

4th Civil No. E049898

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

GERARDO DELGADO,

Plaintiff and Appellant,

vs.

CITY OF RIVERSIDE, CHIEF RUSS LEACH, PHILLIP NEGLIA,
OFFICER MADSEN, MARC DEHDASHTIAN, BRUCE BLOMDAHL,
DENNY CORBETT, MARK ELLIS, BILLY MCCOY, et al.,

Defendants and Respondents.

Appeal from the Riverside Superior Court
Honorable Mac R. Fisher, Judge Presiding
Case No. RIC461445

RESPONDENTS' BRIEF

LEWIS BRISBOIS BISGAARD & SMITH LLP

John M. Porter, SBN 62427
650 East Hospitality Lane, Suite 600
San Bernardino, California 92408
(909) 387-1130 / Fax (909) 387-1138

OFFICE OF THE CITY ATTORNEY
CITY OF RIVERSIDE

Gregory P. Priamos, City Attorney, SBN 136766
James E. Brown, Supervising Deputy City Attorney, SBN 162579
3900 Main Street, Fifth Floor
Riverside, California 92522
(951) 826-5567 / Fax (951) 826-5540

GREINES, MARTIN, STEIN & RICHLAND LLP

Timothy T. Coates, SBN 110364
Alana H. Rotter, SBN 236666
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Defendants and Respondents
CITY OF RIVERSIDE, RUSS LEACH, PHILLIP NEGLIA,
KENNETH MADSEN, MARC DEHDASHTIAN, BRUCE BLOMDAHL,
DENNY CORBETT, MARK ELLIS, WILLIAM MCCOY

**Court of Appeal
State of California
Fourth Appellate District**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: E049898

Case Name: Delgado v. City of Riverside, et al.

Please check the applicable box:

There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest

Please attach additional sheets with Entity or Person Information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: Alana H. Rotter

Greines, Martin, Stein & Richland LLP
Address: 5900 Wilshire Blvd., 12th Floor
Los Angeles, CA 90036

State Bar No: 236666

Party Represented: Defendants and Respondents
CITY OF RIVERSIDE, RUSS LEACH, PHILLIP
NEGLIA, KENNETH MADSEN, MARC
DEHDASHTIAN, BRUCE BLOMDAHL, DENNY
CORBETT, MARK ELLIS, WILLIAM MCCOY

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF FACTS	3
A. A Jury Convicts Delgado Of Resisting Officers Lawfully Performing Their Duties.	3
B. Delgado Sues The Arresting Officers And Other Defendants For Federal Civil Rights Violations Based On A Claim That The Officers Used Excessive Force.	5
C. The Trial Court Enters Summary Judgment For Defendants On The Ground That <i>Heck v. Humphrey</i> Bars Delgado’s Excessive Force Claims.	5
1. Defendants move for summary judgment based on <i>Heck v. Humphrey</i> .	5
2. The trial court grants summary judgment for defendants.	6
D. Delgado Appeals.	7
STANDARD OF REVIEW	8
ARGUMENT	8
I. <i>HECK v. HUMPHREY</i> BARS THIS ACTION BECAUSE A JUDGMENT FOR DELGADO WOULD NECESSARILY DRAW INTO QUESTION HIS UNDISTURBED CONVICTION.	8
A. <i>Heck v. Humphrey</i> Bars A Federal Civil Rights Claim That, If Successful, Would Necessarily Imply The Invalidity Of An Existing Conviction.	8

TABLE OF CONTENTS (Continued)

	Page
B. Delgado’s Excessive Force Claims Would Imply The Invalidity Of His Conviction For Resisting The Officers’ Exercise Of Lawful Duty.	9
1. Delgado’s conviction necessarily included a finding that Officers Corbett, Ellis, and McCoy did not use unreasonable or excessive force.	10
2. Delgado’s civil rights claims rest on the premise that the officers used excessive force.	11
3. Delgado’s civil rights claims are incompatible with his existing conviction.	11
II. <i>YOUNT V. CITY OF SACRAMENTO</i> DOES NOT PERMIT DELGADO’S SUIT.	12
A. The Test Set Forth In <i>Yount</i> Compels Summary Judgment For The Defendants.	12
1. Yount applied a fact-based test to determine that <i>Heck v. Humphrey</i> did not bar a particular civil suit.	13
2. The <i>Yount</i> test shows that <i>Heck v. Humphrey</i> bars Delgado’s civil suit.	14
B. Yount Does Not Establish That Deadly Force Changes The <i>Heck v. Humphrey</i> Analysis	16
1. It makes no difference that the jury was not specifically instructed on the Fourth Amendment standard for reasonable force.	16
2. Neither <i>Yount</i> nor any other authority establishes that unconstitutional deadly force can be lawful for purposes of California law.	18

