UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRAYSON WHITMORE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 1:99CV6523**
	:	
DISTRICT OF COLUMBIA ET AL.,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ARGUMENT

Summary judgment is warranted only where the movant establishes both (1) that it is entitled to judgment as a matter of law, and (2) that there are no genuine issues of material fact pertinent to the questions of law. Fed. R. Civ. P. 56(c); *White v. Fraternal Order of Police*, 909 F.2d 512, 516 (D.C. Cir. 1990). The movant has the burden of showing the absence of any genuine issue of material fact; if, and only if, the movant meets that burden is the plaintiff required to submit evidence to show that there is, in fact, an issue of material fact. *McKinney v. Dole*, 765 F.2d 1129, 1134-35 (D.C. Cir. 1985).

In determining whether the movant has met its burden, the evidence of the nonmovant must be believed and all inferences must be resolved in favor of the nonmovant. *United States v. Spicer*, 57 F.3d 1152, 1159-60 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996); *Franklin v. Barry*, 909 F. Supp. 21, 26 (D.D.C. 1995); *Hayes v. Shalala*, 902 F. Supp. 259,

263 (D.D.C. 1995). Even where facts are undisputed, if reasonable minds could differ on the inferences which might be made, summary judgment is improper. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). In evaluating a motion for summary judgment, the court may not weigh the evidence or make credibility determinations. *International Brotherhood for Painters & Allied Trades Union & Industry Pension Fund v. Duval*, 925 F. Supp. 815, 821 (D.D.C. 1996); *Ramallo v. Reno*, 931 F. Supp. 884, 888 (D.D.C. 1996); *Citizens for Environmental Quality, Inc. v. United States Department of Agriculture*, 602 F. Supp. 534, 537 (D.D.C. 1984).

Clearly, at trial, while the trier of fact may draw all reasonable inferences that follow from the evidence, whether the proven facts from which those inferences are drawn constitute direct or circumstantial evidence, the trier of fact must ultimately weigh the evidence and determine the ultimate fact. By contrast, on a motion for summary judgment, the court may neither weigh the evidence nor determine any factual issue, but must decide only whether there are factual issues or inferences which, if resolved in favor of the nonmovant, as they must be at the summary judgment stage, would allow a reasonable finder of fact to find the ultimate fact asserted. *Duval*, 925 F. Supp. at 821; *Citizens for Environmental Quality*, 602 F. Supp. at 537. If, on consideration of the record evidence, viewing all the evidence and all the factual inferences therefrom in the light most favorable to the nonmoving party, a reasonable trier of fact could find for the nonmoving party, a genuine issue of material fact exists, precluding summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Spicer*, 57 F.3d at 1160. Summary judgment is

improper, therefore, unless the facts and inferences so overwhelmingly favor the movant that reasonable persons could not reach contrary verdicts.

In the present case, the defendants have failed to show that they are entitled to judgment as a matter of law or that there are no genuine issues of fact. The plaintiff has, furthermore, shown that there are, in fact, genuine issues of fact and that the defendants are not entitled to summary judgment as a matter of law. The defendants' Motion for Summary Judgment must, therefore, be denied.[1]

I. THE DEFENDANTS HAVE NOT SHOWN THAT THE RULE OF *HECK v. HUMPHREY* ENTITLES THEM TO JUDGMENT AS A MATTER OF LAW.

The rule cited by the defendants is simply inapposite to the present case. In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the United States Supreme Court stated the obvious, holding that the recovery of damages is precluded for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid," absent a prior reversal, expungement, or other officially authorized invalidation of the conviction or sentence. In *Heck*, the plaintiff brought an action claiming that his conviction violated his constitutional rights. The Court analogized the plaintiff's claim to a malicious prosecution claim, an element of which is the termination of the prior criminal proceeding in favor of the plaintiff, an element intended to prevent collateral attack on a criminal conviction through a civil suit. *Id.* at 484-85. Similarly, the Court noted that if an individual convicted and sentenced for resisting arrest, defined as preventing an officer from effecting a lawful arrest, were to bring

[1]It is noted that the defendants filed their motion with the court two days after the time set by the court.

a civil claim for unlawful arrest, he would have to negate an element of the offense for which he was convicted in order to prevail on his civil claim. *Id.* at 486 n.6. By contrast, the Court noted that a claim for damages from an allegedly unreasonable search, even if successful, would not necessarily imply that the related conviction was unlawful. *Id.* at 487 n.7.

