No. 17-652

IN THE
SUPREME COURT OF THE UNITED STATES

MARIE HENRY, as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor,

Petitioner,

v.

BRETT LIVINGSTON, et al.,

Respondents.

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

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CANDY L. MESSERSMITH
Florida Bar No. 0186996
RUMBERGER, KIRK & CALDWELL
Lincoln Plaza, Suite 1400
300 South Orange Avenue (32801)
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: 407-872-7300
cmessersmith@rumberger.com
Counsel for Respondents Brett Livingston and Ivelisse Severance

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Marie L. Henry, as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor. The Defendants in the District Court were the City of Mt. Dora, Brett Livingston and Ivelisse Severance. Officers Livingston and Severance were the Appellees in the Eleventh Circuit and are the Respondents here. The City of Mt. Dora was not involved in either the appeal or the instant petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(CONTINUED)

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Florida Statutes Section 843.02. Resisting officer without violence to his or her person

Whoever shall resist, obstruct, or oppose any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal

duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

STATEMENT OF THE CASE

The Officers strongly disagree with Petitioner's description of the events leading to M.E.'s arrest, and with her attempt to attribute improper motivations to the Officers. Petitioner claims M.E. was arrested for refusing to give her name to Officer Livingston. (Pet., p. 6) In reality, M.E. was arrested for interfering with Officer Livingston's *Terry* stop[1] pertaining to a criminal mischief complaint.

In the District Court, the Officers filed the arrest report of M.E. as an exhibit to their Renewed Motion to Dismiss. The report was placed under seal as a composite exhibit at S-34. (AA5) Officer Livingston's account of the arrest is found in the report's page 3 of 3. He states that on October 31, 2009 at 10:09 p.m., he responded to Third Avenue and Donnelly Street in Mt. Dora, Florida, to investigate a report of criminal mischief. While Officer Livingston was en route, "Mount Dora

---

[1] "Beginning with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, L.Ed.2d 899 (1968), the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 185 (2004).

Communications advised that a large group of black juvenile subjects were throwing rocks at a building located in the 300 block of Donnelly Street." When Officer Livingston arrived on scene, he found a group of approximately 15 juveniles, "matching the description given by Mount Dora Communications," walking north on Donnelly Street and away from Third Avenue. When the group arrived at Fourth Avenue and Donnelly Street, Officer Livingston asked the juveniles to stop walking and explained he was investigating a complaint of rock-throwing.[2] (AA5, Doc S-34)

The report indicates that at that point, M.E. told Officer Livingston she did not break a window and that she did not need to listen to him. She turned to walk away, and Officer Livingston told her not to leave because he still was conducting his investigation. M.E. turned back toward Officer Livingston and said "I don't have to listen to this." Officer Livingston then asked M.E. for her name or identification. M.E. responded "I don't have to give that to you." She then held her hand approximately three feet away from Officer Livingston's face and said "Boo! Don't look at me." Officer Livingston again asked M.E. for her name or identification. M.E. said "no" and stated she was leaving. She turned away from Officer Livingston and began to walk away. Officer Livingston instructed her not to

---

[2] Petitioner claims that when this stop occurred, the children were nowhere near the building where rocks were thrown. (Pet., p. 5) In reality, the children were less than one block north of the reported location. (AA5, Doc S-34)

leave, but M.E. continued walking. Officer Livingston then placed M.E. under arrest for violating Florida Statutes Section 843.02.[3] (AA5, Doc S-34) That Statute provides:

> Whoever shall **resist, obstruct, or oppose** any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in **the lawful execution of any legal duty**, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(emphasis added)

Officer Severance's involvement in the arrest is found in the report's page 1 of 1. Officer Severance witnessed M.E. walking away from Officer Livingston during the encounter, at which point Officer

[3] The Officers disagree with Petitioner's claim that Officer Livingston grabbed M.E. and threw her to the ground. (Pet., p. 6) Tellingly, Petitioner has voluntarily dismissed with prejudice her claims of excessive force. (AA108)

Severance assisted Officer Livingston in taking M.E. into custody. Officer Livingston placed M.E. in handcuffs and escorted M.E. to a patrol vehicle. M.E. attempted to break loose from custody, but Officer Severance succeeded in keeping M.E. restrained. M.E. then yelled "Don't touch me, bitch!" and "Get away from me!"[4] Officer Severance placed M.E. in the back of the patrol car and drove M.E. to the police station.[5] (AA5, Doc S-34)

