No. 07-1056

IN THE
Supreme Court of the United States

HOZAY ROYAL,

Petitioner,

v.

ROBERT DURISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Respondent does not dispute that the courts of appeals are deeply divided over the question of whether *Heck* v. *Humphrey*, 512 U.S. 477 (1994), bars a Section 1983 action brought by a plaintiff to whom habeas corpus is no longer available. Instead, Respondent acknowledges (Op. 20-22, 25-26) that four circuits have held Section 1983 is *not* available to such a plaintiff, and points to inapplicable or irrelevant factors in an ineffectual effort to distinguish the five circuits that have held Section 1983 *is* available (Op. 22-25). Respondent also admits that the court of appeals' sole reason for affirming the dismissal of Petitioner's action was that it was barred by *Heck* v. *Humphrey*. Op. 14.

The bulk of the Brief in Opposition is devoted to an attack on the timing and merits of Petitioner's Section 1983 claim, neither of which the court of appeals discussed or ruled upon. Respondent's arguments that Petitioner should have brought his claim at a different time or in a different forum are incorrect, as are his arguments on the merits. But in any case they do not provide a basis for denying the Petition because the court of appeals relied solely on the *Heck* bar and did not reach the merits of the case.

1. As shown in the Petition, five circuits have held that *Heck*'s favorable termination requirement does not apply to a Section 1983 suit brought by a former prisoner who has no recourse to habeas corpus. Pet. 17-22. These courts' decisions are in accord with Justice Souter's concurring opinion in *Heck* and the concurring and dissenting opinions of

five Justices in *Spencer* v. *Kemna*. *Heck*, 512 U.S. at 500 (Souter, J., concurring); *Spencer*, 523 U.S. 1, 19 (1998) (Souter, J., concurring); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting).

Without discussing *Heck*'s concurrence or the opinions in *Spencer* that the decisions of five circuits rely upon, Respondent points to irrelevant matters and non sequiturs in an ineffectual attempt to distinguish those decisions.

First, Respondent tries to distinguish the Sixth and Seventh Circuits' decisions by assuming away the question presented. Op. 22-23. Respondent contends that those courts would not allow a Section 1983 case brought by a former prisoner to go forward if the plaintiff "has the option of pursuing a direct appeal or some form of collateral attack in the state courts," or "'could have sought and obtained habeas review while still in prison but failed to do so.'" Op. 23 (quoting *Powers* v. *Hamilton County Public Defender Comm'n*, 501 F.3d 592, 601 (6th Cir. 2007)). But the question here is whether a Section 1983 case can go forward despite *Heck* precisely because plaintiff does *not* have access to habeas corpus or other collateral review. *See DeWalt* v. *Carter*, 224 F.3d 607, 617 (7th Cir. 2000) (*Spencer* reveals that five Justices hold the view that Section 1983 "must be available to challenge constitutional wrongs where habeas is not available."). Here, while Petitioner sought postconviction relief in both state court and in his federal habeas corpus petition, he was unable to obtain relief because he was released and his claim became moot. *See* Pet. 12.

Respondent next asserts that cases from the Second and Ninth Circuits were decided "within the

context of purely administrative determinations, rather than a challenge to a court order such as a conviction or judgment of sentence." Op. 24. But both of the cases that Respondent cites presented exactly the same type of claim that Petitioner asserts here. In *Nonnette* v. *Small*, a former prisoner challenged the calculation of his sentence and the revocation of good time credits. 316 F.3d 872, 874 (9th Cir. 2002). Likewise, the Second Circuit in *Huang* v. *Johnson* allowed a Section 1983 suit challenging the application of credit for time served to go forward though it was "aimed at the duration" of the confinement because "no habeas remedy" was available. 251 F.3d 65, 75 (2d Cir. 2001). Like the plaintiffs in *Nonnette* and *Huang*, Petitioner does not challenge "a conviction or judgment of sentence." Op. 24. Petitioner challenges Respondent's failure to properly credit him with time previously served as required under Pennsylvania law.

Respondent's attempt to distinguish the Eleventh Circuit on the basis that the claim at issue would not "be barred by *Heck* in the first place" (Op. 24-25) is similarly unpersuasive. In *Harden* v. *Pataki*, the Eleventh Circuit reversed a district court's ruling that a Section 1983 case was barred by *Heck*, holding that "because federal habeas corpus [was] not available" to the plaintiff, "§ 1983 must be." 320 F.3d 1289, 1299 (11th Cir. 2003).

On the other side of the circuit split, Respondent agrees that four circuits, the First, Third, Fifth, and Eighth, have held that "a claim does not lie" under Section 1983 where habeas corpus is not available. Op. 20-22; 25-26. Unlike the Second, Sixth, Seventh, Ninth, and Eleventh

Circuits, these courts have expressly declined to follow the view expressed in concurring and dissenting opinions in *Spencer* and the decisions of the courts on the majority side of the split. *E.g.*, *Entzi* v. *Redmann*, 485 F. 3d 998, 1003 (8th Cir. 2007) (declining to follow the *Spencer* opinions and noting contrary Sixth and Ninth Circuit authority); *Williams* v. *Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006) ("We decline to adopt [the Second Circuit's decision in] *Huang* here."); *Randell* v. *Johnson*, 227 F.3d 300, 301 & n.4 (5th Cir. 2000) (per curiam) (declining to follow the *Spencer* opinions and noting that three circuits have held otherwise); *Figueroa* v. *Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (declining to follow the *Spencer* opinions).