In a case very close factually to the present case, the Ninth Circuit explained:

> There is no question that *Heck* bars Smithart's claims that defendants lacked probable cause to arrest him and brought unfounded criminal charges against him. . . .
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> Smithart maintains, however, that defendants used force far greater than that required for his arrest and out of proportion to the threat which he posed to the defendants. In *Heck*, the Court expressly held that where plaintiff's action "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id*. at ___ __ ___, 114 S.Ct. at 2372-73 (emphasis in original; footnotes omitted). Because a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart's arrest or conviction, *Heck* does not preclude Smithart's excessive force claim. *See id*.; *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir.1995) (assuming without deciding that finding of excessive force during plaintiff's arrest would not imply the invalidity of plaintiff's conviction); *see also Heck*, ___ U.S. at ___ n. 7, 114 S.Ct. at 2372 n. 7 (successful section 1983 action for unreasonable search would not necessarily imply that plaintiff's conviction was unlawful); *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1879, 104 L.Ed.2d 443 (1989) (excessive force claim in context of arrest properly characterized as Fourth Amendment claim alleging unreasonable seizure of the person). To the extent that Smithart seeks to recover for defendants' alleged use of excessive force during the course of his arrest, his section 1983 action may proceed despite the fact that his conviction has not been reversed, expunged, invalidated, or called into question by the issuance of a writ of habeas corpus by a federal court.

Smithart v. Towery, 79 F.3d 951, 952-53 (9th Cir. 1996).[2] Contrary to the defendants' assertion, the plaintiff does not have to show that he was not the aggressor in order to prevail on an excessive force claim, but only that the force used was greater than that required. See the discussion on the merits, *infra*. In the present case, as in *Smithart*, a successful action for excessive force would not necessarily imply the invalidity of the arrest or the conviction, and *Heck* does not, accordingly, foreclose the excessive force claim.

II. THE DEFENDANTS HAVE NOT SHOWN THAT THE PLAINTIFF'S CLAIMS ARE COLLATERALLY ESTOPPED BY HIS CRIMINAL CONVICTION.

Collateral estoppel, as the defendants correctly state, precludes the relitigation of an issue which has already been decided in a prior action. The defendants' attempted application of collateral estoppel to this case, however, like their first argument, is fatally flawed. Collateral estoppel, as the Supreme Court has held, cannot be applied absent a "full and fair opportunity" to litigate the issue in the earlier case. *Allen v. McCurry*, 449 U.S. 90, 95 (1980). In the present case, the issue of excessive force was not and would not reasonably have been at issue in the adjudication of the charges brought against the plaintiff. While the circumstances related to assault might be relevant to the officer's defense against the civil claim against him for use of excessive force, the circumstances related to the

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[2]*Hudson v. Hughes*, 98 F.3d 868, 872-73 (5th Cir. 1996), relied on by the defendants, does not govern this case. Under the applicable law in *Hudson*, since self-defense was a justification defense to the crime of battery of an officer, requiring the defendant to show that his use of force against the officer was both reasonable and necessary to prevent a forcible offense against himself, the criminal defendant's claim of excessive force by the officer, if proved, would necessarily imply the invalidity of his conviction for battery of the officer. By contrast, a finding that an officer used excessive force in effecting an arrest would in no way necessitate or imply the invalidity of a conviction for assaulting an officer.

officer's use of force in response to the plaintiff simply had no bearing on the issue of whether the plaintiff, in the first instance, assaulted the officer, and they were irrelevant to the criminal charge of assault.[3]