TABLE OF CONTENTS (Continued)

	Page
III. DELGADO’S CLAIM THAT THE JURY FOUND HE WAS UNARMED IS IRRELEVANT AND UNSUPPORTED BY THE RECORD.	20
CONCLUSION	22
CERTIFICATE OF COMPLIANCE	23

TABLE OF AUTHORITIES

Cases	Page
Acosta v. Hill (9th Cir. 2007) 504 F.3d 1323	16, 17
Amaker v. Weiner (2d Cir. 1999) 179 F.3d 48	9
Boyes v. Evans (1936) 14 Cal.App.2d 472	19
Graham v. Connor (1989) 490 U.S. 386	19, 21
Heck v. Humphrey (1994) 512 U.S. 477	passim
Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465	8
People v. Hovarter (2008) 44 Cal.4th 983	10, 14
People v. Soto (1969) 276 Cal.App.2d 81	19
Scott v. Harris (2007) 550 U.S. 372	16, 17
Tennessee v. Garner (1985) 471 U.S. 1	16-20
Truong v. Orange County Sheriff's Dept. (2005) 129 Cal.App.4th 1423	9
Yount v. City of Sacramento (2008) 43 Cal.4th 885	passim

TABLE OF AUTHORITIES (Continued)

Statutes	Page
42 U.S.C. section 1983	8
Code of Civil Procedure section 437c	8, 12
Penal Code sections:	
69	4, 20
148	4, 10, 14, 16, 18-20
196	19

Rules

California Rules of Court, rule 8.104(a)	7
--	---

INTRODUCTION

Several years ago, a jury convicted plaintiff Gerardo Delgado of resisting law enforcement officers who attempted to arrest him. Delgado does not dispute that as part of his conviction, the jury necessarily determined that the officers used only reasonable, lawful force against him. The conviction has not been overturned.

Now Delgado is suing the same officers and several other defendants, alleging that the officers used excessive force in violation of his rights under the United States Constitution. The force at issue in this suit is exactly the same force that the jury found was reasonable. A determination that the force was unreasonable therefore would necessarily draw Delgado's existing conviction into question. United States Supreme Court precedent forbids that result: *Heck v. Humphrey* (1994) 512 U.S. 477, precludes a civil rights suit that, if successful, "would necessarily imply the invalidity of" an undisturbed criminal conviction. (*Id.* at pp. 486-487.) The trial court thus properly granted summary judgment for the defendants.

Delgado's opening brief argues that a finding of unconstitutional force would not necessarily cast doubt on the validity of his conviction. He emphasizes that although the jury determined that the force was reasonable for purposes of California law, it did not specifically consider whether the force was reasonable for purposes of the United States Constitution. Relying on the recent decision in *Yount v. City of Sacramento* (2008) 43 Cal.4th 885, he asserts that this situation leaves him free to pursue his claims. Not so.

Yount did not adopt a blanket rule permitting a post-conviction excessive force suit whenever deadly force is involved. It merely concluded, under a fact-based test, that Yount's suit did not conflict with his conviction where he had pled no-contest and the defendants conceded that their accidental use of deadly force was unjustified. Here, by contrast,

there unquestionably is a conflict between the conviction and the suit: The jury convicted Delgado after being told that it could not do so if the officers used unreasonable force. A finding here that the force was unreasonable would directly undermine a finding at the heart of Delgado's conviction.

The use of deadly force does not change this analysis. The United States Supreme Court has held that there is no special reasonableness inquiry in cases involving deadly force. Nor is there support for Delgado's claim that deadly force can be simultaneously reasonable under California law and unconstitutional. Either the force was reasonable or it was not. A jury determined that it was reasonable. *Heck v. Humphrey* thus bars this suit in its entirety and the trial court's judgment should be affirmed.

STATEMENT OF FACTS

A. A Jury Convicts Delgado Of Resisting Officers Lawfully Performing Their Duties.

After plaintiff Gerardo Delgado had an argument with his ex-girlfriend, Riverside Police Officers Phillip Neglia, Bruce Blomdahl, Kenneth Madsen, Marc Dehdashtian, Denny Corbett, Mark Ellis, and William McCoy went to Delgado's home to arrest him. (1 Clerk's Transcript (CT) 254 ¶¶ 2-3.) Delgado was shot and injured during the encounter. (1 CT 254 ¶ 5.) Delgado was subsequently indicted for resisting three of the officers, Corbett, Ellis, and McCoy. (1 CT 255 ¶ 6.) His criminal case was tried to a jury. (1 CT 255 ¶ 7.)