In addition, other courts and scholars have acknowledged the circuit split presented by the Petition. *E.g.*, *Powers*, 501 F.3d at 602 ("[O]ur sister circuits are divided on the question."); *Dible* v. *Scholl*, 410 F. Supp. 2d 807, 820 (N.D. Iowa 2006) (noting that the courts have "split into two camps"); Note: *Defining the Reach of* Heck *v.* Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?* 121 Harv. L. Rev. 868, 869 (2008) ("the lower courts are divided" on the question); Bruce Ellis Fein, Heck *v.* Humphrey *After* Spencer *v.* Kemna, 28 New Eng. J. on Crim. & Civ. Confinement 1, 25 (2002) (noting the circuit split on "an important question[] of federal law" that "demand[s] resolution").

The courts and scholars that have recognized the circuit split are correct. The question is an important one, squarely presented here, that is ripe for this Court's resolution.

2. Respondent's contentions that Petitioner should have brought his claim in a different forum or at a different time are incorrect, as are his claims on the merits.

The Brief in Opposition fundamentally misconstrues Petitioner's Section 1983 claim by contending that he should have brought it earlier or in a different forum. Simply stated, Petitioner's claim is that under Pennsylvania law, he was entitled to credit against his 1999 probation revocation sentence for six months that he spent in custody before his initial sentence for the same charge, where that time was not credited against the initial sentence. *See* 42 Pa. Cons. Stat. § 9760. Despite six separate requests, Respondent failed to investigate Petitioner's right to that credit. As a result, Petitioner served a total of seven and one half years on a crime that carries a maximum sentence of seven years. The proper time and forum to bring this claim was in the federal district court, within the limitations period after Petitioner was subjected to illegal imprisonment.

Respondent improperly focuses on whether Petitioner raised the time credit issue with regard to his first sentence in 1984. But regardless of whether Petitioner could have obtained credit against that sentence through appeal or postconviction relief, Pennsylvania law requires that on a probation violation sentence, a defendant is entitled to credit against the maximum sentence for "all time spent in custody" as a result of the offense. 42 Pa. Cons. Stat. § 9760; *see also McSpadden* v. *Dep't of Corr.*, 870 A.2d 975, 977 (Pa. Commw. Ct. 2005); *Commonwealth* v. *Bowser*, 783 A.2d 348, 350 (Pa.

Super. Ct. 2001); *Commonwealth* v. *Williams*, 662 A.2d 658, 659 (Pa. Super. Ct. 1995). Accordingly, Petitioner was entitled to credit for all of the time that he was held regardless of whether he challenged the failure to credit that time to his initial sentence.

Nor is this a collateral attack on Petitioner's conviction or sentence. Petitioner does not contend that he was improperly convicted, and does not contend that his sentence was not lawfully imposed. Petitioner challenges only Respondent's failure to properly calculate the credit Petitioner was due against that sentence. Moreover, Respondent's suggestion (Op. 15-16) that Petitioner did not pursue his claim through available state postconviction relief or federal habeas is plainly wrong. Petitioner brought this claim in a petition under Pennsylvania's Post-Conviction Relief Act, and attempted to amend his habeas corpus petition to include the issue. *See* Pet. 12; Pet. App. 9a. These claims were not denied on their merits; Petitioner's state petition was denied as moot after he was released, and his attempt to add the issue to his habeas petition was denied as defaulted or not yet exhausted. Pet. App. 10a.

a. Petitioner's claim is not barred by issue preclusion, "federal common law," or by the statute of limitations.

Issue preclusion, which Respondent raises for the first time in the Brief in Opposition, plainly does not apply here. In Pennsylvania, issue preclusion applies if five criteria are met: "'(1) when the issue in the prior adjudication was *identical* to the one presented in the later action; (2) when there was a *final judgment* on the merits; (3) when the party against whom the plea is asserted was a party or in

privity with a party to the prior adjudication; (4) when the party against whom it is asserted has had a *full and fair opportunity to litigate the issue* in a prior action; and (5) when the determination in the prior proceeding was *essential to the judgment*.'" *Cohen* v. *Workers' Comp. Appeal Bd.*, 909 A.2d 1261, 1264 (Pa. 2006) (emphasis added).

Respondent contends that "Royal litigated the term and length of his sentence on direct appeal to the Superior Court," (Op. 26), but Petitioner's entitlement to credit for his 1983-84 periods of incarceration was not at issue in that appeal. Indeed, Petitioner's requests that Respondent properly calculate his credit were pending at the same time as his direct appeal. Accordingly at least two requirements for issue preclusion are not met because the issue in Petitioner's appeal was neither "identical" to the issue here nor "essential to the judgment."