In a factually similar case, the court, rejecting the very argument made in this case, explained:

> The District asserts that the trial court erred in denying collateral estoppel effect to the finding of guilt in the criminal assault case. We disagree.
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> Issue preclusion, or collateral estoppel, applies only to those matters actually raised and adjudicated in the antecedent suit. *Lassiter v. District of Columbia*, 447 A.2d 456, 459 (D.C.1982) . . . .
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> For example, in *Lassiter*, *supra*, the plaintiff sued the District of Columbia and a police officer, alleging that the officer had falsely arrested and assaulted him. The plaintiff had been convicted in a juvenile proceeding of assaulting the officer during that same incident. The trial court in the civil suit directed a verdict for the defendants on the ground that collateral estoppel barred the relitigation of factual issues which had been resolved against the plaintiff in his juvenile case. *Lassiter*, *supra*, 447 A.2d at 457. In reviewing the trial court's ruling, we stated:
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> > [A]lthough the juvenile court found that appellant assaulted the police officer—a finding that indicates the reasonableness of some force by the police to accomplish custody—it is true nonetheless that the issue of *excessive* force by the police under the circumstances was not "actually recognized by the parties as

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[3]The cases cited by the defendants must be distinguished from the present case in that collateral estoppel was correctly invoked in those cases. *See Brown v. City of Hialeah*, 30 F.3d 1433, 1437 (11th Cir. 1994) (attempt to introduce evidence that plaintiff had not attempted to shoot officer would have been contrary to plaintiff's guilty plea to attempted murder charge in criminal trial and admission at that time that he had attempted to murder officer by use of firearm); *Robertson v. Johnson County*, 896 F. Supp. 673, 685 (E.D. Ky. 1995) (plaintiff was collaterally estopped from arguing that he had acted in self-defense in an incident in the detox cell, where his conviction for the offense of menacing during that incident had required a finding that plaintiff had not been privileged to act in self-defense; plaintiff was not estopped, however, from claiming use of excessive force in separate incident that occurred during booking).

> important and by the trier as necessary to the first judgment" . . . . An evaluation of the severity of the police response to appellant's attack was not at issue, and thus was not adjudicated, in the juvenile proceeding. It follows that collateral estoppel does not necessarily bar appellant's assault claim.

Id. at 460 (emphasis in original) (citation omitted).

So it is here.

District of Columbia v. Peters, 527 A.2d 1269, 1274-75 (D.C. 1987); *see also Lassiter v. District of Columbia*, 447 A.2d 456, 460 n.9 (D.C. 1982) (conviction of assault on police officer would not, without more, preclude assertion that during altercation officer used excessive force, such as shooting a gun; plaintiff would be judicially estopped, however, to disavow prior testimony he had given under oath).

As is clear from the above cases, the defendants have not shown that they are entitled to summary judgment as a matter of law based on the doctrine of collateral estoppel. To the contrary, it is clear that estoppel does not apply to the facts and circumstances of this case.

III. THE DEFENDANTS HAVE NOT SHOWN THAT THERE IS NO QUESTION OF FACT ON THE MERITS CONCERNING WHETHER THE SHOOTING WAS JUSTIFIED.

The defendants attempt to show that there are no genuine issues of fact on the merits by asserting, first, that the plaintiff's invocation of the Fifth Amendment precludes him from contesting the officer's version of the facts (therefore, they would argue that there are no issues of fact) and, second, that the officer's shooting of the plaintiff was justified. The first assertion is clearly without merit. The second is an attempt to bypass the factual inquiry by stating the desired legal conclusion as a statement of fact. Neither assertion supports summary judgment.

A. The Defendants' Assertion That The Plaintiff's Assertion Of His Fifth Amendment Privilege Somehow Renders The Officer's Account Of The Facts Uncontested Is Unsupportable In Law Or Fact.

