No. 22-2001

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROXANNE TORRES,

Plaintiff-Appellant,

v.

JANICE MADRID, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
Civil Action No. 1:16-cv-01163-LF-KK
Hon. Laura Fashing

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STATEMENT OF PRIOR OR RELATED APPEALS

Ms. Torres's prior appeal in this litigation is docketed as No. 18-2134. This Court's decision in that appeal, *Torres v. Madrid*, 769 F. App'x 654 (10th Cir. 2019), was reversed by the United States Supreme Court, which remanded for further proceedings consistent with its opinion, *Torres v. Madrid*, 141 S. Ct. 989 (2021). This Court then remanded to the district court, *Torres v. Madrid*, 845 F. App'x 803 (10th Cir. 2021) (mem.). Ms. Torres now appeals the district court's decision following that remand, App. Vol. II at 307-24.

INTRODUCTION

In the early morning of July 15, 2014, plaintiff-appellant Roxanne Torres sat in her parked car at an apartment complex after dropping off a friend. Four New Mexico state police officers, including defendants-appellees Janice Madrid and Richard Williamson ("Defendants"), arrived at the complex looking for a different woman who had no relationship to Ms. Torres. Defendants approached Ms. Torres's car and attempted to open the driver's side door without identifying themselves as police. Believing Defendants were carjackers, Ms. Torres began to drive forward out of the parking space. Defendants opened fire, collectively firing thirteen shots at Ms. Torres as she drove away. Bullet trajectory evidence, an eyewitness account by a fellow officer, and Defendants' own testimony confirm that at least some of the shots were fired after Ms. Torres had passed Defendants and they were no longer in danger. Two of the bullets traveled through the rear window of the car and lodged in Ms. Torres's back. Despite her injuries, Ms. Torres was able to escape and drive herself to a hospital.

Ms. Torres filed suit against Defendants under 42 U.S.C. § 1983, alleging that they used excessive force in violation of the Fourth Amendment when they shot her. The district court initially entered summary judgment for Defendants, and this Court affirmed, on the ground that Ms. Torres's successful escape meant that no Fourth Amendment seizure had occurred. The United States Supreme Court granted Ms. Torres's petition for a writ of certiorari and reversed, holding that a Fourth

Amendment seizure occurs when an officer employs physical force to a person with the intent to restrain, even if the person ultimately escapes.

On remand, Defendants again moved for summary judgment, this time arguing that they are entitled to qualified immunity and that Ms. Torres's claims are barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), because she entered a no contest plea to aggravated fleeing from law enforcement and assault upon a peace officer. The district court granted the motion on both grounds, and Ms. Torres now appeals to this Court.

The district court's entry of summary judgment was wrong and should be reversed. The court held that Defendants are entitled to qualified immunity because it was not clearly established until the Supreme Court's decision in this case that an officer's use of physical force with the intent to restrain constitutes a Fourth Amendment seizure if the suspect ultimately escapes. In so holding, the court erroneously based its qualified immunity analysis on a fact that was not known by Defendants when they fired their weapons and thus could not have informed their understanding of whether using deadly force was unlawful—namely, that Ms. Torres would be able to drive away despite their gunfire. The uncertainty over the legal significance of Ms. Torres's escape has no bearing on the qualified immunity inquiry, which is whether Defendants should have known *when they fired* that shooting Ms. Torres was excessive under clearly established law.

The proper qualified immunity inquiry in this case is whether Defendants could reasonably have believed when they discharged their weapons that it was lawful to shoot Ms. Torres in the back after she had passed them and neither they nor anyone else was in immediate danger of being struck by her car. Because clearly established law prohibits police officers from using deadly force after a suspect no longer poses a threat of serious physical harm, Defendants cannot obtain summary judgment based on qualified immunity.

The district court also erred in holding that Ms. Torres's claims are barred under *Heck*. At most, Ms. Torres's plea agreement forecloses an excessive force claim based on shots fired by Defendants at the moment that Ms. Torres initially pulled forward out of the parking space. Ms. Torres's excessive force claims are based on the two bullets that entered her back and thus were discharged by Defendants *after* Ms. Torres had passed them and they were no longer in danger. A reasonable factfinder could assume that, consistent with Ms. Torres's plea agreement, she endangered Defendants when she initially drove forward, yet also conclude that Defendants employed unlawful excessive force when they shot Ms. Torres in the back *after* she had pulled out of the parking space because Defendants were no longer in danger at that time. Accordingly, Ms. Torres can prevail on her claims without necessarily implying the invalidity of her plea agreement, making *Heck* inapplicable.

Although the district court purported to identify certain factual allegations that raise *Heck* problems, most of those allegations are not necessarily inconsistent with

Ms. Torres's plea agreement, and some have been conceded by Defendants. But to the extent this Court finds that any of Ms. Torres's allegations contradict her plea agreement, this Court's precedent establishes that the proper course is not to bar her suit, but rather to strike those allegations, and instruct the jury accordingly.

For these reasons, the Court should reverse the district court's erroneous grant of summary judgment and remand for Ms. Torres's claims to go to trial.

JURISDICTIONAL STATEMENT

Ms. Torres invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1341 and 1343. App. Vol. I at 18. On December 30, 2021, the district court entered summary judgment in favor of Defendants. App. Vol. II at 307-24. Plaintiffs filed a timely notice of appeal on January 3, 2022. App. Vol. II at 325-26; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting qualified immunity to Defendants based on facts not known to them when they shot Ms. Torres.
2. Whether qualified immunity is improper at the summary judgment stage because the record contains evidence that Defendants used deadly force after

Ms. Torres had pulled passed them and they were no longer in any danger, in violation of clearly established law.

3. Whether the district court erred in holding that *Heck v. Humphrey*, 512 U.S. 477 (1994), bars Ms. Torres's excessive force claims where her plea agreement establishes at most that she endangered Defendants when she initially began to pull out of the parking spot, and her claims are based on Defendants' use of deadly force *after* she had passed them and they were no longer in any danger.

STATEMENT OF THE CASE

I. Factual Background

In the early morning of July 15, 2014, plaintiff-appellant Roxanne Torres drove to an apartment complex to drop off a friend. App. Vol. I at 165. She backed into a parking spot, with cars parked on either side of her. App. Vol. I at 167-68. Four New Mexico state police officers, including defendants-appellees Janice Madrid and Richard Williamson, arrived at the apartment complex in unmarked vehicles. App. Vol. I at 132, 140-41, 147, 179-81. They were looking for a different woman who had no relationship to Ms. Torres. App. Vol. I at 132, 147, 175, 179. Defendants parked their vehicles and then approached Ms. Torres's vehicle, where Ms. Torres was sitting in the driver's seat with the doors locked and engine running. App. Vol. I at 136, 165. As Defendants approached, it became apparent that Ms. Torres was not the woman they were looking for, and they had no reason to believe Ms. Torres had committed any crime. App. Vol. I at 132, 181, 184, 187, 206-09. Defendants shouted

commands at Ms. Torres, but Ms. Torres could not hear them. App. Vol. I at 152, 165-66, 169, 181. Defendants then attempted to open the driver's side door. App. Vol. I at 165-66, 170, 182. Ms. Torres looked up and saw Defendants—and their guns—for the first time. App. Vol. I at 165-66, 170-71. They wore dark clothing and marked tactical vests, but Ms. Torres could not read the markings on their clothing and Defendants never verbally identified themselves as police. App. Vol. I at 133, 136-37, 143, 182-83, 187, 205-06.

Believing Defendants were carjackers, Ms. Torres began to drive forward out of the parking space. App. Vol. I at 167, 170-71, 183. Officer Madrid was standing at the car's front left wheel, and Officer Williamson was by the driver's side window. App. Vol. I at 134-35, 148-49, 158, 168, 176, 181-82, 185, 189. As the car moved forward, Defendants opened fire. App. Vol. I at 137-38, 171. Defendants testified that they feared Ms. Torres would hit them, but acknowledged that the car did not touch either of them as Ms. Torres pulled out of the parking space. App. Vol. I at 137-38, 140, 184. Officer Madrid stated that she jumped out of the way as soon as Ms. Torres started to pull forward. App. Vol. I at 137-38, 140. Defendants continued to fire as Ms. Torres drove away from them, collectively firing thirteen shots. App. Vol. I at 137-39, 184-85, 187-88, 259-79. A fellow officer at the scene testified that "some" of the shots were fired "after the vehicle had passed Madrid and Williamson," at which point "neither of them were in danger of being hit." App. Vol. I at 153. Officer Madrid admitted in her deposition that Officer Williamson "fired into the

back of the vehicle" after it had "already passed" her, at which point she was "out of danger." App. Vol. I at 139, 142. Officer Williamson also admitted that he fired into the back of the vehicle with the intent of shooting Ms. Torres as she drove away. App. Vol. I at 187-88. Bullet trajectory analysis established that all thirteen rounds were fired from the side and back of Ms. Torres's vehicle. App. Vol. I at 187, 211, 259-79.

Two bullets traveled through the rear window of the car and lodged in Ms. Torres's back, temporarily paralyzing Ms. Torres's left arm. App. Vol. I at 172, 228-32, 260. Despite being shot twice in the back and partially paralyzed, Ms. Torres was able to keep her foot on the gas pedal and escape the apartment complex. App. Vol. I at 172. She drove a short distance before losing control of her car and stopping. App. Vol. I at 172. She got out and asked a bystander to call the police for help. App. Vol. I at 173-74. Receiving no response, Ms. Torres took a nearby car that was left running and drove to a hospital in Grants, New Mexico. App. Vol. I at 90-91, 173-75. Her injuries were so serious that she was airlifted to a bigger hospital in Albuquerque. App. Vol. I at 91.