In May 2010, M.E.'s juvenile court trial took place in Florida's Fifth Judicial Circuit Juvenile Division. The Honorable Michael G. Takac presided over the trial. The format for the trial was prescribed in part by Florida Statutes Section 985.35(2)(a)-(c). That Section requires adhering to the rules of evidence; permitting M.E. to cross examine witnesses; proceeding in language understandable to M.E. to the fullest extent possible; employing the reasonable doubt standard; and respecting M.E.'s right against self-incrimination.[6]

At the end of that trial, Judge Takac ruled M.E. had in fact violated Florida Statutes Section

---

[4] The Officers disagree with Petitioner's claim that M.E.'s top came down, exposing her breast. (Pet., p. 6)

[5] The Officers disagree with Petitioner's description of M.E.'s treatment at the jail. (Pet., p. 6)

[6] Upon information and belief, Petitioner was a licensed Florida attorney at the time of M.E.'s Juvenile Court trial, *see The Florida Bar v. Henry*, No. SC13-1127, 2015 WL 1456833 (Fla. March 31, 2015), and served as one of M.E.'s attorneys at the trial.

843.02. Judge Takac's Order of Adjudication was filed as a composite exhibit to the Officers' Renewed Motion to Dismiss, and was placed under seal at S-34. (AA5) As shown in the Order, Judge Takac sentenced M.E. to serve probation; complete a counseling program; complete a 25-hour work project; write a letter of apology to the Officers; write a 10-page essay on "The Dangers Faced by Law Enforcement Officers"; write a 5-page essay on "A Citizen's Duty with Respect to Complying with Law Enforcement Officers"; and adhere to a 6 p.m. curfew for 60 days. He went on to assess against M.E. court costs of $65; an FCCA fine of $50; teen court fees of $3; and supervision costs of $1. He withheld delinquency as to all counts.

M.E. then appealed Judge Takac's finding and sentence to Florida's Fifth District Court of Appeal. *M.H.-R. v. State*, 61 So. 3d 483 (Fla. 3d DCA 2011). The Fifth District affirmed Judge Takac's finding that M.E. violated Section 843.02:

> We affirm the trial court's determination that M.H.-R. was guilty of resisting a law enforcement officer without violence. *See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 124 S. Ct. 2451, 159 L. Ed. 2d 282 (2004) (individual may be required to provide his or her name to law enforcement officer where officer has initiated a valid *Terry* stop).

M.H.-R., 61 So. 3d at 483. The appellate court also affirmed M.E.'s sentence, but remanded the case for Judge Takac to resolve inconsistencies between his oral pronouncement and his Order of Adjudication as to the length of M.E.'s curfew and probationary periods.

In 2013, Petitioner Marie L. Henry, M.E.'s mother, filed the underlying instant lawsuit in the U.S. District Court for the Middle District of Florida. Petitioner alleged the Officers had falsely arrested M.E. for violating Section 843.02 (AA12), the very statute that Judge Takac ruled M.E. had violated. Petitioner further alleged the Officers used excessive force in the arrest. Her Complaint consisted of the following counts against the Officers: Count II for false arrest and excessive force in violation of U.S.C. § 1983 against Officer Livingston; Count III for false arrest and excessive in violation of U.S.C. § 1983 against Officer Severance; Count IV for false arrest / imprisonment against Officer Livingston; Count V for false arrest / imprisonment against Officer Severance; and Count VII for assault and battery against Officer Livingston. (AA9)

On April 28, 2014, the Officers filed a Renewed Motion to Dismiss the false arrest components of Counts II and III, as well as the entirety of Counts IV, V and VII, based on the *Heck* doctrine espoused in *Heck v. Humphrey*, 512 U.S. 477 (1994). On November 10, 2014, the District Court granted the Motion, except as to Count VII, in an unpublished opinion. (AA80)

Petitioner appealed.[7] The Eleventh Circuit held oral argument on March 30, 2016, and affirmed the District Court's Order in an unpublished per curium opinion on May 31, 2017. App. 1a. The Eleventh Circuit denied Petitions for Rehearing and for Rehearing En Banc on August 2, 2017. App. 35a.

REASONS FOR DENYING THE PETITION

I. THE OPINION UNDER REVIEW FOLLOWS SUPREME COURT PRECEDENT.

Petitioner asks for certiorari review because other Circuits—not the Eleventh Circuit—have been following dicta from two Supreme Court opinions in applying the *Heck* bar. She asserts that the Eleventh Circuit should have followed that dicta as well, instead of following the *Heck* majority opinion. First, Petitioner cites to Justice Souter's concurring opinion in *Heck*. In that concurrence, Justice Souter stated if a plaintiff without habeas access were barred from brining a Section 1983 claim, that result would "run counter to § 1983's history and defeat the statute's purpose." *Heck*, 512 U.S. at 501. However, Justice Scalia in his majority opinion in *Heck* considered Justice Souter's comment, and expressly rejected the idea of habeas corpus being a prerequisite to the *Heck* bar:

---

[7] Petitioner did not include in her Eleventh Circuit briefs a discreet discussion of the state law false arrest / imprisonment claims, Counts IV and V. To the extent not briefed, the issues should be deemed waived.

