaterial and does not create a triable issue of *material* fact.

Nance fired a less lethal bean bag round, striking Roe in the abdomen and causing him to fall to the ground.[7]

After Roe fell, he turned his back towards the officers with his hands hidden near his waistband.[8] Despite the officers' continued orders for Roe to show them his hands, he failed to comply. Cabrera ordered another less lethal shot, and a second bean bag round was fired, striking Roe's buttocks/lower back area. At that point, Roe removed his hands from his waistband area, allowing the officers to secure them.

Under these circumstances, we conclude Roe's criminal conviction embraced the entire encounter until the second shot, after which the officers were finally able to subdue him. To parse the two shots into two separate and distinct incidents, as Roe urges, would be engaging in improper "'temporal hair-splitting.'" (*Fetters*, *supra*, 243 Cal.App.4th at pp. 840-841.) The chain of events began when Roe refused to obey the officers' commands to show his hands and ended only after the second shot when Roe finally removed his hands from his waist. There was no meaningful temporal break from the provocative acts that Roe admitted and the use of nonlethal force by the officers.

As a final matter, we reject Roe's cursory assertion that "[i]t appears from the record that deployment of the bean bags may have been a retaliatory measure for [Roe's] uncooperativeness and insults directed at the officers." This argument is nothing more than "speculation, which does not, and cannot, raise a triable issue." (*Kase v. Metalclad Insulation Corp*. (2016) 6 Cal.App.5th 623, 646, fn. omitted.) "A party may not avoid summary judgment based on mere speculation and conjecture [citation], but

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[7] Roe disputed defendants' statement of fact that Nance fired the shot simultaneously, stating the shot could be heard on the audio recording taking place after Cabrera's command. Roe does not explain how this dispute creates a triable issue of *material* fact. It does not.

[8] Roe disputed this statement of fact, asserting his "movements after he was shot were involuntary reactions to trauma." This assertion does not create a triable issue of material fact as to the stated fact.

instead must produce admissible evidence raising a triable issue of fact. [Citation.]" (*Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 595-596.) And "[a]s the Ninth Circuit has clarified, *Heck* bars suits 'based on *theories* that "necessarily imply the invalidity of [the plaintiff's] conviction[s] or sentence[s]."' [Citation.]" (*Fetters*, *supra*, 243 Cal.App.4th at p. 841, fn. omitted.)

Because Roe failed to carry his burden in opposition to defendants' summary judgment motion, summary judgment was proper.

III

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.

PROOF OF SERVICE
(Code Civ. Proc., §§ 1013a, 1013b, 2015.5)
STATE OF CALIFORNIA - COUNTY OF SACRAMENTO

I, the undersigned, declare that I am a citizen of the United States and am employed in the City and County of Sacramento, State of California. I am over the age of 18 and not a party to this action; my business address is: 1400 K Street, Suite 400, Sacramento, CA 95814.

On July 11, 2018, I served the document(s) described as: **LETTER OF THE LEAGUE OF CALIFORNIA CITIES® REQUESTING PUBLICATION OF THE OPINION IN *BOYD ALLYN ROE V. CITY OF FOUNTAIN VALLEY, ET AL.* (G054434)** in this action by the following methods addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] (**BY MAIL**) I enclosed the above-referenced document(s) in a sealed envelope or package and placed the envelope for collection and mailing, following our ordinary business practices. I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Sacramento, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (**BY ELECTRONIC SERVICE**) By submitting an electronic version of the above-referenced document(s) to the Court's electronic filing system, TrueFiling, who provides electronic service to all parties and counsel of record who are registered with the Court's TrueFiling system.

Executed on July 11, 2018 at Sacramento, California.

[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

I declare that I am employed in an office of a member of the bar of the court at whose direction the service was made.

Janet M. Leonard

Boyd Allyn Roe v. City of Fountain Valley, et al.
California Court of Appeal, Fourth Appellate District, Division 3
Case No. G054434
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