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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Heck v. Humphrey*, 512 U.S. 477 (1994), a prison inmate may not use 42 U.S.C. § 1983 to challenge the validity of a prison disciplinary proceeding that resulted in the deprivation of good time credits.

The question presented is whether the rule of *Balisok* and *Heck* applies to bar a challenge to a prison disciplinary proceeding that resulted in mixed sanctions — both loss of good time and a change in the conditions of confinement — if the prisoner abandons any claim affecting the loss of good time credits.

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STATEMENT OF JURISDICTION

The opinion of the Second Circuit was issued October 17, 2006. Petitioners' petition for rehearing or rehearing en banc was filed October 30, 2006 and denied by order issued December 27, 2006. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) (2000).

STATEMENT OF THE CASE

In November 2000, respondent Jose Peralta, a prisoner in the custody of the New York State Department of Correctional Services ("DOCS"), filed a *pro se* complaint under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York. Pursuant to an order of the district court dated April 16, 2001, Peralta filed an amended complaint in June 2001. The amended complaint named as defendants three DOCS employees —

petitioners Robert Jones and Donald Selsky, and Sandra Vasquez[1] — as well as two state appellate judges and two clerks of the court on which they serve.[2] Peralta implicitly invoked the district court's jurisdiction under 28 U.S.C. § 1331, by claiming that he was denied procedural due process in a prison disciplinary proceeding.

In the amended complaint, Peralta alleged that he was charged with a number of prison rule violations stemming from an incident in which another prisoner was slashed with a weapon. He was found guilty at the disciplinary hearing and ultimately sentenced, after the penalty was modified on administrative appeal, to restrictive confinement in the Special Housing Unit ("SHU") for 24 months, loss of privileges for the same amount of time, and 24 months loss of good time. He claims he was denied procedural due process in the disciplinary proceeding, including the rights to "adequate assistance,

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1. It does not appear that Vasquez was served with process, and she has not requested representation by this office. For that reason, the motion to dismiss in the district court was made solely on behalf of Jones and Selsky and only they are petitioners here. The motion to dismiss did note that the court could dismiss as to Vasquez *sua sponte* pursuant to 42 U.S.C. § 1997e(c). However, both the district court and the Second Circuit dealt with the named DOCS defendants, including Vasquez, collectively.

2. The complaint was dismissed against the judges and clerks *sua sponte* by order of the district court dated December 10, 2002 on the ground of judicial immunity. App. 24a-27a. Peralta did not challenge this order in the Second Circuit.

witnesses, and a fair and impartial hearing officer, and a fair and impartial appeal officer" (Amended Complaint ¶ 20). Vasquez was Peralta's employee assistant for the hearing, Jones was the hearing officer, and Selsky determined his administrative appeal.

Peralta's amended complaint further states that he commenced a proceeding in state court to challenge the determination, and that the proceeding was dismissed because he did not pay the court's $250 filing fee.[3]

Petitioners moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on August 1, 2003, based upon *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997). Those cases established that a prisoner does not have a cognizable claim under § 1983 to challenge the validity of the procedures that led to a disciplinary determination affecting the duration of his

3. If Peralta's account of what occurred in state court is true, it was an anomaly. State law provides for reduced filing fees for prisoners who have insufficient means to pay full fees and states unequivocally that "in no event" shall a prisoner be prohibited from proceeding for lack of funds. *See* N.Y. C.P.L.R. § 1101(f)(1), (2). If a court determines that a prisoner lacks sufficient funds to pay the full fee, a reduced fee will be set. The case will proceed, and any portion of the reduced fee that the prisoner is unable to pay will be recorded by DOCS as an outstanding obligation to the court and will be collected from the prisoner's future income. *See* DOCS Directive No. 2788, Section VIII *available at http://www.docs.state.ny.us/directives.html* (last visited March 21, 2007).

confinement. Instead, he may seek relief under § 1983 only if he shows that the determination has been judicially or administratively invalidated previously. Petitioners argued that because the disciplinary proceeding here resulted in loss of good time, and Peralta's claims, if accepted, would necessarily imply the invalidity of the disciplinary determination, *Balisok* required that his complaint be dismissed in the absence of a showing that the determination had been previously invalidated — a showing he did not and could not make. Petitioners argued that *Heck* and *Balisok* were applicable because Peralta was penalized by loss of good time, even though he was also penalized by being placed in restrictive confinement. Peralta opposed the motion, claiming that he should be allowed to proceed because he was not seeking damages for the loss of good time, but only for the restrictive confinement. The district court dismissed the complaint on April 26, 2004, finding that Peralta's allegations "would, if proven, 'necessarily imply the invalidity of the deprivation of his good-time credits,' as well as his confinement in SHU." App. 21a (quoting *Balisok*, 520 U.S. at 646).

Peralta filed a *pro se* appeal, and the Second Circuit did not hear argument. Nonetheless the Court vacated the dismissal and remanded for further proceedings. The court held that *Heck* and *Balisok* do not control the case where a prisoner seeks to challenge a disciplinary proceeding that results in "mixed" disciplinary sanctions (*i.e.*, both loss of good time and, usually, a period of restrictive confinement). In such a case, the Second Circuit held

that the prisoner may proceed with a § 1983 claim "*if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement.*" App. 12a-13a (emphasis in original). The case was remanded to the district court to make the following determination:

> whether Peralta has formally agreed, or is then willing, to waive all his potential claims with respect to the sanctions affecting the duration of his imprisonment arising out of the proceeding he is currently challenging. If such a waiver results, the district court must allow Peralta to proceed separately with his challenge under § 1983 to the sanctions affecting the conditions of his confinement.

App. 16a-17a. Petitioners sought rehearing or rehearing en banc, arguing that the decision was fundamentally inconsistent with *Heck* and *Balisok*, that the decision would have serious, unintended consequences for prison and court administration in New York, and that the decision had the potential to expand significantly the federal courts' prisoner caseload. Petitioners urged the court of appeals to provide an opportunity for further briefing before implementing such a significant change. The court denied the petition for rehearing without comment by order dated December 27, 2006. App. 28a-30a.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's decision conflicts with decisions of the Seventh, Eighth, and Ninth Circuits.

Four courts of appeals have considered the question presented by this case. Three of them have decided that a prisoner may not use 42 U.S.C. § 1983 to challenge the validity of a prison disciplinary determination that deprives the prisoner of good time credits or otherwise affects the *duration* of confinement, regardless of whether sanctions affecting the *conditions* of confinement were also imposed. The Second Circuit alone has announced a novel rule permitting a prisoner to maintain an action under § 1983 in just such a case of "mixed" disciplinary sanctions, if he permanently abandons any challenge to the duration of confinement. There is thus a square conflict among the circuits warranting review by this Court.

