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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prisoner who commences a Section 1983 action after he has been released, when habeas corpus relief is no longer available, must satisfy the favorable termination rule of *Heck* v. *Humphrey*, 512 U.S. 477 (1994).

PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were Petitioner, Respondent, and defendant-appellee Vivian Miller. Ms. Miller was dismissed from the case by mutual consent of the parties after briefing but before oral argument in the court of appeals.

Petitioner is also known as "Carlos Johnson."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit. The Third Circuit held that a Section 1983 plaintiff who has been released, and thus is unable to challenge the length of his confinement through a habeas corpus petition, must nevertheless satisfy the "favorable termination" requirement stated in *Heck* v. *Humphrey*, 512 U.S. 477 (1994). The court of appeals' decision implicates an acknowledged split in the circuits. The decision is contrary to the opinions expressed in concurring and dissenting opinions of five Justices of this Court in *Spencer* v. *Kemna*, 523 U.S. 1 (1998), and conflicts with the decisions of five other courts of appeals. These courts hold that *Heck* does not bar an action by a Section 1983 plaintiff who cannot pursue a habeas corpus remedy. Three additional circuits share the view of the Third Circuit that suits by such plaintiffs are barred by *Heck*. Certiorari should be granted to resolve a deep and abiding conflict among the circuits on an important question of federal law.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-6a, and the opinion and judgment of the district court, App., *infra*, 7a-17a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2007. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section one of the Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1.

Section 1983 of Title 42 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress * * * .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided: Whether a prisoner who brings a Section 1983 claim must satisfy the "favorable termination" rule of *Heck* v. *Humphrey*, 512 U.S. 477 (1994), even when he is foreclosed from obtaining a favorable termination through habeas corpus proceedings.

1. The Favorable Termination Rule of *Heck* v. *Humphrey*. In a series of cases beginning in the early 1970s, this Court has examined the "intersection" of 42 U.S.C. § 1983 and the habeas corpus statute. The Court has noted that these two provisions both provide "access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation." *Heck*, 512 U.S. at 480. The habeas corpus statute provides a cause of action for a prisoner who alleges that he is being held "pursuant to the judgment of a State court" "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Section 1983 provides a remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. While a claim that a prisoner is being held in violation of the Constitution or laws of the United States could fall within the broadly-written text of § 1983, the Court's cases have limited the § 1983 remedy to avoid such an overlap.

The Court's examination of the potential conflict between § 1983 and the habeas statute began with *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). In *Preiser*, state prisoners brought actions under

Section 1983 challenging their loss of good-time credits in prison disciplinary proceedings. *Id.* at 477-81. The prisoners sought restoration of their good-time credits and immediate release from custody. *Id.* The Court noted that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody," and that "the traditional function of the writ is to secure release from illegal custody." *Id.* at 484. Accordingly, the Court held that "when a state 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.

In *Heck* v. *Humphrey*, the Court addressed a complementary question: whether prisoners who do *not* seek "immediate or speedier release," may pursue relief under Section 1983 if they seek instead monetary damages for a claim that "call[s] into question the lawfulness of conviction or confinement." 512 U.S. at 481, 483. The Court analogized such a claim to the tort of malicious prosecution, noting that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. The Court held that a similar "favorable termination" requirement was appropriate for Section 1983 damages suits challenging "an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." *Id.* at 486. In those circumstances, "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." *Id.* at 486-87.

Although the plaintiff in *Heck* was "in custody" and could have availed himself of the habeas corpus statute, footnote 10 of the Court's opinion stated, "We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n.10.

In a concurring opinion joined by three other Justices, Justice Souter took a different view. Justice Souter noted that "a sensible way to read the opinion" in *Heck* is that "prison *inmates* seeking § 1983 damages in federal court for unconstitutional conviction or confinement must satisfy a requirement analogous to the malicious-prosecution tort's favorable-termination requirement." 512 U.S. at 500 (Souter, J., concurring) (emphasis added). The concurrence asserted that "the alternative would needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes." *Id.* "If these individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences), like state prisoners, were required to show the prior invalidation of their convictions or sentences in order

to obtain § 1983 damages for unconstitutional conviction or imprisonment, the result would be to deny any federal forum for claiming a deprivation of federal right to those who cannot first obtain a favorable state ruling." *Id.* The concurring Justices concluded: "That would be an untoward result." *Id.*

Four years after *Heck*, the Court addressed a different but related issue in *Spencer* v. *Kemna*, 523 U.S. 1 (1998). In *Spencer*, the Court addressed whether a prisoner challenging the revocation of his parole could maintain his habeas corpus petition even after his sentence expired. The Court held that in such a case, the habeas corpus petition is moot unless the petitioner can show some "collateral consequence" of the conviction. *Id.* at 8. The Court concluded that the petitioner would not suffer collateral consequences from his parole revocation and that his habeas corpus petition was therefore moot. *Id.* at 124-17. The Court rejected the argument that the petitioner would suffer collateral consequences because *Heck*'s favorable termination requirement would bar a future action under Section 1983 if his habeas corpus action were not permitted to proceed. *Id.* at 17.

