No. 13-451

IN THE
Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

JESSIE HARRISON,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the favorable-termination rule under *Heck v. Humphrey* applies to a § 1983 claim—thereby indefinitely postponing the statute of limitations—when a plaintiff alleges false imprisonment based on a sentence that has been fully served.

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BRIEF FOR RESPONDENT

Respondent Jessie Harrison respectfully submits that the petition for a writ of certiorari should be denied. Only the State of Michigan petitions this Court for review, but Michigan prevailed in the Sixth Circuit below. The individual defendants who did not prevail, meanwhile, are not petitioners in this Court, and any petition they might file would be jurisdictionally out of time. The petition is therefore procedurally deficient, preventing this Court's review.

There is also no need for this Court's review because the judgment below is correct. Petitioner misstates the law in the lower courts: on the facts of this case, the result would be the same in at least six of the seven circuits that have considered the question presented. For that reason, and because the facts here are atypical, this case would present a poor vehicle for addressing what is at best a lop-sided circuit split that is not even implicated here.

STATEMENT

A. The Unlawful Imprisonment

The State of Michigan falsely imprisoned respondent Jesse Harrison for eighteen months. *See* Pet. App. at 3a-4a.[1] In 1986, a Michigan jury convicted Harrison of carrying a firearm during the commission of a felony ("felony-firearm") and reckless discharge of a firearm resulting in death, a misdemeanor. *See id.* at 42a ¶¶ 12-14. Under

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[1] Since Harrison's case is still at the pleadings stage, the allegations in his complaint must be accepted as true. *See* *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011).

Michigan law, "[a] consecutive sentence may be imposed only if specifically authorized by statute." *People v. Alexander*, 599 N.W.2d 749, 755 (Mich. Ct. App. 1999). The Michigan felony-firearm statute authorizes a felony-firearm sentence to run consecutively with any sentence imposed for the underlying felony. Mich. Comp. Laws § 750.227b. No statute, however, authorizes sentences for felony-firearm and for a misdemeanor to run consecutively. *See People v. Harrison*, 2008 WL 4276544, *1-2 (Mich. Ct. App. Sept. 16, 2008). The trial court nonetheless sentenced Harrison to sixteen to twenty-four months' imprisonment for his misdemeanor conviction to be served consecutively to a two-year sentence for his felony-firearm conviction. *See id.* at *1; Pet. App. at 42a ¶ 15.

During his incarceration, Harrison repeatedly informed his counselor at the Michigan Department of Corrections, the Parole Board, and the Department's director that his sentences had been incorrectly imposed on a consecutive, rather than concurrent, basis. *See* Pet. App. at 45a-46a ¶¶ 27-31. Each time, the state officials refused to take any action to correct his erroneous sentence or to terminate his incarceration at the statutorily required time. *See id.*

The Michigan Department of Corrections has a practice of regularly reviewing the sentences of inmates for errors. *See id.* at 43a-44a ¶¶ 18, 24. Yet, despite reviewing Harrison's sentence five times between 1985 and 1990, the Department once again made no effort to correct his erroneous consecutive sentences. This is consistent with the Department's practice of only requesting that sentencing courts correct any errors the Department uncovers that decrease an inmate's sentence. *See id.* at 43a-45a ¶¶ 18, 24, 26. That practice remains in effect. *See id.* at 43a-45a ¶¶ 18, 20, 22, 26.

Harrison was released from prison in March 1990—eighteen months after his incarceration should have ended. *See id.* at 26a, 46a ¶ 32. Harrison eventually learned that Michigan procedural rules allowed him to file a motion for relief from judgment in the trial court to correct his sentence. *See Harrison*, 2008 WL 4276544, at *1. In 2003, he filed a *pro se* motion in Michigan state court to amend the 1986 judgment to reflect that his sentences should have run concurrently rather than consecutively. *See id.*; Pet. App. at 3a-4a.

After the trial court denied the motion, the Michigan Court of Appeals reversed and ordered the trial court to amend the judgment to impose concurrent sentences. *See Harrison*, 2008 WL 4276544, at *2. Such relief is typically available only on direct appeal of the original conviction and sentence. *See id.* at 1. In its September 2008 opinion, however, the Michigan Court of Appeals held that good cause excused Harrison's tardy collateral attack because his appellate counsel on direct review had been ineffective. *See id.* at *2.