Ms. Torres was later charged with one count of unlawfully taking a motor vehicle and two counts of aggravated assault with a deadly weapon upon a police officer. App. Vol. I at 90-92. She eventually pled no contest to unlawfully taking a motor vehicle, in violation of N.M. STAT. ANN. § 30-16(D)-(A)(1); to aggravated fleeing from a law enforcement officer, in violation of N.M. STAT. ANN. § 30-22-

1.1; and to assault upon a peace officer, in violation of N.M. STAT. ANN. § 30-22-21. App. Vol. I at 96-101.

II. Procedural History

Ms. Torres filed suit against Defendants under 42 U.S.C. § 1983, alleging they violated her Fourth Amendment right to be free from unreasonable seizures when they shot her twice in the back as she drove away from them. App. Vol. I at 17-24. Defendants moved to dismiss, arguing that Ms. Torres's claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because, if successful, they would render her plea agreement invalid. Defs.' Mot. to Dismiss, *Torres v. Madrid*, No. 1:16-cv-01163-LF-KK, Doc. 32 (D.N.M. filed May 4, 2017). The district court denied the motion, explaining that "Ms. Torres's convictions are not necessarily inconsistent with her excessive force claims" at the pleading stage. *Torres v. Madrid*, No. 1:16-cv-01163-LF-KK, 2017 WL 4271318 (D.N.M. Sept. 22, 2017).

Defendants then moved for summary judgment, which the district court granted on the ground that no Fourth Amendment seizure had occurred. *Torres v. Madrid*, No. 1:16-cv-01163-LF-KK, 2018 WL 4148405 (D.N.M. Aug. 30, 2018). Relying on Tenth Circuit precedent, the court held that a seizure requires the "intentional acquisition of physical control of the person being seized," *id.* at *3 (internal quotation marks omitted), and "there [wa]s no dispute that Ms. Torres did not stop when the officers fired their guns at her," *id.* at *4. This Court affirmed, holding that under its prior decision in *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir.

2010), Ms. Torres's failure to submit to the officers' authority meant she had not been seized for Fourth Amendment purposes. *Torres v. Madrid*, 769 F. App'x 654, 657 (10th Cir. 2019).

The United States Supreme Court granted Ms. Torres's petition for a writ of certiorari and reversed. *Torres v. Madrid*, 141 S. Ct. 989 (2021). The Court relied heavily on its earlier decision in *California* v. *Hodari D.*, 499 U.S. 621 (1991), which, the Court explained, "articulates two pertinent principles. First, common law arrests are Fourth Amendment seizures. And second, the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped." *Torres*, 141 S. Ct. at 995. Applying this originalist definition of seizure, the Court found that the undisputed facts establish that "the officers seized Torres by shooting her with intent to restrain her movement." *Id.* at 1003. It thus remanded for further proceedings consistent with its opinion. *Id.*; *see also Torres v. Madrid*, 845 F. App'x 803 (10th Cir. 2021) (mem.) (remanding to the district court after the Supreme Court's remand to this Court).

Back in the district court, Defendants again moved for summary judgment, this time arguing that they are entitled to qualified immunity because their use of deadly force did not violate clearly established law. App. Vol. I at 26-53. They also re-raised their argument that Ms. Torres's suit is barred under *Heck*. App. Vol. I at 49-52. The district granted the motion, agreeing on both counts. App. Vol. II at 307-24. First, the court held that Defendants are entitled to qualified immunity because it was not

clearly established until the Supreme Court's decision in this case that the use of physical force with the intent to restrain constitutes a Fourth Amendment seizure if the suspect ultimately escapes. App. Vol. II at 312-17. Second, the court held that Ms. Torres's excessive force claims are barred under *Heck* because they are irreconcilable with her no contest plea to aggravated fleeing from a law enforcement officer and assault upon a peace officer. App. Vol. II at 317-23.

Ms. Torres now appeals that grant of summary judgment to this Court. App. Vol. II at 325-26.

SUMMARY OF ARGUMENT

I.A. Qualified immunity precludes liability under 42 U.S.C. § 1983 for excessive force only where the officer reasonably believed in the moment he employed force that doing so was lawful. In police shooting cases, qualified immunity turns on what the officers "reasonably understood" the facts to be "when [they] fired" their weapons. *Mullenix v. Luna*, 577 U.S. 7, 18 (2015). Specifically, the officers must reasonably believe in that moment that "the suspect poses a threat of serious physical harm, either to the officer or to others," in order for their use of deadly force to be lawful. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The district court held that Defendants are entitled to qualified immunity because it was not clearly established until the Supreme Court's decision in this case that an officer's use of physical force with the intent to restrain constitutes a Fourth Amendment seizure if the suspect ultimately escapes. App. Vol. II at 312-17. In so

holding, the district court erroneously based its qualified immunity analysis on a fact that was not known by Defendants when they fired their weapons and thus could not have informed their understanding of whether using deadly force was unlawful—namely, that Ms. Torres would be able to drive away despite their gunfire. The uncertainty over the legal significance of Ms. Torres's escape has no bearing on the qualified immunity inquiry, which is whether Defendants should have known *when they fired* that using deadly force against Ms. Torres was excessive under clearly established law. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) ("The qualified immunity analysis thus is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question." (quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017))).

I.B. The proper qualified immunity inquiry in this case is whether Defendants could reasonably have believed when they discharged their weapons that it was lawful to shoot Ms. Torres in the back after she had passed them and neither they nor anyone else was in immediate danger of being struck by her car. *See Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009) (clearly establishing five years before the shooting in this case that police officers engage in excessive force when they shoot at a fleeing suspect after any risk of serious bodily harm to the officers or bystanders has passed).

Although the district court did not reach Defendants' alternate argument that they are entitled to qualified immunity because they reasonably believed the use of deadly force was justified under the circumstances, this Court can and should hold

that Defendants are foreclosed from obtaining summary judgment on that ground because the record contains substantial evidence that Defendants continued to shoot at Ms. Torres after any danger to them had passed. In particular, bullet trajectory evidence, an eyewitness account from a fellow officer, and Defendants' own testimony confirm that Defendants continued to shoot at Ms. Torres after they were out of danger; indeed, the two bullets that hit Ms. Torres—and that are thus the basis of her excessive force claims—entered through the rear window and lodged in Ms. Torres's *back*, meaning they were not discharged until Defendants were *behind* her. Because a reasonable factfinder could conclude that Defendants had no basis for believing that Ms. Torres posed an immediate danger when they shot the two bullets that entered her back, thereby violating clearly established law, Defendants cannot obtain summary judgment based on qualified immunity.

II.A. *Heck v. Humphrey*, 512 U.S. 477 (1994), bars § 1983 claims where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. The district court held that Ms. Torres's excessive force claims are barred by *Heck* because they are incompatible with her no contest plea to aggravated fleeing from a law enforcement officer and assault upon a peace officer. App. Vol. II at 317-23.

This holding is wrong. As this Court explained in *Hooks v. Atoki*, 983 F.3d 1193, 1201-02 (10th Cir. 2020), the fact that *Heck* bars a plaintiff from making one type of excessive force claim—here, that Defendants used excessive force in the

moment that Ms. Torres initially pulled forward—does not foreclose the plaintiff from asserting an excessive force claim based on force used later in the same encounter.

A reasonable factfinder could conclude that although Ms. Torres endangered Defendants when she initially pulled her car forward, thereby validating her plea agreement, it is *also* true that Defendants employed unlawful excessive force when they shot Ms. Torres in the back *after* she had pulled out of the parking space because Defendants were no longer in danger at that moment. Accordingly, Ms. Torres can prevail on her excessive force claims without necessarily implying the invalidity of her plea agreement, making *Heck* inapplicable.

II.B. The district court based its *Heck* ruling on certain allegations in Ms. Torres's complaint that the court found incompatible with her plea agreement. App. Vol. II at 317-23. This Court has instructed, however, that "when some of the factual allegations [in a complaint] are barred by *Heck* and others are not," the district court should simply strike the specific factual allegations at issue and instruct the jury accordingly, while still allowing the jury to consider the plaintiff's claims. *Hooks*, 983 F.3d at 1201. Most of the factual allegations highlighted by the district court as raising *Heck* problems are not necessarily inconsistent with Ms. Torres's convictions, and some have been conceded by Defendants. But to the extent this Court agrees that any of the allegations contradict Ms. Torres's plea agreement, the Court should remand with instructions to allow Ms. Torres's suit to proceed, resolving any potential

Heck issues by striking those allegations and instructing the jury that Ms. Torres's plea agreement precludes a finding that Defendants were not in danger when Ms. Torres initially pulled her car forward.

STANDARD OF REVIEW

This Court "review[s] grants of summary judgment based on qualified immunity de novo." *McCoy v. Meyers*, 887 F.3d 1034, 1044 (10th Cir. 2018) (citation omitted). The facts and inferences are viewed in the light most favorable to Ms. Torres as the non-moving party. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

The Court also reviews de novo the district court's application of *Heck v. Humphrey*, 512 U.S. 477 (1994), to bar Ms. Torres's claims at the summary judgment stage. *Butler v. Compton*, 482 F.3d 1277, 1278 (10th Cir. 2007). "To be entitled to summary judgment" based on *Heck*, Defendants "must show that there is no genuine issue as to any material fact" regarding whether Ms. Torres can prevail on her excessive force claims without necessarily invalidating her plea agreement. *Id.*

ARGUMENT

I. The District Court Erred In Granting Qualified Immunity To Defendants.

A. The District Court Improperly Based Its Qualified Immunity Analysis On Facts Not Known To Defendants When They Shot Ms. Torres.

