No. 14-151

In the Supreme Court of the United States

KEISCHA WILSON AND MICHAEL WILSON, SR.,
Petitioners,

v.

CITY OF LONG BEACH, HARRY HAMPTON, JUSTIN KRUEGER AND BRIAN NYSTEDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Contrary to Respondents' assertions the Petition has clearly and repeatedly asserted that *Heck* should never be applied to § 1983 claims for excessive force, and has demonstrated that the circuit courts have come to starkly different conclusions concerning the application of *Heck* to such claims. This is most apparent by the conflict within the Ninth Circuit itself. This case presents an excellent vehicle for the United States Supreme Court to resolve these conflicts.

At its core, the problems raised by the Petition concern the following premise: *Heck* is being applied to gut the civil protections of § 1983, by allowing prosecutors in criminal cases to shield police officers from civil liability by charging the victims of excessive force by police officers with crimes, typically crimes sounding in "resisting arrest." When a victim of excessive force at the hands of police officers survives the arrest, he is frequently charged with a crime sounding in "resisting arrest." When he is convicted, and seeks to bring a § 1983 action for excessive force during his arrest, his claim is barred by the lower courts applying *Heck*. Typically, most "resisting arrest" statutes have, as an element, that the police are acting "lawfully" in the performance of their duties. The perverse result of "resisting arrest" convictions is that the lower courts determine that the police could not have been using excessive force against persons convicted of "resisting arrest" because the "resisting arrest" convictions, by definition, conclude that the police were acting lawfully in the performance of their duties. Because the use of excessive force is, by definition, "unlawful," the lower courts are applying

Heck to bar civil actions under § 1983 to persons convicted of "resisting arrest."

As is clearly demonstrated by the plight of Petitioners Keischa and Michael Wilson, the reality presented by this application of *Heck* is quite simple. If a prosecutor can convict a person of "resisting arrest," the police officers involved in that arrest are shielded from civil liability under § 1983, regardless of the extent to which they may have used excessive force during the arrest.

As asserted repeatedly in the Petition, *Heck* was never intended to be applied in this manner. *Heck* is, at its core, a malicious prosecution case, and the reasoning set forth in *Heck* is limited to § 1983 actions sounding in malicious prosecution and false arrest. *Heck* has no application to excessive force cases under § 1983 because it is easily possible for a lawful arrest to be effectuated through the (unlawful) use of excessive force by police officers.

ARGUMENT

I. THE *HECK* BAR IS FUNDAMENTALLY MISAPPLIED TO SECTION 1983 CLAIMS FOR UNREASONABLE SEIZURES PREDICATED ON THE USE OF EXCESSIVE FORCE BY POLICE OFFICERS.

A. *Heck* Involved a Section 1983 Action for Malicious Prosecution, which Requires That the Prior Criminal Proceeding Be Terminated in Favor of the Accused.

In summary, the *Heck* plaintiff had been convicted in a state court of voluntary manslaughter and filed an action under 42 U.S.C. § 1983 seeking damages on the claim that respondents, acting under color of state law, had engaged in unlawful acts that led to his arrest and conviction. *Heck v. Humphrey*, 512 U.S. 477, 478-479 (1994).

In determining that Heck's § 1983 claim could not lie, the *Heck* Court analogized Heck's § 1983 claim to the common law cause of action for malicious prosecution.[1] *Heck, supra.,* at 484. As the court recognized, "[o]ne element that must be alleged and proved in a malicious prosecution action is termination

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[1] The elements of the common law tort of Malicious Prosecution are as follows: The plaintiff must show (1) that the defendant initiated or procured a criminal proceeding against the plaintiff; (2) that the proceeding terminated in the plaintiff's favor; (3) that there was no probable cause to support the defendant's charges; and (4) that the proceeding was instituted primarily for a purpose other than to bring an offender to justice. Restatement (Second) of Torts § 653.

of the prior criminal proceeding in favor of the accused." *Id.* In holding that Heck, as a convicted prisoner, could not succeed on his § 1983 action for malicious prosecution without invalidating his criminal conviction, the *Heck* Court recognized that Heck's conviction, by definition, rendered impossible the "favorable termination" element of the civil action, and held, the relevant question is whether success in a subsequent § 1983 action would "necessarily imply" or "demonstrate" the invalidity of the earlier conviction. *Heck,* 512 U.S. at 487.