B. The Section 1983 Lawsuit

Harrison filed his *pro se* § 1983 complaint in this case on June 14, 2010. *See* Pet. App. at 60a. That complaint named as defendants the State of Michigan, the Department of Corrections, the Parole Board, the Governor, and several Department of Corrections officials. *See id.* at 25a, 39a-41a ¶¶ 1-10. Harrison's complaint alleged that those defendants violated his constitutional rights between 1986 and 1990 by imprisoning him for an additional eighteen months beyond the statutory maximum and by refusing to take any action to correct his erroneous sentence, even after it was brought to their attention. *See id.* at 53a-54a ¶¶ 63-74. In his complaint, Harrison also alleged that those defendants violated his constitutional rights in 2009 and 2010 by refusing to commute his current sentence (Harrison is currently serving a sentence for an unrelated, post-1990 crime) by eighteen months to compensate for the extra time he previously served. *See id.* at 3a, 47a-53a ¶¶ 37-62; Pet. at 4.[2] Harrison sought both monetary and injunctive relief. *See* Pet. App. at 57a-60a ¶¶ 75-86.

Because Harrison is currently incarcerated, the district court screened his complaint and concluded it should be dismissed on its own motion before any of the defendants were served a copy of the complaint. *See id.* at 24a-25a; 42 U.S.C. §§ 1915A, 1997e(c). The district court first dismissed Harrison's claims against Michigan, the Department of Corrections, and the Parole Board because those defendants enjoyed sovereign immunity from suit. *See* Pet. App. at 27a-28a; Pet. at 5.

With the claims against the state defendants dismissed, the district court turned to the claims against the individual defendants. It held that the

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[2] The complaint also names Wayne County, Michigan as a defendant and alleges that the County violated Harrison's constitutional rights by implementing a flawed system for the appointment of counsel that it knew would lead to Harrison receiving ineffective representation. *See* Pet. App. at 52a ¶ 61.

claims against those defendants arising from their conduct in 2009 and 2010 were barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). *See* Pet. App. at 32a-34a. Those claims, according to the district court, called into question the length of the sentence that Harrison is currently serving. The district court then held that Michigan's three-year statute of limitations for tort claims barred Harrison's claims against the individual defendants arising from their conduct between 1986 and 1990. *See* Pet. App. at 30a-31a; Pet. at 5 ("[T]he district court held that Harrison's claims *against the individual defendants* . . . were time-barred.") (emphasis added). Citing *Wallace v. Kato*, 549 U.S. 384, 389 (2007), the district court determined that the statute of limitations began to run on those claims when Harrison was initially released from prison in 1990, so that his suit was seventeen years too late.

The Sixth Circuit affirmed in part, reversed in part, and remanded for further proceedings. *See* Pet. App. at 19a. The Sixth Circuit affirmed that Michigan, the Department of Corrections, and the Parole Board "were immune from suit under the Eleventh Amendment" and should be dismissed on that basis. *Id.* at 6a-7a. Michigan—the sole petitioner here—thus prevailed below and won a complete dismissal from the case. The Sixth Circuit also affirmed the dismissal of Harrison's claim that the individual defendants violated his constitutional rights in 2009 and 2010. *See id.* at 7a. But the Sixth Circuit reversed the district court's holding that the statute of limitations barred Harrison's claims against the individual defendants arising from their conduct between 1986 and 1990. *See id.* at 19a.

According to the Sixth Circuit, *Heck*, 512 U.S. at 489-90, controls the statute of limitations issue in this case—not *Wallace*, 549 U.S. at 389—because "it is not a false arrest that is challenged but an invalid sentence." Pet. App. at 9a. *Heck*, the Sixth Circuit observed, establishes that a § 1983 cause of action "for a wrongful criminal conviction or sentence does not accrue until 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 11a (quoting *Heck*, 512 U.S. at 487). In other words, in this case the statute of limitations on Harrison's § 1983 claims could not start to run until the Michigan Court of Appeals corrected his sentence in 2008, because until that occurred he had no cause of action. *See id.* at 19a. Since Harrison filed suit within three years of the favorable state-court decision, the Sixth Circuit held his suit timely filed. *See id.*

In reaching that result, the Sixth Circuit rejected Judge Roger's dissenting position that Justice Souter's concurrence in *Spencer v. Kemna*, 523 U.S. 1, 18 (1998), established an exception to *Heck*'s favorable-termination requirement that is triggered every time a prisoner is released from custody. *See id.* at 12a-15a. The Sixth Circuit acknowledged Justice Souter advocated for an exception to the favorable-termination requirement where, as a matter of law, a prisoner could not challenge his conviction through federal habeas. *Id.* at 12a. The Sixth Circuit further acknowledged that a previous Sixth Circuit decision had endorsed that exception, *id.* at 13a & n.1, and that federal habeas is generally unavailable once a prisoner is released from custody, *id.* at 15a.