In accord with that holding, five Justices, in concurring and dissenting opinions, expressed the view that *Heck* would *not* bar a future Section 1983 action by a released prisoner. Justice Souter's concurrence, joined by Justices O'Connor, Ginsburg, and Breyer, noted that "*Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim." *Id.* at 19 (Souter, J., concurring). Citing his *Heck* concurrence, Justice Souter wrote that "it would be unsound to read

either *Heck* or the habeas statute as requiring any such result." *Id.* at 19. The concurrence stated that "any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody." *Id.* at 20. Justice Souter concluded that the "better view" is that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21.

Justice Ginsburg, who had not joined Justice Souter's concurrence in *Heck*, concurred separately, stating, "I have come to agree with JUSTICE SOUTER's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentenced have been fully served, for example) fit within § 1983's 'broad reach.'" *Id.*

Justice Stevens, while dissenting from the majority opinion in *Spencer*, agreed with Justices Souter and Ginsburg's concurring opinions, stating that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as JUSTICE SOUTER explains, that he may bring an action under § 1983." *Id.* at 25 n.8.

Five Justices of this Court thus have expressed the view that *Heck*'s favorable termination rule does *not* bar a § 1983 action brought by

individuals for whom no habeas corpus remedy is available.

2. The Facts of This Case. Petitioner Hozay Royal brought this Section 1983 action against officials in the Philadelphia Prison System to recover money damages for 180 days that he spent in custody beyond the seven-year maximum allowed under Pennsylvania law for his shoplifting conviction.

Mr. Royal was convicted of shoplifting in 1984 and sentenced in 1985. App., *infra*, 8a. Before his sentence began, Mr. Royal spent a total of 180 days in custody (in two separate periods) on account of the shoplifting crime. *Id.* Mr. Royal received a sentence with a maximum of four years. *Id.* The 180 days that Mr. Royal spent in custody prior to sentencing were not credited toward his sentence, and Mr. Royal served the entire four years. *Id.*[1] Mr. Royal was released on probation. *Id.*

Under Pennsylvania law, any time that a criminal defendant spends in custody as a result of a particular charge is credited toward the maximum sentence allowed by statute for that charge. 42 Pa. Cons. Stat. § 9760 ("Credit against the maximum term and any minimum term shall be given to the

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[1] During his incarceration, Mr. Royal was convicted on a separate shoplifting charge, the sentence for which was added to the sentence he was already serving. When Mr. Royal's first sentence expired, he remained in custody on the subsequent sentence. The district court's opinion mistakenly stated that Mr. Royal was released immediately after his first sentence ended. App., *infra*, 8a.

defendant for all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts."). This is true so long as the time has not been credited against another sentence. *See Commonwealth* v. *Bowser,* 783 A.2d 348, 350 (Pa. Super. Ct. 2001) (declining to award "duplicate credit"). Mr. Royal did not receive any credit for the 180 days he spent in custody before he began serving the original sentence in 1985. Thus, the time remained available to be credited against the maximum term of imprisonment allowed for shoplifting for any future sentence based on the same charge. *See Commonwealth* v. *Williams*, 662 A.2d 658, 659 (Pa. Super. Ct. 1995) (awarding credit on probation revocation sentence to avoid exceeding the statutory maximum). The maximum sentence under Pennsylvania law for shoplifting (or "retail theft") is seven years. 18 Pa. Cons. Stat. §§ 1103(3), 3929(b)(iv).

In 1999, Mr. Royal was found to have violated the terms of his probation stemming from the same 1984 shoplifting conviction. App., *infra*, 8a. For violating his probation, Mr. Royal received a sentence with a maximum of three years' incarceration, but again was not credited with the 180 days he served in 1984 and 1985. *Id.* at 8a-9a.[2] Mr. Royal served the probation violation sentence in the Philadelphia Prison System, where Respondent is the official responsible for calculating inmate

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[2] Mr. Royal was credited with the time he spent in custody between his 1999 arrest and 1999 sentencing. App., *infra*, 9a.

sentences. During the three years that Mr. Royal was incarcerated on the probation violation, he made six separate requests that Respondent correct the calculation of his sentence to account for the 180 days that Mr. Royal was detained before he began serving his original sentence on the 1984 conviction.