Officers Corbett, Ellis, McCoy, Dehdashtian, Neglia, and Madsen testified at the criminal trial. (1 CT 255 ¶ 8.) They testified to the following sequence of events: When the officers arrived at Delgado's home, McCoy knocked, announced that the Riverside police were there, and asked Delgado to come to the door. (1 CT 255 ¶ 9.) Delgado did not cooperate, so McCoy used a key to open the door. (1 CT 255 ¶ 10.) McCoy and Corbett saw Delgado standing across the room, pointing a gun at them. (1 CT 256 ¶ 11.) Corbett told Delgado to drop the gun. (1 CT 256 ¶ 12.) Delgado moved behind a wall and continued to point the gun at the officers. (1 CT 256 ¶ 13.) McCoy and Corbett fired several rounds toward Delgado. (1 CT 256 ¶ 14.) Delgado moved toward the back door, still with the gun in his hand. (1 CT 257 ¶ 15.) McCoy and Ellis fired at Delgado. (1 CT 257 ¶ 16.) Delgado ran to the back yard, where Neglia, Madsen, and Dehdashtian were positioned. (1 CT 257 ¶¶ 15, 17.) Delgado then ran back inside toward Corbett, Ellis, and McCoy, still holding a gun. (1 CT 257 ¶ 18.) Corbett, Ellis, and McCoy fired again

and Delgado fell to the ground. (1 CT 257 ¶ 19.) Only then were the officers able to arrest Delgado. (1 CT 258 ¶ 20.)

The People argued to the jury that Delgado was guilty of resisting Officers Corbett, Ellis, and McCoy based on this sequence of events. (1 CT 258 ¶ 22.) Delgado’s attorney argued that Delgado could not be guilty of resisting arrest by force or violence, Penal Code section 69, because what the officers thought was a gun may have been a cell phone and because even if Delgado had a gun, he did not actually shoot it. (1 CT 259 ¶ 23.) Delgado’s attorney further argued that Delgado could not be guilty of the lesser included offense of resisting officers, Penal Code section 148(a)(1), because the officers used unreasonable or excessive force. (1 CT 259 ¶¶ 23-24.) The attorney specifically told the jury that “you have to decide whether or not [the officers] should have shot 22 times [Y]ou have to decide whether or not 22 shots at this point, at this guy holding a cell phone or a gun, is reasonable.” (1 CT 259 ¶ 24.)

The jury was instructed that it could convict Delgado only if it was convinced beyond a reasonable doubt that he resisted the officers while they were lawfully performing their duties. (1 CT 260 ¶¶ 27-28.) The jury was further instructed that an officer is not lawfully performing his duties if he “us[es] unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention.” (1 CT 261 ¶ 29.)

The jury convicted Delgado of resisting Officers Corbett, Ellis, and McCoy in violation of Penal Code section 148. (1 CT 261 ¶ 30.) Delgado did not appeal his conviction or the resulting sentence. (1 CT 261 ¶ 31.)

B. Delgado Sues The Arresting Officers And Other Defendants For Federal Civil Rights Violations Based On A Claim That The Officers Used Excessive Force.

Delgado sued defendants—the City of Riverside, then-Police Chief Russ Leach, and the seven officers who came to his home to arrest him—for federal civil rights violations based on the encounter described above. (Motion to Augment Exhibit 1 [complaint]; 1 CT 261 ¶ 32.) He alleged that the officers shot him for no reason and that the use of deadly force against him was unreasonable and excessive. (1 CT 262 ¶ 33.) He alleged that Chief Leach failed to adequately train, monitor, supervise, and discipline the officers. (1 CT 262 ¶ 34.) He further alleged that the City and the Chief maintained policies that resulted in a violation of his civil rights and concealed or failed to discover violations of his civil rights. (1 CT 262 ¶ 35.)

C. The Trial Court Enters Summary Judgment For Defendants On The Ground That *Heck v. Humphrey* Bars Delgado’s Excessive Force Claims.

1. Defendants move for summary judgment based on *Heck v. Humphrey*.

Defendants moved for summary judgment on Delgado’s First Amended Complaint. (1 CT 1-16.) They argued that the complaint ran afoul of the United States Supreme Court’s controlling decision in *Heck v. Humphrey*, *supra*, 512 U.S. 477. *Heck v. Humphrey* bars a civil suit that, if successful, would necessarily cast doubt on the validity of an undisturbed criminal conviction. (*Id.* at pp. 486-487.) Defendants demonstrated that here, a jury convicted Delgado of resisting arrest after it was instructed that it could not convict if the officers used excessive force. (1 CT 11-14.)

Delgado's conviction therefore included a finding that the force was not excessive. (*Ibid.*) Delgado's civil rights suit contends that the exact same force *was* excessive and so success would necessarily imply that Delgado's conviction was invalid. (*Ibid.*)

Delgado opposed summary judgment. (1 CT 234-252.) Relying primarily on *Yount v. City of Sacramento, supra*, 43 Cal.4th 885, he argued that his conviction did not include a finding that it was reasonable for the officers to use *deadly* force. (1 CT 241-252.)