B. Unlike a § 1983 Action for Malicious Prosecution, a § 1983 Action for Excessive Force Can Be Brought by a Convicted Prisoner, Because it Is Possible for a Lawful Arrest to Be Effectuated through the Unlawful Use of Excessive Force by a Police Officer; Hence Success in a § 1983 Excessive Force Claim Would Not Necessarily Imply the Invalidity of that § 1983 Litigant's Criminal Conviction.

Because an element of a malicious prosecution action is the favorable termination of criminal proceedings in favor of the accused, it is clear that a civil § 1983 malicious prosecution action cannot lie while a criminal conviction stands. As the *Heck* Court clearly recognized, a civil malicious prosecution action and a valid criminal conviction are neatly, clearly, and logically mutually exclusive in nature. They cannot coexist. However, the analysis concerning the viability of a § 1983 claim for a police officer's excessive force is totally different because success in a § 1983 claim for

excessive force can easily coexist with a valid criminal conviction. This fundamental premise has been adopted by the California Supreme Court, in contravention to Ninth Circuit case law, which held as follows:

> "For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer." *Yount v. City of Sacramento,* 43 Cal.4th 885, 889 (Cal. 2008)

Therefore, because a police officer can use excessive force in conducting a lawful arrest, *Heck* should never bar § 1983 claims sounding in excessive force even if an officer's "lawfulness" in performance of his duty is an element of the crime. This is because the officer's ***response*** to the crime, may always be excessive under the circumstances and would thus not be precluded by *Heck*.

II. THERE IS A CLEAR CONFLICT BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUITS CONCERNING WHETHER AND HOW THE HECK BAR SHOULD BE APPLIED TO § 1983 CLAIMS FOR UNREASONABLE SEIZURES PREDICATED ON THE USE OF EXCESSIVE FORCE BY POLICE OFFICERS.

As set forth in the Petition, there is a clear conflict within the Circuits as to whether and how to apply the *Heck* doctrine to section 1983 claims for unreasonable seizures predicated on the use of excessive force by police officers.

- Third Circuit: In a § 1983 action sounding in excessive force brought by a plaintiff convicted by a jury of "resisting arrest" the Third Circuit flatly refused to apply the *Heck* bar to the § 1983 claim for excessive force based on the underlying crime of resistance even though the jury was instructed that in order to convict, it had to determine that "substantial force" used by the officer was justified and not excessive. *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997).

- Tenth Circuit: In a § 1983 action sounding in excessive force brought by a plaintiff convicted of "resisting arrest" the Tenth Circuit, focusing on the lawfulness of the arrest attempt and stating that it could "coexist" with the use of excessive force, also refused to apply the *Heck* bar to the 1983 claim by a plaintiff who claimed he was unreasonably beaten during a two to three

minute arrest encounter. *Martinez v. City of Albuquerque*, 184 F.3d 1123 (10th Cir. 1999).

- Seventh Circuit: In a § 1983 action sounding in excessive force brought by a plaintiff convicted of "resisting a law enforcement officer," the Seventh Circuit refrained from applying the *Heck* bar, fearing a rule that would allow police to inflict any retribution they choose and be shielded from civil accountability, held that although the plaintiff did not deny that he resisted arrest, nor challenge the factual basis for his conviction, the defendant officer's use of excessive force in ***effectuating*** that arrest did not "necessarily imply" the invalidity of the plaintiff's conviction for resisting. *Van Gilder v. Baker*, 435 F.3d 689, 692 (7th Cir. 2006).

- Eleventh Circuit: In a § 1983 action sounding in excessive force brought by a plaintiff convicted of "resisting arrest with violence" the Eleventh Circuit refused to apply the *Heck* bar to a § 1983 claim by a plaintiff who claimed injuries sustained during a handcuffing procedure, reasoning that "the lawfulness of the arrest is not an element of the offense of resisting arrest with violence", and that "a successful § 1983 claim against an arresting officer for using excessive force does not necessarily negate an element of the underlying charge of resisting arrest with violence." *Dyer v. Lee*, 488 F.3d 876, 879 (11th Cir. 2007).

