No. 06-1307

In the Supreme Court of the United States

ROBERT A. JONES, Assistant Deputy Superintendent
of Program Services, and DONALD SELSKY,
Director, Special Housing/Inmate Disciplinary Programs,

Petitioners,

v.

JOSE PERALTA

Respondent.

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

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and its progeny bar a suit under 42 U.S.C. § 1983 challenging a prison disciplinary proceeding that resulted in both a loss of good time credits and a change in the conditions of confinement if the prisoner expressly executes an enforceable waiver of any and all claims that would affect the fact or duration of his confinement.

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COUNTERSTATEMENT OF THE CASE

In this case, respondent was subject to a prison disciplinary proceeding that resulted in the imposition of sanctions that affected both the length and the conditions of his confinement. New York state courts dismissed respondent's due process challenge to the disciplinary proceeding, evidently for failure to pay a filing fee. Respondent then brought this suit in federal court under 42 U.S.C. § 1983, seeking damages for the change in the conditions of his confinement. Relying on *Heck* v. *Humphrey*, 512 U.S. 477 (1994), petitioners moved to dismiss the claim, arguing that success on the merits necessarily would lead to a reduction in respondent's sentence. The Second Circuit rejected petitioners' argument, holding that respondent may proceed with his suit if he is willing to waive all current and future challenges to the duration of his confinement. The Second Circuit remanded the case for a determination whether respondent would agree to such a waiver and, if so, to structure an appropriate waiver.

This case does not warrant review. There is no conflict in the circuits; in fact, the Second Circuit is the *only* court to have addressed the question whether the *Heck* doctrine precludes a Section 1983 suit by a prisoner who waives any challenge to the fact or length of confinement. Moreover, the Second Circuit's answer to that question was correct: this Court's decisions applying the *Heck* principle, including recent precedent that was faithfully applied by the court below, establish that *Heck*'s preclusive rule has no effect when the prisoner's suit will not necessarily affect the length of confinement. That certainly is the situation in a case where, as the Second Circuit contemplated here, the prisoner irrevocably and enforceably disclaims any challenge to his or her sentence. And compelling prudential concerns – including the interlocutory nature of the proceeding, uncertainty about whether a waiver will in fact be executed on remand (and, if it is, what it will say), and material ambiguities in the record – make this case an unsuitable vehicle with which to review

the question presented. The petition therefore should be denied.

1. Prison Disciplinary Proceedings. In 1998, respondent was accused of conspiring to injure another inmate at Fishkill Correctional Facility. Following a brief, one-hour proceeding, respondent was found guilty of violating prison rules. Pet. App. 18a. Respondent maintains that prior to and during his disciplinary hearing, he was prevented from obtaining or reviewing a range of key evidence – including logs that would have demonstrated that he was not at the location alleged during the event in question – and that he was denied an impartial hearing. Resp. App. 3a-5a, 18a-20a.[1] Respondent also states that he was prevented from confronting some of the important evidence against him. *Id*. at 5a.

At the conclusion of the hearing, respondent was sentenced to five years of lost good time credit and five years each of segregated housing, lost packages privileges, lost commissary privileges, and lost phone privileges. Pet. App. 18a. Respondent filed a timely administrative appeal. Without opinion or explanation, the appeal board reduced respondent's sentence to two years of lost good time credit and two years of segregated housing, lost packages privileges, lost commissary privileges, and lost phone privileges. *Id.* at 18a-19a.

2. State Court Proceedings. In October 1998, respondent filed an Article 78 petition and motion for an order to show cause in the New York Supreme Court for Dutchess County against prison officials at the Fishkill Correctional Facility. Actions taken by agencies and officers of state and local government in New York – including prison proceedings – are properly challenged in state court through Article 78 petitions. N.Y. C.P.L.R. §§ 7801 & 7803 (McKinney 1998). The motion for an order to show cause averred that

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[1] "Resp. App." refers to the appendix to this brief.

respondent had been denied due process of law. Specifically, respondent claimed that a prison counselor that was assigned to assist with his defense failed to provide him with requested evidence that was necessary for his defense; he also alleged that petitioner Jones, who served as the hearing officer, was unfair and partial in conducting the hearing.

The record does not clearly indicate how the case proceeded in state court after respondent filed his motion to show cause and an accompanying motion to proceed as a poor person.[2] According to the allegations in respondent's federal complaint, which must be accepted as true at this point in the proceeding, the state trial court granted respondent's motion to proceed as a poor person, but then declined to waive the filing fee, Resp. App. 6a, and dismissed the case for failure to perfect.[3] Soon thereafter, the state supreme court transferred the case to the Appellate Division, Second Department. *Ibid*. It appears that in June 1999, respondent filed another motion to proceed as a poor person during his appeal. *Id.* at 25a. Nevertheless, on February 15, 2000, the

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[2] So far as we have been able to determine, respondent's original Article 78 file has been lost by the New York court system. Hence many of the facts and dates relating to the state court suit are unverifiable. The Dutchess County clerk's office informs us that respondent's file was never returned to it following respondent's original transfer of the case to the Appellate Division. The clerk's office for the Appellate Division, Second Department, reports that it transferred the file back to Dutchess County. Neither office has been able to locate the file, although the Dutchess County clerk's office has provided a copy of the order dismissing respondent's case, along with several hundred others.

[3] Although respondent alleges that the fee was $250, Resp. App. 6a, New York law in effect at the time that respondent filed his Article 78 action indicates the fee was actually $165. See 1990 N.Y. Sess. Laws ch. 190, § 260 (McKinney). The district court, however, stated that the fee was $200. Pet. App. 21a.

Appellate Division again dismissed the case for failure to perfect. Respondent next appealed to the New York Court of Appeals; according to the Dutchess County clerk's office, that court dismissed the case for failure to perfect shortly thereafter. According to the complaint, respondent was never given an opportunity to proceed with his Article 78 motion without paying the filing fee.

3. Federal Court Proceedings. Having been foreclosed from pursuing his constitutional claims in state court, in November 2000 respondent filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York. Pet. 1. Pursuant to an order of the district court dated April 16, 2001, respondent filed an amended complaint on June 11, 2001. Pet. App. 24a.

In his amended complaint, respondent alleged with respect to his disciplinary hearing that (1) the prison counselor provided inadequate assistance by refusing to procure certain evidence for respondent's defense; (2) petitioner Jones, the hearing officer, had been biased, unfair, and partial throughout the disciplinary proceeding; and (3) on appeal, petitioner Selsky, the director of inmate disciplinary programs who issued the final determination, decided that respondent was innocent but, rather than expunging his record as required by law, merely reduced respondent's sentence. Resp. App. 6a.[4]

Petitioners moved to dismiss, arguing that the entire complaint was barred by *Heck*. Pet. App. 4a-5a. Respondent opposed the motion, maintaining that he should be allowed to proceed because he was not seeking damages for the loss of

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[4] Respondent further alleged that his Article 78 state court proceeding was deficient and brought a claim against certain judges and court clerks, arguing that they denied him access to the New York state court system. Resp. App. 6a-7a. The district court dismissed these claims on immunity grounds. Pet. App. 24a-27a. Respondent did not appeal this dismissal to the Second Circuit. *Id.* at 4a n.1.

good time, but only for the restrictive confinement. Pet. App. 5a, 20a. The district court dismissed the complaint. *Id*. at 18a-23a.

The court of appeals reversed. Pet. App. 1a-17a. Relying on its prior decision in *Jenkins* v. *Haubert*, 179 F.3d 19, 21 (2d Cir. 1999), the court first concluded that "*Heck* does not preclude a [Section] 1983 claim aimed at sanctions that did not affect the length of confinement." Pet. App. 10a. The court explained:

> We conclude * * * that the purpose of the Heck favorable termination requirement is to prevent prisoners from using [Section] 1983 to vitiate collaterally a judicial or administrative decision that affected the overall length of their confinement, and that punishments related to their term of imprisonment, or the procedures that led to them (if the procedural defect at issue was critical to the imposition of the punishment), must be attacked through a habeas petition. But the favorable termination requirement is not intended to compel a prisoner to demonstrate that a sanction he seeks to challenge, or the procedure that led to it, has been invalidated before he can proceed under [Section] 1983 when that sanction does not affect his term of confinement.

Pet. App. 11a.

Under this principle, the court concluded, a prisoner may challenge the constitutionality of proceedings that lead to "mixed sanctions" – those affecting both the length and conditions of confinement – only if the prisoner permanently waives *all* challenges to the length of confinement:

> We today hold that a prisoner subject to such mixed sanctions can proceed separately, under [Section] 1983, with a challenge to the sanctions affecting his conditions of confinement without satisfying the favorable termination rule, *but that he can only do so*

> *if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement.* In other words, the prisoner must abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current [Section] 1983 suit.