The background for this controversy may be simply stated. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), prisoners sought injunctive relief under 42 U.S.C. § 1983 to restore good-time credits that had been lost in prison disciplinary proceedings. This Court held that a prisoner seeking such relief may not proceed under § 1983, but may seek relief in federal court only by a petition for habeas corpus under 28 U.S.C. § 2254. *Preiser* established that § 1983 may be used to challenge conditions of confinement, but not to challenge the fact or duration of confinement.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court again considered the "intersection" between § 1983 and habeas corpus. There, a prisoner sought damages, but not equitable relief, under § 1983 for an allegedly unconstitutional criminal conviction. Analogizing the prisoner's claim to the tort of malicious prosecution, the Court held that where "a judgment in favor of the plaintiff would *necessarily imply the invalidity of his conviction or sentence* . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487 (emphasis added).

Finally, in *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court held that the *Heck* rule applies not only to convictions but also to prison disciplinary proceedings affecting the duration of confinement, as by the loss of good time credits. Under *Balisok*, where "[t]he principal procedural defect complained of by [the prisoner] would, if established, necessarily imply the invalidity of the deprivation of his good-time credits" (520 U.S. at 646), the prisoner may seek damages or other relief only if the invalidity of the proceeding has previously been established either administratively or by the courts. On the other hand, because § 1983 may be used to challenge conditions of confinement but not the fact or duration of confinement, a prisoner may use § 1983 to bring a challenge to a disciplinary determination if that challenge "threatens no consequence" to the duration of confinement. *Muhammad v. Close*, 540 U.S. 749, 751 (2004).

Four courts of appeals have considered whether, under the rule of *Preiser* and *Heck*, a § 1983 complaint may be brought to challenge a prison determination that affects both the conditions and duration of confinement. The Seventh, Eighth, and Ninth Circuits have all held that it may not.

In *Sheldon v. Hundley*, 83 F.3d 231 (8th Cir. 1996), the Eighth Circuit considered a prisoner's § 1983 action for damages challenging a disciplinary determination that had resulted in both disciplinary detention and loss of good time. Correctly anticipating this Court's holding in *Balisok*, the Eighth Circuit held that the claim for damages was barred because it would require a court to determine the validity of a disciplinary proceeding that resulted in loss of good-time credits, and such a claim was barred by the principle of *Heck*. The Eighth Circuit applied the bar notwithstanding the fact that this was a case of mixed sanctions, involving "both the loss of good-time credits and the disciplinary detention." 83 F.3d at 233. *See also Portley-El v. Brill*, 288 F.3d 1063, 1067 (8th Cir. 2002) ("Because [plaintiff] seeks damages for the *imposition* of discipline that *included* the loss of good time credits," his claim is barred by *Heck*) (emphasis on "included" added). Thus, the Eighth Circuit rule is that a prisoner may not use a damages action under § 1983 to challenge the validity of a prison disciplinary proceeding that results in both loss of good time and other sanctions.

The Seventh Circuit reached the same conclusion in *Post v. Gilmore*, 111 F.3d 556 (7th Cir. 1997). In

that case a prisoner had commenced separate, parallel actions in the district court for both habeas relief and damages under § 1983. Both actions challenged the same prison disciplinary proceeding, which had resulted in both disciplinary segregation and loss of good time. The prisoner sought restoration of his lost good time in the habeas proceeding, and damages for, *inter alia*, his disciplinary segregation in the § 1983 action. The district court dismissed the habeas petition as duplicative of the § 1983 action, but the Seventh Circuit reversed, citing *Heck*, and directed the district court to adjudicate the habeas petition first because "[plaintiff's] § 1983 cannot succeed unless he first prevails on the very [habeas] claim the court has dismissed." 111 F.3d at 557. Thus, the Seventh Circuit held that a § 1983 action would not lie to challenge a disciplinary action resulting in mixed sanctions, even if the prisoner sought in that action to challenge only those sanctions relating to the conditions and not the duration of confinement. *See also Montgomery v. Anderson*, 262 F.3d 641, 643-44 (7th Cir. 2001) (noting that plaintiff could not seek damages under § 1983 for his disciplinary segregation because the disciplinary proceeding, which also affected his ability to earn good time, had not been invalidated in a habeas corpus proceeding).

The Seventh and Eighth Circuits reached this conclusion on the basis of *Heck*, without benefit of this Court's decision in *Balisok*. Prior to *Balisok* the Ninth Circuit took a different view of the matter, permitting a prisoner to seek damages under § 1983 for the alleged violation of his due process rights in a disciplinary proceeding that resulted in both

disciplinary segregation and loss of good time. *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995). But after this Court vacated and remanded for reconsideration in light of *Balisok* (*see* 520 U.S. 1238 [1997]), the Ninth Circuit dismissed the claim, 122 F.3d 39 (9th Cir. 1997), holding that "[*Balisok*] forecloses [plaintiff's] *entire* compensatory claim under 42 U.S.C. § 1983" (emphasis added). 122 F.3d 39.

Only the Second Circuit, in the decision below, has reached a contrary result, holding that a prisoner may use § 1983 to challenge a disciplinary proceeding that resulted in mixed sanctions. Although the prisoner in such a case is challenging the validity of a determination that affects the duration of his confinement, under the Second Circuit's rule the action will nevertheless be exempt from the *Preiser-Heck-Balisok* bar if the relief sought is limited to the conditions of confinement and the prisoner abandons any claim for relief related to the loss of good time. Thus, there is a stark conflict among the circuits on a question that has wide impact on the litigation of prisoner claims in the federal courts. The conflict warrants resolution by this Court.

II. The Second Circuit's decision is inconsistent with decisions of this Court.

As set forth above, beginning with the seminal decision in *Preiser*, 411 U.S. 475, this Court has carefully shaped the principles that determine when the federal courts may entertain actions under § 1983 by prisoners seeking to challenge prison disciplinary

proceedings. In this case, the Second Circuit, while purporting to defer to those principles, has in fact distorted and undermined them. Because the decision below is inconsistent with decisions of this Court on an important matter of federal jurisdiction, the Court should grant certiorari.

Preiser, *Heck* and *Balisok* are based on the principle that habeas corpus, with its core requirement that a prisoner exhaust available state judicial remedies before resorting to the federal courts, is the only proper federal vehicle to challenge the fact or duration of state confinement. This principle, in turn, is deeply rooted in considerations of federal-state comity. Thus, under *Balisok*, where a prisoner seeks damages stemming from the procedures that led to loss of good time, and accepting his claimed errors would necessarily imply the invalidity of the proceeding, he has no cognizable claim under § 1983. 520 U.S. at 648. Such a challenge is a challenge to the duration of confinement, regardless of whether the prisoner only seeks damages not associated with the good time loss, and a § 1983 action does not lie.