2. The trial court grants summary judgment for defendants.

The trial court granted summary judgment for defendants. (RT 32-33; 1 CT 283-284.) In so ruling, the court took judicial notice of portions of the transcript and jury instructions in Delgado's criminal trial. (1 CT 283 [ruling], 90-233 [request for judicial notice].) The noticed materials showed that the jury knew that the officers had used deadly force, that Delgado's criminal defense counsel specifically asked the jury to determine whether that use of force was reasonable, that the jury was instructed that it could not convict if the force was unreasonable, and that the jury convicted. (1 CT 283.) In light of those facts, the trial court found that the jury must have determined that the use of force was reasonable and that Delgado's civil rights suit impermissibly asserted just the opposite. (*Ibid.*)

The court rejected Delgado's argument that the use of deadly force changed the analysis. (1 CT 284.) It noted under United States Supreme Court precedent, deadly force claims require the same reasonableness inquiry as other excessive force claims. (*Ibid.*) Because a criminal jury already determined that the force at issue was reasonable under the circumstances, Delgado's claim that the force was unreasonable necessarily

would draw his conviction into question and thus could not proceed.

(Ibid.)

D. Delgado Appeals.

The court entered judgment for defendants on November 6, 2009, with notice of entry filed on November 19, 2009. (1 CT 286-287 [judgment], 290 [notice of entry].) Delgado timely appealed. (2 CT 300 [notice of appeal filed December 10, 2009]; Cal. Rules of Court, rule 8.104(a) [notice of appeal must be filed within 60 days of service of notice of entry of judgment].)

STANDARD OF REVIEW

A defendant is entitled to summary judgment when one or more elements of the cause of action cannot be established or there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subds. (a), (p)(2).) This court reviews a grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

ARGUMENT

II. ***HECK v. HUMPHREY* BARS THIS ACTION BECAUSE A JUDGMENT FOR DELGADO WOULD NECESSARILY DRAW INTO QUESTION HIS UNDISTURBED CONVICTION.**

A jury convicted Delgado of resisting Officers Corbett, Ellis, and McCoy. The First Amended Complaint sought damages against those same officers and others for using excessive force during their encounter with Delgado. *Heck v. Humphrey* bars Delgado's claims because they conflict with the jury's determination that the force was reasonable, and thus would cast doubt on the validity of his conviction.

A. ***Heck v. Humphrey* Bars A Federal Civil Rights Claim That, If Successful, Would Necessarily Imply The Invalidity Of An Existing Conviction.**

In *Heck v. Humphrey*, the United States Supreme Court held that a plaintiff who has a criminal conviction cannot pursue a claim under 42 U.S.C. section 1983 that "would necessarily imply the invalidity of his conviction or sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." (512 U.S. at

pp. 486-487.) The Court explained that a contrary rule would violate the “hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments” (*Id.* at p. 486; see also *id.* at p. 484 [noting a “strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions”].) Therefore, to recover damages for “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” or otherwise invalidated. (*Id.* at pp. 486-487, fn. omitted.)¹

B. Delgado’s Excessive Force Claims Would Imply The Invalidity Of His Conviction For Resisting The Officers’ Exercise Of Lawful Duty.

As we now explain, *Heck v. Humphrey* squarely applies here because the undisputed facts establish that Delgado is challenging the same force that the jury found was reasonable and not excessive.

¹ Delgado has not disputed that *Heck v. Humphrey* governs this suit, nor could he. (See *Truong v. Orange County Sheriff’s Dept.* (2005) 129 Cal.App.4th 1423, 1427 [California courts “look to federal law to determine the validity of an action under section 1983”]; *Amaker v. Weiner* (2d Cir. 1999) 179 F.3d 48, 51-52 [applying *Heck v. Humphrey* to claims based on 42 U.S.C. §§ 1981, 1985, and 1986].)

1. Delgado’s conviction necessarily included a finding that Officers Corbett, Ellis, and McCoy did not use unreasonable or excessive force.