Pet. App. 12a-13a (emphasis in original). The court added that such a waiver would be enforceable as a matter of judicial estoppel if a prisoner who chose to forgo a challenge to the length of confinement subsequently sought to renege on his abandonment of the claim. *Id.* at 14a-15a.

The Second Circuit remanded the case to the district court to determine whether respondent would formally agree to waive all claims relating to the length of confinement. The court subsequently denied a petition for rehearing or rehearing en banc without dissent. Pet. App. 28a-30a.

REASONS FOR DENYING THE PETITION

This case presents neither a question warranting review nor – to the extent that the question presented is thought to merit consideration – an appropriate vehicle for addressing it. Notwithstanding petitioners' assertion of a conflict in the circuits, only the Second Circuit has addressed the question presented here: whether a prisoner may pursue a Section 1983 claim for damages arising from the conditions of his imprisonment if he irrevocably waives any claims with respect to the length of his confinement. Moreover, the decisions relied upon by petitioners to support the supposed conflict all predate this Court's most recent clarifications of the relevant legal rules, which make clear that the Second Circuit's decision is fully in line with this Court's precedent. See *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005); *Muhammad* v. *Close*, 540 U.S. 749 (2004). If there is any doubt on this point, the Court

should await further consideration of the issue by the lower courts before itself confronting the question presented.

Finally, the fact that litigation is ongoing in the instant case provides a prudential basis for denial of the petition for certiorari. In the first place, the case may become moot after remand; it is possible, for example, that respondent ultimately will choose not to disclaim a challenge to the length of his confinement, which would preclude pursuit of his Section 1983 claim at this time. Moreover, the case may be mooted by settlement or a disposition on other grounds. Additionally, because no waiver has yet been executed in this case, the Court would be unable to review the adequacy of the waiver's terms or the relevance of particular terms to application of the *Heck* doctrine. Denial of the petition is therefore plainly warranted.

I. THERE IS NO CIRCUIT CONFLICT ON THE QUESTION PRESENTED.

1. The Second Circuit is the first and, thus far, the only court to set out a procedure applying the principle that follows directly from this Court's precedent: a prisoner may pursue a Section 1983 claim for damages arising from the conditions of his imprisonment if he "forever [abandons] any and all claims he has with respect to the sanctions that affected the length of his imprisonment." Pet. App. 3a. In arguing to the contrary, petitioners cite only three decisions issued over the span of thirteen years since this Court decided *Heck*, each of which predates this Court's two most recent relevant cases, *Wilkinson* and *Muhammad*. See Pet. 8-10, citing *Post* v. *Gilmore*, 111 F.3d 556 (7th Cir. 1997) (per curiam); *Sheldon* v. *Hundley*, 83 F.3d 231 (8th Cir. 1996); *Gotcher* v. *Wood*, 66 F.3d 1097 (9th Cir. 1995), *vacated and remanded*, 520 U.S. 1238 (1997), *on remand*, 122 F.3d 39 (9th Cir. 1997). But none of these decisions addresses the question presented in this case: whether *Heck* bars a prisoner from using Section 1983 to seek damages with respect to the

conditions of his confinement when resolution of the Section 1983 action will have *no* effect on the duration of confinement because the prisoner has expressly and enforceably waived any claim relating to the length of his sentence.

In *Sheldon* v. *Hundley*, for instance, prison officials charged the defendant with verbal abuse. Sheldon filed a Section 1983 suit seeking money damages for both the loss of good time credits and a change in the conditions of his confinement. The Eighth Circuit dismissed his Section 1983 claim and required him to pursue a habeas remedy. The court explained that if "success on the merits of *a particular* [Section] 1983 claim would *necessarily* imply the invalidity of a disciplinary result lengthening the plaintiff's prison sentence, *Heck* requires favorable termination of the action in an authorized state tribunal or a federal habeas court, even if the claim is for damages rather than earlier release." 83 F.3d at 233 (emphasis added). At no point, however, did the *Sheldon* court consider, let alone decide, whether the plaintiff could have pursued a Section 1983 action for damages with respect *only* to the conditions of his confinement if he had executed an enforceable waiver of his right to pursue a reversal of the denial of his good time credits.

Petitioners also mistakenly claim that two decisions of the Seventh Circuit conflict with the decision below. In *Post* v. *Gilmore*, the Seventh Circuit considered a situation in which plaintiff Post lost good time credits and was subjected to solitary confinement following a prison disciplinary determination. Post filed both a habeas petition with respect to his lost good time credits and a Section 1983 complaint with respect to his solitary confinement. Relying on *Heck*, the court concluded that the two suits must be "adjudicated in sequence – and the sequence should begin with the [Section] 2254 claim." 111 F.3d at 557. The court never considered whether Post could have proceeded with his Section 1983 suit if he had agreed to seek only damages and to abandon his habeas proceeding, waiving "forever any and all claims he

has with respect to the sanctions that affected the length of his imprisonment." Pet. App. 3a. See also *Montgomery* v. *Anderson*, 262 F.3d 641 (7th Cir. 2001) (holding that a prisoner must pursue habeas relief before Section 1983 damages, without considering whether the plaintiff could have proceeded with his Section 1983 suit if he waived relief for his lost good time credits).

Finally, petitioners inaccurately claim that the Ninth Circuit's opinion in *Gotcher* v. *Wood* conflicts with the decision below. In the initial proceedings in that case, the plaintiff brought a Section 1983 claim seeking damages both for the loss of good time credits and for a change in the conditions of his confinement. The Ninth Circuit first held that the plaintiff could pursue his Section 1983 suit as filed. 66 F.3d 1097 (9th Cir. 1995). Washington State filed a petition for certiorari, and this Court summarily vacated and remanded the case for reconsideration in light of *Edwards* v. *Balisok*, 520 U.S. 641 (1997). *Wood* v. *Gotcher*, 520 U.S. 1238 (1997). On remand, the Ninth Circuit summarily concluded "that *Edwards* forecloses Gotcher's entire compensatory claim under 42 U.S.C. § 1983." 122 F.3d at 39. But like the Seventh and Eighth Circuits, the Ninth Circuit never considered or addressed the question presented in this case: whether the plaintiff could have pursued his Section 1983 claim for damages arising *only* from the conditions of his imprisonment if he had permanently abandoned *all* claims relating to the sanction that affected the length of confinement.

2. Because only the Second Circuit has addressed the question presented here, this Court should await further consideration of the issue by the lower courts before itself confronting the question. Members of the Court have often noted that it is "desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari). Allowing the lower courts "'to serve as labora-

tories in which the issue receives further study before it is addressed by this Court'" will increase "the likelihood that the issue will be resolved correctly." *Brown* v. *Texas*, 522 U.S. 940 (1997) (Stevens, J., respecting denial of certiorari, joined by Souter, Ginsberg, and Breyer, JJ.) (quoting *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari, joined by Blackmun and Powell, JJ.)). That is especially so in this case, because additional experience could cast considerable light on several significant, unresolved issues related to the Second Circuit's holding, including questions as to the scope and enforceability of the proposed waivers and the willingness of prisoners actually to exercise the waiver option.

The importance of percolation in the instant case is accentuated by the fact that the opinions of the Seventh, Eighth, and Ninth Circuits upon which petitioners rely all predate this Court's most recent rulings on the interplay between habeas review and Section 1983. Notably, the Second Circuit relied extensively on *Muhammad* v. *Close*: "As the *Muhammad* Court explained, '*Heck*'s requirement to resort to state litigation and federal habeas before [Section] 1983 is not * * * implicated by a prisoner's challenge that *threatens no consequence for his conviction or the duration of his sentence*. There is no need to preserve the habeas exhaustion rule and no impediment under *Heck* in such a case * * *.'" Pet. App. 11a-12a (emphasis added; alterations in original; quoting *Muhammad*, 540 U.S. at 751-52). Moreover, in *Wilkinson* v. *Dotson*, the Court further explained that when "victory for the prisoners [does not] *necessarily* [mean] immediate release or a shorter period of incarceration," *Heck* is no bar to a Section 1983 suit. *Wilkinson*, 544 U.S. at 80 (emphasis added).

Because all three allegedly conflicting decisions predate this Court's holdings in *Wilkinson* and *Muhammad*, they could not have taken into account either the full range of this Court's relevant precedent or the Second Circuit's own anal-

ysis relying on that precedent. And it surely would be useful for the Court to have the views of other courts of appeals on the question whether – as plainly seems to be the case – this Court's more recent holdings support the approach taken below. Further percolation of the question presented, in light of *Wilkinson* and *Muhammad*, is therefore appropriate.