It is true that the plaintiff objected to 4 of the 12 Interrogatories submitted by the defendants with an objection based on the Fifth Amendment. It is also true that the plaintiff also provided detailed answers to each of those questions, notwithstanding his objection. In addition, the plaintiff has, obviously, provided factual allegations in his Complaint. More importantly, the defendants either misunderstand or attempt to mischaracterize the effect in a civil proceeding of invoking the Fifth Amendment.

The effect of invoking the Fifth Amendment in a civil proceeding is simply that it permits the jury to draw a negative inference from the refusal to testify in response to probative evidence offered against that party[4]—it is not to negate the answers that the party has, in fact, given or to negate all other evidence that the party has provided or will provide. *See*, *e.g.*, *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976); *Securities & Exchange Commission v. Incendy*, 936 F. Supp. 952, 956 (S.D. Fla. 1996); *Javid v. Scott*, 913 F. Supp. 223, 228-29 (S.D.N.Y. 1996).

[4]It is noted that an exception exists to the negative inference rule in cases where an individual is a defendant in both a civil case and a criminal case and is forced to choose between waiving the privilege or losing the civil case in a summary proceeding. *See Pervis v. State Farm Fire & Casualty Co.*, 901 F.2d 944 (11th Cir.), *cert. denied*, 498 U.S. 899 (1990). Although *Pervis* involved a plaintiff in the civil case who was also a defendant in a criminal case at the time of the interrogatories, his invocation of the privilege was, nonetheless, directed toward the criminal case and was invoked solely to preserve the privilege as to the criminal case.

Most importantly, as noted *supra*, because the summary judgment standard mandates that all inferences must be resolved in favor of the nonmovant, any negative inference from the plaintiff's invocation of the Fifth Amendment would be premature at the summary judgment stage. Even if such an inference were reasonable, in light of the fact that the plaintiff provided answers, notwithstanding his invocation of the Fifth Amendment, the inference could only be considered by the factfinder in weighing the evidence. *See Javid*, 913 F. Supp. at 228-29 (jury could draw negative inference from party's refusal to answer); *United States v. Lileikis*, 899 F. Supp. 802, 804 (D. Mass. 1995) (finder of fact permitted to draw adverse inference in civil action when party declined to answer questions on grounds of potential self-incrimination). Finally, it is noted that, in response to a summary judgment motion, the nonmovant may offer additional evidence in order to show a genuine issue of fact. The defendants' argument is, accordingly, without merit and not well taken.

B. The Evidence Shows That There Are, At The Very Least, Genuine Issues Of Fact As To Whether The Officer's Shooting Of The Plaintiff Constituted Excessive Force.

It has been settled for some time that unreasonable force is excessive force in violation of the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 394-99 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7-22 (1985). An officer's use of force must be evaluated under the standard of objective reasonableness under the facts and circumstances—it is, by definition, a factual inquiry. *See Graham*, 490 U.S. at 397. Under both federal and district law, the amount of force which is reasonable is only that amount of force reasonably necessary under the circumstances. *Graham v. Davis*, 880 F.2d 1414, 1418-19 (D.C. Cir.

1989); *Lassiter*, 447 A.2d at 460 n.6 (regardless of the nature of the underlying crime, officer may use only force reasonably necessary under circumstances to effect arrest).

Use of deadly force against a fleeing felon is unreasonable, as a matter of law, unless it is necessary to prevent the suspect's escape and, even then, if, and only if, there is probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or to third parties. *E.g.*, *Garner*, 471 U.S. at 1; *Griffin v. Hilke*, 804 F.2d 1052, 1056 (8th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987). Clearly, the standard when the victim is neither fleeing nor attempting to flee must be at least as high, and the use of deadly force in such a circumstance is unreasonable unless there is a significant threat of death or serious injury. *See Garner*, 471 U.S. at 1; *Griffin*, 804 F.2d at 1056.

In the present case, although the officer apparently argues that his use of deadly force against the plaintiff was reasonable because of his belief that the plaintiff posed a threat of serious injury to the officer, there are, at the very least, questions of fact as to whether such a belief was reasonable, and differing inferences are possible even as to those facts which are not disputed. The summary judgment evidence, therefore, does not support judgment for the defendants as a matter of law.