- Ninth Circuit: In *Beets v. County of Los Angeles*, 669 F.3d 1038, 1041 (9th Cir. 2012) (discussed *infra*) the Ninth Circuit applied the *Heck* bar to

a § 1983 action for excessive force where the underlying offense was an assault with a deadly weapon reasoning that success in the plaintiff's § 1983 claim could not coexist with an assault conviction of the plaintiff's decedent's accomplice because the jury was instructed that the officer must have been acting in "lawful performance of his duties."

- Ninth Circuit: In *Hooper v. County of San Diego*, 629 F.3d 1127, 1131 (9th Cir. Cal. 2011), the Ninth Circuit held the opposite way when it refused to apply the *Heck* bar, holding that "a conviction under § 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful."

As set forth above, *Beets* (followed by *Wilson*) and *Hooper* are in direct conflict with each other because in either factual circumstance a conviction could coexist with an action for excessive force. Put another way, even if the jury in *Beets* was instructed that it could only convict the decedent's accomplice if the officer was in lawful performance of his duties and not using excessive force at the time of the assault, the officer's ***response*** to the assault with a deadly weapon may have been excessive under the circumstances and would thus not be precluded by *Heck*. *See, e.g.*, *Hooper*, *supra*, 629 F. 3d at 1131, and *Yount*, *supra*, 43 Cal. 4th at 899. This is the place in the analysis in which the Ninth Circuit differs. There is no clear cut rule which is why this case presents an excellent vehicle for resolving the conflict.

As set forth in the petition, the Circuits do not analyze the *Heck* bar in the same manner across the

board and there are (at least) two conflicting lines of case law within the Ninth Circuit, itself, both of which are being followed by lower courts.

III. UNLIKE EVERY OTHER CIRCUIT COURT, THE NINTH CIRCUIT HAS ARBITRARILY DRAWN A DISTINCTION BETWEEN JURY VERDICTS AND PLEAS IN ITS APPLICATION OF THE *HECK* BAR TO § 1983 EXCESSIVE FORCE ACTIONS.

Respondents argue that the Ninth Circuit affords the same treatment in application of the *Heck* bar regardless of whether the underlying conviction was by way of jury verdict or plea. This is simply incorrect. Respondents' argument fails to reconcile the reality that California Courts are following the now established legal standard set forth in *Smith v. City of Hemet* and *Beets v. County of Los Angeles*.

***Smith v. City of Hemet*, Ninth Circuit (en banc), 2005**

As set forth in the petition, in 2005, the Ninth Circuit, *en banc*, decided *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. Cal. 2005). In *Smith*, the Ninth Circuit analyzed whether the *Heck* bar would apply to a § 1983 action for excessive force brought by a person convicted of violating *California Penal Code* 148.

In direct contravention to every other sister circuit, the Ninth Circuit recognized a distinction between a jury verdict and a plea:

> "Where a defendant is charged with a single-act offense but there are multiple acts involved each of which could serve as the basis for a conviction,

> a jury does not determine which specific act or acts form the basis for the conviction. [*citation*] Thus, a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would '*necessarily* imply the invalidity of his conviction." *Smith*, 394 F. 3d at 699, fn.5, citing, *People v. McIntyre*, 115 Cal. App. 3d 899, 910-11; also citing, *Susag*, *supra*, 94 Cal App 4th at 1410. (*emphasis in original*)

This statement does not logically follow because, if multiple acts could give rise to a conviction and a jury does *not* determine which specific facts form the basis of that conviction, then it cannot be said that a subsequent civil action would *necessarily* imply the invalidity of the conviction. Further, it is an incorrect statement of California law because a jury is *never* instructed that it cannot convict if the officer engaged in excessive force **at any time** during the entire encounter.