This plain reading of *Balisok* is supported by *Wilkinson v. Dotson*, 544 U.S. 74 (2005), where the Court determined that § 1983 was available because the claim — that certain parole procedures were constitutionally inadequate — would not implicate the validity of the plaintiffs' convictions or sentences. The Court discussed "the legal journey from *Preiser* to *Balisok*," and synthesized the decisions in terms that are fatal to the Second Circuit's approach:

> These cases, taken together, indicate that a state prisoner's § 1983 action is barred

> (absent prior invalidation) — no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) — *if* success in that action would necessarily demonstrate the invalidity of the confinement or its duration.

544 U.S. at 81-82 (emphasis in original).

The Second Circuit's decision cannot be reconciled with this Court's holdings as summarized in *Wilkinson*. In this very case, Peralta's complaints — including, as in *Balisok*, the claim that the hearing officer was biased — would, if accepted, demonstrate the invalidity of the deprivation of good time credits. Even if Peralta seeks relief for only the conditions and not the duration of his confinement, the relief would be predicated on a finding that would necessarily invalidate the duration of confinement as well. Accordingly, Peralta's claim is not cognizable under § 1983.

The Second Circuit attempted to reconcile its holding with the decisions of this Court by announcing a new procedure by which a prisoner could, by waiving his challenge to the duration of confinement, convert a claim barred by *Heck* and *Balisok* into one that would not be subject to the bar:

> We today hold that a prisoner subject to such mixed sanctions can proceed separately, under § 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.*

App. 12a-13a (emphasis in original). This novel procedure, created out of whole cloth, is itself inconsistent with the rationale of *Balisok*.

Under *Heck* and *Balisok*, § 1983 cannot be used to attack a proceeding, if success on the claim would necessarily demonstrate the invalidity of the prisoner's length of confinement, unless the proceeding has previously been set aside administratively or by the courts. Whether the claim is barred is a threshold matter to be resolved by examining the implications of his claim when the action is commenced. As this Court stated in both of those decisions, the question is whether the asserted claim is cognizable under § 1983 at all. *Heck*, 512 U.S. at 483; *Balisok*, 520 U.S. at 643. If it is not, the claim must be dismissed. Thus, the bar to suit is not susceptible to the control or manipulation of the prisoner in the way the Second Circuit has devised. Rather, the invalidation requirement is a precondition to suit, akin to an element of the cause of action, without which there is no viable lawsuit *ab initio*. The prisoner's agreement to forego specific remedies cannot create a cognizable claim where none exists.

Moreover, if the Second Circuit's approach is permitted to stand, it will destroy the clarity this

Court has brought to the question of when the statute of limitations begins to run. In *Heck*, after reiterating that where the decision applies, no cause of action exists until the underlying determination has been invalidated, the Court observed:

> Under our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the § 1983 claim has not yet arisen. Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor [citations omitted], so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

512 U.S. at 489-90. On the other hand, if a prisoner's claim is not subject to the invalidation requirement, it accrues when he knows of the injury (*see, e.g., Pearl v. City of Long Beach*, 296 F.3d 76, 79-80 [2d Cir. 2002]), which would generally be when the determination is issued and he begins serving the penalties imposed. *Cf. Wallace v. Kato*, __ U.S. __, 127 S. Ct. 1091, 1097 (2007) (tort claim accrues and statute of limitations begins to run when wrongful act or omission results in damages). Thus, if the Second Circuit's view prevails, a § 1983 action challenging a single prison determination that imposes mixed sanctions would be subject to two different accrual dates. Such ambiguity serves neither prisoners nor correctional officials.

III. The decision below is unworkable, because it places prison officials and the state courts in an untenable position.

The regime created by the Second Circuit's decision assumes that a prisoner can make an enforceable waiver of his challenge to the duration of confinement, in order to challenge the conditions of confinement in an action pursuant to § 1983. But that assumption blinks reality. Suppose a prisoner elects to challenge only the conditions and not the duration of confinement, in order to avoid the bar of *Heck* and *Balisok*. If a federal court then determines that the disciplinary proceeding was constitutionally defective, prison officials will be ordered to release the prisoner from disciplinary confinement, but not to restore lost good time.

But for several reasons, that puts prison administrators in an untenable situation. First, the failure to restore good time in those circumstances would be perceived by the prison population as a flagrant violation of constitutional rights, despite any waiver made by the prisoner in the § 1983 action. This would have a serious negative effect on prison security.

Furthermore, it is by no means clear that state law would permit DOCS to do what the Second Circuit invites. Under state law, DOCS 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.

See, e.g., Matter of Blanche v. Travis, 760 N.Y.S.2d 919 (App. Div. 2003) (parole board cannot rescind open parole release date relying on disciplinary determinations that were reversed and expunged by DOCS on administrative review); *Matter of Davidson v. Coughlin*, 546 N.Y.S.2d 247, 248 (App. Div. 1989) ("It is beyond argument that allowing references to charges that have been dismissed ... to remain in prisoners' records leaves inmates in jeopardy of having these references unfairly used against them."); *Matter of Garrett v. Coughlin*, 516 N.Y.S.2d 796, 797 (App. Div. 1987) ("'[the] mere potential for an indirect penalty being imposed upon prisoners for infractions for which guilt is not established places prisoners in a shockingly unfair status.'"). Thus, where a federal court has effectively annulled a disciplinary determination, DOCS may not be free to ignore the court's findings. *Cf. Heck*, 512 U.S. at 498 (Souter, J., concurring) (success by a plaintiff in a § 1983 claim for damages challenging his conviction or sentence would, as a practical matter, compel the state to release the prisoner).[4]

On the other hand, if DOCS defers to the federal court's decision as a matter of propriety, or due to concerns for internal security or because of state law requirements, then *Preiser*, *Heck* and *Balisok* are

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4. Thus, the Second Circuit's suggestion that its waiver procedure is analogous to a waiver of a severable, independent ground for relief (App. 14a n.7) is unpersuasive. Rather, the prisoner is being asked to waive the necessary, logical consequences that would flow from a decision in his favor.

completely eviscerated. Prisoners will effectively have shortened the duration of their confinement in a § 1983 action rather than by a petition for habeas corpus, in violation of the principles developed by this Court over the course of decades.

The Second Circuit's rule places the state courts in a similarly untenable position. If DOCS declines to restore the prisoner's good time and, despite the waiver, the prisoner sues DOCS in state court, the court has two equally unpalatable choices. If the state court enforces the waiver, it gives its imprimatur to what a federal court has determined is an unconstitutional deprivation of good time. Alternatively, if the state court concludes that the waiver cannot or should not be enforced, then the result is to allow a prisoner to challenge the duration of his confinement through a § 1983 action, in clear derogation of the rule of *Preiser*, *Heck*, and *Balisok*.