The plaintiff alleges that he was kicked from behind, and that he turned around and produced a knife in response to the officer's verbal aggression and physical aggression in drawing his gun and pointing it at the plaintiff, not knowing that the defendant was an officer since he was dressed in civilian clothes. The officer alleges that the plaintiff approached him with a large knife in one hand and a beer bottle in the other. The plaintiff alleges that he did not attempt to use the knife against the officer, but did refuse to drop it since he did not know

that the defendant was an officer. The officer alleges that the plaintiff raised the knife while standing within five feet of him and made a stabbing motion toward him. In testimony at the criminal trial, however, the officer stated that the plaintiff was 8-10 feet from him. The plaintiff has stated that he was in a clearly intoxicated state at the time of the incident. He was so drunk, in fact, that he was swaying from side to side and forward and backward. The plaintiff is ___ tall and weighs ___ pounds; the officer appears to be about ___ tall and to weigh about ___ pounds. It is uncontested that when the plaintiff failed to drop his knife the officer intentionally and without warning shot him, aiming for his body mass at point-blank range. Clearly, there are genuine issues of fact concerning the distance between the parties, whether whatever threat the officer perceived was reasonable, and whether shooting the plaintiff was reasonably necessary.

When deadly force is used, the defendant must prove that he actually and reasonably believed that he was in imminent danger of death or serious bodily harm. *Frost v. United States*, 618 A.2d 653, 661 (D.C. 1992). The relative size, condition, and strength of the parties can certainly be considered in evaluating the objective circumstances of the case and the objective reasonableness of the use of force. *See Harper v. United States*, 608 A.2d 152, 155 & n.5 (D.C. 1992); *Davis*, 880 F.2d at 1419 (individual entitled to use only amount of force reasonably required to protect himself). A reasonable jury could certainly conclude that a man of the defendant's size, confronted with a slight and very drunk man who could not even stand up straight and who kept asking the defendant whether he was the police, could not reasonably have believed he was in that kind of imminent danger, notwithstanding the plaintiff's possession of a knife, and could not reasonably have believed that shooting the

plaintiff was reasonably necessary to prevent any perceived harm. While a reasonable jury might be able to conclude that the officer reasonably perceived the plaintiff as posing a significant threat to his safety, a reasonable jury could also, and just as easily, reasonably infer from the facts that no reasonable officer could have believed that shooting the plaintiff in the chest was reasonably necessary.

In a case factually similar to this one, the court, concluding that the evidence was sufficient to go to the jury, explained:

> At approximately 2:30 a.m. on September 21, 1988, Rene Coll and a companion robbed a convenience store in Rutland. Police responded to the call and spotted the fleeing suspects. Coll halted at the corner of a garage, his escape blocked by police officers. He refused to give up and told the police he had a gun, although he was armed only with a knife. Officer Johnson arrived with a police dog. He released the dog and it went for Coll, who held it off with his knife. Officer Johnson's testimony at trial was that he was approximately twenty feet from Coll when Coll moved aggressively toward him and reached toward his belt for what Officer Johnson believed was a gun. Fearing for his life, Officer Johnson fired at Coll, wounding him in the abdomen. Coll's testimony was that he went into a crouch, holding the dog at bay with his knife, and never moved for fear that the dog would attack.
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> . . . .
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> . . . [V]iewing the evidence in the light most favorable to plaintiff, . . . we reject defendants' contention that plaintiff's evidence was insufficient for the case to go to the jury.

Coll v. Johnson, 636 A.2d 336, 337, 339 (Vt. 1993). Just as in *Coll*, in the present case the question of whether the shooting was justified is a question that involves resolution of factual questions and inferences and must, accordingly, be determined by the trier of fact. The defendants' Motion for Summary Judgment, therefore, must be denied.

CONCLUSION

For all of the foregoing reasons, this Court should deny the defendants' Motion for Summary Judgment.

Respectfully submitted,

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