

1 HONORABLE RICHARD A. JONES
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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
11 AT SEATTLE

11 MARK ALAN HAYS,

12 Plaintiff,

13 v.

14 SHANE ANDERSON, et al.,

15 Defendants.

CASE NO. C09-98RAJ

ORDER

16
17 **I. INTRODUCTION**

18 This matter comes before the court on the Defendants' motion for summary
19 judgment (Dkt. # 32). Neither the Plaintiff nor Defendants requested oral argument, and
20 the court finds the motion suitable for resolution on the basis of the parties' briefing and
21 supporting evidence. For the reasons explained below, the court GRANTS the
22 Defendants' motion (Dkt. # 32).

23 **II. BACKGROUND¹**

24 On November 23, 2007, Plaintiff Mark Hays was walking on University Way in
25 Seattle's University District. While in the neighborhood, he met Michael Lujan for the

26 ¹ This description of the facts elaborates upon the background section included in the court's
27 previous order (Dkt. # 49).

1 first time, and together they improperly crossed an intersection against the traffic light.
2 While Mr. Hays and Mr. Lujan were in the crosswalk, an unmarked car containing four
3 Seattle Police Department officers, including Officers Thomas Hanley and Jonathan
4 Huber, drove into the crosswalk, directly in front of Mr. Lujan.

5 Mr. Hays continuing walking across the street, away from the police officers' car,
6 but Mr. Lujan stopped to talk with the officers. After Mr. Lujan gestured for Mr. Hays to
7 return, Mr. Hays again entered the crosswalk. After this point, there are two versions of
8 the facts. According to Mr. Hays, the police officers took him to the ground for no
9 apparent reason:

10 Just over half-way across University, I was suddenly taken to the ground by
11 physical force. I was on my side for a few seconds before someone
12 unidentified to me, forced me to my stomach and straddle my shoulders.
13 This person then began vigorously slamming my forehead area to the
14 pavement. I had no idea who this person might be, until I felt a second
15 person move and hold my wrists behind my back, which led to me to
16 assume that they were probably policemen. I was stunned by the front
17 impacts to my head, and quite unable to even move my hands around me to
18 protect my head from the pavement. I knew my head was being badly
19 injured, so I lay limp, hoping that the head-slamming would stop. The man
20 continued to slam my head to the ground over and over. I was completely
21 overwhelmed and had no recourse against the assault. At one point, I was
22 able to look to the curbside, and saw a girl who was watching. I gave her a
23 plaintive look to encourage her assistance, and indicate that I was entirely
24 helpless. I saw her put her cell phone to her ear, then returned my head to
25 the ground. I felt more punching and kicking and my head was slammed
26 down several more times. In shock, I did nothing but lay motionless,
27 waiting for the senseless attack to end.

28 First Amended Complaint (Dkt. # 8-2), at 5-6.

The police officers describe the incident differently. *See* Hanley Decl. (Dkt. # 33),
Ex. A. According to the police statement form, after witnessing the jaywalking, the
officers initially talked with Mr. Hays and Mr. Lujan through an open car window and
identified themselves as police officers. They informed the two that their crossing was

1 illegal, and then Officer Hanley exited the vehicle to further discuss the matter. Mr.
2 Lujan ran away from Officer Hanley, and Officer Huber pursued him. Mr. Lujan then
3 changed directions and ran toward Officer Hanley, and the officer wrapped his arms
4 around Mr. Lujan and attempted to force him to the ground. Officer Hanley claims that
5 he told Mr. Lujan that he was under arrest, but Mr. Lujan resisted and attempted to break
6 free.