But the Sixth Circuit interpreted Justice Souter's exception narrowly. That exception, according to the decision below, only applies where the brevity of a prisoner's confinement effectively precludes habeas relief during the time of imprisonment *and* the prisoner was prevented from satisfying the favorable-termination requirement via state-law procedures. *See id.* at 15a. Neither condition is satisfied here, and so the Sixth Circuit held Justice Souter's exception "irrelevant to Harrison's claim." *Id.*

Judge Rogers, as noted, dissented. Judge Rogers interpreted Justice Souter's concurrence in *Spencer* as establishing "that the favorable-termination requirement does not apply after a plaintiff/prisoner is released from custody." *Id.* at 20a-21a. Harrison's claim, according to Judge Rogers, therefore "accrued upon his release from prison in 1990." *Id.* at 19a-20a.

Michigan and the other defendants did not make an appearance or file a brief in the Sixth Circuit. *See* Pet. App. at 6a; Pet. at ii. That was not because the Sixth Circuit was uninterested in Michigan's views. Well after the briefing deadline passed, the Sixth Circuit invited Michigan to file a brief. *See* Opp. App. at 1a. The State declined. *See id.* at 8a; Pet. App. at 6a. Once the Sixth Circuit issued its decision, Michigan also declined to seek rehearing or rehearing *en banc* below. Instead, the State made its first appearance in this case when it filed its petition for certiorari. None of the individual defendants—

the defendants who did not prevail below—joined the petition. *See* Pet. at ii.

REASONS FOR DENYING THE PETITION

I. The Petition Is Procedurally Deficient Because The Individual Defendants Are Not Petitioners Here

The Sixth Circuit affirmed the district court's dismissal of Michigan on sovereign-immunity grounds. *See* Pet. App. at 6a-7a. The individual defendants, meanwhile, did not prevail on statute of limitations grounds, and the case was remanded as to them. In this Court, however, the individual defendants are not listed as petitioners—only Michigan. *See* Pet. at ii ("The petitioner is the State of Michigan."). That defect is fatal to this Court's review.

Because the only party petitioning for certiorari prevailed below and seeks certiorari on an issue relating to other parties who are not petitioners here, the petition should be denied. This Court's practice reflects a "settled refusal" to entertain petitions by the prevailing party below regardless of whether the dispute falls within this Court's jurisdiction under 28 U.S.C. § 1254(1). E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartness, Supreme Court Practice 87 (9th ed. 2007); *see also Gunn v. University Comm. to End War in Viet Nam*, 399 U.S. 383, 390 n.5 (1970); *New York Tel. Co. v. Maltbie*, 291 U.S. 645, 646 (1934) (*per curiam*). Michigan did not lose in the court below; those defendants that did lose are not petitioners here. There is thus no basis in this Court's Rules or precedent for Michigan to pursue certiorari concerning an issue that applies to other defendants, especially where Michigan was a named defendant and yet prevailed on other grounds.

The individual defendants also cannot, at this point, correct the defect in Michigan's petition: any petition for certiorari filed by those individual defendants would now be jurisdictionally out of time. *See* 28 U.S.C. § 2101(c). Moreover, although those individual defendants are technically respondents here, the time for filing a response supporting certiorari expired long ago. *See* S. Ct. R. 12.4, 12.6 ("A response of a party aligned with petitioner below who supports granting the petition shall be filed within 30 days after the case is placed on the docket, and that time will not be extended."). Because the individual defendants cannot properly file a petition or a response, they "will not qualify for any relief from this Court." S. Ct. R. 12.6. In other words, any opinion this Court might issue would be completely advisory with no effect on the outcome of this case. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (holding Article III's case-or-controversy requirement does not permit courts to issue advisory opinions); *Hayburn's Case*, 2 U.S. (Dall.) 409 (1792).