Mr. Royal informed Respondent that unless he was credited with the time he was held prior to his original sentence, he would be incarcerated for 180 days beyond the seven-year maximum allowed by Pennsylvania law for shoplifting: Mr. Royal was detained 180 days before his original sentence; he served four full years on that sentence; and he was being held on an additional three-year sentence. Together, those periods would total seven years and 180 days.

Respondent never came to any conclusion as to whether Mr. Royal was entitled to the credit. Instead, Respondent's replies to Mr. Royal's requests indicated that Respondent did not believe he could confirm the periods of incarceration from 1984 and 1985. Those replies were contained in two hand-written notes. The first note was written on Mr. Royal's second request for credit, and said: "This is a state parole issue & I doubt we can confirm any time from that period that wasn't applied to Mr. Royal's state sentence when he was sent to the [state correctional institution]." C.A. App. 51a. Respondent's second hand-written response similarly expressed doubt that Respondent could confirm Mr. Royal's time, stating: "I have no microfilm or automated records for the period you are referring to, and the court database is no help." C.A. App. 47a-48a. In addition Respondent stated (contrary to

Pennsylvania law) that because he was serving a probation violation sentence, Mr. Royal would not be entitled to credit for time served prior to his original sentence. *Id.*[3]

Mr. Royal then included in his subsequent requests a full explanation of the two periods that he was incarcerated in 1984 and 1985 along with documentation of those periods. C.A. App. 23a-25a; 33a-38a; 45a-46a. The documents Mr. Royal provided showed the date he was initially arrested, the date he was discharged on bail, the date he was arrested for the second time, that his second arrest included a "fugitive from justice" charge that precluded bail, the date of his conviction, the date of his sentencing, and the "Sentence Status Summary" from 1985, showing that he had not received any credit for time served. *Id.*

Respondent never responded to Mr. Royal's further requests or to the documentation that Mr.

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[3] Pennsylvania's sentencing law provides that a person convicted of a crime be given credit against the maximum term of imprisonment for "all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts." 42 Pa. Cons. Stat. § 9760. Pennsylvania state court decisions confirm that time spent in custody on an original sentence is credited toward the maximum sentence for a probation violation sentence stemming from the same crime. *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).

Royal provided.[4] Mr. Royal served the full three years on the probation violation sentence. Combined with his original sentence and the time he was detained prior to that sentence, Mr. Royal served seven years and 180 days for the 1984 shoplifting conviction.

Mr. Royal's State and Federal Petitions for Post-Conviction Relief. In 2000, while incarcerated on the probation violation sentence, Mr. Royal brought a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), seeking credit for the time he served in 1984 and 1985. App., *infra*, 9a. Mr. Royal's PCRA petition remained pending during his remaining incarceration for the probation violation. Mr. Royal was released on February 16, 2002, and on October 30, 2002, his PCRA petition was denied as moot. *Id.* at 10a.

In December 2000, Mr. Royal brought a habeas corpus petition, which he later attempted to amend to raise his time credit issues. The court denied Mr. Royal's petition, and denied his motion to amend, stating that the time-credit claim either was defaulted or was not yet exhausted due to the pending PCRA petition. *Id.*

The District Court's Order. Proceeding pro se, Mr. Royal filed this action for money damages under 42 U.S.C. § 1983 against Respondent, alleging violations of his Eighth Amendment right to be free from cruel and unusual punishment, and his Fifth

[4] Respondent did correct a three-day error regarding credit for the time Mr. Royal spent in custody in 1999 prior to the 1999 sentence. App., *infra*, 9a.

and Fourteenth Amendment right to procedural due process.[5]

The district court granted summary judgment to Respondent. App., *infra*, 7a. On Mr. Royal's Eighth Amendment claim, the court acknowledged that the Eighth Amendment is violated based on an incorrectly calculated sentence if the plaintiff shows 1) "that a prison official had knowledge of the contention that the sentence the prisoner is serving has been incorrectly calculated and thus of the risk that unwarranted punishment was being, or would be, inflicted"; 2) "that the official either failed to act or took only ineffectual action under the circumstances indicating that his or her response to the problem was a product of deliberate indifference to the prisoners plight"; and 3) "a causal connection between the official's response to the problem and the infliction of the unjustified detention." *Id.* at 11a, citing *Sample* v. *Diecks*, 885 F.2d 1099, 1110 (3d Cir. 1989).

The court assumed that Mr. Royal's pre-commitment time was improperly credited and that his term of imprisonment exceeded the maximum allowable under Pennsylvania law, but held that Royal "failed to establish that the excessive detention was the result of deliberate indifference by prison officials." *Id.* at 11a.

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[5] Mr. Royal also sued Vivian Miller, the clerk of the courts for the Court of Common Pleas of Philadelphia County and the Philadelphia Municipal Court. By agreement of the parties, Ms. Miller was dismissed from the case after briefing but before oral argument in the court of appeals.