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing

the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Accordingly, qualified immunity forecloses liability under § 1983 unless the unlawfulness of the challenged conduct is "clearly established," which "means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted).

The district court held that Defendants are entitled to qualified immunity because it was not clearly established until the Supreme Court's decision in this case that an officer's use of physical force with the intent to restrain constitutes a Fourth Amendment seizure if the suspect ultimately escapes. App. Vol. II at 312-17. In so holding, the district court erroneously based its qualified immunity analysis on a fact that was not known by Defendants when they fired their weapons and thus could not have informed their understanding of whether using deadly force was unlawful—namely, that Ms. Torres would be able to drive away despite their gunfire.

As the Supreme Court has explained, qualified immunity in the excessive force context looks solely at whether a reasonable officer would have understood in the moment he decided to employ force that such force was unwarranted and therefore unlawful. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). In police shooting cases, qualified immunity thus turns on what the

officers "reasonably understood" the facts to be "when [they] fired" their weapons. *Mullenix v. Luna*, 577 U.S. 7, 18 (2015). Specifically, the officers must reasonably believe in that moment that "the suspect poses a threat of serious physical harm, either to the officer or to others" in order for their use of deadly force to be lawful. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The circuit split that prompted the Supreme Court's review in this case had to do with whether a suspect's escape precludes Fourth Amendment liability because no "seizure" occurs if the officer fails to terminate the suspect's movement. App. Vol. II at 314. Although it is true that if the Supreme Court had resolved that issue in Defendants' favor, Ms. Torres's Fourth Amendment claims against them would not be able to proceed, the uncertainty over the legal significance of Ms. Torres's escape has no bearing on the qualified immunity inquiry, which is whether Defendants should have known *when they fired* that the use of deadly force against Ms. Torres was excessive under clearly established law. The fact of Ms. Torres's successful escape could not have impacted Defendants' decision to use deadly force against her because, to state the obvious, it had not happened yet and thus was unknown by Defendants when they shot at her with the intent of restraining her.

The Supreme Court's decision in *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017), illustrates this point. The defendant in *Hernandez* was a United States Border Patrol Agent who shot and killed a 15-year-old Mexican national across the United States-Mexico border. The boy's parents asserted *Bivens* claims against the agent,

alleging that the shooting violated the Fourth and Fifth Amendments. *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015). The Fifth Circuit granted the agent qualified immunity because it was not clearly established at the time of the shooting whether the Constitution prohibits the use of excessive force against "an alien who had no significant voluntary connection to . . . the United States." *Id.* at 120.

The Supreme Court reversed. Because it was "undisputed that Hernandez's nationality and the extent of his ties to the United States were unknown to [the agent] at the time of the shooting," the Court explained, "whether those facts would support granting immunity or denying it" was "not relevant." *Hernandez*, 137 S. Ct. at 2007. "The qualified immunity analysis is . . . limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question." *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017)).

The Supreme Court's seminal excessive force decision, *Graham v. Connor*, 490 U.S. 386 (1989), likewise leaves no doubt that the district court erred in granting Defendants qualified immunity based on facts not known to them at the time they fired their weapons at Ms. Torres. *Graham* explains that the substantive constitutional standard for excessive force turns on whether the officer's use of force is unlawful based on the "reasonableness at the moment" of the officer's "split-second judgment[]" to employ force, "rather than with the 20/20 vision of hindsight." *Id.* at 396-97.

This Court's precedent is in accord. In *Al-Turki v. Robinson*, 762 F.3d 1188 (10th Cir. 2014), a prison nurse asserted qualified immunity against a prisoner's § 1983 claim for her alleged failure to provide him with a medical evaluation or treatment while he suffered through several hours of severe abdominal pain. *Id.* at 1190. She argued that while the prisoner may have been in great pain—perhaps presaging a serious or life-threatening illness—the cause ultimately turned out to be kidney stones, and thus the pain was temporary and not an indication of a life-threatening condition. This Court rejected this qualified immunity defense because it "focus[ed] on the facts we now know about the duration and cause of Plaintiff's pain, while the pertinent question for determining her entitlement to qualified immunity depends on the facts that were known at the time." *Id.* at 1194.[1]

[1] The other circuits also consistently evaluate qualified immunity defenses solely from an *ex ante* perspective. *See, e.g.*, *Solis v. Serrett*, No. 21-20256, 2022 WL 1183762, at *1, __ F.4th __ (5th Cir. Apr. 21, 2022) (in assessing qualified immunity, "we view the events from the officers' point of view at the very moment they acted"); *Jefferson v. Lias*, 21 F.4th 74, 85 (3d Cir. 2021) (denying qualified immunity because the officer "did not witness or know about any . . . facts before using deadly force" that could have rendered such force lawful); *Wright v. City of Euclid*, 962 F.3d 852, 868 (6th Cir. 2020) ("The reasonableness of force is predicated solely on the knowledge of officers in the moments before the force is used."); *N.S. v. Kansas City Bd. of Police Comm'rs*, 933 F.3d 967, 970 n.1 (8th Cir. 2019) ("qualified-immunity analysis . . . considers only the facts actually available to the officer at the time" he employed force); *Rhodes v. Robison*, 408 F.3d 559, 570 (9th Cir. 2005) (rejecting qualified immunity defense based on the plaintiff's reaction to the challenged conduct because that "puts the cart before the horse: it shifts the focus of the qualified immunity inquiry from the time of the conduct to its aftermath"); *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002) ("[W]e do not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act.").

Restricting qualified immunity analysis to the facts known to the officers at the moment they employed force is consistent with the purposes of qualified immunity, which balance "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Incorporating retrospective facts into the qualified immunity inquiry, as the district court did here, upsets this balance by allowing immunity to be granted or withheld based on information that has no bearing on the officers' personal responsibility for the challenged conduct. The fairness of holding Defendants accountable for shooting Ms. Torres turns on whether Defendants could reasonably have believed in the moment they fired their guns that using deadly force against Ms. Torres was justified under the circumstances. *See Brosseau*, 543 U.S. at 198 (qualified immunity analysis "focus[es] on whether the officer had fair notice that her conduct was unlawful"). If Defendants knew or should have known that using deadly force against Ms. Torres was excessive under clearly established law, granting them qualified immunity based on the happenstance of Ms. Torres's successful escape would be nothing more than a windfall in contravention of qualified immunity's purposes.

Indeed, by the district court's reasoning, until the Supreme Court's decision in this case last year, a police officer who attempted to shoot someone dead for absolutely no reason at all could not be held accountable under § 1983 so long as the victim was able to limp away. At the same time, qualified immunity would not protect

an officer who had every reason to believe when he fired his gun that the use of deadly force was necessary to protect his life, but subsequent factual developments revealed it was not. This sort of perversity is why the Supreme Court in *Hernandez* rejected any reliance on post-conduct factual developments or discoveries, "whether those facts would support granting immunity *or* denying it." 137 S. Ct. at 2007 (emphasis added).[2]

B. The Summary Judgment Record Forecloses Granting Defendants Qualified Immunity Based On The Reasonableness Of Their Use Of Deadly Force.

As explained *supra*, at 15-16, the proper qualified immunity inquiry in a deadly force case is whether the officers reasonably believed when they discharged their weapons that "the suspect pose[d] a threat of serious physical harm, either to the officer[s] or to others." *Garner*, 471 U.S. at 11.[3] More specifically in this case,

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[2] Consistent with the Supreme Court's excessive force and qualified immunity jurisprudence, the nation's leading law enforcement organizations emphasize in their National Consensus Policy and Discussion Paper on Use of Force that the reasonableness of an officer's decision to use force turns solely on "the officer's evaluation of the situation in light of the totality of the circumstances known to the officer at the time the force is used." Int'l Ass'n of Dirs. of L. Enf't, Int'l Ass'n of Chiefs of Police & Ass'n of State Crim. Investigative Agencies, et al., *National Consensus Policy on the Use of Force* 2 (revised 2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf. "This evaluation as to whether or not force is justified is based on what was reasonably believed by the officer, to include what information others communicated to the officer, at the time the force was used." *Id.* at 8 (citing *Graham*, 490 U.S. at 396). Police officers are thus advised that courts will not conduct "an analysis after the incident has ended of circumstances not known to the officer at the time the force was utilized." *Id.*

[3] The *Garner* standard for deadly force is also reflected in the second factor of the *Graham* test for determining when the use of force is excessive. *Graham*, 490 U.S. at 396 (the reasonableness of force turns on (1) "the severity of the crime at issue," (2) "whether the

Defendants' qualified immunity defense turns on whether they reasonably shot Ms. Torres twice in the back after she had passed them and neither they nor anyone else was in immediate danger of being struck by her car. *See Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009) (clearly establishing five years before the shooting in this case that police officers engage in excessive force when they shoot at a fleeing suspect after any risk of serious bodily harm to the officers or bystanders has passed); *Reavis ex rel. Estate of Coale v. Frost*, 967 F.3d 978, 991 (10th Cir. 2020) (affirming denial of qualified immunity for an officer who shot into the car of a fleeing suspect because "a reasonable officer in [the defendant's] position would have perceived" that once the plaintiff's "vehicle had passed him . . . he was no longer in any immediate danger").