The Second Circuit's confidence that this would not occur because of the doctrine of judicial estoppel is misplaced. That doctrine is designed to prevent a litigant from making factual assertions in a legal proceeding where he has made contrary assertions in a prior proceeding. *See, e.g., All Terrain Properties v. Hoy*, 705 N.Y.S.2d 350 (App. Div. 2000); *see also Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2d Cir. 1997). It is by no means clear that the state courts would consider that doctrine applicable in these circumstances, where the result might be violative of state policy.

The Second Circuit suggests that its novel rule is required to prevent prison officials from imposing trivial sanctions relating to duration of confinement in order to bar § 1983 challenges to conditions of confinement (App. 16a), but the court points to no examples of such a practice, and we are aware of none. In any event, the rule is an overbroad response to that concern; courts have ample power to craft rules to deal with perceived abuses and actions taken in bad faith. A speculative risk of abuse provides no reason to discard the entire regime of deference to state court determinations that affect the fact or duration of confinement.

Finally, the Second Circuit's decision has the potential to expand substantially the caseload of the federal courts. DOCS advises that in a recent 12-month period, there were 7,190 disciplinary proceedings that resulted in mixed sanctions. If the Second Circuit's new rule is permitted to stand, all the prisoners on whom these sanctions were imposed will now be permitted to challenge the validity of their disciplinary proceedings under § 1983. This Court should overturn the decision before a massive increase in filings inundates the federal courts of the Second Circuit and of any other circuit that may choose to follow the Second Circuit's rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 17, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2005

(Submitted: June 19, 2006 Decided: October 17, 2006)

Docket No. 04-2822-pr

JOSE PERALTA,

Plaintiff-Appellant,

v.

SANDRA VASQUEZ, ROBERT A. JONES, DONALD SELSKY,

Defendants-Appellees,

ANITA R. FLORIO, GUY JAMES MANGANO, MARTIN H. BROWNSTEIN, JAMES EDWARD PELZER,

Defendants.

Before MINER, CALABRESI, *Circuit Judges*, HOLWELL, *District Judge.**

* The Honorable Richard J. Holwell, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (Jones, *J.*) dismissing plaintiff's action under 42 U.S.C. § 1983 on the grounds that it was not cognizable under *Heck v. Humphrey*, 512 U.S. 477 (1994).

Vacated and Remanded

CALABRESI, Circuit Judge.

This appeal presents a new twist on a familiar issue: What requirements must a prisoner meet before he can maintain a claim under 42 U.S.C. § 1983 that challenges sanctions imposed pursuant to a prison disciplinary proceeding? The case law is clear that when a prisoner's challenge either to the process or the result of a prison disciplinary proceeding necessarily implies the invalidity of a sanction that affects the duration of his sentence, such as the deprivation of good-time credits, the prisoner may not maintain an action under § 1983 unless he has shown that the sanction (or the procedures that led to it, if the procedural defect at issue was critical to the imposition of the sanction) have been overturned through administrative channels or by a state or federal court. It is also clear that when a prisoner's challenge involves a sanction that affects only his conditions of confinement, this "favorable termination" requirement does not apply and a prisoner may maintain an action under § 1983 without showing that the sanction (or the procedures that led to it) have been previously invalidated.

What is not clear, however, is whether a prisoner who was subject to a single disciplinary proceeding that gave rise to two types of sanctions – one that affected the duration of his custody and the other that affected the conditions of his

confinement-can, without needing to satisfy the favorable termination rule, maintain a § 1983 action aimed solely at the second type of sanction. We now resolve this open question and hold that, in "mixed sanctions" cases, a prisoner can, without demonstrating that the challenged disciplinary proceedings or resulting punishments have been invalidated, proceed separately with a § 1983 action aimed at the sanctions or procedures that affected the conditions of his confinement. But we also hold that he may only bring such an action if he agrees to abandon forever any and all claims he has with respect to the sanctions that affected the length of his imprisonment.

FACTS

On May 16, 1998, Jose Peralta, an inmate in the custody of New York State's Department of Correctional Services ("DOCS"), was accused of cutting another inmate several times with a "razor-type weapon." A disciplinary hearing was scheduled to adjudicate the matter. Defendant Sandra Vasquez, a corrections counselor with DOCS, was assigned to assist the appellant in the hearing. Defendant Brian Jones, the assistant superintendent at Fishkill Correctional Facility, where Peralta was being detained at the time of the incident, conducted the hearing on June 12, 1998. Jones found Peralta guilty and imposed a penalty of five years of confinement in the Special Housing Unit ("SHU"), five years loss of packages, commissary, and telephone privileges, and five years loss of good-time credits. The appellant appealed to Donald Selsky, the director of special housing/inmate disciplinary programs, who modified the penalty to twenty-four months of SHU confinement and a twenty-four month

loss of packages, commissary, and telephone privileges, in addition to a twenty-four month loss of good-time credits.

Having exhausted his appeals within the prison, Peralta filed an Article 78 petition challenging the decision in New York Supreme Court, *see* N.Y. C.P.L.R. § 7801 (Consol.2006), which transferred the case to the Appellate Division, Second Department. A judge of the Appellate Division granted Peralta "leave to file as a poor person" but declined to waive the filing fee. When Peralta failed to pay the filing fee, which he stated he could not afford, his case was dismissed. His appeal to the New York Court of Appeals of the decision dismissing his case was denied.

Peralta, proceeding pro se, then filed the instant action under 42 U.S.C. § 1983, alleging that the disciplinary hearing violated his constitutional rights. In his amended complaint, filed at the direction of the district court (Mukasey, *J.*), Peralta claimed that defendants Vasquez, Jones, and Selsky denied him "adequate assistance, witnesses, and a fair and impartial hearing officer" and, in doing so, deprived him of substantive and procedural due process and protection against cruel and unusual punishment in violation of the Fourteenth and Eighth Amendments.[1] These defendants moved to dismiss the case on the ground that Peralta could not prevail on his § 1983 claim without first establishing that the disciplinary hearing or the resulting sanctions had been invalidated in a state or

1. Peralta also alleged in his amended complaint that judges and clerks of the Appellate Division, Second Department violated his constitutional rights. The district court dismissed the complaint against these defendants because they were immune. Peralta does not appeal this portion of the judgment.

federal proceeding, and that this had not occurred. In response, Peralta argued that, because he sought damages only for those sanctions affecting his conditions of confinement and not for the loss of his good-time credits, he could maintain his claim despite not having demonstrated that the sanctions or hearing had been invalidated.[2]

The district court (Jones, *J.*)[3] granted the defendants' motion. The district court acknowledged that, unlike many cases in which a prisoner challenges the result of prison disciplinary hearings through a § 1983 action, the plaintiff here sought damages only for his confinement in SHU-and not for the loss of good-time credits. It also noted that neither the Supreme Court nor this Court had "addressed the issue of whether a prisoner may proceed separately with his § 1983 claim as to those portions of his sentence which affected only the conditions of his confinement." Nevertheless, it found "that allowing a plaintiff to 'split' his claims under the circumstances in this action would be ill-advised." It therefore held that a prisoner-plaintiff who challenges only the conditions of confinement imposed pursuant to a disciplinary proceeding that also resulted in the loss of good-time credits must, like a plaintiff who challenges both types of sanctions, demonstrate that those sanctions or the

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2. He also argued that he was entitled to pursue his claim under § 1983 because he was not able to challenge the defendants' actions through a petition for habeas corpus.