II. THE DECISION BELOW PROPERLY APPLIES THIS COURT'S PRECEDENT.

Not only have no other courts squarely addressed the question presented, but the Second Circuit's approach to "mixed sanctions" cases fully accords with this Court's *Heck* jurisprudence. When a prison disciplinary proceeding affects both length and conditions of confinement, the decision below allows Section 1983 suits to proceed only when the prisoner irrevocably waives his or her right to pursue any and all challenges to the sanctions affecting the length of confinement. Pet. App. 12a-13a. Under the Second Circuit's rule, a prisoner who agrees to such a waiver is not only precluded from challenging the length of confinement through Section 1983, but is also barred from pursuing a subsequent similar claim through state or federal habeas. Because the Second Circuit prohibits Section 1983 suits from affecting length of confinement, its approach is consistent with *Heck* and its progeny. Contrary to petitioners' claim, moreover, such waivers of claims are frequently employed in litigation generally and prison litigation specifically, and present no danger to prison safety or the administration of justice.

1. It is settled that if a plaintiff's success in a Section 1983 suit "would necessarily imply the invalidity of his conviction or sentence," the plaintiff first "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. At the same time, the Court

has made clear that, if a Section 1983 suit will not affect the length of a prisoner's confinement, the action may proceed. *Ibid*. And as the Court has clarified recently, if success in a Section 1983 suit would not "necessarily spell speedier release," the claim does not "lie[] at 'the core of habeas corpus'" and is not barred by *Heck*. *Wilkinson*, 544 U.S. at 82 (quoting *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973)). "*Heck*'s requirement to resort to state litigation and federal habeas before [Section] 1983 is not * * * implicated by a prisoner's challenge that *threatens no consequence* for his conviction or duration of his sentence." *Muhammad*, 540 U.S. at 751 (emphasis added).

This conclusion flows from this Court's decision in *Edwards* v. *Balisok*: "[T]he Court [in *Balisok*] held the prisoner's suit *Heck*-barred not because it sought nullification of the disciplinary procedures but rather because nullification of the disciplinary procedures would lead *necessarily* to restoration of good-time credits and hence the shortening of the prisoner's sentence." *Wilkinson*, 544 U.S. at 84 (emphasis added). Under the Second Circuit's waiver rule, a plaintiff proceeding with a Section 1983 claim in a "mixed sanctions" case would, by force of his waiver, necessarily *not* threaten any consequence to those sanctions affecting the fact or duration of his confinement.

Petitioners' selective reading of *Wilkinson* distorts the meaning of this Court's line of precedent following *Heck*. Ignoring the core holding of *Wilkinson* that "[Section] 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner," 544 U.S. at 81 (emphasis in original), petitioners contend that the Court should be concerned with what a plaintiff's claims "would, if accepted, demonstrate." Pet. 12. But *Wilkinson* clearly expresses a concern, not for what success on a Section 1983 claim might "demonstrate" in the abstract, but for whether success would grant relief "where a state prisoner requests present or future re-

lease." 544 U.S. at 81. In *Wilkinson*, the challenge to state parole procedures was cognizable under Section 1983 because, given the discretionary nature of parole decisions, success in the suit would "not mean immediate release from confinement or a shorter stay in prison * * *." *Id*. at 82. That is, because a challenge to the parole system would not "necessarily spell speedier release," the claim did not "lie[] at 'the core of habeas corpus.'" *Ibid*. (quoting *Preiser*, 411 U.S. at 489).

Likewise, in *Muhammad* v. *Close*, the Court allowed a prisoner to seek damages for special detention that was imposed prior to his disciplinary proceeding. Because the prisoner had been acquitted of the charge that led to his special detention, the Court reasoned that the Section 1983 suit could proceed because it "threaten[ed] no consequence for his conviction or duration of his sentence." 540 U.S. at 751.[5] Once again, the Court's concern in *Muhammad* was for the practical consequences of success on the merits in the Section 1983 action.

Insofar as it has no consequence for the fact or duration of respondent's confinement, the Second Circuit's holding in the instant case thus conforms with this Court's precedent. To challenge a prison proceeding that results in a mixed outcome affecting both length and conditions of confinement, "the prisoner must abandon, not just for now, but also in any future proceedings, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current [Section] 1983 suit." Pet. App. 13a. Once the prisoner has permanently waived any challenge to the length of his or her confinement, success on the claims raised in the Section 1983 suit would have no

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[5] In *Muhammad*, the Court noted specifically that the prisoner had amended his complaint to omit claims that the state argued implicated habeas-type relief, 540 U.S. at 753, which is consistent with the Second Circuit's waiver approach here.

bearing on the fact or length of his or her confinement. Like the plaintiff in *Wilkinson*, respondent does not "seek[] an injunction ordering his immediate or speedier release into the community." *Wilkinson*, 544 U.S. at 82.

This Court's holdings from *Heck* through *Wilkinson* thus focus on the practical effects of a Section 1983 suit. Where success in the suit would necessarily alter the length of confinement, a suit is barred by *Heck*. When a prisoner waives any and all challenges to an extension of the length of confinement resulting from a prison disciplinary proceeding, *Heck* is not implicated. The Second Circuit therefore properly applied this Court's precedent.

2. There is nothing novel in the Second Circuit's analysis: it follows from the practice, long accepted by courts, of permitting and enforcing tactical litigation decisions that result in the irrevocable waiver of certain claims. Rather than being a departure from established practice, the Second Circuit's holding thus relies on fundamental principles of waiver and estoppel that are essential to many aspects of federal litigation.

For example, federal habeas corpus requires exhaustion of claims in state court. 28 U.S.C. § 2254. When a prisoner files a petition for a writ of habeas corpus that contains both exhausted and unexhausted claims, he must either seek a stay of his petition while exhausting all claims – an option that is often unavailable (see *Rhines* v. *Weber*, 544 U.S. 269 (2005)) – or proceed immediately with the exhausted claims by forever waiving relief as to his unexhausted claims. *Rose* v. *Lundy*, 455 U.S. 509, 520 (1982). See also *Rhines*, 544 U.S. at 278 (same). See, *e.g.*, *Andrew* v. *Vare*, 04-cv-00695, 2007 WL 766332, at *3 (D. Nev. Mar. 8, 2007) (stating that the petitioner could elect to "submit a sworn declaration voluntarily abandoning the unexhausted claims in his federal habeas petition, and proceed only on the exhausted claims"); *Fernandez* v. *Cattell*, 06-cv-281, 2006 WL 2690076, at *3

(D.N.H. Sept. 16, 2006) (stating that the plaintiff "has the option of foregoing his unexhausted claims and requesting that the Court proceed promptly with consideration of his sole exhausted claim," but only if he "waive[s] ever having his other issues considered by this Court").

This habeas exhaust-or-waive rule operates much like the Second Circuit's Section 1983 waiver rule: to proceed with a Section 1983 suit seeking damages for a disciplinary proceeding that resulted in mixed sanctions, the prisoner must forever waive all claims with respect to the sanctions relating to length of confinement. Otherwise, his entire claim must be dismissed.

Waiver of claims and causes of action are commonplace in other areas of the law as well. In the context of criminal plea agreements, for instance, individuals routinely waive the right to pursue certain claims with respect to appeals. Courts just as routinely enforce such plea agreements and appeal waivers. See, *e.g.*, *United States* v. *Novosel*, 481 F.3d 1288 (10th Cir. 2007) (enforcing an appeal waiver in a plea agreement by dismissing the appeal). Likewise, parties who reach settlement agreements in civil suits often also include waivers as to further litigation. Courts routinely uphold such waivers. See, *e.g.*, *Johnson* v. *Flowers*, 2007 WL 959421 (6th Cir. Apr. 2, 2007) (applying judicial estoppel to prevent a plaintiff from bringing a claim she agreed to waive in a prior settlement agreement). Indeed, some waivers are implicit in the pleadings; for example, basic principles of claim preclusion hold that "a suit for injunctive relief precludes a second suit on the same cause of action for damages." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure 2d § 4410 (2007). The Second Circuit's holding, which would condition a prisoner's right to proceed with a Section 1983 suit challenging mixed sanctions on a waiver of habeas-related claims, is thus well-grounded in long-established law and litigation practice.

3. Petitioner's argument, Pet. 15-16, that state law would preclude a prisoner from waiving entitlement to early release is plainly mistaken. Petitioners assert that "[u]nder state law, [the New York State Department of Correctional Services] must expunge a disciplinary determination that has been judicially or administratively annulled, and neither it nor any other state agency may rely on it for any purpose." Pet. 15. But the cases cited by petitioner in support of this assertion in fact demonstrate the opposite.