Should Michigan now claim to represent the interests of the individual state officials in this litigation, the simplest response is that Michigan's own petition says otherwise. The State is the only petitioner listed on the cover of the petition, and Michigan's description of the parties to the proceedings draws a clear distinction between Michigan as the petitioner and the other defendants below. *See* Pet. at ii ("The petitioner is the State of Michigan. Petitioner *and the other defendants* did not participate in the lower court proceedings.")

(emphasis added). Further complicating matters, the Michigan Attorney General's office told the Sixth Circuit it was not even "authorized to enter an appearance or [file] responsive pleadings on the [Department of Corrections'] behalf," Opp. App. at 8a, even though the Department of Corrections is a state agency, *see Diaz v. Mich. Dep't of Corrections*, 703 F.3d 956, 961-62 (CA6 2013). It would be curious if the Attorney General were authorized to represent the individual defendants in this case when it purportedly lacked authority to represent the state agency that employs most of those defendants.

States do not invariably represent individual state officials in § 1983 actions, and in this case it is unclear whether the individual defendants would even want Michigan to represent their interests. The position the State asks this Court to adopt is not necessarily in the individual defendants' long-term interests. Michigan's approach could significantly increase the amount of § 1983 litigation, as many more prisoners would have a plausible § 1983 claim if the favorable-termination requirement disappears the moment a prisoner is released from custody. *See Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 602-03 (CA6 2007); Pet. App. at 22a (noting that "applying *Spencer* broadly would open the courthouse doors to every released prisoner"). That may not concern Michigan—sovereign immunity protects it from harassing or time-consuming litigation—but it will almost certainly concern the individual defendants. *Cf. Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (noting the important societal "interest[]" in "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably”).

Ultimately, whether Michigan actually represents the individual defendants is irrelevant. The State, if it intended to represent the individual defendants and their interests, should have named those individuals as petitioners. This is not an esoteric procedural hurdle. Simply stated, it is important (and indeed required) that the right parties come before this Court as petitioners. States sometimes do file certiorari petitions on behalf of state officials in § 1983 cases, but they properly name the officials as the petitioners. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020 (2011); *Zinermon v. Burch*, 494 U.S. 113 (1990). Nor can Michigan now fix the defect in its petition by attempting to expand the list of petitioners months after the petition was filed. *See* S. Ct. R. 12.4 (“A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition.”).

Michigan is also particularly hard-pressed to insert itself at this stage given its lack of participation in the proceedings below. Michigan did nothing to protect its interests or the interests of the state officials before seeking certiorari in this Court. *Cf. In re Blodgett*, 502 U.S. 236, 240 (1992) (denying relief where a state first objected to a Ninth Circuit order in its petition to this Court). Even after the Sixth Circuit asked Michigan to file a response brief, the State declined. *See* Opp. App. at 1a, 8a. And, although Michigan now claims the decision below “conflicts with established law” and the Sixth Circuit’s own precedent, Pet. at 9, 18, neither Michigan nor the individual defendants asked for panel rehearing or rehearing *en banc*. This Court's limited resources are not well spent where, as here, Michigan waited until a certiorari opportunity presented itself before becoming involved in the litigation, even as it in fact prevailed below.

Serious jurisdictional questions also exist regarding whether Michigan even has standing to appear as a petitioner. As a prevailing party, it is doubtful whether Michigan has the necessary "injury in fact" that is caused by "the conduct complained of" and that "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks omitted). Nor is it apparent that Michigan has third-party standing. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (holding a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Resolving those fact-bound standing issues would undoubtedly distract the parties and the Court from the question presented.

In short, whether by design or through neglect, the individual defendants are not named as petitioners in this Court. The complex prudential and jurisdictional issues that problem creates are significant vehicle problems that make this an unattractive case for resolving the question presented, even if the Court believes that question deserves review.

II. The Sixth Circuit's Interlocutory Ruling Is Correct And Does Not Warrant Review

A. The Sixth Circuit Correctly Held That Inmates May Not Automatically Challenge Their Conviction Or Sentence Under § 1983 Once Released From Custody

The Sixth Circuit correctly determined that the statute of limitations does not bar Harrison's § 1983 claims against the individual defendants. *See* Pet. App. at 19a. A § 1983 plaintiff has no cause of action for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" unless "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87; *see also id.* at 489-90. Harrison did not satisfy this favorable-termination requirement until 2008, less than two years before he filed this suit, when the Michigan Court of Appeals corrected his invalid sentence after finding that his delay in seeking such relief was excusable. *See Harrison*, 2008 WL 4276544, at *1-2.

