No. 13-

In the Supreme Court of the United States

JAMES MARTIN DEEMER,

Petitioner,

v.

JEFFREY BEARD, JOHN KERESTES, KRIS CALKINS, DON YOUNG, CATHERINE C. MCVEY, AMY CLEWELL, & JOHN DOES NOS. 1 THROUGH X,

Respondents.

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

In *Heck* v. *Humphrey*, 512 U.S. 477 (1994), the Court held that an incarcerated individual may not challenge the constitutionality or duration of his or her incarceration by bringing suit under 42 U.S.C. § 1983. Instead, before a plaintiff who is still in custody may pursue a Section 1983 claim, he or she "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 486-487.

Seven courts of appeals have held that this *Heck* "favorable-termination" rule does not apply to suits by individuals who are no longer in custody and who had no practical opportunity to seek federal habeas relief. Four circuits disagree. The court below, expressly recognizing this conflict, applied the minority approach and dismissed petitioner's Section 1983 suit on that ground, even though petitioner had no practical opportunity to seek habeas relief to challenge his unlawful incarceration.

The question presented is:

Whether *Heck*'s favorable-termination requirement applies when federal habeas relief was unavailable as a practical matter to a Section 1983 plaintiff?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Martin Deemer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-13a) and the district court (*id*. at 14a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

This petition presents an important and frequently recurring issue that has deeply divided the courts of appeals—and led to extensive comment by individual Members of the Court—in the years since the decision in *Heck* v. *Humphrey*, 512 U.S. 477, 486 (1994). In *Heck*, the Court held that an incarcerated prisoner with access to federal habeas may not bring a Section 1983 claim that, if successful, would have the effect of invalidating the plaintiff's incarceration. Instead, to proceed with a Section 198 action challenging the fact or duration of conviction, incarcerated plaintiffs must show that their claims previously were vindicated on direct appeal, by executive order, or by success on a petition for post-conviction review in state or federal court. *Id*. at 486-487. *Heck* did not, however, expressly address the application of its rule in circumstances where habeas relief was

unavailable as a practical matter to the Section 1983 plaintiff.

Subsequently, in *Spencer* v. *Kemna*, 523 U.S. 1 (1998), five Justices, in three separate opinions, expressed the view that the *Heck* rule does not apply to individuals who are not presently incarcerated and who never had, as a practical matter, recourse to federal habeas.

In the wake of *Spencer*, the lower courts have deeply divided on whether that understanding of *Heck* is correct: although seven circuits have held the *Heck* "favorable-termination" rule inapplicable in circumstances where a Section 1983 plaintiff had no practical opportunity to obtain relief through federal habeas, four circuits have adopted the contrary rule.

That question is presented here. Petitioner asserts that prison officials miscalculated his release date, resulting in 366 days of imprisonment beyond his maximum term. While incarcerated, petitioner appealed the calculation of his release date to state court; that court, however, did not resolve petitioner's claim while he was incarcerated, and it dismissed the action as moot upon his release. No court, accordingly, adjudicated—or was, during the period of petitioner's incarceration, able to adjudicate—whether petitioner was imprisoned for more than a year beyond the expiration of his sentence.

Petitioner subsequently filed this Section 1983 lawsuit, contending that respondents violated his federal constitutional rights by wrongfully incarcerating him. Although the district court found petitioner's position "not without force," it concluded that circuit precedent mandated application of the *Heck* favorable-termination rule. It therefore ordered peti-

tioner's suit dismissed because his assertedly unlawful incarceration had not been set aside in a habeas or other post-conviction proceeding. App., *infra*, 15a.

The Third Circuit—expressly recognizing that the circuits are divided seven to four on whether *Heck* applies in these circumstances—affirmed. App., *infra*, 8a-9a. Judge Rendell concurred separately. Although she agreed that the circuit had previously decided the issue in a manner that barred petitioner's claim, she concluded that "the principles that animated the Supreme Court's decision in *Heck* should lead to a different result, were the Court to consider the issue anew in the fact pattern before us." *Id*. at 12a.

Because uniformity on this important question of federal law is essential—and because the rule applied by the court below, which makes it impossible for many individuals to vindicate their federal constitutional rights in any forum, is incorrect—further review is warranted.

A. The *Heck* Rule.

This case concerns the relationship between Section 1983, which provides a mechanism to vindicate federal constitutional rights, and the federal habeas statute, which offers incarcerated individuals a vehicle with which to contest the constitutionality of their confinement. The Court has several times addressed the interaction of these provisions.