In *Garrett* v. *Coughlin*, 516 N.Y.S.2d 796 (1987), for instance, the court stated that expungment is just one "available remedy" or form of "appropriate relief" following the annulment of an adverse judgment. *Id.* at 797. It is neither an indispensable nor *sua sponte* remedy. A court may, in its discretion, opt not to order expungment. *Ibid.* Following success on the merits, a prisoner may seek a mandamus order requiring expungment in an Article 78 proceeding, but the court will offer relief only when the refusal to expunge was "arbitrary and capricious." *Ibid.* And if a plaintiff were to waive expungment as a condition of proceeding with his Section 1983 suit, a court's refusal to order expungment surely would be neither arbitrary nor capricious.

For this same reason, *Matter of Blanche* v. *Travis*, 760 N.Y.S.2d 919 (App. Div. 2003), and *Matter of Davidson* v. *Coughlin*, 546 N.Y.S.2d 247 (App. Div. 1989), are equally unavailing for petitioners. Because a prisoner invoking the Second Circuit's procedure will have waived his or her right to challenge the fact or length of confinement, any Article 78, habeas, or other proceeding seeking shortened confinement for the same grounds as adjudicated in the Section 1983 suit would be strictly barred.

4. As the Second Circuit properly observed, its ruling is also essential to prohibit prison authorities from insulating disciplinary proceedings from Section 1983 review. Pet. App. 16a n.8. If petitioners were correct and a prisoner could

never challenge "mixed sanctions" through Section 1983 suits – even when the prisoner disavows any relief affecting the length of confinement – prison administrators would have a strong incentive *always* to impose "mixed sanctions" when adjudicating punishment through prison disciplinary proceedings. That would allow prison officials to postpone, and often effectively to preclude, the use of Section 1983 suits to challenge prison disciplinary proceedings. In many cases, that would foreclose access to an important vehicle for the enforcement of federal rights. See *Muhammad*, 540 U.S. 752 n.1 ("The assumption is that the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction, not special disciplinary confinement for infraction of prison rules. This Court has never followed the speculation in *Preiser* * * * that such a prisoner subject to 'additional and unconstitutional restraints' might have a habeas claim independent of [Section] 1983."). See also *Sandin* v. *Conner*, 515 U.S. 472, 476 (1995) (Section 1983 action brought to challenge disciplinary hearing resulting in punitive confinement).

Moreover, as the Court stated earlier this Term, the fact that district courts must deal with large numbers of prisoner cases does not permit the imposition of special procedural rules that are not supported by law. *Jones* v. *Bock*, 127 S. Ct. 910, 926 (2007). Congress has dictated a method for dealing with the "outsized share of [prisoner] filings" in federal district courts – the Prison Litigation Reform Act (PLRA). *Id.* at 914. The PLRA contains both an exhaustion provision designed to resolve complaints before they become lawsuits, 42 U.S.C. § 1997e(a), and screening provisions intended to speed dismissal of frivolous claims, 28 U.S.C. §§ 1915A(b)(1) & 1915(e)(2)(B); 42 U.S.C. § 1997 e(c)(1).

Further, as a practical matter, the Second Circuit rule will not produce the "massive increase in filings [that will] inundate the federal courts" foreseen by petitioners. Pet. 18. First, the number of disciplinary cases involving sanctions

severe enough to trigger due process concerns will be small (see *Sandin*, 515 U.S. at 484), and the category of disciplinary cases involving mixed sanctions will be limited – unless, as discussed above, prison officials begin to impose confinement sanctions in all cases for the purpose of avoiding federal review, a result the Court should not countenance. Second, the number of cases in which a prisoner will execute a waiver of the sort authorized by the Second Circuit will be limited for the simple reason that many prisoners value their freedom more than a damages award. Such prisoners are unlikely to pursue a Section 1983 suit when it requires a permanent waiver of claims that could reduce the length of their confinement. Third, following the PLRA, prisoners who file Section 1983 suits must pay filing fees, 28 U.S.C. § 1915, and have limited ability to recover attorney's fees, 42 U.S.C. § 1997e(d); these requirements discourage insubstantial suits.

Finally, petitioners' unsupported assertion that the Second Circuit's rule "would have a serious negative effect on prison security," Pet. 15, is without merit. A prisoner who expressly waives his claims as to fact and length of confinement so as to pursue a conditions-of-confinement claim will have *voluntarily* surrendered the possibility of restored good time credits. There is no reason to assume that the prison population will resent implementation of an agreement freely and knowingly entered into by a prisoner so as to gain a tactical benefit in litigation. In any event, these individuals will create no more a threat to security than any other prisoner who believes himself or herself wrongfully accused, convicted, or detained.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Finally, several features of this case make it a poor vehicle for addressing whether a prisoner may pursue a Section 1983 suit when he or she irrevocably waives relief with re-

spect to sanctions affecting the duration of confinement. To the extent that the issue presented by the petition holds any interest, the Court should defer addressing it until presented with a suitable case.

1. First, litigation is ongoing in this case and there are several crucial points that remain to be resolved on remand from the Second Circuit's decision. Indeed, because the Second Circuit has remanded the case to determine whether respondent is willing to waive claims relating to the length of his sentence, there exists a real chance that this case will become moot. For instance, following remand to the district court, respondent and petitioners may agree to settle the case with respect to the conditions-of-confinement sanctions. Alternately, depending upon the precise scope and terms of the required waiver, respondent may choose not to waive and instead elect to renew an Article 78 petition in New York state court or pursue some other means of seeking relief relating to the length of his confinement. Further, the question presented may become moot if, following remand, the case is dismissed on alternative grounds such as qualified immunity or an adverse ruling on the merits.

2. Additionally, the Court should not address the question presented in the abstract. Rather, it should have before it an executed waiver. The precise content and form of any given waiver may be relevant to the Court's decision because the Court ultimately may affirm the Second Circuit's authorization of a waiver but wish to ensure that the waiver is consistent with the Court's recent decisions regarding the favorable-termination rule. Without the benefit of a specific waiver in the record, this case presents an unsuitable vehicle for reviewing the Second Circuit's rule.

3. Further, the factual record of respondent's state-court proceeding is both unclear and unusual. The Second Circuit, reviewing the record, indicated that respondent exhausted his appeals within the prison and then filed an Article 78 petition

in New York Supreme Court challenging the prison proceeding. Pet. App. 4a. Although the state-court judge granted leave to file as a poor person, respondent alleges that the court declined to waive the filing fee. *Ibid*. When respondent was unable to pay the fee, his case was dismissed and his appeal to the New York Court of Appeals denied. *Ibid*. The State describes this outcome, if it occurred, as an "anomaly," Pet. 3 n.3, because New York law allows a prisoner suit to proceed even if the plaintiff is unable to pay the filing fees. N.Y. C.P.L.R. § 1101(f)(1), (2). Here, it is unclear why the appellate court dismissed the action after granting respondent leave to proceed as a poor person. As a result, it is unclear whether respondent may re-file his Article 78 petition.

This confusion in the factual record – exacerbated by the fact that the case file evidently was lost while being transferred from the appellate division to the state trial court – may implicate an important legal question that has not been resolved by this Court: whether the unavailability of habeas relief allows a prisoner to proceed with a Section 1983 claim that would otherwise be barred by *Heck*.[6] As recognized in *Monroe* v. *Pape*, 365 U.S. 167, 173 (1961), one of the principal purposes served by Section 1983 is providing "a federal remedy where the state remedy, though adequate in theory, is not available in practice." See also *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990) (reiterating the same). Here, through what petitioners call an "anomaly," no remedy was practi-

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[6] Although the Second Circuit indicated that respondent did not challenge the district court's conclusion that "'plaintiff's inability to pursue a habeas remedy is due to his own failure to properly pursue his state challenge to the disciplinary proceeding'" (Pet. App. 6a n.4) – that is, his inability "to pay the required filing fee" (*id*. at 22a) – this complex question cannot be so easily dismissed on the basis of pro se briefing and an incomplete factual record.

cally available to respondent in state court.[7] In this setting, it is not clear whether a federal habeas remedy is available to respondent.

This Court, however, has never resolved whether a prisoner who may not be eligible for federal habeas may bring a claim through Section 1983 that would otherwise be barred by *Heck*. Compare *Spencer* v. *Kemna*, 523 U.S. 1, 21 (1998) (Ginsburg, J., concurring) ("Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within [Section] 1983's 'broad reach.'") with *Wilkinson*, 544 U.S. at 87-88 (Scalia, J., concurring) ("[A] prisoner who wishes to challenge the length of his confinement, but who cannot obtain federal habeas relief because of the statute of limitations or the restrictions on successive petitions, §§ 2244(a), (b), (d), cannot use the unavailability of federal habeas relief in his individual case as grounds for proceeding under [Section] 1983."). See also *Muhammad* v. *Close*, 540 U.S. at 752 n.2 (case presented "no occasion" to address the question whether "unavailability of habeas for other reasons may also dispense with the *Heck* requirement."). That the present case may implicate this disputed

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[7] Under state law, the state court should have dismissed respondent's Article 78 proceeding without prejudice for failure to perfect. See, *e.g.*, *Arbisser* v. *Gelbelman*, 660 N.Y.S.2d 133 (App. Div. 1997) (explaining that when a plaintiff fails to file the required index fee, the action will be "deemed dismissed without prejudice" under New York law). Given the ambiguity of the disposition in this case, it is unclear whether respondent could proceed under 28 U.S.C. § 2254, which states that a habeas petition may not be granted "if [the prisoner] has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Although respondent technically had the "right" to refile his Article 78 suit, he did not have the means to pay the now-$190 index fee, which the court had previously declined to waive.

question – on a record leaving considerable doubt about the treatment of respondent's state habeas claim and the current availability of state habeas relief (in the event such relief is not waived by respondent) – will complicate this Court's review of the question presented and provides another basis for denying the petition.