Having erroneously granted qualified immunity based on the now-resolved circuit split over the legal significance of Ms. Torres's escape, the district court did not reach Defendants' alternate argument that they are entitled to qualified immunity because they reasonably believed the use of deadly force was necessary under the circumstances. App. Vol. I at 35-37; App. Vol. II at 316-17. Although this Court could remand that issue for the district court to determine in the first instance, it would also be appropriate for the Court to instead hold that Defendants are

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suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight"); *see also Reavis ex rel. Estate of Coale v. Frost*, 967 F.3d 978, 985 (10th Cir. 2020) (describing it as "particularly true" that the second *Graham* factor "is undoubtedly the most important" in deadly force cases) (internal quotation marks omitted).

foreclosed from qualified immunity at the summary judgment stage because the record contains substantial evidence that Defendants shot Ms. Torres in the back after any danger to them had passed, in violation of clearly established law.

Defendants and Ms. Torres agree that when Ms. Torres's car first lurched forward, Officer Madrid was standing at the front left tire and Officer Williamson was standing next to the driver's side window. App. Vol. I at 134-35, 150-51, 158, 168, 176, 181-82, 185, 189. As discussed in the next section, *infra*, at 27-31, Ms. Torres does not contest on appeal that her plea agreement prevents her from arguing that at that initial moment, Defendants lacked a reasonable basis for using deadly force against her. The summary judgment record establishes, however, that Defendants continued to shoot at Ms. Torres *after* she had pulled passed them, firing a total of thirteen bullets from the side and back of the vehicle, two of which entered Ms. Torres's back. App. Vol. I at 137-39, 172, 184-85, 187-88, 211, 228-32, 259-79.

As the district court noted, a fellow officer at the scene confirmed that "'some' of the shots were fired after Ms. Torres's vehicle passed by Officers Madrid and Williamson," at which point "the officers were not in any danger of being hit." App. Vol. II at 309; *see also* App. Vol. I at 151-53. Officer Madrid admitted in her deposition that Officer Williamson "fired into the back of the vehicle" after it had "already passed" her, at which point she was "out of danger." App. Vol. I at 139. Officer Williamson also admitted that he fired into the back of the vehicle as Ms. Torres drove away. App. Vol. I at 187-88. Bullet trajectory analysis established that

all thirteen rounds were fired from the side and back of Ms. Torres's vehicle. App. Vol. I at 187, 211, 259-79.

Most significantly, the two bullets that hit Ms. Torres—and that are thus the basis of her excessive force claims—entered through the rear window and lodged in Ms. Torres's *back*, meaning they were not discharged until Defendants were *behind* her. App. Vol. I at 172, 228-32, 260. Defendants have never alleged that anyone besides them was at risk of being hit when Ms. Torres fled the parking lot. Accordingly, the summary judgment record includes ample evidence for a reasonable factfinder to conclude that Defendants had no basis for believing that Ms. Torres posed a "serious threat of physical harm" when they shot the two bullets that entered her back.

It has been clearly established in this Circuit since 2009—five years before the shooting in this case—that police officers engage in excessive force when they shoot at a fleeing suspect after any risk of serious bodily harm to the officers or bystanders has passed. In *Cordova*, 569 F.3d 1183, the defendant officer shot and killed a fleeing suspect who initially "evaded capture by driving straight at" the defendant and another officer; as the chase continued, the defendant again believed he was "about to be run over, and therefore rapidly fired at the vehicle while simultaneously trying to move out of the way." *Id.* at 1186-87. The fatal shot, however, "entered the [suspect's] truck from the side and went through the back of [his] head," "strongly suggest[ing] that [he] had turned the truck and was no longer bearing down upon [the defendant] at the moment [he] fired the fatal shot." *Id.* at 1187. Given the evidence

that "whatever danger [the defendant] might have perceived had passed by the time he fired the fatal shot," *id.*, the Court concluded that a reasonable jury could find that the defendant's use of deadly force violated the Fourth Amendment, *id.* at 1191-92.

Although the Court found that the defendant in *Cordova* was entitled to qualified immunity because no previous Tenth Circuit decision clearly established the unlawfulness of deadly force under these circumstances, it has since recognized that *Cordova* itself constitutes clearly established law for violations occurring after 2009. In *Reavis*, the Court relied on *Cordova* in denying qualified immunity to an officer who shot a suspect in a stabbing incident. 967 F.3d at 982. While attempting to flee, the suspect accelerated his truck and drove straight at the defendant, missing him by inches. *Id.* at 983. "About the time [the suspect's] side mirror passed" the defendant, he "raised his gun" and "fired five to seven times as the vehicle passed." *Id.* The suspect died from a gunshot wound in the back of his head. *Id.* at 984. The district court rejected the defendant's qualified immunity defense because *Cordova* clearly established at the time of the shooting that "when an officer employs such a level of force that death is nearly certain," there must be an "immediate danger to other officers or civilians . . . at the moment the gun was fired." *Id.* at 987 (internal quotation marks omitted). This Court agreed, holding that *Cordova* provided the defendant "fair notice that opening fire at a fleeing vehicle that no longer posed a threat to himself or others was unlawful." *Id.* at 995; *see also id.* at 989 (noting that *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013), similarly denied qualified

immunity "as to an officer's final shots because under the totality of the circumstances the officer lacked probable cause to believe the suspect posed a threat when the officer fired those shots").

Likewise, in *Simpson v. Little*, 16 F.4th 1353 (10th Cir. 2021), the defendant officer claimed that he shot at the fleeing suspect because the officer was in danger of being run over, but the evidence showed that "none of the bullets struck the front of the vehicle. Instead, the bullet defects be[gan] near the middle of the driver's side window and continue[d] along the side of the SUV, and two shots struck the rear of the vehicle." *Id.* at 1358. The bullets that struck the suspect in the left hip and killed him entered through the driver's side door. *Id.* This Court affirmed the district court's determination that the defendant was not entitled to qualified immunity because *Cordova* "provided 'fair warning' to a reasonable officer in [the defendant's] position" that it was unlawful to shoot a suspect fleeing by car if "the threat to the officer was not 'actual and imminent' when he pulled the trigger." *Id.* at 1364, 1366.

The Court further noted that although *Reavis* was decided in 2020, it is precedential for the point that *Cordova* clearly established the relevant law as of 2009. *See id.* at 1365 (""[A] case decided after the incident underlying a section 1983 action can state clearly established law when that case ruled that the relevant law was clearly established as of an earlier date preceding the events in the later section 1983 action."" (quoting *Soza v. Demsich*, 13 F.4th 1094, 1100 n.3 (10th Cir. 2021)); *see also McCoy v. Meyers*, 887 F.3d 1034, 1050 n.19 (10th Cir. 2018) (finding it clearly established in 2011

that "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated" (internal quotation marks omitted)).

Notably, the Third Circuit recently observed that its denial of qualified immunity on similar facts—i.e., where the defendant officer was initially in danger of being hit by the plaintiff's car and then used deadly force against the plaintiff after that danger had passed—was consistent not only with this Court's decision in *Reavis*, but also precedent from the Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. *Jefferson v. Lias*, 21 F.4th 74, 82-83 (3d Cir. 2021). As in this case (and discussed further *infra*, at 30), the shooting incident in *Jefferson* occurred in 2014, and the plaintiff was able to escape and drive himself to the hospital despite his bullet wounds. *Id.* at 76-77. The Third Circuit denied qualified immunity based on the "robust consensus" of pre-2014 case law clearly establishing that "a suspect fleeing in a vehicle, who has not otherwise displayed threatening behavior, has the constitutional right to be free from the use of deadly force when it is no longer reasonable for an officer to believe his or others' lives are in immediate peril from the suspect's flight." *Id.* at 81, 85.

So, too, here. The bullet trajectory evidence, a fellow officer's eyewitness account, and Defendants' own testimony establish that whatever risk of harm Defendants faced when Ms. Torres initially drove forward, that danger had passed when they shot the two bullets that entered Ms. Torres's back, and that no one else was at risk of immediate harm as Ms. Torres drove out of the parking lot. This

evidence forecloses Defendants' qualified immunity defense at the summary judgment stage.

II. The District Court Erred In Finding Ms. Torres's Excessive Force Claims Barred Under *Heck*.

A. Ms. Torres's Claims Do Not Necessarily Imply The Invalidity Of Her Plea Agreement.

Heck v. Humphrey, 512 U.S. 477 (1994), bars § 1983 claims where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. As noted earlier, *supra*, at 7-8, shortly after Ms. Torres escaped her encounter with Defendants, her car became undriveable, and she ultimately drove herself to the hospital in a car she found running nearby. App. Vol. I at 90-91, 173-74. She subsequently accepted a plea deal in which she pled no contest to unlawfully taking a motor vehicle and to two charges relating to her initial flight from Defendants: aggravated fleeing from a law enforcement officer and assault upon a peace officer. App. Vol. I at 96-101.

The district court held that Ms. Torres's excessive force claims are barred by *Heck* because they are incompatible with her plea to the latter two charges. App. Vol. II at 317-23; *see* N.M. STAT. ANN. § 30-22-1.1(A) (aggravated fleeing from a law enforcement officer "consists of a person willfully and carelessly driving [her] vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop . . . by a uniformed law enforcement officer"); *id.* § 30-22-21(A)(2) (assault upon a peace officer consists of "any unlawful act, threat or

menacing conduct which causes a peace officer while [she] is in the lawful discharge of [her] duties to reasonably believe that [she] is in danger of receiving an immediate battery"). The district court concluded that these convictions "establish[] that [Ms. Torres] drove her vehicle in a manner that endangered the life of another person," thereby "entitl[ing] [Defendants] to use deadly force to try to stop her" and foreclosing her excessive force claims. App. Vol. II at 319.