With regard to Mr. Royal's Fifth and Fourteenth Amendment claim, the district court noted the Third Circuit's holding that a prisoner must be given "meaningful and expeditious consideration" of a claim that his term of imprisonment has been miscalculated. *Id.* at 15a, citing *Sample*, 885 F.2d at 1115. The district court held that Royal "failed to point to evidence from which a factfinder would find that his claim was not meaningfully and expeditiously considered by defendants." *Id.* The district court thus granted summary judgment to Respondent on Royal's due process claim.

The Court of Appeals' Opinion. Mr. Royal timely appealed from the district court's judgment. The court of appeals appointed counsel and ordered the parties to address the additional question of "whether *Heck* v. *Humphrey*, 512 U.S. 477 (1994), bars the current action under 42 U.S.C. Section 1983."

In addition to his arguments that the district court was incorrect to grant summary judgment, Petitioner argued that *Heck* did not apply because success on his claim would not "render a conviction or sentence invalid" and would "not demonstrate the invalidity of any outstanding criminal judgment against" him. *Heck*, 512 U.S. at 486-87. Petitioner also argued that, in accordance with the concurring and dissenting opinions of five Justices of this Court in *Spencer* v. *Kemna*, *Heck* does not bar a Section 1983 action brought by an individual who cannot obtain a favorable termination because habeas corpus is no longer available. Petitioner acknowledged that the Third Circuit had already

rejected the latter argument in *Williams* v. *Consovoy*, 453 F.3d 173 (3d Cir. 2006), but raised the issue to preserve it for further review.

After briefing and oral argument, the court of appeals affirmed the judgment of the district court on the alternative ground that Royal's claims are barred by *Heck*. App., *infra*, 6a. The court rejected Petitioner's argument that success on his claims would not invalidate his sentence, stating, "[w]ere we to hold that the Commonwealth of Pennsylvania did, in fact, incarcerate Royal beyond the statutory maximum, we would necessarily be holding that the 'confinement or its duration' was invalid in violation of the favorable termination requirement announced in *Heck*." *Id.* at 4a.

The court of appeals also rejected Petitioner's argument that *Heck* should not apply because habeas corpus was no longer available to him. *Id.* at 5a-6a. The court acknowledged that "several Courts of Appeals have concluded that *Heck*'s favorable termination requirement does not apply to a prisoner no longer in custody." App., *infra*, 5a-6a & n.1 (citing *Huang* v. *Johnson*, 251 F.3d 65, 74 (2d Cir. 2001); *Shamaeizadeh* v. *Cunigan*, 182 F.3d 391, 396 (6th Cir. 1999); *DeWalt* v. *Carter*, 224 F.3d 607, 617 (7th Cir. 2000). The court noted, however, that the Third Circuit has "expressly declined to adopt this rule." App., *infra*, 5a-6a, citing *Williams*, 453 F.3d at 177-78.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Opinion Conflicts With Decisions Of Five Other Circuits.

The court of appeals' opinion in this case recognizes the split among the circuits on the question of whether a prisoner no longer in custody must satisfy the favorable termination rule of *Heck* v. *Humphrey* in order to bring a § 1983 suit challenging the duration of his incarceration. App., *infra*, 6a. Other courts and scholarly commentary have also acknowledged the split. *E.g.*, *Powers* v. *Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 602 (6th Cir. 2007) ("[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) (noting that "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 circuit split is even more pronounced than would appear from the Third Circuit's opinion. In addition to the three circuits the court of appeals cited, two additional circuits have held that a Section 1983 action may proceed without satisfying a favorable termination requirement when habeas corpus is not available to the plaintiff. On the other hand, three circuits have agreed with the Third Circuit, and have held that *Heck* bars a Section 1983

action even if the plaintiff cannot obtain a favorable termination through habeas corpus.

The circuit split warrants this Court's review. The conflict in authority makes the ability of prisoners to obtain relief for unconstitutional treatment at the hands of state officials depend on geographical happenstance. An individual like Mr. Royal—attempting to obtain relief for half a year of unconstitutional imprisonment—could proceed on his claim in the five circuits that do not view *Heck* as a bar when habeas is not available, but cannot proceed in the four circuits that hold the opposite view. This Court has acknowledged that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may * * * dispense with the *Heck* requirement." *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam). While the Court stated that case was "no occasion to settle the issue," the occasion is now here. *Id.*

A. Five Circuits Hold That *Heck* Does Not Bar A § 1983 Plaintiff's Case If Habeas Corpus Is Unavailable.

The majority of circuits to address the question have held that the favorable termination rule of *Heck* does not bar § 1983 plaintiffs who cannot pursue habeas corpus. Several of the decisions of these courts involved allegations, as here, that prison officials miscalculated a sentence or failed to give proper credit.