* * * *

This case presents an issue that has been addressed by only one court of appeals, on a record that is incomplete and in some respects ambiguous; this Court should deny the petition so that other lower courts have an opportunity to consider the Second Circuit's waiver rule. Additionally, the approach taken by the Second Circuit is fully consistent with this Court's precedents. Finally, to the extent that the issue presented is of interest, the Court should defer review until presented with a case that presents the issue cleanly.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Counsel for Respondent

MAY 2007

APPENDIX A[1]

In the United States District Court
For the Southern District of New York

JOSE PERALTA, plaintiff, pro se

v.

SANDRA VASQUEZ, Correction Counselor; ROBERT A. JONES, Assistant Deputy Superintendent of Program Services; DONALD SELSKY, Director, Special Housing/Inmate Disciplinary Programs; ANITA R. FLORIO, Judge of the Appellate Division, Second Department; GUY JAMES MANEANO, Judge of the Appellate Division, Second Department; MARTIN H. BROWNSTEIN, Former Court Clerk; JAMES EDWARD PELZER, Court Clerk of Appellate Division, Second Department;

Defendants.

AMENDED COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

01-Civ. – 3171

Chief Judge Michael B. Mukasey

I. Previous Lawsuits:

I've filed no previous lawsuits in State or Federal Court even remotely related to this action or to my imprisonment.

II. Place of Present Confinement:

There is a grievance procedure in this present prison, and in the previous prisons where the violations occurred. However, the grievance process cannot be utilized for Disciplinary Proceedings. However, using the Disciplinary process, I did appeal the Tier III Hearing of Fishkill Correctional Facility, to Donald Selsky in Albany, New York's Department of Correctional Services ("DOCS") Headquarters, then I ap-

[1] Errors in the handwritten documents reproduced in these appendices appear in the originals and are not corrected here.

pealed to State Supreme Court via Article 78 proceeding, which was then ordered to the transferred from Poughkeepsie, N.Y. Supreme Court, to the Appellate Division, Second Judicial Department. The Appellate Division dismissed and I appealed to the State's highest Court, the New York State Court of Appeals, who Denied my Leave application.

III. Parties:

The plaintiff's name is JOSÉ PERALTA, #95-A-2340, who's address is Clinton Correctional Facility, P.O. Box 2001, Dannemora, New York 12929.

The Defendant Sandra B. Vasquez, is employed as a Correctional Counselor at Fishkill Correctional Facility, Prospect Street, P.O. Box 307, Beacon, New York 12508.

The Defendant Robert A. Jones, is employed as Assistant Deputy Superintendent of Program Services at Fishkill Correctional Facility, Prospect Street, P.O. Box 307, Beacon, New York 12508.

The Defendant Donald Selsky is employed as Director, Special Housing/Inmate Disciplinary Programs at the NYS Department of Correctional Services, State Office Building Campus, 1220 Washington Avenue, Albany, New York 12226.

The Defendant Anita R. Florio is employed as a Judge of the Appellate Division, Second Judicial Department, at 45 Monroe Place, Brooklyn, N.Y. 11201.

The Defendant GUY JAMES MANGANO is employed as a Judge of the Appellate Division, Second Judicial Department, at 45 Monroe Place, Bklyn, N.Y., 11201.

The Defendant Martin H. Brownstein is employed formerly as the Clerk of the Court at the Appellate Division, Second Department, 45 Monroe Place, Bklyn, N.Y. 11201.

The Defendant James Edward Pelzer is employed as the present Clerk of the Court, at the Appellate Division, Second Department, 45 Monroe Place, Bklyn, N.Y. 11201.

IV. Statement of Claim:

CLAIM AGAINST SANDRA B. VASQUEZ

1) On May 16, 1998 while at Fishkill Correctional Facility, the plaintiff was accused of violating the Inmate Rule Book charges: 104.11 'Violent Conduct'; 104.12 'Demonstration; 100.10 'Assault on Inmate'; and, 105.12 'Unauthorized Organizations/Activity.' The Report being written by a one Sergeant M. Capra, and dated May 29, 1998, alleged under a "Conspiracy" theory, that plaintiff was responsible for inmate Valcarcel being cut several times with a razor-type weapon and having to receive about 60 stitches.

2) Sergeant Capra's report, which is premised upon his "opinion" of plaintiff's involvement, in particular, alleges that at approximately 2:00 p.m., inmate Valcarcel was arguing in the prison yard with inmate Torres. Prison staff noticed the altercation, thus causing the two prisoners to cease arguing. However, at 2:55 p.m. the altercation picked back up and continued later, in the general population cell block "L-Unit", in the bathroom area, where inmate Torres supposedly cut inmate Valcarcel several times.

3) The report, being based upon the writer's opinion, is also based upon witness, as well as confidential-witness hearsay and double hearsay, nothing directly linking plaintiff to this incident as being either the assaulter or the assaulted.

4) Being a non-English speaking latino from the Dominican Republic, the plaintiff was provided with a copy of the "Inmate Misbehavior Report," both in English and one in Spanish, and was also assigned Sandra B. Vasquez to act as his Spanish Speaking Tier Assistant.

5) Outside of obtaining a statement from plaintiff saying plaintiff knows nothing about the assaulted inmate, and that plaintiff lives in "I-Unit", not "L-Unit" where the assault happened, Defendant Vasquez's employee assistance to plaintiff was wholly inadequate to prepare plaintiff for a Superintendent's proceeding on disciplinary charges as pro-

vided/required by rule, where Vasquez did not interview or obtain statements from witnesses requested by plaintiff, outside of notifying Sgt. Capra that plaintiff would be calling him to testify as to the Tier III ticket Sgt. Capra wrote against plaintiff; Defendant Vasquez made no effort to investigate plaintiff's claim of innocence such as interviewing and finding the identities of prison staff who allegedly witnessed the altercation in the prison yard between inmate Valcarcel and Torres, or the prison-staff that conducted the investigation which led to the charges against plaintiff, or to ascertain the identities and locations of the confidential informants who provided the prison-staff with all the hearsay and double-hearsay statements that resulted in the charges against plaintiff; nor did the Assistant Vasquez try to ascertain where inmate Valcarcel was being transferred to, for a possible interview and a written statement, since plaintiff requested the assaulted inmate Valcarcel as an alibi witness, to support plaintiff's claim that he was not even in the yard at the time of the argument incident that led to the cutting; nor did Vasquez obtain any internal prison movement records/documentation that could've easily proven plaintiff's whereabouts at the time of the incidents.

6) Further addressing Defendant Vasquez's inadequate assistance, which assistant <u>initiated</u> on June 2, 1998 at 9:05 a.m., and <u>concluded</u> at June 7, 1998 at 9:05 a.m., Vasquez did not determine whether her non-English speaking client-subject ever received an English and Spanish version of the 'revised February 1998' Inmate Rule Book, that began allowing prisoners to be charged and disciplined under 'Conspiracy theory' counts, when in fact, plaintiff never received the newly revised Inmate Rule Book.

7) Vasquez did not even provide her client-subject with a copy of DOCS, Directive #4932 which governs and explains the rights of a prisoner at a Tier Hearing.

8) As an Employee Assistant to prisoners facing serious discipline charges, Vasquez can be credited with having ba-

sic knowledge of her duties and obligations to plaintiff in preparation for a Tier III hearing as spelled out in Directive #4932, Section 251-4.1/& 251-4.2, therefore Vasquez acted with bad faith in the face of clearly established Directives. Plaintiff had no Defense.

CLAIM AGAINST ROBERT A. JONES

9) After Defendant Vasquez's employee assistance to plaintiff, Defendant Jones conducted a Superintendent's hearing, as the "Hearing Officer", on June 12, 1998 at 12:56 p.m., after which Jones found plaintiff Guilty of all charges, notwithstanding plaintiff's Not Guilty plea, and giving plaintiff a penalty of five years (60 months) of SHU confinement (where plaintiff was immediately taken to after the inmate-on-inmate assault on May 16, 1998); five years loss of Packages; five years loss of Commissary; five years loss of Phone privileges; and five years loss of Good Time, of which good-time loss has triggered plaintiff's liberty interest, since plaintiff has been committed to New York State, DOCS custody, to serve 8½ to 25 years in prison.