7 While Officer Hanley was struggling to get Mr. Lujan to the ground, Mr. Hays
8 tackled him from behind and took him down to the ground. Officer Hanley was trapped
9 on the ground under Mr. Hays, while Officer Edward Hagerty took control of Mr. Lujan
10 and Officer Huber came to assist Officer Hanley. Officer Hanley was on the ground with
11 Mr. Hays's torso stretched across his upper legs. In order to extricate himself from Mr.
12 Hays, Officer Hanley "repeatedly punched" Mr. Hays in the left thigh. Hanley Decl., Ex.
13 A. Officer Hanley was then able to get out from under Mr. Hays and regained a standing
14 position. From that vantage point, Officer Hanley saw that Mr. Hays was resisting
15 Officer Huber's efforts to get his hands out from under him. Officer Hanley then
16 "resumed punching Hays repeatedly with my closed right fist in his left kidney area," and
17 eventually dislodged Mr. Hays's left hand. *Id.* Mr. Hays's left hand remained under his
18 body, despite Officer Huber's attempts to pull it free. Officer Hanley "began using
19 repeated knee strikes to [Mr. Hays's] torso/stomach area on his left side" until the
20 officers were able to pull Mr. Hays's right hand behind his back and handcuff him. After
21 Mr. Hays was handcuffed, he made no further efforts to resist. Officer Hanley's
22 statement also mentions that Mr. Hays's breath smelled of alcohol and he appeared
23 intoxicated. *Id.*

24 Based on this incident, Mr. Hays was charged with assaulting a police officer and
25 obstructing a police officer, and convicted on both charges. Mr. Hays appealed the
26 convictions, and the Washington State Court of Appeals affirmed.

1 Mr. Hays then filed this lawsuit, and the only claims now remaining are against
2 Officers Hanley and Huber for excessive force. The officers have moved for summary
3 judgment.²

4 III. ANALYSIS

5 A. Standard of Review on Summary Judgment.

6 Summary judgment is appropriate if there is no genuine issue of material fact and
7 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
8 moving party bears the initial burden of demonstrating the absence of a genuine issue of
9 material fact, or that there is an absence of evidence supporting an essential element of
10 the non-moving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once
11 the moving party meets that initial burden, the opposing party must then set forth specific
12 facts showing that there is a genuine issue of fact for trial in order to defeat the motion.
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The issue of fact must be
14 genuine; mere disagreement about a material fact is not sufficient. *Matsushita Elec.*
15 *Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (1986).

16 B. The Plaintiff's Excessive Force Claims are Barred Under the *Heck* Doctrine.³

17 Section 1983 creates a remedy for violations of constitutional and other federal
18 rights committed by defendants who act under color of state law. *Motley v. Parks*, 432
19 F.3d 1072, 1077 (9th Cir. 2005). The Constitution protects a suspect from a police
20 officer's use of excessive force. *See Graham v. Connor*, 490 U.S. 386, 395 (1989).

21 ² Mr. Hays's Opposition to this motion was due on January 4, 2010. On January 11, Mr. Hays
22 filed a motion for extension of the response deadline (Dkt. # 42), claiming confusion regarding
23 the interplay between noting dates and notices of unavailability, and filed an untimely
24 Opposition (Dkt. # 44) the following day. The Defendants opposed the motion for extension and
25 moved to strike the untimely Opposition. Though the court does not excuse Mr. Hays's failure
26 to abide by court deadlines, the court nonetheless GRANTS Plaintiff's motion (Dkt. #42) and
27 DENIES the Defendants' motion to strike (Dkt. # 46) due to the court's strong preference for
28 considering a claim's merits.

³ Because the court concludes that *Heck* bars all claims remaining in this case, the court need not
consider the Defendants' alternative grounds for summary judgment.

1 But, if the suspect is later convicted of a crime and the conviction has not been
2 invalidated, the suspect cannot pursue a Section 1983 claim if that claim would
3 “necessarily imply the invalidity of his conviction or sentence.” *Heck v. Humphrey*, 512
4 U.S. 477, 487 (1994). If the Section 1983 claim would succeed only by negating “an
5 element of the offense of which he has been convicted,” then the plaintiff’s Section 1983
6 claim is barred. *Id.* at 487 n.6 (describing an example of this circumstance).