In *Huang* v. *Johnson*, the Second Circuit considered a Section 1983 action challenging the calculation of a juvenile's credit for time served in a correctional facility against his time of confinement

in juvenile delinquency facilities. 251 F.3d 65, 67 (2d Cir. 2001). After reviewing this Court's rulings in *Heck* and *Spencer*, and noting the opinions of Justices Souter, Ginsburg, and Stevens, the court held that "*Heck* does not bar Huang's Section 1983 action." *Id.* at 75. Although the action was "aimed at the duration" of the confinement, the juvenile had "no habeas remedy because he ha[d] long since been released from [juvenile delinquency] custody." *Id.* Accordingly, because "'five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be [available]," the court concluded "that Huang's Section 1983 claim must be allowed to proceed." *Id.*, quoting *Jenkins* v. *Haubert*, 179 F.3d 19, 26 (2d Cir. 1999).

In another case decided the same year, the Second Circuit held that *Heck*'s favorable termination rule did not bar a Section 1983 case brought by a plaintiff who was ineligible for habeas corpus because he had been assessed a fine rather than incarcerated. *Leather* v. *Ten Eyck*, 180 F.3d 420, 424 (2d Cir. 1999).

The Ninth Circuit has also held that a former prisoner to whom habeas is unavailable may pursue a § 1983 action without satisfying *Heck*'s favorable termination rule. In *Nonnette* v. *Small*, a former prisoner challenged via § 1983 the calculation of his sentence and the revocation of his good-time credits. 316 F.3d 872, 874 (9th Cir. 2002). The court stated that "the crucial question" in the case was: "Does the unavailability of a remedy in habeas corpus because of mootness permit Nonnette to maintain a § 1983 action for damages, even though success in that

action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits?" *Id.* at 876. The court, informed by the concurring and dissenting opinions in *Spencer*, held that "*Heck* does not preclude Nonnette's § 1983 action." *Id.* at 877. The court noted that if *Heck* had decided that the favorable termination rule applied to former prisoners no longer in custody, it would not be "free to consider it undermined by the opinions in *Spencer*." *Id.* at 877 n.5. The court concluded, however, that "*Heck* does not control, and reach[ed] that understanding with the aid of the discussions in *Spencer*." *Id.*

The Seventh Circuit has come to the same conclusion in decisions involving Section 1983 challenges brought by individuals who could not obtain relief through habeas corpus. In *Carr* v. *O'Leary*, the court considered a § 1983 claim brought by a prisoner who lost good time credits for missing the prisoner count even though he was prevented from making the count by a prison riot (that he did not participate in). 167 F.3d 1124, 1125 (7th Cir. 1999). After the suit was filed, the plaintiff was released from prison and could no longer bring a habeas petition. *Id.* at 1127. The defendants asserted *Heck* as a bar to the suit only after summary judgment was granted to the plaintiff on liability. *Id.* at 1125. Writing for the court, then-Chief Judge Posner considered whether the defendants should be relieved of waiving their *Heck* defense, and concluded that although the concurring and dissenting opinions in *Spencer* were inconsistent with a prior Seventh Circuit case, they "cast[] sufficient doubt on the applicability of *Heck* to the

present case to make it unreasonable to relieve the defendants from their waiver of *Heck*." *Id.* at 1127.

Several months after *Carr* was decided, the Seventh Circuit considered a Section 1983 claim brought by a prisoner alleging equal protection and retaliation violations stemming from a disciplinary proceeding that resulted in the loss of his prison job. *DeWalt* v. *Carter*, 224 F.3d 607, 613 (7th Cir. 2000). The court stated that it was "faced squarely with the issue whether Mr. DeWalt may bring his § 1983 action * * * when the underlying disciplinary sanction has not been overturned or invalidated." *Id.* The court reviewed *Preiser*, *Heck*, *Spencer*, and the concurring and dissenting opinions in *Spencer,* observing that the latter "reveal that five justices now hold the view that a § 1983 action must be available to challenge constitutional wrongs where habeas is not available." *Id.* at 614-17. The court held that "that the unavailability of federal habeas relief does not preclude a prisoner from bringing a § 1983 action to challenge a condition of his confinement that results from a prison disciplinary action." *Id.* at 618. To reach this result, the court overruled two pre-*Spencer* decisions that "precluded plaintiffs from pursuing § 1983 actions when federal habeas was not available or when the prisoner had not first availed himself of the option." *Id.* at 617-18 & n. 6.

In *DeWalt*, the Seventh Circuit noted this Court's disapproval of "relying on statements in separate opinions to determine whether a case had been overruled," but stated that it was relying on the opinions in *Spencer* "not to overrule precedent, but to

help guide us in deciding an open question." *Id.* at 617 n.5.