This Court's favorable-termination requirement addresses two different concerns. It ensures prisoners do not use § 1983 to evade the procedural requirements of federal habeas corpus. *See Heck*, 512 U.S. at 480-81; *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). And it protects the need for "finality and consistency" in criminal judgments. *Heck*, 512 U.S. at 485. Without a favorable-termination requirement, the possibility exists that a

§ 1983 suit could create "two conflicting resolutions arising out of the same or identical transaction": a successful tort suit implying a conviction or sentence is invalid and an undisturbed judgment imposing that invalid punishment. *Id.* at 484 (quotation marks omitted). That concern over inconsistent judgments does not evaporate the day an inmate is released from prison. *See id.* at 484-87. As this Court specifically held in *Heck*: "[T]he 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 (emphasis added).

That clear statement in *Heck*—that the favorable-termination requirement survives a prisoner's release from custody—resolves this case. Michigan nonetheless argues Justice Souter's concurrence in *Spencer* establishes the exact opposite rule, and the State asks this Court to follow Justice Souter's alleged approach. *See* Pet. at 16-18.

Spencer is a habeas case in which this Court held that a prisoner's release from custody moots any pending habeas petitions. *See Spencer*, 523 U.S. at 3, 18. In so holding, the Court rejected the argument that the pending petition could not be moot because the favorable-termination rule would then forever foreclose a § 1983 damages action. *Id.* at 17. The Court was nonplussed by this argument because a § 1983 damages action need not "always and everywhere be available." *Id.*

Justice Souter concurred to express his view that former prisoners are not obligated "to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21. He acknowledged, however, that this approach rested on "a different rationale for" the favorable-termination requirement than the Court adopted in *Heck*. *Id.* at 20. In Justice Souter's view, that requirement "was a simple way to avoid collisions at the intersection of habeas and § 1983" that gave way when habeas relief was no longer available. *Id.* (quotation marks omitted).

That approach directly conflicts with this Court's statements in *Heck*, *see, e.g.,* 512 U.S. at 490 n.10, and ignores the need for finality and consistency that is the centerpiece of that opinion's reasoning, *see id.* at 484-85. Michigan has offered no compelling reason for adopting Justice Souter's different rationale and overruling *Heck*'s interpretation of § 1983. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) ("[*S*]*tare decisis* in respect to statutory interpretation has special force for Congress remains free to alter what we have done.") (quotation marks omitted). Michigan's approach also creates significant new uncertainties that faithfully adhering to *Heck* would not. Courts would have to answer whether a prisoner who files a habeas petition and loses could nonetheless file a § 1983 suit after his release from custody without satisfying the favorable-termination requirement. And courts would have to confront whether the favorable-termination requirement applies to plaintiffs who could have filed for habeas while in custody but neglected to do so. *See Guerrero v. Gates*, 442 F.3d 697, 706 (CA9 2006).

The Sixth Circuit correctly adopted a middle-ground approach that asks whether federal habeas and state relief was always effectively unavailable to the plaintiff, not just unavailable at the time the plaintiff filed suit. *See* Pet. App. at 15a. That approach honors *Heck*'s holding and rationale, while simultaneously exempting from the favorable-termination requirement those prisoners for whom favorable termination was truly "impossible as a matter of law," *Spencer*, 523 U.S. at 21 (Souter, J., concurring). Prisoners whose confinement was so brief that state or federal habeas proceedings could not possibly conclude before the prisoners' release are the most common example. *See id.* at 21 n.*; Pet. App. at 14a-15a.

Michigan's objections to this approach are without merit. Michigan first objects that whether favorable termination is possible should turn exclusively on whether federal habeas is available. *See* Pet. at 17. That ignores that habeas relief is not the only way *Heck* held a § 1983 plaintiff could satisfy the favorable-termination requirement. *See* 512 U.S. at 489-90. This Court also listed direct review, expungement, and state post-conviction review as possibilities. *See id.* Because each of those are possible ways to satisfy the favorable-termination requirement, the impossibility of favorable termination must consider whether any of those options is available.