> Justice Souter also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon that principle in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges. *Post*, at 2379. We think **the principle barring collateral attacks**—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—**is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated**.

Heck, 512 U.S. at 490, n. 10. (emphasis added)

Second, Appellant relies on the concurring and dissenting opinions in the case of *Spencer v. Kemna*, 523 U.S. 1 (1998). In that case, Justice Souter's concurrence states "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Spencer*, 523 U.S. at 21. Four other Justices dissented from the

majority opinion but agreed with the above-quoted sentiment in Justice Souter's concurrence.[8]

Because of the dicta in *Spencer*, the federal circuits are split on the issue of whether the availability of habeas is a prerequisite to *Heck*'s application. The Second, Fourth, Sixth, Seventh and Tenth Circuits have ruled the *Heck* bar inapplicable when habeas is unavailable. The First, Third, Fifth and Eighth have applied the bar despite the unavailability of habeas.

Here, the District Court correctly applied the *Heck* bar, and the Eleventh Circuit was correct in affirming. As the Fifth Circuit has noted, the dicta in *Spencer* is an insufficient basis to "relax *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural mechanism to challenge their conviction." *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000). The First Circuit in addressing this issue reiterated the importance of adhering to the binding precedent of *Heck*'s majority opinion. The First Circuit explained it was

> mindful that dicta from concurring and dissenting opinions in a recently decided case, *Spencer v. Kemna,* 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), may cast doubt upon the universality of Heck's "favorable termination"

[8] Two of the four Justices, in addition to Justice Souter, have retired from the Court since *Spencer* was decided.

> requirement. *See id.* at 19-21, 118 S.Ct. at 989 (Souter, J., concurring); *id.* at 21-23, 118 S.Ct. at 990 (Ginsberg, J., concurring); *id.* at 25 n. 8, 118 S.Ct. at 992 n. 8 (Stevens, J., dissenting). **The [Supreme] Court, however, has admonished the lower federal courts to follow its directly applicable precedent**, even if that precedent appears weakened by pronouncements in its subsequent decisions, **and to leave to the Court "the prerogative of overruling its own decisions."** *Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). We obey this admonition.

Figueroa v. Rivera, 147 F.3d 77, 81 n. 3 (1st Cir.1998). (emphasis added)

In *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007), the Eighth Circuit similarly rejected the argument from a Section 1983 plaintiff that *Heck* was inapplicable due to the unavailability of habeas. The Eighth Circuit noted that the *Heck* Court placed no such requirement on the application of the doctrine:

> **The opinion in *Heck* rejected the proposition urged by [the plaintiff].** The

Court said that "the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck,* 512 U.S. at 490 n. 10, 114 S.Ct. 2364. **[The plaintiff] relies on a later decision of the Supreme Court, *Spencer v. Kemna*,** 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), in which a combination of five concurring and dissenting Justices agreed in *dicta* that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21, 118 S.Ct. 978 (Souter, J., concurring); *id.* at 25, 118 S.Ct. 978 n. 8 (Stevens, J., dissenting). **Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck*, however, we decline to depart from that rule.** *Accord Figueroa v. Rivera,* 147 F.3d 77, 81 n. 3 (1st Cir.1998); *see also Cabrera v. City of Huntington Park,* 159 F.3d 374, 380 n. 6 (9th Cir.1998); *but cf. Shamaeizadeh v. Cunigan,* 182 F.3d 391, 396 n. 3 (6th

Cir.1999); *Nonnette v. Small,* 316 F.3d 872, 876-77 (9th Cir.2002).

Entzi, 485 F.3d at 1002. (emphasis added) See also *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir. 2005) (recognizing the concurring and dissenting opinions in *Spencer* and stating "these opinions do not affect our conclusion that *Heck* applies to [the plaintiff's] claims.").

This Court need not issue a second opinion to confirm that *Heck v. Humphrey* means what it says. Because the District Court correctly followed *Heck*, this lawsuit is not the ideal vehicle for resolving the Circuit split, contrary to Petitioner's suggestion.