In *Preiser* v. *Rodriguez*, 411 U.S. 475, 476 (1973), state prisoners challenged a deprivation of their good-time credits. Invoking Section 1983, they sought an injunction to compel restoration of the credits, which would have required their immediate release from custody. *Ibid.* But such relief, the Court

found, "fell squarely within th[e] traditional scope of habeas corpus." *Id.* at 487. And the habeas statute requires "exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief." *Id.* at 489. Thus, it "would wholly frustrate explicit congressional intent" to allow plaintiffs to "evade this requirement" through use of a Section 1983 suit. *Id.* at 489-490. Accordingly, to resolve "the interrelationship of two important federal laws" (*id.* at 482), the Court concluded 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*, the court considered a Section 1983 suit seeking only damages, brought by an incarcerated plaintiff who had already been denied federal habeas relief. 512 U.S. at 479. The Court held that such a suit is barred; otherwise, Section 1983 "would permit a collateral attack on the conviction through the vehicle of a civil suit," thus circumventing the carefully designed limitations on the federal habeas remedy. *Id.* at 484 (quotation omitted). To bring a civil rights claim under Section 1983, the Court concluded, a "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 486-487. This principle has become the familiar *Heck* "favorable-termination" requirement.

Justice Souter (joined by Justices Blackmun, Stevens, and O'Connor) concurred in *Heck*, noting that a "sensible way to read" the majority opinion is that it applies only to "*prison inmates* seeking [Section] 1983 damages in federal court for unconstitutional conviction or confinement." 512 U.S. at 500 (Souter, J., concurring) (emphasis added). Individuals not "in custody" for purposes of federal habeas, such as "people who were merely fined, * * * 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," need not show "favorable termination." *Ibid*. To hold otherwise would be "an untoward result" (*ibid*.), in the view of these Justices, because the *Heck* doctrine should not "shut off federal courts altogether." *Id*. at 501.

In *Spencer*, the Court held that a federal habeas petition was moot because the petitioner, who had completed his term of incarceration, was unable to show collateral consequences sufficient to satisfy Article III's case-or-controversy requirement. 523 U.S. at 14-16. But of particular relevance to the current problem, Justice Souter concurred, this time joined by Justices O'Connor, Ginsburg, and Breyer. He reiterated his view that the favorable-termination requirement applies only to individuals who had adequate recourse to federal habeas; a broader rule would be "unsound." *Spencer*, 523 U.S. at 19 (Souter, J., concurring). Justice Ginsburg wrote separately: she agreed that "[i]ndividuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within [Section] 1983's 'broad reach.'" *Id*. at 21 (Ginsburg, J., concurring). In dissent, Justice Stevens endorsed this principle:

"Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear * * * that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25 n.8 (Stevens, J., dissenting).

Most recently, in *Muhammad* v. *Close*, 540 U.S. 749 (2004), the Court granted certiorari on two questions: whether *Heck* applies to prison disciplinary proceedings that do not affect the fact or duration of the underlying sentence; and if so, whether *Heck* applies even when circumstances render favorable termination impossible. See 539 U.S. 925 (2003). After finding that the *Heck* rule does not apply to such proceedings (540 U.S. at 754-755), the Court had "no occasion to settle" whether the "unavailability of habeas * * * may * * * dispense with the *Heck* requirement" (*id*. at 752 n.2).

B. Factual Background.

Petitioner was convicted in Pennsylvania state court on two counts of retail theft and sentenced to a maximum term of six years' imprisonment. App., *infra*, 3a. On June 25, 2007, he was released on parole, with 489 days remaining on his sentence. *Ibid.* Because he failed to report to a residential drug treatment program, the Pennsylvania Board of Probation and Parole (the "Board") declared him delinquent and issued a detainer warrant. *Ibid.*

On November 14, 2007, petitioner was arrested in Warren County, New Jersey. App., *infra*, 3a. He was charged with a New Jersey offense and also detained pursuant to a detainer issued by the Board that same day. *Id*. at 16a. The New Jersey state

charges were dismissed 366 days later, and petitioner was transferred out of Warren County. *Id*. at 3a.[1]

After petitioner was transferred to Pennsylvania to serve the remainder of his sentence, he sought credit for the 366 days of time he served pursuant to the Board detainer in Warren County. App., *infra*, 16a. Petitioner invoked *Martin* v. *Pennsylvania Board of Probation & Parole*, 840 A.2d 299, 309 (Pa. 2003), which provides, as a matter of Pennsylvania law, that when an individual is incarcerated pursuant to both new charges and a Board detainer, the time must be credited to either the new charge or the existing sentence underlying the Board detainer. See App., *infra*, 16a. When, as here, the new charges are ultimately dismissed, *Martin* requires the State to credit the time spent incarcerated to the existing sentence. See *Hears* v. *Pa. Bd. of Probation & Parole*, 851 A.2d 1003, 1007 (Pa. Commw. Ct. 2004).

The Board, however, rejected petitioner's petition for administrative review. App., *infra*, 4a. The Board did not address *Martin*; the Board appears to have been of the view that, contrary to fact, petitioner was *convicted* of the Warren County charge. See Ct. App. Joint Appendix at 17-18, Dkt. No. 9.