Michigan's concern that considering state-law procedures will render the impossibility exception a dead letter is overblown. *See* Pet. at 17. It is true, as Michigan suggests, that some extraordinary state-law relief from a conviction or sentence will almost always exist. But this Court has already addressed that concern in the habeas context by limiting the universe to common state-law remedies with no need "to file repetitive petitions." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). Similar common-sense guidelines would address Michigan's concerns here.

Michigan also has it backwards when it complains that the Sixth Circuit's decision will unnecessarily expose state officials to suit years after the relevant events. *See* Pet. at 18. That is the likely result of *Michigan's* gloss on the favorable-termination requirement. Because few prisoners successfully overturn their conviction or sentence, a robust favorable-termination requirement means few prisoners have § 1983 claims. Michigan's rule would mean *every* prisoner has a potential § 1983 claim as soon as he is released from custody, whether that is five, ten, or twenty-five years after his conviction.

B. This Is A Poor Vehicle For Addressing The Lopsided Split Among The Circuits

The 4-4 split Michigan alleges over the scope of *Heck*'s favorable-termination requirement is actually a lopsided 6-1 split supporting the decision below. Only the Second Circuit apparently agrees with Michigan that *Heck*'s favorable-termination requirement no longer applies once a prisoner is released from custody even if the prisoner could have, but did not, seek federal habeas while imprisoned. *See Huang v. Johnson*, 251 F.3d 65, 75 (CA2 2001). The other circuits Michigan cites in favor of its position—the Eleventh, Ninth, and (remarkably) the Sixth—have either not addressed the question or have clarified in subsequent decisions that the language Michigan cites is not as sweeping as Michigan now claims.

The Eleventh Circuit's decision in *Harden v. Pataki*, 320 F.3d 1289 (CA11 2003), ultimately turned on the distinct and well-established exception to the favorable-termination requirement for § 1983 claims where success would "not demonstrate the invalidity of any outstanding criminal judgment," *Heck*, 512 U.S. at 487; *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1298 (2011). In *Harden*, a prisoner challenged the procedures used to extradite him from a federal prison in Georgia to a state one in New York. *See* 320 F.3d at 1292. The Eleventh Circuit held *Heck* did not bar the prisoner's § 1983 claim because "the violations of extradition procedures alleged in this case . . . do not impugn his conviction or sentence." *Id.* at 1298. That is true whether or not the prisoner was in custody at the time he filed suit.

Although the *Harden* opinion also discussed *Heck* and Justice Souter's concurring opinion in *Spencer*, the Eleventh Circuit subsequently clarified that *Harden* did not "rule on whether" Justice Souter's concurrence created an exception to *Heck*'s favorable-termination requirement. *Vickers v. Donahue*, 137 F. App'x 285, 289-90 (CA11 2005). *Harden*, the Eleventh Circuit made clear, "turned on [its] holding that extradition procedures, even if they violate federal rights, have no bearing, direct or implied, on the underlying guilt or innocence of the person extradited." *Id.* (quotation marks omitted).

Michigan similarly gives the Ninth Circuit's decision in *Nonnette v. Small*, 316 F.3d 872 (CA9 2002), a sweeping scope the Ninth Circuit has disavowed. *Nonnette*, it is true, held the favorable-termination requirement did not apply because the prisoner "was released from the incarceration of which he complains, and is now on parole." *Id.* at 875; *see also id.* at 876-77. But a subsequent decision clarified that "*Nonnette* was founded on the unfairness of barring a plaintiff's potentially legitimate constitutional claims when" the plaintiff "could not seek habeas relief only because of the shortness of his prison sentence." *Guerrero*, 442 F.3d at 705. At least on the facts of this case, where Harrison had four years to seek federal habeas relief, the Ninth Circuit thus agrees with at least five other circuits that a § 1983 claim challenging the fact or length of confinement is *Heck*-barred absent favorable termination. *See id.* ("Guerrero cannot now use his failure timely to pursue habeas remedies as a shield against the implications of *Heck*.") (quotation marks omitted).[3]