10) Hearing Officer Jones was bias, unfair, and partial throughout the Hearing, basing the finding of plaintiff's guilt on a third party's (hearsay) assessment of informant's credibility, as the only evidence of reliability of informant'(s) in camera, or taped testimony, without the hearing officer making his own assessment(s) of confidential witnesses and informants; Jones acknowledged the fact that plaintiff received inadequate assistance, but still continued the hearing without amending the issue by adjourning hearing so that plaintiff can receive proper assistance; by not inquiring into the impropriety of inmate Valcarcel's transfer out of the facility before he could be questioned by all parties to the hearing; by relying on a correction officer's allegation that inmate Valcarcel refused to testify for plaintiff, without quoting verbatim on the audio-hearing record, the reason inmate Valcarcel offered.

CLAIM AGAINST DONALD SELSKY

11) Clearly reiterating the Tier Hearing arguments, plaintiff argued on appeal to Donald Selsky, that the hearing officer was in non-compliance with Directive #4932 which also governs the conduct and method of determination a hearing officer must follow in order to hold a fair and impartial hearing, as well as the arguments challenging Defendant Vasquez's assistance, as both are alleged herein in above-paragraph/statements 1 through 10, after which, Selsky notified plaintiff to send him all material supporting plaintiff's Tier III appeal – Selsky's letter being dated July 8, 1998.

12) As opposed to granting plaintiff a full reversal, expungement of charges, and restoration of good-time, Selsky "MODIFIED" the penalty, from 60 months loss of good-time, privileges, and SHU confinement, to 24 months loss of good-time, privileges, and SHU confinement, which plaintiff served in full satisfaction.

13) Plaintiff then sought Judicial intervention for a Reversal, by way of Article 78/Order to Show Cause.

CLAIM AGAINST JUDGES ANITA R. FLORIO & GUY JAMES MANGANO

14) After the Poughkeepsie County Supreme Court transferred plaintiff's Article 78 proceeding to the Appellate Division, Second Department (because plaintiff raised a meritorious Substantial Evidence question), by Order dated June 10, 1999, Presiding Judge Anita R. Florio issued an August 31, 1999 "Decision & Order On Motion" which, in contradiction of it's own terms, granted plaintiff leave to appeal as a poor person, but at the same time failed to waive the State Court's $250.00 filing fee, requiring plaintiff, a poor, pro se prisoner, to pay the filing fee in full first before being given any further access to the Court – on plaintiff's appeal as of right to the Appellate Division, Second Department.

15) Plaintiff simply could not afford to pay this initial filing fee in full, which, as a result, caused presiding Judge Guy

James Mangano to review the plaintiff's State & appellate court file and issuing an Decision & Order, on the Court's own motion, dated June 7, 2000, Dismissing plaintiff's entire case and cause for failure to timely perfect the appeal, knowing plaintiff was granted poor person status in the lower article 78 Court, and knowing plaintiff could not pay an advance $250.00 filing fee in full, denying plaintiff access to that Court.

16) Plaintiff's appeal to the NYS Court of Appeals, (from the Dismissal Order and Poor Person Order) was denied on February 8, 2001, by Chief Judge Judith S. Kaye.

CLAIM AGAINST DEFENDANTS MARTIN H. BROWNSTEIN & JAMES EDWARD PELZER

17) By letter dated October 18, 1999, Defendant Brownstein wrote plaintiff, refusing to File any papers, unless plaintiff, who is a non-english speaking, non-english writing prisoner, submits a professional nine copies of an Appeal Brief in strict conformance to the Court Rules, holding plaintiff to the standards of a competent licensed attorney, and then telling plaintiff that he must pay a $250.00 filing fee.

18) Brownstein, the Court Clerk of the Appellate Division Second Department during that time, again wrote plaintiff/appellant a letter dated October 26, 1999 saying that the August 31, 1999 order by Presiding Judge Anita R. Florio, (in Matter of Peralto v. Jones, Docket No. 99-05445) did not waive the $250.00 filing fee, but yet its grants plaintiff poor person status.

19) Present Court Clerk James Edward Pelzer, ENTERED the June 7, 2000 order, effectively dismissing plaintiff's one direct appeal, as of right, from the Appellate Division, Second Department's Calendar, hermetically sealing the Court up, and denying plaintiff access to it, for failing to pay filing fee and then perfecting the appeal.

V. CLAIMANT'S FIRST CAUSE OF ACTION

20) Whether viewed in concert, or separately, the actions/inactions of the named DOCS Defendants in denying plaintiff adequate assistance, witnesses, and a fair and impartial hearing officer, and a fair and impartial appeal officer, deprived plaintiff of substantive and procedural due process of law and protection against cruel and unusual punishment, in the 14th Amendment & 8th Amendment of the United States Constitution.

CLAIMANT'S SECOND CAUSE OF ACTION

21) Whether viewed in concert, or separately, the action/inactions of the named Appellate Division, 2nd Dept., Judges/Clerks in requiring plaintiff to pay a full filing fee in advance, and then dismissing plaintiff's appeal for plaintiff's inability to pay, and appeal time expiration, in the face of plaintiff's poor person grant, deprived plaintiff of his First Amendment, United States Constitutional Right to Access to the Courts and to Petition the governmental for a redress of grievances, as well as denying plaintiff substantive & procedural due process under Fourteenth Amendment, U.S. Constitution.

VI. RELIEF

Plaintiff, sues Defendants in their individual capacity and/or in their official capacity;

Plaintiff, seeks compensatory damages in the amount of Eight Million Dollars and punitive Damages in the amount of Twelve Million Dollars totaling: Twenty-Million Dollars ($20,000,000.00) plus costs and disbursements of this action, plus interest;

Plaintiff, also seeks injunctive relief and declaratory relief Ordering Defendants to refrain from such Federal violations in the future; the total damage award sought, being inclusive of emotional distress and mental anguish suffered.

PLAINTIFF SWEARS UNDER THE PAINS & PENALTY OF PERJURY THAT THE FOREGOING IS TRUE & CORRECT.

Executed On: May 31, 2001.

/s/ José Peralta
JOSÉ PERALTA
95-A-2340
CCF/P.O. Box 2001
Dannemora, NY 12929
Plaintiff, pro se.
cc: Filed.

PROOF OF SERVICE

STATE OF NEW YORK)
COUNTY OF CLINTON) ss.:

JOSÉ PERALTA, being duly sworn, deposes and says that on this First day of June, 2001, I have mailed the original 'Amended Complaint' (in PERALTA vs. VASQUEZ, 01-Civ-3171 (MBM)), along with the attached court copy of Honorable Chief Judge Michael B. Mukasey's April 16, 2001 'Order', to:

Pro se Clerk's Office
United States District Court
Southern District of New York
U.S. Courthouse – 500 Pearl Street
New York, NY 10007

by enclosing same inside of a secure envelope, wrapped and addressed as above, with this Proof of Service enclosed, and depositing same inside of a mail-drop-box regularly maintained for outgoing U.S. Mail, by the prison officials here at Clinton Correctional Facility.

Deponent swears under the penalty of perjury that the foregoing is true and correct.

Executed on: May 31, 2001.

/s/ José Peralta
JOSÉ PERALTA
95-A-2340
CCF/P.O. Box 2001
Dannemora, NY 12929
Plaintiff, pro se.
cc: Filed.

APPENDIX B

APPELLATE DIVISION SUPREME
COURT OF THE STATE OF NEW YORK

THE STATE OF NEW YORK – against – JOSE PERALTA	AFFIDAVIT OF SERVICE. RE: MATTER OF PERALTA V. JONES DOCKET NO. 99-05445

STATE OF NEW YORK) S.S.
COUNTY OF KINGS)

JOSÉ PERALTA, PETITIONER HEREIN, BEING DULY SWORN, DEPOSES AND SAYS THAT.

ON THE _____ DAY OF DECEMBER 1999. I PLACED INTO THE HAND OF NOTARY PUBLIC AT SOUTHPORT CORRECTIONAL FACILITY. THE FOLLOWING LEGAL DOCUMENTS, IN PRE-SEALED (WRAPPERS), ORDER TO SHOW CAUSE, PETITIONER'S ARTICLE 78 PETITION IN WHICH ADSP R. JONES AND DONALD SELSKY WERE NAMED AS RESPONDENTS.