This holding is wrong. At most, Ms. Torres's plea agreement forecloses an excessive force claim based on shots fired by Defendants at the moment Ms. Torres initially pulled forward to leave the parking space. As explained in the previous section, *supra*, at 21-23, Ms. Torres's excessive force claims are based on the two bullets that entered her back and thus were discharged by Defendants *after* Ms. Torres had passed them and they were no longer in danger. It can be true both that, consistent with Ms. Torres's plea agreement, she endangered Defendants when she initially pulled her car forward, *and* that Defendants employed unlawful excessive force when they shot Ms. Torres in the back *after* she had pulled out of the parking space because Defendants were no longer in danger at that moment. Accordingly, Ms. Torres can prevail on her excessive force claims without necessarily implying the invalidity her plea agreement, making *Heck* inapplicable. *See Nelson v. Campbell*, 541 U.S. 637, 647 (2004) ("necessarily" is key to conducting a proper *Heck* analysis).

The district court's analytical error is demonstrated by the two Tenth Circuit cases it purported to distinguish. App. Vol. II at 313-14. In *Hooks v. Atoki*, 983 F.3d

1193 (10th Cir. 2020), this Court explained that the fact that *Heck* bars a plaintiff from making one type of excessive force claim—here, that Defendants used excessive force in the moment that Ms. Torres initially pulled forward—does not foreclose the plaintiff from asserting an excessive force claim based on force used later in the same encounter. The plaintiff in *Hooks* pled no contest to aggravated assault and battery of a police officer and then brought suit under § 1983, asserting excessive force claims arising out of the encounter with police that resulted in his conviction. *Id.* at 1200-01. This Court held that although some of the plaintiff's claims were barred by *Heck* because they related to force applied when the plaintiff was assaulting the officers as established by his conviction, *id.* at 1201, the district court had erred in dismissing the claims alleging excessive force *after* that portion of the encounter, when the officers were no longer at risk of assault or battery, *id.* at 1196, 1201. Likewise in *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1126 (10th Cir. 1999), this Court found that the plaintiff's conviction for resisting arrest did not foreclose his excessive force claim because "whether [the plaintiff] resisted arrest by initially fleeing the scene is a question separate and distinct from whether the police officers exercised excessive or unreasonable force in effectuating his arrest."[4]

[4] The district court suggested, App. Vol. II at 319, that this case is instead akin to *Havens v. Johnson*, 783 F.3d 776 (10th Cir. 2015), but there the plaintiff's entire theory of excessive force was that he was innocent of the crimes for which he was convicted; as the Court explained, the plaintiff had no explanation for "how [the officer] used excessive force in a way that would still be consistent with the basis of his attempted-assault conviction." *Id.* at 777; *see also id.* at 784. Here, in contrast, a reasonable jury could find that although Ms.

The Third and Eleventh Circuits recently reached the same result in cases with similar facts to this one. The plaintiff in *Jefferson v. Lias*, 21 F.4th 74 (3d Cir. 2021), had driven recklessly while fleeing police. *Id.* at 77. The defendant officer fired at the plaintiff's vehicle as it passed in front of him, claiming that "he feared for his own safety and others around him." *Id.* One bullet struck the plaintiff's arm, but he was able to continue driving and check himself into a hospital. *Id.* The plaintiff pled guilty to second-degree eluding, and then later brought an excessive force claim against the officer. *Id.* at 77-78. The Third Circuit rejected the officer's *Heck* challenge, explaining that a reasonable factfinder could conclude that although the plaintiff initially engaged in risky flight such that he was properly convicted of second-degree eluding, he was no longer a danger to anyone at the moment the officer shot him. *Id.* at 86-87.

In *Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185 (11th Cir. 2020), the plaintiff asserted an excessive force claim against an officer who shot him during a traffic stop. *Id.* at 1187. The defendant officer argued that the claim was *Heck*-barred because the encounter ultimately resulted in the plaintiff's conviction for fleeing to

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Torres's plea agreement establishes that she endangered Defendants when she initially pulled her car forward, Defendants engaged in excessive force when they shot her in the back after she had passed them. *Havens* identifies this as precisely the sort of excessive force claim that can proceed without running afoul of *Heck*: "An excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer. For example, the claim may be that the officer used too much force to respond to the assault *or that the officer used force after the need for force had disappeared*." *Id.* at 782 (emphasis added).

elude a law enforcement officer and aggravated assault on a law enforcement officer. *Id.* at 1193-94. The Eleventh Circuit disagreed, explaining that it was "not a logical impossibility" that the defendant shot the plaintiff without provocation and *then* the plaintiff "committed aggravated assault and fled the scene." *Id.* at 1194. The court emphasized that "as long as it is *possible* that a § 1983 suit would not negate the underlying conviction, then the suit is not *Heck*-barred." *Id.* at 1193 (emphasis in original) (internal quotation marks omitted).

As in *Jefferson* and *Harrigan*, it is not logically impossible that Ms. Torres acted unlawfully in one moment of her encounter with Defendants, thus validating her plea agreement, and Defendants acted unlawfully in another moment, thus validating her excessive force claims. Specifically, a jury could find that although Ms. Torres unlawfully put Defendants in danger when she initially pulled forward out of the parking space, Defendants shot the two bullets that entered Ms. Torres's back after that danger had passed, in violation of the clearly established law discussed *supra*, at 21-27.[5] This possibility forecloses Defendants' *Heck* challenge at the summary judgment stage.

[5] Although the district court indicated that such a verdict would lack evidentiary support, *see* App. Vol. II at 320, that suggestion is plainly belied by the ample evidence discussed *supra*, at 21-23, demonstrating that Defendants were no longer in danger when they shot the two bullets that entered Ms. Torres's back. That evidence certainly suffices to sustain Ms. Torres's claims when the facts and inferences are viewed in the light most favorable to Ms. Torres, as required at the summary judgment stage. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

B. To The Extent Any Of Ms. Torres's Factual Allegations Contradict Her Plea Agreement, The Proper Course Is To Strike Them And Allow The Rest Of Her Suit To Proceed.

The district court based its *Heck* ruling on certain allegations in Ms. Torres's complaint that the court found incompatible with her plea agreement. App. Vol. II at 317-18 (noting that Ms. Torres alleged that Defendants failed to identify themselves as police officers when they attempted to open her car door, that Defendants had no basis to believe she was armed, and that Defendants were beside the vehicle, not in front of it). This Court has instructed, however, that "when some of the factual allegations [in a complaint] are barred by *Heck* and others are not," the proper course is to strike the specific factual allegations at issue and instruct the jury accordingly, while still allowing the jury to consider the plaintiff's claims. *Hooks*, 983 F.3d at 1201; *see also McCoy v. Meyers*, 887 F.3d 1034, 1040 n.2 (10th Cir. 2018) (affirming the district court's decision to allow the plaintiff to withdraw his allegation that he never pointed a gun at the defendants as *Heck*-barred rather than dismissing his claims); *Martinez*, 184 F.3d at 1127 (noting that the way to avoid a potential *Heck* problem with the plaintiff's excessive force claim is to "instruct the jury that [the plaintiff's] state arrest was lawful per se").

There is no reason the district court cannot not proceed accordingly here, instructing the jury that Ms. Torres's plea agreement is lawful per se and precludes a finding that Defendants were not in danger when Ms. Torres initially pulled her car forward. To the extent that any of Ms. Torres's allegations are incompatible with that

instruction, the district court can simply strike those allegations, and allow the rest of Ms. Torres's claims to proceed.

Most of the factual allegations highlighted by the district court as raising *Heck* problems are not necessarily inconsistent with Ms. Torres's convictions, and some have been conceded by Defendants. For example, the district court identifies Ms. Torres's contention that she did not have any weapons at the time of the encounter as inconsistent with her convictions and the undisputed facts which establish that her "weapon" was her car. App. Vol. II at 319. But the allegation is that she did not have any weapons with her *inside* the car. App. Vol. I at 19. This is not inconsistent with her convictions, and is undisputed by Defendants. *See* App. Vol. I at 188. That Ms. Torres alleges she did not realize Defendants were police officers, App. Vol. II at 317, is also not inconsistent with her convictions, which do not require proof of successful identification. Moreover, Defendants acknowledge that they did not identify themselves as police when they attempted to open Ms. Torres's car door. App. Vol. I at 136, 143, 182, 187. But if this Court agrees with the district court that these allegations are incompatible with Ms. Torres's plea agreement, it may instruct the district court to strike them from trial.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for further proceedings.[6]

Dated: May 4, 2022

Respectfully Submitted,

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[6] The district court also granted summary judgment to Defendants on two derivative conspiracy claims because they necessarily failed without an underlying excessive force violation. App. Vol. II at 323. If the Court reverses the district court's grant of summary judgment with respect to the excessive force claims, that ruling should revive Ms. Torres's conspiracy claims as well.