Remarkably, Michigan also claims the decision below conflicts with prior Sixth Circuit precedent that, according to Michigan, holds that *Heck*'s favorable-termination requirement does not apply to former prisoners no longer in custody. *See* Pet. at 9 (citing *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n.3 (CA6 1999)). That assertion rests exclusively on dicta in an opinion "abrogate[d]" by this Court's decision in *Wallace*, 549 U.S. at 392-94. *Fox. v. DeSoto*, 489 F.3d 227, 233 (CA6 2007). But even if Sixth Circuit precedent was internally contradictory, Michigan should have sought to resolve that conflict

[3] *See also* Pet. App. at 15a; *Figueroa v. Rivera*, 147 F.3d 77, 81 (CA1 1998); *Gilles v. Davis*, 427 F.3d 197, 210 (CA3 2005); *Randell v. Johnson*, 227 F.3d 300, 301 (CA5 2000); *Entzi v. Redmann*, 485 F.3d 998, 1003 (CA8 2007).

via rehearing or rehearing *en banc* rather than raising the conflict for the first time in its petition here.

In the end, this is a poor vehicle for resolving whatever disagreements the lower courts may have regarding the scope of *Heck*'s favorable-termination requirement. Those courts nearly unanimously agree that on facts similar to this case, the favorable-termination requirement applies.

Three other unique aspects of this case make it a poor vehicle for clarifying the tension between *Heck* and Justice Souter's concurrence in *Spencer*. *First*, Harrison successfully overturned in state court the sentence implicated by this § 1983 action. *See Harrison*, WL 4276544, *1-2. None of the other circuits have confronted a similar situation. There has accordingly been almost no analysis in the circuit courts on how the availability of state court relief—as demonstrated by a § 1983 plaintiff successfully obtaining such relief—would affect whether a favorable-termination is "impossible as a matter of law." *Spencer*, 523 U.S. at 21 (Souter, J., concurring). This Court should not be one of the first to address that issue. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court" is not one "of first view").

Second, while Harrison successfully invalidated his sentence in state court many years after his conviction, this case has the added wrinkle that Harrison's delay in seeking such relief was excused by the Michigan Court of Appeals based on the ineffectiveness of Harrison's appellate counsel. Once again, the facts presented are outside the norm—procedural hurdles will almost always prevent state-court relief twenty-two years after a conviction—and make this case a poor candidate for addressing the legal issues presented in Michigan's petition.

Third, this case is unusual because the *Heck* issue here determines when the statute of limitations begins to run, not whether Harrison has a cause of action at all. None of the other circuits have examined the issue in a similar posture. And that unique posture may affect whether the favorable-termination requirement applies. Judge Rogers, dissenting below, believed the *Heck* bar is more forgiving when it merely affects whether a statute of limitations has started than when it affects whether a cause of action exists. *See* Pet. App. at 22a-23a. Harrison also argued below that, even if the statute of limitations started in 1990, the harm from his unlawful confinement is a continuing tort, so his 2010 suit would still be timely. The Court, to the extent it is interested in the question presented, should wait for a vehicle with less unusual facts.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

December 23, 2013 Respectfully submitted,

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Filed: September 26, 2011

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Jessie Harrison v. State of Michigan
Originating Case No. : 10-00570

Dear Counsel,

This case will be scheduled to be considered by a merits panel and we are giving you an opportunity to respond to the appellant's brief which was filed on February 28, 2011. If you wish to participate in this appeal, the brief must be filed electronically with the Clerk's office no later than this date. An appearance form must also be filed. If you do not plan to file a brief, please file a letter electronically to the clerk's office by the due date advising that you are going to participate in the appeal.

Appellee's Principal Brief Appendix (if required by 6th Cir. R. 30(a)) and (c)(2))	Filed electronically by **October 26, 2011**
Appellant's Reply Brief (Optional Brief)	Filed electronically **17** days after the appellee's brief. See Fed. R. App. P. 26(c)

Sincerely yours,

s/Yvonne Henderson
Case Manager
Direct Dial No.
513-564-7031

cc: Mr. Jessie Harrison
Mr. Eric Restuccia

CHECKLIST FOR BRIEFS

ECF FUNDAMENTALS:

___ Briefs filed ECF unless filer is pro se or attorney with a waiver for ECF filings

___ PDF format required

___ Native PDF format strongly preferred

___ In consolidated cases (excluding cross-appeals), appellants should un-check the case number(s) that is/are not their case. The appellant's brief should appear only on the docket of his/her specific appeal.