The relevant facts are undisputed:

- Delgado was charged with resisting Officers Corbett, Ellis, and McCoy. (1 CT 255 ¶ 6.)
- The jury considering the charges knew that the officers shot at Delgado multiple times during their encounter with him. (1 CT 256-257 ¶¶ 14, 16, 19.)
- The court instructed the jury that it could convict Delgado only if the People proved beyond a reasonable doubt that the officers acted lawfully. (1 CT 260 ¶ 28; 1 CT 150-151.)
The court further instructed that “[i]f the People have not met this burden, *you must find the defendant not guilty.*” (1 CT 260 ¶ 28, emphasis added; 1 CT 150.)
- The court instructed the jury that an officer is *not* acting lawfully if he uses “unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention.” (1 CT 261 ¶ 29; 1 CT 150.)
- Delgado’s criminal defense counsel asked the jury “to decide whether or not 22 shots at this point, at this guy holding a cell phone or a gun, is reasonable.” (1 CT 259 ¶ 24; 1 CT 231.)
- The jury convicted Delgado of resisting the officers in violation of Penal Code section 148. (1 CT 261 ¶ 30; 1 CT 100, 102, 103.)

The jury could not have convicted Delgado if it had believed that the use of force was unreasonable or excessive. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005 [jury is presumed to follow the instructions given to it]; *Yount v. City of Sacramento, supra*, 43 Cal.4th at p. 894

[section 148(a)(1) “requires that the officer be *lawfully* engaged in the performance of his or her duties”].) The undisputed facts therefore establish that the jury rejected Delgado’s argument that the officers used excessive force and found instead that the officers’ use of force was reasonable.

2. Delgado’s civil rights claims rest on the premise that the officers used excessive force.

Delgado does not dispute that the civil rights claims set forth in his First Amended Complaint involve the same use of force that was described to the criminal jury. Whereas the jury determined that the force was reasonable, Delgado’s complaint alleges that it was unreasonable and excessive. (1 CT 262 ¶ 33; Motion to Augment Exhibit 1 ¶ 10 [complaint alleging that “the use of deadly force against [Delgado] was unreasonable, unnecessary, excessive, malicious, and/or for the purpose of inflicting pain”].)

3. Delgado’s civil rights claims are incompatible with his existing conviction.

Delgado’s criminal conviction had to, and did, include a finding that the officers’ use of force was lawful and reasonable. His present suit alleges that the force was unreasonable. There is no way to reconcile these two competing characterizations. As we explain below, Delgado’s effort to do so is unsupported by case law and contrary to the undisputed facts. His excessive force claims necessarily cast doubt on the validity of his undisturbed conviction. The trial court therefore properly granted summary judgment for the defendants based on *Heck v. Humphrey*.²

² In addition to the claims against Officers Corbett, Ellis, and McCoy,

III. *YOUNT V. CITY OF SACRAMENTO* DOES NOT PERMIT DELGADO'S SUIT.

Delgado does not dispute that *Heck v. Humphrey* bars his suit if success would necessarily imply that his conviction for resisting the officers was invalid. Nor does Delgado dispute that the jury found as part of his conviction that the officers' use of force was reasonable. Rather, relying on *Yount v. City of Sacramento*, he contends that a suit for excessive deadly force does not draw a section 148(a)(1) conviction into question and that force that is reasonable for purposes of section 148 may be unreasonable under the United States Constitution. That argument misreads *Yount* and overlooks the significance of the undisputed facts regarding Delgado's conviction.

A. The Test Set Forth In *Yount* Compels Summary Judgment For The Defendants.

the First Amended Complaint also asserts claims against four other officers, the police chief, and the City. (1 CT 261 ¶ 32; Motion to Augment Exhibit 1 [complaint].) All of these claims rely on Delgado's allegation that Officers Corbett, Ellis, and McCoy used excessive force. Because that showing would run afoul of *Heck v. Humphrey*, the trial court properly recognized that Delgado's conviction for resisting Officers Corbett, Ellis, and McCoy precluded his claims against the other defendants as well. (1 CT 284; Code Civ. Proc., § 437c, subd. (p)(2) [defendant entitled to summary judgment if one or more elements of the cause of action cannot be established].)

Delgado reads too much into *Yount* when he describes it as finding that “in cases where *deadly force* is used, a person can be convicted of resisting arrest under 148(a)(1) *and* maintain a later civil action against an arresting officer under § 1983.” (AOB 7.) *Yount* is not that broad. It simply adopts a test for determining when *Heck v. Humphrey* bars a subsequent suit—a test that in this case compelled summary judgment.

1. Yount applied a fact-based test to determine that *Heck v. Humphrey* did not bar a particular civil suit.

Yount stemmed from an accidental police shooting. The police attempted to arrest Yount, who was highly intoxicated and actively resisted their efforts. (43 Cal.4th at pp. 889-890.) One of the officers decided to use his Taser to subdue Yount. (43 Cal.4th at p. 891.) The officer “pulled what he thought was his Taser and fired it at the back of Yount’s thigh.” (*Ibid.*) But the officer had not grabbed his Taser; he had grabbed his pistol and he inadvertently shot Yount with it. (*Ibid.*) Yount pled no contest to resisting arrest, then sued the officer for using excessive force. (*Id.* at pp. 891-892.)