STATEMENT CONCERNING ORAL ARGUMENT

Resolution of this appeal requires analysis of multiple complicated legal questions and consideration of nuanced factual issues. Accordingly, it is the professional opinion of counsel that oral argument would be beneficial.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a) and 10th Circuit Rule 32. This brief contains 9241 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), as calculated in Version 16.50 of Microsoft Word for Mac. It was prepared in 14-point (above-the-line) or 13-point (footnotes) font using Garamond, a proportionally spaced typeface.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2022, I electronically transmitted the foregoing brief to the Clerk of the Court using the appellate CM/ECF System, causing it to be served on counsel of record, who are all registered CM/ECF users.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ROXANNE TORRES,

Plaintiff,

v. 1:16-cv-01163-LF-KK

JANICE MADRID et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on defendants Janice Madrid and Richard Williamson's Renewed Motion for Summary Judgment on the Basis of Qualified Immunity and Other Grounds. Doc. 112. Plaintiff Roxanne Torres opposes the motion. Doc. 122. In addition to the motion and response, the Court also considered the defendants' reply and the parties' submissions of supplemental authority. Docs. 123, 125–130. For the following reasons, the Court GRANTS defendants' motion.

I. Facts[1]

On Tuesday morning, July 15, 2014, at about 6:30 am, New Mexico State Police officers went to an apartment complex in Albuquerque to serve an arrest warrant on a person named Kayenta Jackson. *See* Doc. 1 ¶ 5; Doc. 112-8 (Exh. H, 0:00–0:15). The officers believed Ms. Jackson was a resident of apartment number 22. *See* Doc. 1 ¶ 5. The arrest warrant for Ms.

[1] Ms. Torres purportedly disputes almost all of the facts the defendants rely on in their motion, but many of the "disputes" are actually additional facts that Ms. Torres presumably believes are important or relevant. *See* Doc. 122 at 1–10. For the purposes of this order, the Court recounts only the most basic facts over which there is no arguable dispute. The Undisputed Material Facts (UMFs) are recounted in Document 112 at pages 2 through 5. The Court cites to supporting evidence as necessary, but it does not cite to all the evidence that supports every fact.

Jackson was for felony white collar crimes. *See* UMF 10. Defendants Janice Madrid and Richard Williamson were two of the police officers involved. *See* UMF 13.

Officer Madrid and Officer Williamson parked their unmarked patrol vehicle near a 2010 black and white Toyota FJ Cruiser. *See* Doc. 1 ¶ 6. Plaintiff Roxanne Torres was in the Toyota FJ Cruiser with her motor running. *See* UMF 8. She had backed into a parking spot in front of apartment 22, and there were cars on either side of her. *See* UMF 7; Doc. 122-2 at 13 (diagram); Doc. 122-4 at 26 (diagram). Officers Madrid and Williamson were wearing tactical vests and dark clothing, or "BDUs" (battle dress uniforms). *See* Doc. 1 ¶ 7; Doc. 112-4 at 6. Their clothing clearly identified them as police officers. Docs. 112-4 at 8–13 (photos of Officers Madrid and Williamson in the clothes they were wearing that morning).

Both officers approached, and Officer Williamson attempted to open the locked door of the Toyota FJ Cruiser in which Ms. Torres was sitting. Doc. 122-4 at 6; *see also* Doc. 122-3 at 7–8. Ms. Torres saw one person standing at her driver's side window, and another at the front tire of her car, on the driver's side. *See* Doc. 122-3 at 10 (Ms. Torres's description at her deposition), 18 (diagram based on description). Although the officers repeatedly shouted, "Open the door!," *see* Doc. 112-8 (Exh. H, 1:12–1:18 (Officer Madrid's audio recording of incident); Exh. I, 1:01–1:12 (Officer Williamson's audio recording of incident)), Ms. Torres claimed she could not hear them because her windows were rolled up, Doc. 122-3 at 11. The officers never orally identified themselves as police officers. *See* Doc. 112-8 (Exh. H, 1:12–1:18; Exh. I, 1:01–1:12). Ms. Torres testified that she thought she was the victim of an attempted carjacking, so she drove forward. Doc. 122-3 at 7–9. Both officers testified that they believed Ms. Torres was going to hit them with her car, and that they were in fear for their lives. Doc. 112-2 at 7; Doc. 112-4 at 4, 7. Ms. Torres claims that neither officer was in harm's way during the incident. Doc.

122 at 12 (citing to testimony by Officer Jeff Smith that "some" of the shots fired were fired after Ms. Torres's vehicle passed by Officers Madrid and Williamson, and that once the vehicle had passed them, the officers were not in any danger of being hit, Doc. 122-2 at 80). Both officers fired their duty weapons at Ms. Torres. Doc. 1 ¶ 10. Ms. Torres did not stop. *See* UMF 26, 27. The entire incident—from the time Officers Madrid and Williamson attempted to open Ms. Torres's door until Ms. Torres drove away and was shot—lasted about twenty seconds. *See* Doc. 112-8 (Exh. H, 1:12–1:30 (Officer Madrid's audio recording of incident); Exh. I, 1:01–1:22 (Officer Williamson's audio recording of incident)).

Ms. Torres drove forward, over a curb and landscaping, and left the area. Doc. 112-1 at 6. She drove to a commercial area, lost control of her car, and stole a different car that had been left running in a parking lot. Doc. 112-1 at 6–7, 9. She then drove to Grants, New Mexico. Doc. 112-1 at 9. In Grants, she went to the hospital for treatment, Doc. 112-1 at 10, and she subsequently was transferred to the University of New Mexico Hospital (UNMH), *see* Doc. 122-6 (UNMH medical records). She stayed in the hospital one day. *See* Doc. 122-6. Ms. Torres had been shot twice in the back. Doc. 122-6 at 2 (medical record); Docs. 122-7, 122-8 (photos of injuries).

On July 16, 2014, Ms. Torres was charged by criminal complaint with two counts of aggravated assault with a deadly weapon upon a peace officer, and one count of the unlawful taking of a motor vehicle. Doc. 112-5. She was taken into custody the same day. Doc. 112-6 at 3. She was indicted on these charges two weeks later, on July 30, 2014. Doc. 112-6. Count 1 of the indictment identified Officer Williamson as the victim, and count 2 of the indictment identified Officer Madrid as the victim. *Id.* at 1. On March 31, 2015, Ms. Torres pled no contest to aggravated fleeing from a law enforcement officer, in violation of N.M. STAT. ANN. § 30-22-

1.1, a lesser included offense of count 1 of the indictment. Doc. 112-7 at 1. She also pled no contest to assault upon a peace officer, in violation of N.M. STAT. ANN. § 30-22-21, a lesser included offense of count 2 of the indictment. *Id*. In addition, she pled no contest to count 3 of the indictment, which was the unlawful taking of a vehicle charge. *Id.*

II. The Complaint

In counts I and III of her complaint, Ms. Torres alleges that Officer Madrid and Officer Williamson, respectively, through the intentional discharge of their weapons, "exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied under these same circumstances." Doc. 1 ¶¶ 14, 21. In counts II and IV,[2] Ms. Torres alleges that Officers Madrid and Williamson conspired together to use excessive force against her. *Id.* ¶¶ 17, 24. In other words, all of Ms. Torres's claims are excessive force claims under the Fourth Amendment.

III. Discussion

The defendants argue that they are entitled to qualified immunity on all of Ms. Torres's excessive force claims not only because their use of deadly force was reasonable under the circumstances, but also because the contours of plaintiff's claims were not clearly established when the incident occurred. Doc. 112 at 10–24. They also argue that Ms. Torres's claims are barred under the *Heck*[3] doctrine. *Id.* at 24–27. I agree with defendants that the contours of

[2] The complaint mistakenly identifies count IV as count II. Doc. 1 at 5.

[3] In *Heck v. Humphrey*, the Supreme Court held that a plaintiff cannot bring a § 1983 civil rights claim based on actions whose unlawfulness would render an existing criminal conviction invalid. 512 U.S. 477, 486–87 (1994). If, on the other hand, a court determines that a plaintiff's civil rights claim, even if successful, would not necessarily demonstrate the invalidity of a criminal conviction, the action may proceed absent some other bar to the suit. *Id.* at 487.

plaintiff's claims were not clearly established on July 16, 2014, and also that her claims are barred under the *Heck* doctrine.[4] I therefore grant defendants' motion for summary judgment.

A. Legal Standard for Summary Judgment Motions

Summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on the issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

The movant bears the initial burden of establishing that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). "[T]he movant need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010) (quoting *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1125 (10th Cir. 2000)). If this burden is met, the non-movant must come forward with specific facts, supported by admissible evidence, which demonstrate the presence of a genuine issue for trial. *Celotex*, 477 U.S. at 324. The non-moving party cannot rely upon conclusory allegations or contentions of counsel to defeat summary judgment. *See Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). Rather, the non-movant has a responsibility to "go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to [his] case in order

[4] Because either basis is sufficient for the grant of summary judgment, I do not address whether the officers' use of force was reasonable under the circumstances.

to survive summary judgment." *Johnson v. Mullin*, 422 F.3d 1184, 1187 (10th Cir. 2005) (alteration in original) (internal quotation marks omitted).

At the summary judgment stage, the Court must view the facts and draw all reasonable inferences in the light most favorable to the non-movant. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court's function "is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. There is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* Summary judgment may be granted where "the evidence is merely colorable, or is not significantly probative." *Id.* at 249–50 (internal citations omitted).