The Sixth Circuit recently joined the courts holding that *Heck* does not bar a Section 1983 action where habeas corpus is not available. The court previously stated in a footnote that *Spencer* "clearly excludes from *Heck*'s favorable termination requirement former prisoners no longer in custody." *Shamaeizadeh* v. *Cunigan*, 182 F.3d 391, 396 n.3 (6th Cir. 1999). In 2006, the Sixth Circuit confirmed that "the better-reasoned view" is "the logic of those circuits that have held that *Heck*'s favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights." *Powers*, 501 F.3d at 603. The Court noted that the courts that have "decreed themselves bound by Heck to the exclusion of Justice Souter's comments in his *Heck* and *Spencer* concurrences" have "mistaken the ordinary rule refinement that appellate courts necessarily engage in for an improper departure from binding Supreme Court precedent." *Id.* at 602. Because the "*Heck* Court was not confronted with a factual scenario * * * in which the § 1983 claimant has no recourse in habeas," *Heck* "offered no binding guidance on the application of the favorable-termination requirement to [those] circumstances." *Id.* at 603.

Finally, In *Harden* v. *Pataki*, the Eleventh Circuit considered a Section 1983 claim challenging the validity of procedures used to extradite a prisoner from Georgia to New York. 320 F.3d 1289 (11th Cir. 2003). The court held that the claim was not barred by *Heck*. *Id.* The court cited the

concurring and dissenting opinions in *Spencer*, noting that "'five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be.'" *Id.* at 1298, quoting *Jenkins*, 179 F.3d at 26. The court held that "because federal habeas corpus is not available to a person extradited in violation of his or her federally protected rights, even where the extradition itself was illegal, § 1983 must be. If it were not, a claim for relief brought by a person already extradited would be placed beyond the scope of § 1983, when exactly the same claim could be redressed if brought by a person to be, but not yet, extradited." *Id.* at 1299, citing *Spencer*, 523 U.S. at 20-21 (Souter, J., concurring).

B. Four Circuits Hold That *Heck* Bars A Section 1983 Plaintiff's Case Even If Habeas Corpus Is Unavailable.

Four circuits, including the Third Circuit below, have take the contrary position that a Section 1983 plaintiff must prove a favorable termination as part of his claim, and therefore the claim is barred when habeas corpus is not available because the prisoner is not in custody.

In the decision in this case, the Third Circuit rejected the concurring and dissenting opinions in *Spencer*, following its prior precedent in *Williams* v. *Consovoy*, 453 F.3d 173 (3d Cir. 2006). *Williams* involved a former prisoner's Section 1983 challenge to a parole officer's decision to detain him, which ultimately resulted in a revocation of parole. *Id.* at 175-76. The court held that although the Section 1983 action was brought while the prisoner was no longer in custody, "a § 1983 remedy is not available

to a litigant to whom habeas relief is no longer available." *Id.* at 177. The court acknowledged that the Second Circuit had held otherwise in *Huang*, but stated, "We decline to adopt *Huang* here." *Id.*

The decision in *Williams* also relied on the Third Circuit's decision in *Gilles* v. *Davis*, 427 F.3d 197 (3d Cir. 2005). *Gilles* acknowledged the concurring and dissenting opinions in *Spencer*, but stated that "these opinions do not affect our conclusion that *Heck* applies" to an individual "who has no recourse under the habeas statute." *Id.* at 210. Judge Fuentes dissented, stating that "[u]nder the best reading of *Heck* and *Spencer* v. *Kemna*, the favorable termination rule does not apply where habeas relief is unavailable." *Id.* at 217 (Fuentes, J., dissenting) (citation omitted).

The First Circuit has reached a similar conclusion. In *Figueroa* v. *Rivera*, a prisoner died while his petition for habeas corpus was pending. 147 F.3d 77, 79 (1st Cir. 1998). Members of the prisoner's family brought a Section 1983 action alleging that public officials had conspired to frame the prisoner for his crime and that other officials failed to provide adequate medical care, resulting in the prisoner's death. *Id.* at 79. The First Circuit held that even though the prisoner's habeas corpus action was mooted by his death, the action was barred by *Heck* because the prisoner's family did not allege that the conviction had been overturned or was subject to any other favorable termination. *Id.* at 80-81. The court held that while the result might work "a fundamental unfairness," the "core holding" of *Heck* was "that annulment of the underlying conviction is an element of a section 1983

'unconstitutional conviction' claim." *Id.* at 80-81. The court was "mindful" that the concurring and dissenting opinions in *Spencer* "may case doubt upon the universality of *Heck*'s 'favorable termination' requirement." *Id.* at 81 n.3. The court believed, however, that its resolution was required in order "to follow [this Court's] directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions." *Id.*