The question before the California Supreme Court was whether, under *Heck v. Humphrey*, Yount’s no-contest plea precluded his excessive force suit. (*Id.* at pp. 888-889.) To answer that question, the Court considered, “using the substantial evidence test, what acts or omissions may have formed the factual basis” for Yount’s prior conviction, what misconduct he alleged in the civil rights suit, and the relationship between the two. (*Id.* at p. 894 [“We find this framework useful”].)

Yount stipulated that there was a factual basis for convicting him under section 148(a)(1) “without any explicit recitation of what those facts were.” (43 Cal.4th at p. 895.) The Court determined that his plea

established that the arresting officers were entitled to use reasonable force against him. (*Id.* at p. 898.) The defendants conceded, however, that Yount’s resistance did not justify the accidental use of deadly force. (*Id.* at pp. 891, 898.) In light of that concession, the Court concluded that Yount’s claim that the force was unreasonable did not cast doubt on the validity of his conviction. (*Id.* at p. 899.)

Yount did not hold that a litigant always may sue for excessive force after being convicted under section 148(a)(1), so long as the force involved is deadly. Such a rule would be contrary to *Heck v. Humphrey*. The Court just held that given the facts at hand—including the admittedly accidental use of deadly force and a plea with no specified factual basis—Yount’s conviction did not necessarily include a determination that it was reasonable for the officer to shoot him. As we now discuss, the facts here are starkly different.

2. The *Yount* test shows that *Heck v. Humphrey* bars Delgado’s civil suit.

The first step of the test endorsed in *Yount* is to determine what acts formed the factual basis for the prior conviction. (43 Cal.4th at p. 894.) Whatever the situation in *Yount*, there can be no question that Delgado’s conviction—the only one that matters—included an express determination that the use of deadly force was reasonable: The jury knew that the officers shot at Delgado, was specifically asked to determine whether that use of force was reasonable, and was instructed that it could not convict Delgado if the force was excessive. (1 CT 259-261 ¶¶ 24, 27-29.) The jury convicted Delgado. (1 CT 261 ¶ 30.) It therefore unquestionably found that the use of deadly force was reasonable. (*People v. Hovarter, supra*, 44 Cal.4th at p. 1005 [jury is presumed to follow the instructions

given to it].) Without that determination, it could not have convicted Delgado.

The second step of the *Yount* test is to examine the misconduct alleged in the civil suit. (43 Cal.4th at p. 894.) Delgado’s suit asserts that the officers used unreasonable force against him. (1 CT 262 ¶ 33; Motion to Augment Exhibit 1 ¶ 10 [complaint alleging that the use of deadly force was “unreasonable” and “excessive”].)

The final step of the *Yount* test is to consider the relationship between the bases for Delgado’s conviction and for this suit. (43 Cal.4th at p. 894.) Delgado’s conviction required the jury to find that it was reasonable for the officers to shoot at Delgado. This suit seeks a finding that the same shooting was unreasonable. Such a finding would imply the invalidity of Delgado’s conviction.

An example offered in *Yount* confirms this point. *Yount* analogized the case to a situation in which a defendant resists a lawful arrest and an officer responds with excessive force. (*Yount, supra*, 43 Cal.4th at p. 899.)

In that situation, there are “two isolated factual contexts” and “[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.” (*Ibid.*) In this case, by contrast, there are not two isolated factual contexts. Rather, the jury was told that excessive force *would* negate the charge that Delgado resisted the officers and counsel argued to the jury that the force was unreasonable. (1 CT 260-261 ¶¶ 28-29.) The jury thus considered the officers’ use of force as part and parcel of whether Delgado could be convicted. Its determination that the force was not excessive disposes of this case.

**B. Yount Does Not Establish That Deadly Force Changes
The *Heck v. Humphrey* Analysis.**

Delgado contends that his current suit is not incompatible with his jury conviction because he alleges deadly force and the jury was not specifically instructed on how to determine if deadly force is unreasonable for purposes of the Fourth Amendment. (AOB 4, 10-14, 18.) The use of deadly force does not impact the analysis set forth above.