B. Section 1983 Claims and Qualified Immunity

Section 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must prove that a defendant acted under color of state law to deprive the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would be aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under the Tenth Circuit's two-part test for evaluating qualified immunity, the plaintiff must show (1) that the defendant's conduct violated a constitutional or statutory

right, and (2) that the law governing the conduct was clearly established when the alleged violation occurred. *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998); *accord Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Unless both prongs are satisfied, the defendant will not be required to "engage in expensive and time[-]consuming preparation to defend the suit on its merits." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

To prove an excessive force claim under the Fourth Amendment, Ms. Torres must prove that the force used to effect a seizure was objectively unreasonable under the totality of the circumstances. *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008). The "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). An officer may use deadly force if a reasonable officer under similar circumstances would have had probable cause to believe that there was a threat of serious physical harm to the officer or someone else. *Id.* at 1260.

Ms. Torres also "must show . . . that a 'seizure' occurred . . . ." *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000). "[W]ithout a seizure, there can be no claim for excessive use of force." *Jones v. Norton*, 809 F.3d 564, 575 (10th Cir. 2015). Until the Supreme Court held otherwise in this case, the Tenth Circuit had held that any seizure—whether by force or a show of authority—requires the "intentional acquisition of physical control" of the person being seized. *Childress*, 210 F.3d at 1156. However, the Supreme Court in this case distinguished between seizures by force and seizures by control, and held that "[a] seizure [by

force] requires the use of force *with intent to restrain*." *Torres v. Madrid*, 141 S. Ct. 989, 998 (2021) (emphasis in original). The test is "whether the challenged conduct *objectively* manifests an intent to restrain." *Id.* (emphasis in original). Because the officers in this case shot at Torres and "objectively manifested an intent to restrain her from driving away," "the officers seized Torres for the instant that the bullets struck her." *Id.* at 999.

The Supreme Court acknowledged, however, that its distinction between seizures by force and seizures by control, and its clarification that each type of seizure is governed by a separate rule, has not always been clear. *Id.* at 1001. As Justice Gorsuch pointed out in dissent, this unclear distinction led to a circuit split, and the Supreme Court took this case to "sort out the confusion." *Id.* at 1005. Indeed, before the Supreme Court granted certiorari in this case, the Tenth Circuit affirmed this Court's grant of summary judgment based on its earlier holding in *Brooks v. Gaenzle*, 614 F.3d 1213, 1224 (10th Cir. 2010), stating that "an officer's intentional shooting of a suspect does not effect a seizure unless the 'gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him.'" *Torres v. Madrid*, 769 F. App'x 654, 657 (10th Cir. 2019) (unpublished) (quoting *Gaenzle*, 614 F.3d at 1224). The Tenth Circuit concluded that "[w]ithout a seizure, Torres's excessive-force claims (and the derivative conspiracy claims) fail as a matter of law." *Id.*

If qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *City of Tahlequah, Oklahoma v. Bond*. 142 S. Ct. 9, 11 (2021) (internal quotation marks omitted), it must protect the officers in this case. A Tenth Circuit panel and three justices of the United States Supreme Court believed that no constitutional violation occurred in this case. Although a majority of the Supreme Court held otherwise, the contours of the Supreme Court's holding in 2021 was not clear to a reasonable officer in 2014, when the

events in this case took place. *See id.* ("It is not enough that a rule be suggested by then-existing precedent; the rule's contours must be so well defined that it is clear to a reasonable officer that his [or her] conduct was unlawful in the situation he [or she] confronted.") (internal quotation marks omitted). Officers Madrid and Williamson are entitled to qualified immunity.

Ms. Torres argues that the Supreme Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991), clearly established that Ms. Torres was seized when she was shot, and that therefore Officers Madrid and Torres are not entitled to qualified immunity. *See* Doc. 122 at 21. But the Supreme Court explicitly did not decide this issue in *Torres*. *See Torres*, 141 S. Ct. at 995. The Supreme Court explained that *Hodari D.* had articulated two principles: that "common law arrests are Fourth Amendment seizures," and that "the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped." *Id.* But the Court explicitly stated that it would "not decide whether *Hodari D.*, which principally concerned a show of authority [not a show of force], controls the outcome of this case as a matter of *stare decisis*, because we independently reach the same conclusions." *Id.* Thus, *Hodari D.* did not clearly establish that Officers Madrid and Williamson seized Ms. Torres in 2014 when they shot her but did not stop her.

Ms. Torres further argues that the Supreme Court in "*Torres* recognized that the cases and commentary 'speak with virtual unanimity' on the question of seizure by physical force with intent to detain." Doc. 122 at 21 (quoting *Torres*, 141 S. Ct. at 996). Ms. Torres, however, has quoted the Supreme Court out of context. In *Torres*, the Supreme Court explained that although the seizure of property always has meant "taking possession," the seizure of a person "plainly refers to an arrest." *Torres*, 141 S. Ct. at 995–96. The Court then reviewed old British and early American common law to determine what constituted an arrest around the time that the Fourth

Amendment was adopted and made applicable to the states. *Id.* at 996–97. The Court determined that there was "virtual unanimity," *id.* at 996, among these historical records (dating from 1605 to 1904) that "an arrest required only the application of force—not control or custody—through the framing of the Fourteenth Amendment, which incorporated the protections of the Fourth Amendment against the States," *id.* at 997. The Court acknowledged, however, that it was "aware of no common law authority addressing an arrest under such circumstances [as those that exist here], or indeed any case involving an application of force from a distance," *id.* at 997, but it saw no reason that these circumstances should alter the analysis, *id.* at 997–98. Thus, although the Supreme Court ultimately held that Officers Madrid and Williamson arrested, or seized, Ms. Torres at "the instant that the bullets struck her," *id.* at 999, it was not clearly established in 2014 that they had done so. *See Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) ("for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate") (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)).

Ms. Torres's final argument as to whether the contours of the constitutional right violated in this case were clearly established in 2014 does not address the precise argument that defendants are making. She argues that "[i]t was clearly established that shooting an unarmed civilian in the back where there was no danger to the Defendant officers was clearly established in the 10th Circuit on July 15th, 2014." Doc. 122 at 21. First, it is undisputed that Ms. Torres was armed with her vehicle, and any case that does not involve a plaintiff in a moving vehicle is simply inapplicable. Second, and more to the point, this argument does not address whether Officers Madrid and Williamson would have understood in 2014, under then-existing Tenth Circuit and Supreme Court precedent, that they had arrested, or seized, Ms. Torres at the moment that their bullets hit her. Ms. Torres essentially is arguing that the officers' use of deadly force

under these circumstances was unreasonable, an issue that is hotly contested but which the Court does not address.

C. The *Heck* Doctrine and its Application to this Case

In *Heck*, the Supreme Court held that a plaintiff cannot bring a § 1983 civil rights claim based on actions whose unlawfulness would render an existing criminal conviction invalid. 512 U.S. at 486–87. If, on the other hand, a court determines that a plaintiff's civil rights claim, even if successful, would not necessarily demonstrate the invalidity of a criminal conviction, the action may proceed absent some other bar to the suit. *Id.* at 487.

Here, Ms. Torres originally was charged with two counts of aggravated assault with a deadly weapon upon a peace officer, but she ultimately was convicted of the lesser included offenses of aggravated fleeing from a law enforcement officer (with respect to Officer Williamson) and assault upon a peace officer (with respect to Officer Madrid). An excessive force claim against these two officers is not necessarily inconsistent with Ms. Torres's convictions if, for example, the officers used too much force to respond or the officers used force after the need for force disappeared. *Havens v. Johnson*, 783 F.3d 776, 782 (10th Cir. 2015). To determine the effect of *Heck* on Ms. Torres's excessive force claims, the Court must compare Ms. Torres's allegations and claims to the offenses she committed. *Id.* Ms. Torres's excessive-force claims may be barred in their entirety if the theory of her claims is inconsistent with her prior convictions. *Id.* (citing *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656 (5th Cir. 2007)).

In her complaint, Ms. Torres alleges that Officers Williamson and Madrid "were in 'tactical vests' and dark clothing[,] making it impossible for [her] to identify" them as police officers. Doc. 1 ¶ 7. She also alleges that the officers attempted to open her locked car doors

without her consent or permission, and that she thought it was an attempted carjacking, so she drove away. *Id.* ¶ 8. She further alleges that she had no weapons, did not make any gestures suggesting she was armed, and did not take out anything that looked like a weapon. *Id.* ¶ 9. Finally, she alleges that both officers were beside her vehicle, not in front of it. *Id.* In other words, Ms. Torres claims that she did nothing wrong and did not endanger anyone in any way.

By contrast, Ms. Torres was convicted of aggravated fleeing a law enforcement officer, namely, Officer Williamson,[5] in violation of N.M. STAT. ANN. § 30-22-1.1. *See* Doc. 112-7. Ms. Torres's conviction under this statute established that she "willfully and carelessly dr[ove] [her] vehicle in a manner *that endanger[ed] the life of another person* after being given a visual or audible signal to stop . . . by a uniformed law enforcement officer [Officer Williamson]. . . ." N.M. STAT. ANN. § 30-22-1.1(A) (emphasis added). Ms. Torres also was convicted of assault upon a peace officer, namely, Officer Madrid,[6] in violation of N.M. STAT. ANN. § 30-22.21. *See* Doc. 112-7. Ms. Torres's assault conviction established that Ms. Torres either "attempted to commit a battery upon the person of [Officer Madrid] while [s]he [was] in the lawful discharge of [her] duties," or that Ms. Torres committed "any unlawful act, threat or menacing conduct which cause[d] Officer Madrid[,] while [ ] in the lawful discharge of [her] duties[,] to reasonably believe that [s]he [was] in danger of receiving an immediate battery." N.M. STAT. ANN. § 30-22-21(A).