3. The case was reassigned to Judge Barbara Jones on April 16, 2003.

disciplinary hearings giving rise to them have been invalidated before he can proceed with any § 1983 claim.[4]

DISCUSSION

I.

We review the district court's dismissal of the complaint de novo, and accept all material factual allegations therein as true. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 106 (2d Cir.2005).

II.

This case implicates the overlap between 42 U.S.C. § 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254. The intersection of these two statutes, and the prerequisites for bringing a claim under each of them, has given rise to a series of cases in the Supreme Court and in this Court examining when a prisoner challenging the imposition of various types of punishment, and seeking different remedies, may rely on § 1983 to pursue relief.

In the initial case, *Preiser v. Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court established that habeas is the exclusive remedy for a state

4. The district court also held that this Court's cases allowing a plaintiff to maintain an action under § 1983 when habeas relief is no longer available did not apply here because "[p]laintiff' s inability to pursue a habeas remedy is due to his own failure to properly pursue his state challenge to the disciplinary proceeding." Peralta does not challenge this portion of the judgment.

prisoner seeking an earlier release. There, state prisoners who had been deprived of good-time credits as a result of internal disciplinary proceedings brought an action under § 1983. They sought injunctive relief to compel the prison to restore those credits, and, as a result, gain them immediate release. *Id.* at 476, 93 S.Ct. 1827. The Court held that the prisoners could not maintain their action under § 1983 because when a prisoner is challenging "the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500, 93 S.Ct. 1827. Conversely, *Preiser* concluded that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Id.* at 499, 93 S.Ct. 1827.

Over twenty years later, in *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Court considered when a prisoner, who sought money damages but not an earlier release for an allegedly unconstitutional conviction, could pursue a claim under § 1983. The prisoner-plaintiff in that case claimed that the county prosecutor and state police investigator had obtained his criminal conviction by engaging in unlawful acts. *Id.* at 478-79, 114 S.Ct. 2364. The Court held that Heck's § 1983 action was not cognizable because although on its face it sought only monetary damages, "the basis for the damages claim necessarily demonstrates the invalidity of the conviction. In that situation, [Heck] *can* be said to be 'attacking ... the fact or length of ... confinement,'...." *Id.* at 481-82, 114 S.Ct.

2364 (quoting *Preiser,* 411 U.S. at 490, 93 S.Ct. 1827) (alteration in original). Accordingly, it adopted what is known as the "favorable termination rule":

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff 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, 28 U.S.C. § 2254.... Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 486-87, 93 S.Ct. 1827 (internal citations omitted).

Appendix A

In a subsequent case, *Edwards v. Balisok,* 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), the Court made clear that *Heck's* favorable termination rule applies to challenges made under § 1983 to procedures used in disciplinary proceedings that deprived a prisoner of good-time credits. In *Edwards,* the prisoner-plaintiff was found guilty of breaking prison rules at a hearing and sentenced to a mixed sanction of 10 days in isolation, 20 days in segregation, and the loss of 30 days of good-time credits. *Id.* at 643, 117 S.Ct. 1584. He then filed a § 1983 action that sought (1) a declaration that the procedures used in the disciplinary proceeding violated his Fourteenth Amendment due process rights, (2) damages for the allegedly unconstitutional procedures, and (3) an injunction to prevent future violations. In challenging only the procedures employed, the prisoner did not request the restoration of good-time credits or damages for the imposition of the sanctions affecting the conditions of his confinement. *Id.* at 644, 117 S.Ct. 1584.

The Court rejected the prisoner's argument that a distinction should be made between challenges to the procedures used in a disciplinary proceeding and challenges to the results of such a proceeding. It held that although the prisoner did not request that his good-time credits be restored, the claimed procedural defect (bias of the hearing officer), if established, would necessarily imply the invalidity of that punishment. A favorable outcome therefore would affect the length of his sentence, and, as a result, the prisoner's action was subject to *Heck's* favorable termination rule. *Id.* at 648, 117 S.Ct. 1584. The Court, however, "did not address whether the prisoner [subject to mixed sanctions] could proceed

separately with his § 1983 claim as to those portions of his sentence which affected only the conditions of his confinement." *Jenkins v. Haubert,* 179 F.3d 19, 25 (2d Cir.1999) (citing *Edwards,* 520 U.S. at 648, 117 S.Ct. 1584).

These cases, therefore, left open two questions: (a) whether *Heck's* favorable termination requirement applies to a § 1983 claim aimed at prison disciplinary proceedings that resulted only in sanctions which have no effect on the duration of confinement, and (b) if *Heck* does not, whether, where disciplinary proceedings result in sanctions that affect both the conditions of confinement as well as its duration, a prisoner can proceed separately with a § 1983 claim with respect to the parts of his punishment affecting only conditions of confinement.

In *Jenkins v. Haubert* we answered the first of these, concluding that *Heck* does not preclude a § 1983 claim aimed at sanctions that did not affect length of confinement. 179 F.3d at 21.[5] The prisoner-plaintiff in *Jenkins* was subject to two disciplinary hearings, each of which resulted in the sanction of thirty days in "keeplock."[6] *Id.* at 20-21. He alleged that the manner in which the proceeding he challenged was conducted violated his due process rights. In analyzing whether the prisoner's claim was cognizable under § 1983

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5. In doing so, we applied the dicta, to the same effect, in *Preiser. See Preiser,* 411 U.S. at 499, 93 S.Ct. 1827.

6. Keeplock is "a form of administrative segregation in which the inmate is confined to his cell, deprived of participation in normal prison routine, and denied contact with other inmates." *Jenkins,* 179 F.3d at 21 (internal citations and quotation marks omitted).

despite his failure to demonstrate that the proceeding had been invalidated, we noted that "the Court has never announced that the *Heck* rule bars a prisoner's challenge under § 1983 to an administrative or disciplinary sanction that does not affect the overall length of his confinement." *Id.* at 27. We held that because the prisoner's "suit is properly characterized as a challenge to the conditions of his confinement, rather than as a challenge to the fact or duration of his confinement, *Heck's* favorable termination requirement does not apply." *Id.* The Supreme Court subsequently adopted the same reasoning in *Muhammad v. Close,* 540 U.S. 749, 754, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (per curiam) (holding that *Heck's* favorable termination requirement does not apply to § 1983 actions challenging "prison disciplinary proceedings in the absence of any implication going to the fact or duration of [the] underlying sentence").