**1. It makes no difference that the jury was not
specifically instructed on the Fourth Amendment
standard for reasonable force.**

The United States Supreme Court has rejected Delgado’s theory that *Tennessee v. Garner* (1985) 471 U.S. 1, requires a special inquiry for deadly force claims. The Court explained that *Garner* “did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’ *Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test . . . to the use of a particular type of force in a particular situation.” (*Scott v. Harris* (2007) 550 U.S. 372, 382.) Even in a case involving deadly force, “all that matters is whether [the officers’] actions were reasonable.” (*Id.* at p. 383; see also *Acosta v. Hill* (9th Cir. 2007) 504 F.3d 1323, 1324 [under *Scott v. Harris*, civil rights plaintiff was not entitled to a special deadly force instruction; it was sufficient that jury found for the officer after receiving an excessive force instruction]³.) Reasonableness depends on the totality of

³ Delgado asserts that *Acosta v. Hill* does not shed light on whether a section 148(a)(1) conviction includes a determination of reasonableness under the U.S. Constitution. (AOB 15, fn. 6.) Defendants do not argue otherwise. The point is that *Acosta*, like *Scott v. Harris*, belies Delgado’s contention that deadly force requires a different Fourth Amendment analysis than other types of force. Moreover, there is no basis for

the circumstances. (*Tennessee v. Garner, supra*, 471 U.S. at pp. 8-9.) Here, the criminal jury reviewed the facts surrounding Delgado’s encounter with police and determined that the officers’ use of force was reasonable. “[T]hat is the end of the inquiry.” (*Acosta v. Hill, supra*, 504 F.3d at p. 1324.)

More significantly, Delgado’s argument that the jury was not instructed on the Fourth Amendment standard for reasonableness is exactly the kind of collateral attack that *Heck v. Humphrey* prevents. (See *Heck v. Humphrey, supra*, 512 U.S. at pp. 484, 486.) The question at this stage is not whether the jury was properly instructed or whether the force was unreasonable as a matter of constitutional law. The question is whether the present suit necessarily casts doubt on the validity of Delgado’s conviction.

It does. The jury should not have convicted Delgado if the officers acted unlawfully. A determination here that the force was unconstitutionally excessive would mean that the officers acted unlawfully and thus that Delgado should not have been convicted. That possible outcome compelled summary judgment for defendants.

2. Neither *Yount* nor any other authority establishes that unconstitutional deadly force can be lawful for purposes of California law.

Delgado’s additional claim that *Acosta* “misreads *Scott v. Harris* as mandating that a jury must not be given any direction on applying the Fourth Amendment constitutional standard.” (AOB 15, fn 6.) *Acosta* did not prevent a court from instructing a jury on how to apply the constitutional standard. It just held that under *Scott v. Harris*, an “excessive force instruction based on a reasonableness standard” sufficed and that the trial court did not err in refusing to give a separate deadly force instruction. (*Acosta v. Hill, supra*, 504 F.3d at p. 1324.)

Delgado says that *Yount* indicates that “the standard of reasonableness under the lawful element of 148(a)(1) is a lower standard than that for the use of *deadly* force.” (AOB 9.) Based on this premise, he contends that a finding that force is unconstitutionally excessive could co-exist with the jury’s finding that the force was not excessive. None of the cited authorities supports this claim.

Yount does not hold that deadly force can be reasonable for section 148(a)(1) purposes but unreasonable under the United States Constitution. Delgado’s contrary claim reads too much into *Yount*’s citation to *Tennessee v. Garner, supra*, 471 U.S. 1. *Yount* cited *Tennessee v. Garner* only for the proposition that a criminal conviction does not “in itself establish a justification for the use of deadly force.” (*Yount, supra*, 43 Cal.4th at p. 898.) *Yount* did not comment on how California’s reasonableness standard compares to that dictated by the Fourth Amendment. It is true that *Yount* concluded that “[t]he use of deadly force in this situation . . . requires a separate analysis” and ultimately permitted *Yount*’s civil rights suit. (43 Cal.4th at p. 899.) But as we have explained, that determination was based on the specific facts at hand, including the defendants’ concession that the officer shot *Yount* by accident and without justification. *Yount* did not say, or even suggest, that the suit could proceed because the Fourth Amendment prohibits force that is nonetheless reasonable under California law.

Delgado’s other authorities are equally unavailing. He cites federal cases that describe the Fourth Amendment reasonableness inquiry, but none of those cases indicates that California uses a different standard or discusses what constitutes “reasonable” force for purposes of section 148(a)(1). (See AOB 9-10 [citing *Tennessee v. Garner, supra*, 471 U.S. 1 and *Graham v.*

Connor (1989) 490 U.S. 386].)⁴ And Delgado cites California authorities stating that an officer may use only reasonable force, but none of those authorities draws any comparison to federal law or permits force that the Fourth Amendment would bar. (See AOB 9-10 [citing *People v. Soto* (1969) 276 Cal.App.2d 81; *Boyes v. Evans* (1936) 14 Cal.App.2d 472; and Cal Crim 2670 jury instruction].)

The lack of supporting authority is not surprising. As the jury was instructed here, a defendant can only be convicted of resisting an officer who was acting lawfully. (1 CT 150-151; *Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 894.) Under Delgado’s theory, the officers were acting lawfully even though they were violating the United States Constitution. That cannot be right. The force was either reasonable or unreasonable, excessive or not excessive. It could not be both at once.