___ Title of brief (example "Appellant's Brief")

___ Name(s) and address(es) of counsel filing the brief

COVER OF BRIEF (Fed. R. App. P. 32(a)(2)):

___ Sixth Circuit case number

___ Heading: "United States Court of Appeals for the Sixth Circuit"

___ Title of case

___ Nature of proceeding and name of court, agency or board below

___ Title of brief (example "Appellant's Brief")

___ Name(s) and address(es) of counsel filing the brief

CONTENTS (Fed. R. App. P. 28, 6th Cir. R. 28):

___ Corporate Disclosure Form

___ Table of Contents

___ Table of Authorities with page references (with cases alphabetically arranged, statutes and other authorities)

___ **Statement in support of oral argument** (if there is no statement, argument is waived)

****Page limitation, word or line count begins here. See Fed. R. App. P 32(a)(7)

___ Jurisdictional statement

___ Statement of issues

___ Statement of the case

___ Statement of facts **with references to record** (and appendix for any relevant pleadings not available ECF)

References to lower court, agency record or appendix if one is required must be clear. Abbreviations may be used such as R or RE for district court record entry number on docket or TR for transcript or AR for administrative record. **The word "Doc" or "DE" is not an acceptable description**. Examples:

RE #21, Appellant's Motion for Summary Judgment, pp. 2-5 RE #53, Plaintiff's Trial Testimony, p. 1 R. No. 44, Plea Agreement R. No. 27, TR. Jury Trial 12/5/03, pp. 77 - 85 A.R. at pp. 190-191 RE. 33: Trial Tr. 8/30/04 at pp. 7, 89, 112-113

___ Summary of argument

___ Argument **with references to record and citations to case law, statutes and other authorities**

___ Standard of review (for each issue which may appear in discussion of each issue or under separate heading placed before discussion of issues)

___ Signed conclusion

Signature format is: s/(attorney's name)

Graphic or other electronic signatures discouraged

****Page limitation, word or line count ends here.

___ Certificate of Compliance, if required by Fed. R. App. P. 32(a)(7)C)

___ Dated Certificate of Service

___ **Designation of Relevant District Court Documents**

___ Other Addendum contents allowed by Fed. R. App. P. 28(f) or 6th Cir. R. 28. Addendum may **not** contain any items from lower court record or appendix.

TYPEFACE AND LENGTH
(See Fed. R. App. 32(a)(5) and (a)(7):

___ Typeface either proportionally-spaced font at 14 point (such as CG Times or Times New Roman) or monospaced font at 12 point (such as Courier New).

Times New Roman at 14 point

`Courier New at 12 point`

___ Length for principal briefs: 30 pages OR up to 14,000 words (proportional fonts) OR up to 1300 lines (monospaced font)

___ Length for reply brief: 15 pages OR up to 7,000 words (proportional fonts) OR up to 650 lines (monospaced font)

___ Briefs using the 14,000 word or 1300 line limits <u>must</u> include word or line count in certificate of compliance
(see Fed. R. App. P. 32(a)(7)(C))

___ Headings, footnote and quotations count toward word or line limitations

___ For Death Penalty briefs,
see 6th Cir. R. 22(c)(8)

___ For Cross-Appeals, see Fed. R. App. P. 28.1

___ For Amicus briefs, see Fed. R. App. P. 29, 32

MISCELLANEOUS:

___ Personal information must be redacted from the brief - see Fed. R. App. P. 25(a)(5) for specifics. When filing a brief, the ECF system will require attorneys to verify that personal information has been redacted.

___ Footnotes must be same sized text as body of brief

___ Pages serially paginated

___ Text double-spaced

___ Margins: at least 1” on all four sides

Jessie Harrison v State of Michigan,
Case No. 10-2185
Schumaker, Kelly (AG)
to: Yvonne Henderson
10/06/2011 12:13 PM
Cc: “Cataline, Shelly (AG)”
Show Details

Pursuant to our telephone conversation, this will confirm that the Michigan Department of Corrections (MDOC) has had no involvement in the above referenced case. Inasmuch as the MDOC was never served in the lower court and did not request representation from our office, we are not authorized to enter an appearance or responsive pleading on the MDOC’s behalf at this time.

Should you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Kelly Schumaker
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Michigan Department of Attorney General
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(517) 335-7021 (Main Line)
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