We conclude from all this that the purpose of the *Heck* favorable termination requirement is to prevent prisoners from using § 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 § 1983 when that sanction does not affect his term of confinement. As the *Muhammad* Court explained, " *Heck's* requirement to resort to state litigation and federal habeas before § 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. . . ." *Muhammad,* 540 U.S. at 751-52, 124 S.Ct. 1303.

With that in mind, we turn to the merits of the second question posed above, whether and under what circumstances a prisoner may employ § 1983 in a mixed sanctions case to challenge the conditions rather than the terms of his confinement.

III.

Peralta seeks damages for the sanctions imposed on him which affected only the conditions of his confinement and, on that basis, he argues that his § 1983 action is cognizable, despite the fact that he has not demonstrated that the disciplinary hearing that gave rise to the alleged constitutional violation was overturned in a habeas or analogous proceeding. Whether a prisoner who was subject to a single disciplinary proceeding that gave rise to sanctions that affect both (a) the duration of his imprisonment and (b) the conditions of his confinement may, without satisfying the favorable termination requirement, maintain a § 1983 action aimed solely at the latter sanctions is an open question in the circuit. We today hold that a prisoner subject to such mixed sanctions can proceed separately, under § 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 § 1983 suit.

Both Supreme Court and circuit precedents clearly hold that a prisoner subject to a disciplinary proceeding that gives rise to sanctions that affect only the conditions of his confinement, and not the duration of his imprisonment, may maintain an action under § 1983 challenging those sanctions (or the procedures by which they were imposed) without satisfying *Heck's* favorable termination requirement. *Muhammad,* 540 U.S. at 754, 124 S.Ct. 1303; *Jenkins,* 179 F.3d at 27. Why then preclude a § 1983 action undertaken by a prisoner who was subject to a single disciplinary proceeding that gave rise to mixed sanctions but who seeks to challenge only those sanctions that affect the conditions of his confinement? The most-perhaps the only-plausible reason is that, if the prisoner prevails in his § 1983, conditions of confinement, action, he may, in a subsequent federal habeas petition or action brought in a state court challenging the duration of his confinement, seek to estop the state, collaterally, from defending the sanctions affecting length of imprisonment. Were that to happen, the validity of the duration of confinement would, in clear violation of *Heck,* have been decided in a § 1983 action.

If such a prisoner, however, as a prerequisite for maintaining his § 1983 action, both agrees to and can successfully abandon once and for all the duration claim, then his success in the § 1983 action would have *no* effect

on the sanctions that relate to the length of time he served in prison, and the concern animating the *Heck* favorable termination rule would simply not be implicated.[7]

Can we be sure that a prisoner's commitment to abandon any claim he has with respect to the sanctions that affect the duration of his confinement will be enforced in later proceedings? The doctrine of judicial estoppel provides us with that certainty. Judicial estoppel ensures, inter alia, that "abandonment of a claim to obtain a litigation advantage precludes the later reassertion of that claim." *United States v. Levasseur,* 846 F.2d 786, 799 (1st Cir.1988). In order for judicial estoppel to be invoked, (1) the party against whom it is asserted must have advanced an inconsistent position in a prior proceeding, and (2) the inconsistent position must have been adopted by the court in some matter. *Bates v. Long Island R.R.,* 997 F.2d 1028, 1038 (2d Cir.1993); *see also Mitchell v. Washingtonville Cent. Sch. Dist.,* 190 F.3d 1, 6 (2d Cir.1999).

Both elements of judicial estoppel would readily be satisfied should a prisoner-who was subject to mixed sanctions and who, having agreed to abandon forever his

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7. Allowing a party to abandon a claim that would otherwise prevent him from moving forward in federal court with the remainder of his action is not novel. Courts regularly permit a habeas petitioner who has a "mixed petition"-that is, one that involves both exhausted and unexhausted claims-to abandon his unexhausted claims so that he may proceed with his exhausted claims. *See Zarvela v. Artuz,* 254 F.3d 374, 378 (2d Cir.2001) (citing *Rose v. Lundy,* 455 U.S. 509, 519-20, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)); *see also McKethan v. Mantello,* 292 F.3d 119, 122 (2d Cir.2002).

duration claim, was allowed to proceed separately with his conditions of confinement claim under § 1983-subsequently, and in a separate proceeding, attempt to use the outcome of the § 1983 action to estop collaterally the state from defending the sanctions affecting length of his confinement.

Such a prisoner would manifestly have adopted, and proffered to the court, inconsistent positions in two separate proceedings. Moreover, under the rule articulated here, the court would only have allowed the prisoner to maintain his § 1983 action in the initial proceeding *because* the prisoner had agreed to forswear his claims related to the duration sanctions. As a result, the reliance requirement of judicial estoppel would certainly be met. In other words, at the time of the second proceeding, a prisoner who tried to renege on his abandonment of any duration suit would necessarily have satisfied both elements of judicial estoppel, and he would, therefore, be precluded from reasserting his previously abandoned challenge.

Given the efficacy and applicability of judicial estoppel, a prisoner who, on bringing a § 1983 suit challenging conditions of confinement, abandons any duration of imprisonment claims arising out of the same disciplinary process, is, substantively, in the precise condition of the prisoners who in *Muhammad* and *Jenkins* were allowed to bring § 1983 actions. His only surviving claim would be a § 1983 cognizable (conditions of confinement) suit. And the survival of that suit does not in any way implicate the concerns animating *Heck* and *Edwards;* the favorable termination rule, therefore, does not apply. *Cf. Sira v. Morton,* 380 F.3d 57, 67 (2d Cir.2004) (noting that "the Supreme

Court recently clarified [in *Muhammad*] that a § 1983 action challenging the validity of a disciplinary sanction that does not affect the overall length of the prisoner's confinement may be brought regardless of whether the sanction was overturned"); *Jenkins,* 179 F.3d at 27. Accordingly, this type of § 1983 claim may proceed even if the prisoner-plaintiff has not shown that the sanctions or the procedures that led to them have been overturned through administrative channels or by a state or federal court.[8]

CONCLUSION

The judgment of the district court is *Vacated* and *Remanded.* On remand, the district court is to ascertain whether Peralta has formally agreed, or is then willing, to waive all his potential claims with respect to the sanctions