***Beets v. County of Los Angeles*, Ninth Circuit 2012**

The Ninth Circuit later decided *Beets*, *supra*, 699 F.3d 1038, a case involving an underlying crime of assault with a deadly weapon. In *Beets,* the Ninth Circuit affirmed the notion that *Heck* should apply differently to a jury verdict as opposed to a plea.

In *Beets*, a decedent's accomplice, "Morales," was "charged and convicted of, among other things, three counts of assault with a deadly weapon (*i.e.*, the vehicle) on a peace officer." *Beets* at 1041.

Subsequently, the decedent's parents brought a 42 U.S.C. § 1983 action against Deputy Winter alleging that he used excessive force when he shot and killed the decedent. *Id*. at 1040. The District Court dismissed the action pursuant to *Heck* and the case was appealed to the Ninth Circuit. *Id*.

The Ninth Circuit held:

> "The jury that convicted Morales determined that Deputy Winter acted within the scope of his employment and did not use excessive force. The instructions given on the charge that Morales assaulted a peace officer with a deadly weapon required that to convict Morales, the jury had to find that she acted willfully against a police officer who was 'lawfully performing his duties as a peace officer,' and that the officer was not 'using unreasonable or excessive force in his or her duties.' Accordingly, the jury's conviction of Morales rejected any contention that Deputy Winter used excessive force, and thus any recovery by the plaintiffs in this civil action would be contrary to the jury's determination." *Beets* at 1045.

To further clarify this point, the Court then cited to *Smith v. City of Hem*et, 394 F.3d at 699, fn. 5, and quoted the following:

> "… Thus, **a jury's verdict necessarily determines the lawfulness of the officers' actions throughout the whole course of the defendant's conduct, and any action alleging the use of excessive force would 'necessarily imply the invalidity of his**

conviction.'" *Id.* (*Emphasis in original*.) (*Citations omitted*.)

Yet, this analysis is in direct conflict with *Nelson, supra*, which held that a lawful arrest attempt can be effectuated in an unlawful manner.

***Wilson v. City of Long Beach*, Ninth Circuit, 2014**

In the instant case, the Ninth Circuit, relying on *Smith* and *Beets,* construed *Heck* in a manner inconsistent with decisions by the Ninth and other Circuits. Specifically, the Wilson court held that 1) "[t]he jury in the state court criminal case was instructed that it could convict the Wilsons of resisting arrest only if it found that the police were acting lawfully, and lawful was defined to include the absence of excessive force" and 2) "[t]his case is materially the same as *Beets v. County of Los Angeles*, 669 F.3d 1038 (2012), where the criminal jury convicted after being instructed it could not do so unless the officer acted lawfully and did not use excessive force." Petition, App. A at 2.

IV. REVIEW IS NECESSARY TO RESOLVE CIRCUIT CONFLICTS WITH RESPECT TO THE APPLICATION OF THE *HECK* BAR.

Smith v. City of Hemet led to a line of cases that hold to the notion that, when analyzing the *Heck* bar, an underlying conviction by a jury is afforded different treatment than a conviction by way of a plea. *Beets* furthered this line of thinking and courts are citing to *Beets* for the same proposition. *See, e.g.*, *Kyles v. Baker*, 2014 U.S. Dist. LEXIS 154750, 32 (N.D. Cal. Oct. 31, 2014), "Defendants are wrong that the instant case is

analogous to *Beets*. Kyles was convicted by a plea of no contest, not by a jury trial. His conviction thus did not 'necessarily determin[e] the lawfulness of the officers' actions throughout the whole course of [his] conduct.' *Beets*, 669 F.3d at 1045." (*Citation in original.*)

Additionally, the Ninth Circuit's holdings in *Beets*, *Wilson* and *Hooper* cannot be reconciled with each other. *Beets* and *Wilson* applied the *Heck* bar even when it was possible for the criminal convictions to coexist with a finding that the officers used excessive force. Conversely, *Hooper* came to the exact opposite conclusion, following the California Supreme Court and holding that "a conviction under § 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful." *Hooper*, 629 F. 3d at 1131.

Accordingly, this case presents an excellent vehicle to resolve these conflicts.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted.

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Respectfully submitted,

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