1) ADSP R. JONES
FISHKILL CORR. FACILITY
P.O. BOX 1245
BEACON, N.Y. 12508-1245

2) DONALD SELSKY
STATE OFFICE BUILDING
CAMPUS #2
ALBANY, N.Y. 12226

3) ATTORNEY GENERAL
DEPARTMENT OF LAW
STATE CAPITAL OFFICE BUILDING
ALBANY, N.Y. 12224

APPENDIX C

At a term of the Supreme Court of the
State of New York, held in and for the
County of Dutches on the _____ day of
______________, 19______.

Present: Hon. ____________
__________________, Justice

Supreme Court of the State of New York
County of Dutches.

----

in the Matter of the Application of	<	
José Peralta, petitioner,	<	Order to Show
	<	Cause
- against -	<	
	<	
ADSP. R. Jones and	<	Index No.
Superintendent of Fishkill, Respondent	<	
Facility. Donald Selsky Director (SHU)	<	
for a Judgment pursuant to Article 78	<	
of the Civil Practice Law and Rules	<	

Upon the annexed petition of José Peralta, verified on the October 14, 1998, and the affidavit of petition, sworn to on October 14, 1998, it is

Ordered that Respondent ADSP, R. Jones and the Superintendent of fishkill facility show cause at a term of this Court, to be held in the county of Dutches on the October 29, 1998, or as soon thereafter as counsel may be heard, why a judgment should not be made and entered in this matter pursuant to Article 78 of the Civil practice Law and Rules:

1. Vacating and setting aside Respondents determination of June 12, 19998., assigning petitioner to 5 years of SHU, 5

years lost of Commissary, Packages and Phone and 5 years of Good time. SHU Special Housing Unit (solitary confinement, "SHU") because [the underlying Superintendent's Hearing is null and void, also because all my due process rights was violated!,]

2. Directing Respondent to [expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing]

3. Granting such other and further relief as the Court may deem just and proper. it is further

Ordered that pending the Hearing of this special proceeding and pursuant to section 7805 of the C.P.L.R., Respondent and all other officers, employees, agents, attorney and persons working in active concert and participation with Respondent are stayed and prohibited from taking action related to or enforcing Respondent's determination of June 12, 1998: it is further

Ordered that service of a copy of this Order together with the papers upon which it is granted, upon both the Respondent ADSP. R. Jones and Superintendent of fishkill facility, and the Attorney General, by mail, on or before October 29, 1998, shall be deemed sufficient.

Enter:

____

Justice of the
Supreme Court

APPENDIX D

Supreme Court of the State of New York
County of Dutches.

in the Matter of the Application of	<	
José Peralta petitioner,	<	Affidavit in Support
	<	of Order to Show
- against -	<	Cause
	<	
ADSP. R. Jones and	<	Index No.
Superintendent of Fishkill, Respondent	<	
Facility. Donald Selsky Director (SHU)	<	
for a Judgment pursuant to Article 78	<	
of the Civil Practice Law and Rules	<	

State of New York) ss.:
County of Clinton)

I, José Peralta, being duly sworn, depose and say:

4. I am the petitioner in the above-entitled proceeding.

5. I make this affidavit in support of my annexed application for an order to show cause to prosecute the attached petition pursuant to Article 78 of the Civil Practice Law and Rules which challenges:

Incident: 05/16/98 02:00 PM

Reporter: 05/29/98

Hearing: 06/12/98 01:04 PM ADSP R. Jones

Facility: Fishkill facility

Disposition Received: 5 years of S.H.U. 5 years lost of commissary, packages and phone and 5 years lost of good time. ("SHU") Special Housing Unit (solitary confinement, "SHU")

104.11 Violent Conduct, 104.12 Demonstration, 100.10 Assault on inmate, 105.12 Unauth Org./act.

6. the [specific grounds] are as follows: (1.251-42 Assistant); (2.253.1(b) Hearing Officer); (3.253.6 Method of Determination and they are substantiated in part by criminal law (Pino v. Dalsheim 605 F.Supp. 1305) due process violation.

a. Upon receipt of report petitioner requested assistant (Spanish speaking) to obtain non-disruptive documents to assist petitioner in proper defense at hearing. Even though Assistant did appear before petitioner, Assistant failed to perform Assistants obligations of providing petitioner with requested documentation and Assistant further knowingly and maliciously lied by signing on Assistant sheet that petitioner had received everything he had asked for and refused to sign indicating that Assistance was in fact previded - thus further hindering Appellant at his Hearing.

b. Hearing officer proved to be unfair and partial in his conducting this hearing when after acknowledging (Mr. R. Jones) the fact that petitioner had not been properly Assisted, continued hearing without amending this issue by ordering proper Assistance to petitioner.

c. The Method of Determination as described in Directive # 4932 states that (all) material (must) be weighed and Judge by Hearing officer (before) any decision is rendered and if there is (any) discrepancy as to the following of these Directives and their guidelines then Misbehavior Report (must) be dismissed with prejudice! the outcome of this Hearing is not only a Miscarriage of D.O.C.S. Guidelines but also a blatant violation of petitioner Due process Rights.

Furthermore please see Matters of Brooks v. Scully, 504 NYS 2d. 387 Supp. 1986).

The Court held that, the Regulation requiring that an inmate be provided with an Assistant under such circumstances is essential for the reasonable ability of the inmate to cause and Guide a <u>appropriate investigation</u> to obtain witnesses or

other relevant proof in defense of the Charges lodged against him.

The court views the need for a meaningful discharge of his rile by the inmate Assistant in compliance with the mandate of the Regulations to be inexplicable interwoven in that Modicum of Due process to which an inmate is entitled in Disciplinary proceedings brought Against him…

(According to New York Jur 2d Vol 83. Penal and Correctional institutions pg. 194 § 84.92 [Prison officials Must of Course Comply with their own regulations and failure to do so Justifies Judicial intervention…)

(see also Matters of Giano v. Sullivan 709 F.Supp 1209) regarding tier Assistance of Marshaling facts of Requested Documents and rile of Assistant)

7. Petitioner appeal this matter to Donald Selsky. Director, Special Housing., Department of Correctional Svc. and the Commissioner. which was review and modified on August 21, 1998. (See attach Documents.

8. Petitioner seeks to proceed by order to show cause rather than by Notice of petition because I do not want to wrongfully be placed in Solitary Confinement, with-out have an opportunity to have the court review my case.

9. Petitioner designates Dutches County as the place of venue.

10. No previous applications for the relief requested herein has been made to any Court.

11. I have moved by the annexed application to proceed as a poor person.

Wherefore, petitioner respectfully request that this Court enter an Order directing Respondent to Show Cause why a Judgment should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules I am the petitioner in the above-entitled proceeding I make this affidavit in support of my annexed application for an Order to Show Cause to

prosecute the attached petitioner pursuant to Article 78 of the Civil Practice Law and Rules which petitioner challenges and granting such other and further relief as the Court may deem just and proper.

____
[signature of José Peralta]

Sworn to before me this
14 day of Oct, 1998

____
NOTARY PUBLIC

JOHN W. KIRKPATRICK
Notary Public, State of New York
Registration No. 4826104
Qualified in Clinton County
Commission Expires April 11, 2000

APPENDIX E

Supreme Court of the State of New York
County of Dutches.

----

in the Matter of the Application of	<	
José Peralta petitioner,	<	Verified Petition
	<	
- against -	<	
	<	
ADSP. R. Jones and	<	Index No.
Superintendent of Fishkill,	<	
Facility. Donald Selsky Director (SHU)	<	
Respondent	<	
For a Judgment pursuant to Article 78	<	
of the Civil Practice Law and Rules	<	

To: THE SUPREME COURT OF THE STATE OF NEW YORK FOR DUTCHES COUNTY

The petition of José Peralta , complaining of the Respondent, ADSP R. Jones., Superintendent of fishkill facility., Donald Selsky, Director (SHU). Respectfully alleges:

1. Petitioner José Peralta is an inmate at Clinton Correctional Facility, P.O. Box 2001, Dannemora, N.Y. 12929

2. Respondent [Superintendent of fishkill facility, is in charged with the overall supervision and administration of fishkill facility.

3. this petition challenges [disciplinary action taken on June 12, 1998, when Respondent, [pursuant to a Superintendent's Hearing,] had determined to [place him in the Special Housing Unit ("SHU", Solitary Confinement) for a period of 5 years / modified to two years. Even know that my due process Rights are violate, which is unconstitutional.

4. the [specific grounds are as follow: (1.251.6 Method of Determination) and they are substantiated in part by criminal law (Pino v. Dalsheim 605 F.Supp. 1305) due process violation.

5. Upon Receipt of Report petitioner Requested Assistant (Spanish speaking) to obtain Non-Disruptive Documents to Assist petitioner in proper Defense at hearing. Even though Assistant did Appear before petitioner, Assistant failed to perform Assistants obligations of providing petitioner with Requested Documentation and Assistant further Knowingly and Maliciously Lied by Signing on Assistant Sheet that petitioner had Received Everything he had asked for and Refused to sign indicating that Assistance was in fact previded - thus further Hindering Appeallant at his Hearing!