The Fifth Circuit has likewise held that *Heck* bars actions brought by prisoners for whom no habeas remedy is available. In *Randell* v. *Johnson*, as here, the plaintiff claimed that he was not properly credited with time he spent incarcerated and "therefore had to serve the time over again." 227 F.3d 300 (5th Cir. 2000) (per curiam). The court noted that the plaintiff was "no longer in custody and thus can not file a habeas petition," but held that he must nevertheless "satisf[y] the favorable termination requirement of *Heck*." *Id.* at 301. Because he could not do so, "he is barred from any recovery and fails to state a claim upon which relief may be granted." *Id.*

The Eighth Circuit has also held that *Heck* bars a Section 1983 case brought by a prisoner after he has been released. In *Entzi* v. *Redmann*, the plaintiff challenged his loss of sentence-reduction credits for failing to participate in a sex offender treatment course. 485 F. 3d 998, 1003 (8th Cir. 2007). The court rejected the argument that *Heck* did not bar the action because the habeas corpus was no longer available to the plaintiff. *Id.* Noting the concurring and dissenting opinions in *Spencer*, the court nevertheless held, "[a]bsent a decision of the

Court that expressly overrules what we understand to be the holding of *Heck*, however, we decline to depart from that rule." *Id.*

II. *Heck* Does Not Bar A § 1983 Action If Habeas Corpus Is Not Available To The Plaintiff.

The lower court decisions holding that *Heck* bars relief by Section 1983 plaintiffs for whom habeas corpus relief is unavailable are not persuasive. These decisions take the view that *Heck* is "directly applicable precedent" that they must follow "even if that precedent appears weakened by pronouncements in [the Court's] subsequent decisions." *Figueroa*, 147 F.3d at 81 n.3; *see also Entzi*, 485 F.3d at 1003 (declining to depart from "what we understand to be the holding of *Heck*"); *Randell* v. *Johnson*, 227 F.3d at 301 (quoting *Figueroa*); *Gilles*, 427 F.3d at 210 (same); *see also Dible*, 410 F. Supp. at 822 ("[T]he conclusion reached by these courts is premised upon the belief that *Heck* definitively decided, in the negative, the question of whether a prisoner who is precluded from pursuing habeas relief can file a § 1983 action without first meeting the favorable determination requirement.").

But *Heck* did not decide whether a Section 1983 action should be available to a former prisoner who could no longer pursue habeas corpus relief. The facts of *Heck* involved an individual who, unlike Petitioner, was "in custody" for habeas purposes when he brought his § 1983 action. Although the Court stated in a footnote that it did not believe "the principle barring collateral attacks * * * is rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated," 512 U.S. at 490 n.10, that

dictum was not necessary to decide the case and therefore did not constitute "directly applicable precedent" that the lower courts are bound to follow. *Cf. Figueroa*, 147 F.3d at 81 n.3.[6]

Moreover, *Heck* stated that it was dealing specifically with "the intersection" between § 1983 and the habeas corpus statute. 512 U.S. at 480. As Justice Souter's concurrence stated, when habeas corpus is not available to challenge unconstitutional conduct by state officials, the case is "outside the intersection of § 1983 and the habeas statute." 512 U.S. at 500 (Souter, J., concurring). *Heck*'s holding thus did not reach the question presented here or in the other cases forming the circuit split. *See* Fein, 28 New Eng. J. on Crim & Civ. Con. at 23-25 (arguing that the dicta of *Heck*'s footnote 10 was superceded by the concurring and dissenting opinions in *Spencer*, and that lower courts should follow the latter).

For the reasons articulated by Justice Souter's concurring opinion in *Spencer*, when habeas corpus is not available to address an individual's unconstitutional treatment at the hands of state officials, Section 1983 must be. The broad language of Section 1983 covers "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." While *Preiser* and *Heck* limited the

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[6] The same footnote stated that "no real-life example comes to mind" of a case "involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." *Heck*, 512 U.S. at 490 n.10. However, the instant case and the others forming the circuit split provide numerous such examples.

§ 1983 remedy to avoid conflicts with the habeas corpus statute, no such limitation is needed where there is no conflict between the two. To hold otherwise would create a "patent anomaly" whereby prisoners still in custody have available a forum to address constitutional wrongs, but those who are no longer (or never were) in custody would have no such forum.