II. JUVENILE COURT DISPOSITIONS ARE SUFFICIENT TO TRIGGER APPLICATION OF THE *HECK* DOCTRINE.

Judge Takac's ruling and sentencing are the functional equivalents of convictions for purposes of the *Heck* doctrine. Because Judge Takac at the end of M.E.'s trial ruled M.E. had violated Florida Statutes Section 843.02, Judge Takac necessarily concluded beyond a reasonable doubt that (1) M.E. did in fact "resist, obstruct, or oppose" the Officers and (2) the Officers were engaged "in the lawful execution of [a] legal duty" when they arrested M.E. See Fla.Stat. § 843.02. Florida's Second District Court of Appeal affirmed that ruling. Petitioner now seeks to relitigate the exact issues decided at the juvenile court trial and subsequent state court

appeal. That is, she seeks to prove M.E. did not resist, obstruct or oppose the Officers, and that M.E.'s arrest was not the lawful execution of a legal duty. If Petitioner were to prevail on these issues, that result would imply the invalidity of both Judge Takac's ruling and also his sentencing of M.E. In addition, that result would imply the invalidity of the Second District Court of Appeal's affirmance of that ruling.

The *Heck* doctrine bars this exact result.[9] The doctrine in no way undermines the rehabilitative goal of Florida's juvenile justice system. It is a procedural mechanism that rightfully prevents M.E. from relitigating the issue of probable cause in her attempt to obtain a money judgment. This issue already has been litigated twice, once in the Juvenile Court and once in the Second District Court of Appeal. The *Heck* doctrine does not make M.E. a criminal for purposes of criminal law nor does it punish M.E.

III. THE PETITION ACCUSES THE OFFICERS OF RACIAL BIAS AS PART OF AN ATTEMPT TO PORTRAY THIS CASE AS ONE OF EXCEPTIONAL IMPORTANCE.

Petitioner makes several unfortunate and inflammatory allegations against Officers Livingston and Severance without any factual support. She accuses Officers Livingston and Severance of racial

[9] Most of the courts to have analyzed this issue have ruled that juvenile dispositions can trigger application of the *Heck* doctrine. (AA51)

bias: "Here, the Officers decided to stop M.E. and her friends based on race." (Pet., p. 27) In reality, Officer Livingston approached M.E. and her group because they fit dispatch's description of "a large group of black juvenile subjects" and were less than one block away from the location of the reported rock-throwing. (AA5, Doc S-34)

Petitioner accuses the Officers of demonstrating "callous behavior and subsequent indifference to federal constitutional rights." (Pet., p. 27) She further claims the Officers' "conduct here is a perfect example of why Congress created a federal remedy to protect citizens from actions by state officials that are corrupt or indifferent to federal constitutional rights." (Pet., p. 4) In reality, as explained earlier in this Response, the Officers performed a lawful *Terry* stop.

Petitioner uses careful wording to imply the Officers believed their actions were unconstitutional from the start, and that the Officers never contended otherwise in any of the proceedings in the lower courts. For example, Page 4 of the Petition states "Below, the respondents did not dispute on the merits that M.E. Henry-Robinson was unconstitutionally stopped and unconstitutionally arrested without probable cause." Page 27 of the Petition describes the arrest as one "for which the City and Officers have not even asserted they had probable cause in this litigation." In reality, the Officers consistently have explained the probable cause for their Constitutional stopping and arresting of M.E., including in their

arrest report, interrogatory responses and deposition testimony.

IV. THE OPINION UNDER REVIEW HAS MINIMAL PRECEDENTIAL VALUE.

The opinion under review is unpublished. As such, it has limited precedential value. Eleventh Circuit Rule 36-2, titled "Unpublished Opinions, states in pertinent part:

> An opinion shall be unpublished unless a majority of the panel decides to publish it. **Unpublished opinions are not considered binding precedent**, but they may be cited as persuasive authority.

(emphasis added) Eleventh Circuit Internal Operating Procedure 6, titled "Unpublished Opinions," states in pertinent part:

> A majority of the panel determine whether an opinion should be published. **Opinions that the panel believes to have no precedential value are not published.** Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent.

(emphasis added) Eleventh Circuit Internal Operating Procedure 7, titled "Citation to Unpublished Opinions by the Court," states:

> The court generally does not cite to its "unpublished" opinions because **they are not binding precedent**. The court may cite to them where they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case.

(emphasis added) See e.g. *Balkum v. Pier1 Imports (U.S.), Inc.*, No. 6:17-cv-1299-Orl-37-DCI, 2017 WL 3911560, at *4, n. 3 (M.D. Fla. Sep. 7, 2017) ("Nevertheless, unpublished Eleventh Circuit opinions are not binding on this Court.").

CONCLUSION

For the above reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

CANDY L. MESSERSMITH
Florida Bar No. 0186996
RUMBERGER, KIRK &
CALDWELL, P.A.
Lincoln Plaza, Suite 1400
300 South Orange Avenue (32801)
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: 407-872-7300
Telecopier: 407-841-2133
cmessersmith@rumberger.com