6. Hearing officer proved to be unfair and partial in His Conducting this hearing when after acknowledging (Mr. R. Jones) the fact that petitioner had not been properly Assisted, Continued Hearing with-out Amending this issue by Ordering proper Assistance to petitioner.

7. the Method of Determination as Described in Directive # 4932 states that (all) material (must) be weighed and Judge by Hearing officer (before) Any Decision is Rendered and if there is (any) Discrepancy as to the following of these Directives and their Guidelines with prejudice! the outcome of this Hearing is not only a Miscarriage of D.O.C.S. Guidelines but also a blatant violation of petitioner Due process Rights.

Furthermore please see Matters of Brooks v. Scully 504 NYS 2d 387 Supp 1986).

The court held that, the Regulation requiring that an inmate be provided with an Assistant under such circumstances is essential for the reasonable ability of the inmate to cause and Guide a appropriate investigation to obtain witnesses or other relevant proof in defense of the Charges Lodged Against him. The court views the Need for a Meaningful

discharge of his role by the inmates Assistant in Compliance with the Mandate of the Regulations to be inexplicably interwoven in that Modicum of Due process to which an inmate is entitled in Disciplinary proceedings brought Against him…

(According to New York Jur 2d Vol 83. Penal and Correctional institutions pg. 194 § 84.92 [Prison officials Must of Course Comply with their own regulations and failure to do so Justifies Judicial intervention…)

8. Respondent's Determination was [arbitrary, capricious, and abuse of discretion] because (the hearing was held at a time when petitioner was incompetent to proceed on his own behalf. Because (1.251.6 Method of Determination) and they are Substantiated in part by Criminal Law (pino v. Dalsheim 605 F.Supp. 1305) Due Process Violation.

Wherefore, petitioner respectfully requets that Judgement be entered pursuant to Article 78 of the Civil practice Law and Rules:

1. Vacating and setting aside Respondents determination of June 12, 1998 assigning petitioner 5 years to [place him in the special Housing Unit ("SHU" Solitary Confinement) / Modified to 2-years, (SHU) because [the underlying Superintendent's Hearing is Null and Avoid);

2. Directing Respondents to expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respectfs to the status he enjoyed prior to the commencement of said Superintendent's Hearing;

3. Granting such other and further relief as the Court may deem Just and proper.)

Dated: 10-14-98

Clinton Corr Fac

P.O. Box 4001

Dannemora, NY
12929

José Peralta
Petitioner Pro-se

Verification

State of New York)
County of Clinton) ss.:

José Peralta being duly sworn, deposes and says that deponent is the petitioner in the above-captioned proceeding, that he has read the foregoing petition and knows the contents thereof, that the same is true to deponents own knowledge, except as to Matters therein state upon information and belief, which Matters deponent believes to be true.

José Peralta

Sworn to before me
this 14 day of Oct , 1998

NOTARY PUBLIC

JOHN W. KIRKPATRICK
Notary Public, State of New York
Registration No. 4826104
Qualified in Clinton County
Commission Expires April 11, 2000

APPENDIX F

State of New York)
) ss.:
County Of Clinton)

José Peralta, petitioner herein, being duly sworn, deposes and says that:

On the _____ day of ______________, 1998; I placed into the hands of an officer of the Southport Correctional Facility the following legal documents, in pre-sealed wrappers: Order to Show Cause, Petitioner's Article 78 petition in which ADSP R. Jones and Donald Selsky were named as respondents:

The aforementioned petition was addressed to the following parties, and sent via U.S. Mail Service from the confines of the Southport Correctional Facility to:

ADSP R. JONES	DONALD SELSKY	ATTORNEY GENERAL
Fishkill Corr. Facility	State Office Building	Department of Law
1245	Campus #2	State Capitol Office Building
Beacon, NY 12508	Albany, NY 12226	Albany, NY 12224

Affiant herein affirms under the penalty of perjury that the above is true, accurate, and correct.

Dated: ________________________
Chemung County, New York

/s/ ______________________________
José Peralta
D.I.N. 95A2340
Southport Corr. Facility. P.O. Box 2000
Pine City, NY 14871

Sworn to and subscribed before me this
_18th_ day of _DECEMBER_, 199_8_

____
NOTARY PUBLIC

RICHARD A. ANGELLOTTI
Notary Public, State of New York
Chemung County 01AN508924

APPENDIX G

Supreme Court, Appellate
Division, Second Department

In the matter of the Application of Jose Peralta Petitioner, – against – ADSP. R. Jones and Superintendent of Fishkill Corr. Fac, Donald Selsky Director (SHU) Respondent(s).	Motion to Proceed As a poor Person Index No. 5231/98 Docket No. 99-05445

Please take notice, that upon the annexed Affidavit Sworn to this 28 Day of June 1999 a Motion will be made at a term of this Court to be held at the Appellate Division, Second Department, 45 Monroe Place Brooklyn, New York, 11201, on the ___ Day of ____, 1999 at 1:30 p.m. for an order granting Petitioner permission to proceed as a poor person.

____
Jose Peralta, 95 A 2340
Petitioner, Pro Se

APPENDIX H

Affidavit In Support Of Motion
Supreme Court, Appellate Division
Second Department, Brooklyn, New York
State of New York, County of Chemung

Jose Peralta, 95-A-2340, Being duly sworn, deposes and says;

1) I am the petitioner in the above entitled action, I have appealed ___ the appellate Division from an Order or Judgment of the Supreme Court, Dutches County, dated, June 10, 1999. The above entitled Action Article 78 has been transferred to this Court by the Supreme Court, Dutches County pursuant to CPLR 7804(g) because of a substantial evidence issue CPLR 7803(4).

2) By this Motion I seek the following relief: Petitioner respectfully request that he be permitted to proceed herein as a poor person, without payment of any cost or fees, that this Court assign a suitable Attorney to serve as Attorney and Counsel for the petitioner herein.

3) Petitioner will be unable to prosecute this proceeding unless permitted to do so as a poor person.

4) The grounds for the Motion and reasons the relief should be granted are: I have been previously granted poor person status at the commencement of this Action by the lower Court and I am a poor person incarcerated at Southport Corr. Fac., PO Box 2000, Pine City, New York, 14871, in the county of Chemung and State of New York.

Sworn to before me this _28_ day of _June_ 1999

____

Notary Public

____

Jose Peralta, 95-A-2340
Petitioner, Pro-Se

APPENDIX I

Jose Peralta
95-A-2340
Southport Corr. Fac.
PO Box 2000
Pine City, New York 14871

Hon. Martin H. Browstein
Clerk
Appellate Division, Supreme Court
Second Judicial Department
45 Monroe Place
Brooklyn, New York 11201

June ____, 1999

RE: Matter of Peralta v. Jones
Index No. # 5231/98
Docket No. # 99-054445

Dear Hon. Browstein

I write your office to inquire about the status of my Article 78 proceeding that

MISSING TEXT OR PAGE – NOT HERE

APPENDIX J

Jose Peralta
95-A-2340
Southport Corr. Fac.
PO Box 2000
Pine City, New York 14871

Martin H. Brownstein
Clerk of the Court
Appellate Division,
Supreme Court
Second Judicial Department
State of New York
45 Monroe Place
Brooklyn, New York 11201

July 15, 1999

RE: Matter of Peralta v. Jones
Docket No. 99-05445

Dear Hon. Brownstein

This is in response to your letter dated July 7, 1999 in which you acknowledge receipt of my letter and informed me that my transferred Article 78 proceeding must be perfected in your Court in the same manner as an appeal. You also informed me that I could make an application to your Court requesting to proceed as a poor person in this matter and asking your Court permission to allow me the opportunity to proceed in this appeal on the original papers (the lower Court file) instead of filing a record or appendix.

Presently, I would like to draw your attention to my previous letter received by your office on July 6, 1999 because their seems to be a misunderstanding.

The July 6, 1999 letter/Motion packet, contained a letter in which I explained my present predicament, a format request to proceed in this matter on the original papers and a

notice of appeal; motion to proceed as a poor person and supporting affidavit.

From your letter it seems that your office has overlooked my notice of appeal; motion to proceed as a poor person and supporting affidavit and has not formally filed my motion or placed it on the calendar.

Enclosed you shall find a copy of the original July 6, 1999 letter/Motion packet and I request at this moment that your office formally place the entire letter/Motion packet on the Calendar so that it can be considered by the Honorable Justices in your court and a decision/order rendered on my request.

I would like to thank you in advance for your time an co-operation in this matter. I faithfully await your response.

Respectfully yours,

____