Applying *Heck*'s favorable termination rule to cases in which it is impossible as a matter of law to comply with the rule would also create a class of cases in which an individual may be subject to unconstitutional treatment at the hands of state officials, but be left with no avenue of relief. This is particularly true where, as here, the claim is that a person was unconstitutionally kept in prison beyond his lawfully-authorized term. The only possible "favorable termination" in such a case would be a grant of habeas corpus. But so long as the period of unconstitutional imprisonment is shorter than the time it takes to bring and adjudicate a habeas corpus petition, the petition will be moot under *Spencer*. In *White* v. *Phillips*, 34 F. Supp. 2d 1038, 1042 (W.D. La. 1998), then-Chief Judge Little provided an example to illustrate this point:

> What if the prison had detained White two months beyond his prison term without a hearing, but released him before a court could pass on his habeas petition? If *Heck* were an absolute bar to a civil suit absent the favorable outcome showing, White would have no recourse against the state prison in a neutral federal forum for the

> deprivation of his liberty. Such a result patently contradicts § 1983's clear goal of providing a neutral federal forum to air constitutional grievances.

Id.

III. This Case Is An Excellent Vehicle To Decide The Question Presented.

This case presents an ideal vehicle to decide whether *Heck*'s favorable termination rule should bar Section 1983 claims brought by prisoners who cannot pursue habeas corpus. The court of appeals' decision directly implicates the circuit split because it relied solely on *Heck* to affirm the district court's grant of summary judgment. *See* App., *infra*, 3a. Royal was unable to obtain a "favorable termination" to satisfy *Heck* principally because the period of his unconstitutional detention was too short to complete even the state postconviction relief procedures, much less a habeas corpus proceeding.

Should Mr. Royal prevail before the Court, he has substantial arguments on the merits that the court of appeals did not reach because of its imposition of the *Heck* bar. On his Eighth Amendment claim, the district court erroneously held that Mr. Royal "failed to proffer sufficient evidence from which a factfinder could find the existence of deliberate indifference on the part of" Respondent, *id.* at 13a; however, the Third Circuit has held that deliberate indifference is demonstrated "where prison officials were put on notice and then simply refused to investigate a claim of sentence miscalculation." *Moore* v. *Tartler*, 986 F.2d 682, 686 (3d Cir. 1993). The evidence here—particularly

when viewed in the light most favorable to Mr. Royal (as the district court was bound to do)—shows that Respondent did not undertake any meaningful investigation of Royal's claims. Respondent's "investigation" proceeded no further than to express doubt that he could obtain documentation of Mr. Royal's periods of incarceration, and Respondent refused to investigate the claim when Mr. Royal provided documentation.[7] Respondent never came to a conclusion one way or the other as to whether Mr. Royal was entitled to credit for the time he served in 1983 and 1984.

For the same reason, the district court was incorrect to hold that Mr. Royal "failed to point to evidence from which a factfinder would find that his [Due Process] claim was not meaningfully and expeditiously considered" by Respondent. App., *infra*, 15a. In so holding the district court relied on a minor correction of the credit for time Mr. Royal served in 1999. *Id.* The correction of a three-day error from 1999, however, cannot constitute meaningful consideration of Mr. Royal's request for 180 days credit for time served in 1984 and 1985. At a minimum, Mr. Royal should be entitled to have these arguments considered by the court of appeals.

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[7] Respondent also relied on an interpretation of Pennsylvania sentencing law that was contrary to every reported case on the subject. *See supra*, n. 3.

IV. The Question Is Important And Recurring And Will Not Benefit From Further Consideration In The Courts Of Appeals.

The numerous appellate and district court cases that have addressed the question of whether *Heck* bars a § 1983 suit when habeas is not available demonstrate that the issue is recurring. *See* Fein, 28 New Eng. J. on Crim. & Civ. Confinement at 25 ("The issue has and will continue to recur, given the numerosity of 1983 and 2254 cases."); *see also id.* at 9-13 (collecting cases). The issue is also important. As this Court has recognized, "Congress enacted § 1983 and its predecessor, § 2 of the Civil Rights Act of 1866, 14 Stat. 27, to provide an independent avenue for protection of federal constitutional rights." *Pulliam* v. *Allen*, 466 U.S. 522, 540 (1984). The courts are now intractably divided on whether that avenue is available when habeas corpus is not, leaving the question of whether an individual's constitutional rights can be upheld not to the wisdom of a neutral decisionmaker, but to the accident of geography.

To date, nine courts of appeals and numerous district courts have weighed in on the question of whether *Heck*'s favorable termination requirement applies to § 1983 claimants who cannot pursue relief through habeas corpus. The issue has attracted the attention of scholarly articles, which conclude that the majority opinion of the courts of appeals should be adopted. *See* 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. at 889; Fein, 28 New

Eng. J. on Crim. & Civ. Confinement at 25. These authorities have considered this Court's prior cases, along with their concurring and dissenting opinions, the text and intent of § 1983 and the habeas corpus statute, and the policy considerations on both sides of the issue. The issue has been fully considered, the circuits have staked out their positions, and issue is now framed for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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