Delgado elaborates in a footnote that his point is not that deadly force is lawful in California, but that “lawfulness of use [of] force under California law is a general standard while the constitutional standard requires a ‘separate analysis’ for deadly force.” (AOB 10, fn. 3.) This explanation does not resolve the fundamental inconsistency in Delgado’s position, namely that he seeks a finding that the force was unreasonable and

⁴ Delgado inaccurately describes the “section 148(a)(1) standard that ‘[a] peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self defense’” as being the same rule whose codification the Court struck down in *Tennessee v. Garner*. (AOB 10.) *Tennessee v. Garner* dealt with a statute that permitted law enforcement officers to “use all the necessary means” to arrest a fleeing or forcibly resisting felon. (471 U.S. at p. 4.) Section 148(a)(1), by contrast, does not authorize the use of “all necessary means.” As Delgado’s own description makes clear, it authorizes only the use of *reasonable* force. *Tennessee v. Garner* cites a different California statute, Penal Code section 196, as embodying the “all necessary means” common law rule under review in that case. (471 U.S. at p. 16, fn. 14.) Section 196 is not at issue here.

a jury has already determined that the force was reasonable. Because those two findings are incompatible, *Heck v. Humphrey* bars his suit.

IV. DELGADO’S CLAIM THAT THE JURY FOUND HE WAS UNARMED IS IRRELEVANT AND UNSUPPORTED BY THE RECORD.

Delgado asserts in passing that the officers’ use of force was per se unreasonable because the jury implicitly found that he did not threaten force. (AOB 18.) This assertion is misplaced because it goes to the merit of Delgado’s suit rather than to the threshold question of whether *Heck v. Humphrey* bars the suit entirely. But the assertion is also contrary to the record.

Delgado emphasizes that he was charged with violating Penal Code section 69 but convicted only under section 148, a lesser included offense. (AOB 18.) While true, this fact has no bearing on whether the officers’ use of force was justified because Delgado threatened force or violence or because the officers could reasonably have believed that he did.

It is undisputed that Delgado’s counsel urged the jury not to convict Delgado under section 69 *even if Delgado had a gun* because “*what he’s doing is making a threat,*” not actually using force or violence. (1 CT 259 ¶ 23, emphasis added.) The jury may have relied on this argument. That is, it may have believed that Delgado was armed but that it could not convict him because he did not discharge the weapon. The acquittal thus does not establish as a matter of law that Delgado posed no threat of violence and that the use of deadly force was unreasonable. (See *Tennessee v. Garner, supra*, 471 U.S. at p. 11 [deadly force may be reasonable “if the suspect threatens the officer with a weapon”].) Moreover, even if the jury had found that Delgado was unarmed, that still would not render the force unreasonable as a matter of law. The relevant

question is whether an officer could reasonably have *perceived* Delgado as a threat in the heat of the moment. (*Graham v. Connor, supra*, 490 U.S. at p. 396.) Under that standard, the use of deadly force may have been justified if Delgado was holding a cell phone but the officers reasonably believed he was holding a gun.

In any event, it makes no difference whether Delgado could show in this case that the force was unreasonable. Defendants did not move for summary judgment on the ground that the force was reasonable as a matter of law. They moved on the ground that a jury has already determined that the force was reasonable and that *Heck v. Humphrey* precludes Delgado from attempting to show otherwise. (1 CT 4-16.) The trial court properly granted judgment on that ground.

CONCLUSION

In convicting Delgado for resisting officers in the lawful performance of their duties, a jury determined that the officers did not use unreasonable or excessive force. Delgado's present claims that the officers used unreasonable force in violation of his constitutional rights would, if successful, necessarily draw his conviction into question. *Heck v. Humphrey* therefore bars his suit in its entirety. The trial court's grant of summary judgment for defendants should be affirmed.

Dated: July __, 2010

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP
John M. Porter

OFFICE OF THE CITY ATTORNEY
CITY OF RIVERSIDE
Gregory P. Priamos, City Attorney
James E. Brown, Supervising Deputy City Attorney

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates
Alana H. Rotter

By _____
Alana H. Rotter

Attorneys for Defendants and Respondents CITY OF RIVERSIDE, RUSS LEACH, PHILLIP NEGLIA, KENNETH MADSEN, MARC DEHDASHTIAN, BRUCE BLOMDAHL, DENNY CORBETT, MARK ELLIS, WILLIAM MCCOY

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached Respondents' Brief was produced using 13-point Times New Roman type style and contains **5,455** words not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: July __, 2010

LLP

GREINES, MARTIN, STEIN & RICHLAND

By _____
Alana H. Rotter