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8. Not only does consistency with prior holdings require this result, but so also does the avoidance of unfortunate incentives. Were we to hold otherwise, we would give an undesirable incentive to prison officials, allowing them to place severe and unnecessary roadblocks in the way of prisoners who wish to challenge conditions of confinement. It is understandably difficult for a prisoner to prove "favorable termination" with respect to prison disciplinary proceedings. Accordingly, the rule advanced by the defendants, which, absent favorable termination, would ban a § 1983 action whenever a disciplinary proceeding resulted in the extension of confinement as well as a change in confinement conditions, would create the incentive to include as part of every instance of prisoner punishment a sanction that affected the duration of the prisoner's sentence-even if it would just be the loss of one day's worth of good-time credit. We do not believe that such an incentive furthers the twin goals of avoiding frivolous suits challenging conditions of confinement, while permitting potentially valid ones.

affecting the duration of his imprisonment arising out of the proceeding he is currently challenging. If such a waiver results, the district court must allow Peralta to proceed separately with his challenge under § 1983 to the sanctions affecting the conditions of his confinement.[9]

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9. Before the district court considers the merits of that claim, however, it must permit the defendants to assert any of several affirmative defenses that could result in the dismissal of the plaintiff's claim, defenses which the defendants, for various reasons, may not have deemed necessary to proffer earlier. *See Jenkins,* 179 F.3d at 28-29.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 26, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

01 Civ. 3171 (BSJ)

JOSE PERALTA,

Plaintiff,

v.

SANDRA VASQUEZ, et al.,

Defendants.

MEMORANDUM ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff pro se Jose Peralta brings this action pursuant to 42 U.S.C. § 1983, alleging that he was denied due process in a prison disciplinary proceeding that resulted in sanctions including five years confinement in the Special Housing Unit ("SHU"), five years loss of package, commissary and telephone privileges, and five years loss of good time credit. (Compl. ¶ 9).[1] This penalty was subsequently modified to

1. References to Plaintiff's First Amended Complaint, filed on or about June 11, 2001, are cited (Compl. ¶ __).

two years confinement in SHU and two years loss of privileges and good time credit. (Compl. ¶ 12). Plaintiff was incarcerated at Fishkill Correctional Facility during the time the alleged violation occurred.[2] Defendants move to dismiss because Plaintiff cannot show that his disciplinary proceedings were invalidated, as required by *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court agrees and GRANTS Defendants' motion to dismiss.

> In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a 1983 plaintiff 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, 28 U.S.C. § 2254.

Heck, 512 U.S. 486-87. In *Preisser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court held that a prisoner must seek habeas corpus relief under 28 U.S.C. § 2254 in order to challenge a prison disciplinary proceeding that resulted in the loss of good time credits. Although *Preisser* was limited to equitable relief, *Edwards v. Balisok*, 520 U.S. 641 (1997), extended *Preisser*, holding that a state prisoner may not bring

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2. As Plaintiff is no longer housed at Fishkill Correctional Facility, his claims for injunctive relief are dismissed as moot. *Prins v. Coughlin*, 76 F.3d 504, 506 (2d Cir. 1996).

a § 1983 claim for damages if that claim challenges the validity of the procedures used to deprive him of good time credits unless the disciplinary disposition has already been reversed through a state administrative or judicial proceeding or a habeas proceeding. *Edwards*, 520 U.S. at 645. In other words, *Edwards* extended the *Heck* Rule to claims for damages that implicated the fact or duration of confinement.

Plaintiff contends that he may nonetheless maintain this action because he seeks damages only for his confinement in SHU not the loss of good time credits. Courts in this district have interpreted *Edwards* to prohibit claims for damages under § 1983 where the plaintiff has suffered both a loss of good time credit as well as condition of confinement sanctions – such as confinement in SHU – unless the proceeding has otherwise been invalidated. Even where the plaintiff seeks damages based only on his conditions of confinement, the *Heck* Rule applies because where the loss of good time credit and another sanction are part of the same sentence imposed after plaintiff is found guilty of a single charge, a finding of a significant procedural defect, such as a denial due process during the hearing, would indicate not only that the non-good time credit sanction was the result of a tainted proceeding, but that the deprivation of good-time credit was similarly invalid. *Gomez v. Kaplan*, 2000 U.S. Dist. LEXIS 14239, at *22 (S.D.N.Y. Sept. 29, 2000); *see also McNair v. Jones*, 2002 U.S. Dist. LEXIS 17409, at *36-38 (Sept. 18, 2002).

Although a prisoner may maintain a § 1983 action for a due process violation resulting in condition of confinement sanctions that have no effect on the duration of the prisoner's

overall confinement but rather may be characterized as conditions of confinement, *Jenkins v. Haubert*, 179 F.3d 19, 21 (2d Cir. 1999), Plaintiff argues that he may "split" these claims and pursue a § 1983 action even though the challenged proceeding also resulted in a deprivation of good time credits. Although neither the *Edwards* Court nor the Second Circuit in *Jenkins v. Haubert* addressed the issue of whether a prisoner may proceed separately with his § 1983 claim as to those portions of his sentence which affected only the conditions of his confinement. *Jenkins*, 179 F.3d at 25, this Court finds that allowing a plaintiff to "split" his claims under the circumstances in this action would be ill-advised. *See Gomez v. Kaplan*, 2000 U.S. Dist. LEXIS 14239, at *23-24. Here, the alleged due process violations that Plaintiff seeks to challenge – including, *inter alia*, that the hearing officer's decision was based on impermissible hearsay and that Plaintiff received inadequate assistance in preparing for the disciplinary proceeding from his assigned "Spanish Speaking Tier Assistant" (Compl. ¶¶ 3-6) – would, if proven, necessarily imply the invalidity of the deprivation of his good-time credits," as well as his confinement in SHU. *Edwards v. Balisok*, 520 U.S. 641, 646 (1997).

Plaintiff does not allege that his disciplinary disposition has already been reversed through a state administrative or judicial proceeding or a habeas proceeding. Plaintiff filed an Article 78 petition, challenging the disciplinary proceeding; however, that petition was dismissed because Plaintiff failed to pay a mandatory $200.00 state filing fee.

Plaintiff's subsequent appeal to the New York State Court of Appeals was denied.[3] (Compl. ¶¶ 13-19). Plaintiff did not file a petition for a writ of habeas corpus, nor does it appear that such a petition would succeed.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Although the Second Circuit has recognized limited exceptions to the *Heck* Rule – for example, allowing a plaintiff to bring a § 1983 action for false imprisonment even if habeas relief is no longer available because the plaintiff has been released from custody, *see Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001) – here, Plaintiff's inability to pursue a habeas remedy is due to his own failure to properly pursue his state challenge to the disciplinary proceedings; specifically, Plaintiff failed to pay the required filing fee in

3. Plaintiff originally named several state court judges and personnel in this action, presumably for their failure to waive the mandatory filing fee after Plantiff was granted leave to proceed in forma pauperis. (Compl. ¶¶ 14-19, 21). The claims against those defendants were dismissed in an order dated December 10, 2002, on the grounds of immunity.

state court. Under these circumstances, the Court will not permit him now to bring a claim pursuant to § 1983 without having invalidated the underlying disciplinary proceeding. *Cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) ("we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts"). To permit otherwise, would create a loophole to the *Heck* Rule for plaintiffs who willfully default in their state challenges to the underlying disciplinary proceeding.