Respondent's claim (also raised for the first time in the Brief in Opposition) that this action is "barred as a matter of federal common law" (Op. 30) is likewise flawed. Respondent claims that "Royal litigated the term and length of his sentence in his District Court habeas proceeding," but the district court did not rule on the merits of the time credit issue Petitioner asserts in this action. Rather, the court denied Petitioner's motion to amend the petition to add the issue on the grounds that the issue was not yet exhausted or procedurally defaulted. C.A. Supp. App. SA90-91 n.2.

Nor is Petitioner's claim barred by the statute of limitations. Respondent claims that the statute began to run on Petitioner's claim—that he was

illegally imprisoned beyond his lawful sentence in 2001-02—in 1984, when Petitioner first learned he was not properly credited with time served, or in 1999, when Respondent indicated that he did not have records from which to calculate Petitioner's time credit. Op. 33. But "'[u]nder the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission *results in damages*.'" *Wallace* v. *Kato*, 127 S. Ct. 1091, 1097 (2007) (quoting 1 C. Corman, Limitation of Actions § 7.4.1, at 526-27 (1991)) (emphasis added). Here, Petitioner's claim to time credit did not result in damages until he remained in prison beyond the time when his properly calculated sentence ended. Before then, Petitioner's claim to damages would have been speculative. Petitioner filed his complaint in this case within the statutory period following the first day that he was illegally imprisoned.[1]

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[1] The limitations period for a § 1983 action is based on the state's personal injury statute of limitations. *Wilson* v. *Garcia*, 471 U.S. 261, 276 (1985). In Pennsylvania, personal injury suits are subject to a two-year statute of limitations. 42 Pa. Cons. Stat. § 5524(2). Petitioner was released on February 16, 2002. Had Petitioner received proper time credit, he would have been released 180 days earlier, August 20, 2001. Petitioner's injury thus accrued the next day, August 21, 2001. Petitioner submitted his complaint and application to proceed *in forma pauperis* on July 31, 2003, and it was filed on Aug. 8, 2003, both within the two year statute of limitations period commencing August 21, 2001. C.A. App. 18a, 26a.

b. Respondent's arguments on the merits are incorrect and do not provide a basis for denying certiorari.

The Brief in Opposition (at 10) misstates the record regarding Respondent's purported investigation of Petitioner's claim for time credit from 1983 and 1984. Contrary to Respondent's suggestion, Respondent did not come to any conclusion regarding whether Petitioner was entitled to credit in 1999 for his uncredited detention in 1983 and 1984. His 1999 response to Petitioner's request for credit stated simply, "I have no microfilm or automated records for the period you are referring to, and the court database is no help."[2] C.A. App. 47a-48a. Respondent's assertion that there are four sentences to which "Royal's claimed six months of time served could have been applied" in 1984 (Op. 10) is contained in an affidavit he submitted during this litigation, five years after Petitioner's requests for time credit. C.A. S. App. SA48-50. It is evident from the affidavit—which relies in part on

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[2] Respondent also stated (incorrectly) that because Petitioner was serving a probation violation sentence, he would not be entitled to credit for time served prior to his original sentence. C.A. App. 47a-48a. Respondent now argues that he was applying a presumption (stated in a case decided six years later) that a period of incarceration includes all credit to which the prisoner was entitled, Op. 11 & n.2; however, even if such a presumption were applicable, it applies only "'unless the record shows otherwise.'" *Aviles* v. *Pa. Dep't of Corr.*, 875 A.2d 1209, 1213-14 (Pa. Commw. Ct. 2005) (quoting *United States* v. *Kendis*, 883 F.2d 209 (3d Cir. 1989)). Here, "the record shows otherwise" because Petitioner submitted his "Sentence Status Summary" that showed he received *no* credit against his initial sentence for time served. C.A. App. 35a.

Petitioner's deposition testimony—that these speculations were made during this litigation, *not* contemporaneously with Petitioner's requests. *See id.* ¶ 9. Indeed, even in the affidavit Respondent does not conclude Petitioner was not entitled to credit, admitting that "[t]he above possibilities are conjecture on my part."[3] *Id.* at SA49, ¶ 13.

Respondent's contention that Petitioner's suit is without merit does not provide a basis for denying certiorari. As shown in the Petition, Petitioner has substantial arguments that the district court was incorrect to grant summary judgment in this case. Pet. 28-29. The court of appeals did not reach those arguments because it held that the action was barred by *Heck* v. *Humphrey*. Five circuits, however, would have held that the action was *not* barred by *Heck*. Accordingly, this case presents an ideal vehicle in which to decide whether a Section 1983 plaintiff who has no recourse to habeas corpus must nevertheless satisfy *Heck*'s favorable termination requirement.

[3] Because this case arises on appeal from a grant of summary judgment to Respondent, the standard is whether there is no question of material fact and the movant is entitled to judgment as a matter of law. Thus, it would be improper to hold that what "could have" happened supports the summary judgment ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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