7 The Ninth Circuit applied the *Heck* doctrine to a Section 1983 claim for excessive
8 force in *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002). In that case, the plaintiff
9 was shot by police as he left the scene of a robbery. He claimed the police started
10 shooting at random, but the police contended that they fired shots at the plaintiff because
11 he fired first. The plaintiff was convicted in state court of, *inter alia*, attempted murder
12 of the police officers. The plaintiff then filed Section 1983 claims against the police
13 officers for excessive force, but the court found that those claims were barred by the
14 plaintiff’s conviction for attempted murder:

15 [T]here was no break between Cunningham’s provocative act of firing on
16 the police and the police response that he claims was excessive. Indeed, in
17 convicting Cunningham of felony murder, the jury concluded that the
18 police response was a natural consequence of Cunningham’s provocative
19 act. Because the two are so closely interrelated, Cunningham’s conviction
20 forecloses his excessive force claim against the [police] officers.

21 *Cunningham*, 312 F.3d at 1155.

22 The Fifth Circuit also recently applied the *Heck* doctrine to an excessive force
23 claim, in a case more factually analogous to this case. In *DeLeon v. City of Corpus*
24 *Christi*, 488 F.3d 649 (5th Cir. 2007), the court recited the plaintiff’s version of the
25 underlying facts: A police officer arrived at the plaintiff’s home after his wife called for
26 assistance during a domestic dispute. The officer asked the plaintiff to step outside, but
27 the plaintiff protested. The officer then sprayed him in the face with chemicals and
28 swung at him with a baton. The plaintiff grabbed the baton and the two men began

1 fighting over the baton. The plaintiff caught the officer in a bear hug on his knees, but
2 eventually let go of him and backed away with his hands up. The officer then shot at the
3 plaintiff at least four times.

4 The plaintiff was charged with aggravated assault of a police officer and pleaded
5 guilty. *See id.*, 488 F.3d at 651. The plaintiff later brought, *inter alia*, an excessive force
6 claim against the officer, and he argued that it was not barred by *Heck* because “his
7 conviction would not be invalidated by his proving that excessive force was used well
8 after the need of it had ceased.” *Id.*, 488 F.3d at 656. But the court found that that
9 argument was not supported by the plaintiff’s complaint, wherein his allegations
10 suggested that the officer had no need to use force at all:

11 [T]he complaint maintains that [the plaintiff] did nothing wrong, that he
12 simply defended himself, against mace, baton, and then gun, as the violence
13 escalated. . . . There is no alternative pleading or theory of recovery that
14 would allow this claim for excessive force to proceed without interfering
15 with the Texas proceeding against [the plaintiff] for aggravated assault on
16 an officer. Rather it is presented as a single violent encounter throughout
17 which [the officer] used excessive force. . . . [The plaintiff’s] excessive
18 force claim is that “he was unlawfully assaulted, and physically beaten and
19 shot by [the officer.]”

20 *DeLeon*, 488 F.3d at 656-57.

21 In both *DeLeon* and in this case, the plaintiffs allege that police officers assaulted
22 them for no reason and that the officers’ use of force was therefore excessive. In *DeLeon*,
23 such a contention contradicted the plaintiff’s guilty plea to the aggravated assault charge,
24 because he could not have both committed aggravated assault against the officer and been
25 the victim of the officer’s unprovoked use of force. Likewise, Mr. Hays’s allegations that
26 police officers assaulted him for no reason while he remained limp, helpless, and
27 motionless contradict his convictions for assaulting and obstructing a police officer: he
28 cannot have both remained limp and motionless and, at the same time, assaulted a police

1 officer. Thus, so long as Mr. Hays's convictions remain valid,⁴ they bar his excessive
2 force claims.

3 **III. CONCLUSION**

4 For the reasons stated above, the court GRANTS Defendants' motion (Dkt. # 32).
5 DATED this 5th day of February, 2010.
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9 The Honorable Richard A. Jones
10 United States District Judge
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⁴ Mr. Hays requested that if the court concludes that *Heck* applies, the court should stay (rather
25 than dismiss) his excessive force claim pending the resolution of his personal restraint petition
26 pending in state court. *See* Pltf.'s Opp'n (Dkt. # 44) at 4-5. But a personal restraint petition
27 challenges conditions of confinement, not the underlying conviction; Mr. Hays's convictions
28 have already been affirmed on appeal, and he confirmed that his convictions are valid. *See*
Pltf.'s Opp'n at 4 (stating that the validity of his criminal convictions is not challenged). Thus,
the pending personal restraint petition bears no relevance to *Heck*'s application.