In short, the theory of Ms. Torres's excessive force claims is at odds with her convictions for aggravated fleeing from a law enforcement officer and assault on a peace officer. Ms.

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[5] This conviction is a lesser included offense of Count 1 of the indictment, which names Richard Williamson as the victim. *See* Doc. 112-6 at 1.

[6] This conviction is a lesser included offense of Count 2 of the indictment, which names Janice Madrid as the victim. *See* Doc. 112-6 at 1.

Torres's aggravated fleeing conviction establishes that she drove her vehicle in a manner that endangered the life of another person. At the point that Ms. Torres did that, both Officer Madrid and Officer Williamson were entitled to use deadly force to try to stop her. *See Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995) (deadly force is justified if a reasonable officer would have probable cause to believe that there was a threat of serious physical harm to themselves or others). And although in her complaint Ms. Torres alleges she was unarmed, *see* Doc. 1 ¶ 9, her convictions and the undisputed facts of this case establish that Ms. Torres's "weapon" was her car: she drove her car in a manner that endangered the life of another person, and she either attempted to hit Officer Madrid with her vehicle, or she caused Officer Madrid to reasonably believe that Ms. Torres was going to hit her with her vehicle. Again, under any of these scenarios, both officers were justified in using deadly force. *See Sevier*, 60 F.3d at 699. Ms. Torres's excessive force claims are premised on the theory that she was simply sitting in her car minding her own business when unknown people—who turned out to be police officers—attempted to open her car door and frightened her into driving away, and that she did not endanger either officer when she did so. As was true in *Havens*, 783 F.3d at 783–84, Ms. Torres does not allege that defendants used excessive force against her in response to her aggravated fleeing from Officer Williamson and assault on Officer Madrid. She claims instead that she was completely innocent and did nothing wrong. This version of events simply could not sustain the elements of her convictions. The *Heck* doctrine therefore bars Ms. Torres's excessive force claims.

This case is in contrast to *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125–27 (10th Cir. 1999), in which the Tenth Circuit held that the plaintiff's excessive force claim was not barred by the plaintiff's prior conviction for resisting arrest. In *Martinez*, the court held that

plaintiff's conviction for resisting arrest could coexist with a claim that the officers used more force than was necessary to subdue him and effect his arrest. *See id.* Nevertheless, the court held that plaintiff's allegations that the officers had no probable cause to arrest him and that he did not actively resist arrest must be stricken from his complaint because those claims were inconsistent with his prior conviction. *Id.* at 1127. Here, Ms. Torres's prior convictions necessarily establish that Ms. Torres drove away from the officers in a manner that endangered the life of at least one other person, and that she either attempted to hit Officer Madrid with her vehicle, or that Officer Madrid reasonably believed that the vehicle was going to hit her. The officers fired their weapons at the same time and immediately upon Ms. Torres driving away; these shots were the only force used against Ms. Madrid. *See* Doc. 112-8 (Exh. H, 1:12–1:30 (Officer Madrid's audio recording of incident); Exh. I, 1:01–1:22 (Officer Williamson's audio recording of incident)); *see also* Doc. 1 ¶ 10. Both officers stopped shooting within seconds. *See* Doc. 112-8 (Exh. H, 1:12–1:30; Exh. I, 1:01–1:22). Further, Ms. Torres did not stop and was not subdued. The force, therefore, was not more than what was necessary to stop her. Ms. Torres's claims of excessive force are fundamentally inconsistent with her convictions and are barred under *Heck*. *C.f. Hooks v. Atoki*, 509 F.3d 1278, 1200–03 (10th Cir. 2020) (applying *Heck* to bar some, but not all, of plaintiff's excessive force claims where plaintiff alleged six distinct uses of force); *Beets v. County of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012) ("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").

Ms. Torres's response to the officers' motion for summary judgment on this issue fundamentally misapprehends the nature of the *Heck* doctrine. She argues that "[t]he no contest plea to assault did not determine whether shooting at Ms. Torres from the side and back when

Defendants were in absolutely no danger of being hit was a reasonable use of force," and that the "no contest plea to aggravated fleeing does not answer or address the reasonableness of the use of force by Defendants." Doc. 122 at 23. She also argues that this Court previously noted that "it is not evident from the plea agreement that either Officer . . . shot at her in reaction to her aggravated fleeing." *Id.* at 24 (quoting Doc. 42 at 8). In making these arguments, Ms. Torres focuses on collateral estoppel, not the *Heck* doctrine. *See id.* at 23–24.

First, it is of no consequence that Ms. Torres's convictions arose from a no contest plea. As the Tenth Circuit explained in *Havens*, "the *Heck* doctrine derives from the existence of a valid conviction, not the mechanism by which the conviction was obtained (such as admissions by the defendant), so it is irrelevant that [the plaintiff] entered an *Alford* plea." *Havens*, 783 F.3d at 784; *see also Hooks*, 983 F.3d at 1201 (applying *Heck* to bar some of plaintiff's excessive force claims based on plaintiff's "no contest plea to two counts of assault and battery of a police officer").

Second, there is no requirement under *Heck* that the prior criminal case address and determine whether the officers used reasonable force in reaction to the situation that confronted them as there might be for collateral estoppel. Collateral estoppel is used to "bar the relitigation of ultimate facts or issues actually and necessarily decided in the prior suit by a valid and final judgment," and to prevent repeated litigation of the same issues under "the guise of different causes of action." *Reeves v. Wimberly*, 1988-NMCA-038, ¶ 6, 107 N.M. 231, 233, 755 P.2d 75, 77. The preclusive effect in federal court of a state judgment is governed by the state's preclusion rules.[7] *Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., Inc.*, 497 F.3d

[7] Ms. Torres cites to *Haring v. Prosise*, 462 U.S. 306 (1983) in response to the defendants' *Heck* argument. Doc. 122 at 23. In *Haring*, the Supreme Court held that a plaintiff's guilty plea in state court did not preclude his § 1983 claim in federal court under the rules of collateral estoppel

1096, 1100 (10th Cir. 2007). In New Mexico, there are four elements the moving party must establish to demonstrate that the doctrine applies: "(1) the parties are the same or in privity with the parties in the original action; (2) the subject matter or cause of action in the two suits are different; (3) the ultimate facts or issues were actually litigated; and (4) the issue was necessarily determined." *Reeves*, 1988-NMCA-038, ¶ 8, 107 N.M. at 233, 755 P.2d at 77. New Mexico courts, however, have "eliminated the traditional rule that the parties must be the same or in privity if the doctrine of collateral estoppel is to apply" in civil cases. *Id.* ¶ 12, 107 N.M. at 234, 755 P.2d at 78. In other words, the test for determining whether collateral estoppel applies is quite stringent. In contrast, under the *Heck* doctrine, the defendants need only show that a judgment in favor of Ms. Torres on her excessive force claims would necessarily imply that her state convictions for aggravated fleeing and assault on a peace officer were invalid. The defendants explicitly do not rely on collateral estoppel. *See* Doc. 123 at 12 (noting that defendants have not raised collateral estoppel as a defense). As discussed above, because the theory of Ms. Torres's excessive force claims is wholly inconsistent with her prior convictions, the *Heck* doctrine bars her claims.

Third and finally, this Court's earlier determination that "it is not evident from the plea agreement that either Officer . . . shot at her in reaction to her aggravated fleeing," *see* Doc. 122 at 24 (quoting Doc. 42 at 8), is irrelevant to the issue at hand. As explained in its earlier order, the Court was deciding a motion to dismiss and could consider only Ms. Torres's complaint and, potentially, the plea agreement that was attached to the motion. Doc. 42 at 7. Now, in considering the officers' motion for summary judgment, the Court may consider all the

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as applied by the state of Virginia. *See Haring*, 462 U.S. at 312–17. *Haring* is simply inapplicable to whether the *Heck* doctrine—not collateral estoppel—bars Ms. Torres's claims here.

undisputed evidence in the case. FED. R. CIV. P. 56. Based on that evidence, which includes numerous documents from Ms. Torres's criminal case, I find that Ms. Torres's claims of excessive force are incompatible with her convictions for aggravated fleeing and assault on a peace officer and are barred under *Heck.*

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendants' Renewed Motion for Summary Judgment on the Basis of Qualified Immunity and Other Grounds (Doc. 112). Officers Madrid and Williamson are entitled to qualified immunity on Counts I and III because the contours of the constitutional right violated were not clearly established in July 2014, when the events occurred. Alternatively, Ms. Torres's claims against the officers in Counts I and III are barred by the *Heck* doctrine. Because Counts II and IV are derivative conspiracy claims, they fail as a matter of law under either theory. *See Dixon v. City of Lawton, Okl.*, 898 F.2d 1443, 1449 (10th Cir. 1990) ("to recover under a § 1983 conspiracy theory, a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient"). The Court therefore dismisses this case with prejudice.

IT IS SO ORDERED.

Laura Fashing
United States Magistrate Judge
Presiding by Consent

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ROXANNE TORRES,

Plaintiff,

v. 1:16-cv-01163-LF-KK

JANICE MADRID et al.,

Defendants.

FINAL JUDGMENT

Pursuant to the memorandum opinion and order entered concurrently herewith, the Court enters this Final Order pursuant to Rule 58 of the Federal Rules of Civil Procedure and hereby dismisses this matter with prejudice.

Laura Fashing
United States Magistrate Judge
Presiding by Consent