Defendants' motion to dismiss is GRANTED, and the Clerk of the Court is directed to close this case.

SO ORDERED:

s/ Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
April 26, 2004

APPENDIX C — ORDER OF PARTIAL DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED DECEMBER 10, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

01 Civ. 3171 (MBM)

JOSE PERALTA,

Plaintiff,

-against-

GLENN S. GOORD, Commissioner DOCS; WYANYE STRACK, Superintendent Fishkill Correctional Facility; ADSP R. JONES, Fishkill Correctional Facility,

Defendants.

ORDER OF PARTIAL DISMISSAL

By Order dated April 16, 2001, plaintiff, appearing *pro se,* was directed to file an amended complaint with this Court within sixty (60) days to detail his claim that his right to due process was violated at his prison disciplinary hearing. Plaintiff filed an amended complaint[1] on June 11, 2001 as

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1. In the Amended Complaint, plaintiff names as defendants: **Sandra Vasquez**, Correction Counselor; **Robert** A. **Jones**, Assistant Deputy Superintendent of Programs Services; **Donald Selsky**, (Cont'd)

directed, however, because plaintiff seeks to pursue claims against parties who are immune from such suit, I dismiss part of this amended complaint for the following reasons.

Judges have absolute immunity from suit for judicial acts performed in their judicial capacities. *Mireles v. Waco,* 502 U.S. 9, 11 (1991) *(per curiam)* ("judicial immunity is an immunity from suit, not just from the ultimate assessment of damages." *Id.* (citation omitted)); see *Stump v. Sparkman,* 435 U.S. 349, 356 (1978); *Pierson v. Ray,* 386 U.S. 547, 553-55 (1967); *Tucker v. Outwater,* 118 F.3d 930 (2d Cir. 1997), *cert. denied,* 522 U.S 997 (1997); *Oliva v. Heller,* 839 F.2d 37 (2d Cir. 1988); see also *Forrester v. White,* 484 U.S. 219, 225 (1988). This absolute "judicial immunity is not overcome by allegations of bad faith or malice," *Mireles,* 502 U.S. at 11, nor can a judge "be deprived of immunity because the action he took was in error . . . or was in excess of his authority," *id.* at 13 (quoting *Stump,* 435 U.S. at 356). As the alleged wrongdoings of defendants Florio and Mangano were acts performed in a judicial capacity, plaintiff's claims are foreclosed by absolute immunity and are subject to dismissal. *See* 28 U.S.C. § 1915(e)(2)(B)(iii).

Plaintiff's allegations that defendants Brownstein and Pelzer, the former and current Clerk of Court of the New

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(Cont'd)

Director, Special Housing/Inmate Disciplinary Programs; **Anita R. Florio**, Judge of the Appellate Division, Second Department; **Guy James Mangano**, Judge of the Appellate Division, Second Department; **Martin H. Brownstein**, Former Court Clerk; **James Edward Pelzer**, Court Clerk of Appellate Division, Second Department.

Appendix C

York Supreme Court, Appellate Division, Second Department, required that he pay a filing fee for his action in state court, failed to give him the court file in his case on June 29th and refused to let him speak to the prosecution before his criminal case was called on June 30th must be dismissed because court clerks are absolutely immune for conduct which is judicial in nature and an integral part of the judicial process. See *Rodriguez v. Weprin,* 116 F.3d 62, 66 (2d Cir. 1997) (court clerks are absolutely immune from claims arising out of failure to properly manage court calendar). Since "[a] court's inherent power to control its docket is part of its function of resolving disputes between parties,'" as is its inherent power to control order in the courtroom, defendant Smutt assumes the absolute immunity afforded to judicial officers. *Kampfer v. Rodriguez,* No. 97-CV-739 (RSP/DNH), 1998 WL 187364, at *2 (N.D.N.Y. Apr. 15, 1998) (quoting *Rodriguez,* 116 F.3d at 66); see *McGann v. Lange,* No. 96-CV-859 (SJ), 1996 WL 586798, at *2 (E.D.N.Y. Oct. 10, 1996) (ministerial acts which are "integral to the judicial process'" are protected by absolute immunity). The complaint as it pertains to these two defendants must therefore be dismissed. 28 U.S.C. § 1915(e)(2)(B)(iii).

Accordingly, this action, filed *in forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed as to defendant Florio, Mangano, Brownstein, and Pelzer because it "seeks monetary relief against a defendant who is immune from such relief.". 28 U.S.C. § 1915(e)(2)(B)(iii). In light of plaintiff's remaining allegations, I direct the Acting Clerk of Court to reassign this action as it pertains to the remaining defendants to a district judge in accordance with the Rules for the Division of Business Among District Judges. A copy of this

Appendix C

Order shall be served with the summons and amended complaint. Nothing herein shall preclude the remaining parties from making any such motion to dismiss the complaint as they may be advised to make. The Acting Clerk of Court is directed to designate this action as a Local Rule 33.2 case and advise the parties that any discovery in this action shall be conducted in accordance with Local Rule 33.2. The *Pro Se* Office is directed to provide plaintiff with copies of the standard discovery requests for service upon defendants. I certify pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States,* 369 U.S. 438, 444-45 (1962).

SO ORDERED

s/ Michael B. Mukasey
MICHAEL B. MUKASEY
Chief Judge

Dated: DEC 10 2002
New York, New York

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 27, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	04-2822-Pr
Short Title:	Peralta v. Vasquez
DC Docket Number:	01-cv-3171
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Barbara Jones

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of December two thousand six.

Appendix D

Jose Peralta,

Plaintiff-Appellant,

v.

Sandra Vasquez, Corrections Counselor, Robert Jones, Assistant Deputy Superintendent of Program Services, Donald Selsky, Director, Special Housing/Inmate Disciplinary Programs,

Defendant-Appellee,

Glen S. Goord, DOCS, Wayne Strack, Fishkill Correctional Facility, R. Jones, Assistant Deputy Superintendent of Program Services, Anita R. Florio, Judge of the Appellate Division, Second Department, Guy James Mangano, Judge of the Appellate Division, Second Department, Martin H. Brownstein, Former Court Clerk, James Pelzer, Court Clerk of Appellate Division, Second Department,

Defendants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by counsel for the appellees Nancy A. Spiegel. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: s/ [illegible]
Motion Staff Attorney