Petitioner then appealed the Board's decision to the Commonwealth Court of Pennsylvania. App., *infra*, 4a. That appeal was pending when petitioner

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[1] After the Warren County charges were dismissed, petitioner was transferred to Bergen County, New Jersey, where he served time on an unrelated conviction. App., *infra*, 3a n.2. That period of incarceration is not relevant to petitioner's claim. *Ibid*.

was released from prison. *Ibid*.[2] The state court subsequently granted the Board's motion to dismiss petitioner's appeal as moot. *Ibid*.[3]

When petitioner was released from incarceration on June 17, 2010, at the expiration of a sentence that had not been modified to reflect time served in Warren County, no court had declared his confinement for an extra 366 days unlawful, notwithstanding his substantial, good-faith efforts to obtain timely release. App., *infra*, 4a-5a. Necessarily, then, because the state court had not yet reviewed petitioner's state-law challenge to his confinement, he had not obtained "a favorable disposition" on his "attempts to overturn the Board's decision." *Id*. at 5a.

C. Proceedings Below.

After his release, petitioner filed this suit pursuant to Section 1983 against individual defendants responsible for his unlawful incarceration. App., *infra*, 5a. He asserts that his incarceration for 366 days beyond the lawful expiration of his sentence violated the Eighth and Fourteenth Amendments of the Unit-

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[2] While he was incarcerated, petitioner also "directed correspondence to various agencies and individuals," several of whom are respondents here, "explaining that he had served his full sentence and asking to be released." App., *infra*, 4a. Despite this correspondence, petitioner remained incarcerated.

[3] Pursuant to Pennsylvania law, an appeal to the Commonwealth Court is the correct—and exclusive—means to challenge a Board's determination regarding a prisoner's release date. See *Borsello* v. *Colleran*, 833 A.2d 1213 (Pa. Commw. Ct. 2003). Petitioner nonetheless also filed a petition for a writ of habeas corpus in the Schuylkill County Court of Common Pleas. App., *infra*, 4a. The docket indicates that the state court never acted on this petition.

ed States Constitution. *Ibid.* Petitioner seeks compensatory and punitive damages. *Id.* at 14a.

1. The district court dismissed the suit, observing that petitioner had not previously obtained invalidation of his period of incarceration, which the court believed to be required by *Heck*. Petitioner had argued "that the *Heck* rule should not apply to his case because he had diligently pursued his state-court remedies and his challenge to his confinement was unsuccessful only because the state court dismissed it as moot upon his release from incarceration." App., *infra*, 15a. In these circumstances, it would have been premature for petitioner to seek federal habeas relief prior to release because he had not yet exhausted his state remedies; and after his release, there was no federal habeas jurisdiction because petitioner was no longer in custody. See *Maleng* v. *Cook*, 490 U.S. 488, 490-491 (1989) (per curiam). Although the district court agreed that this "argument is not without force" (App., *infra*, 15a) and that it "may succeed in other circuits" (*id.* at 18a), the court concluded that "the Third Circuit has rejected it." *Ibid.*

2. The Third Circuit affirmed. App., *infra*, 1a-13a. The court expressly recognized that, "[t]aking a cue from the five-justice *Spencer* plurality, seven courts of appeals have found that the *Heck* favorable termination rule does not apply to plaintiffs for whom federal habeas relief is unavailable, at least where the plaintiff is not responsible for failing to seek or limiting his own access to the habeas corpus remedy." App., *infra*, 8a (citing cases). But, the court noted, the Third Circuit, "along with three other courts of appeals * * * have interpreted *Heck* to impose a universal favorable termination requirement

on all [Section] 1983 plaintiffs attacking the validity of their conviction or sentence." *Ibid* (citing cases).

Following this precedent, the court concluded that, "under *Heck*, any claimant, even if the door to federal habeas is shut and regardless of the reason why, must establish favorable termination of his underlying criminal proceeding before he can challenge his conviction or sentence in a [Section] 1983 action." App., *infra*, 11a. It thus affirmed the district court's dismissal of the complaint. *Ibid*.

3. Judge Rendell concurred, agreeing that circuit precedent foreclosed petitioner's claim. App., *infra*, 12a. She wrote separately, however, to express her view "that the principles that animated the Supreme Court's opinion in *Heck* should lead to a different result, were the Court to consider the issue anew in the fact pattern before us." *Ibid*. Because *Heck* reconciles Section 1983 with federal habeas, its "concerns disappear once the defendant is no longer incarcerated." *Ibid*.

Additionally, Judge Rendell continued, "it could be said that fairness mandates that a former prisoner, who no longer has habeas review available, should be permitted via [Section] 1983 to seek recourse for alleged violations of his rights." App., *infra*, 12a. In Judge Rendell's view, "fairness is a persuasive consideration" and *Heck* "should not reach to deny [petitioner] the opportunity for vindication via [Section] 1983." *Id*. at 13a. But Judge Rendell concluded that petitioner's claim is foreclosed in the Third Circuit "until the Supreme Court decides this issue." *Ibid*.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision in this case confronts petitioner with a perverse sort of Catch-22: the court held that he could not proceed under Section 1983 to challenge his unconstitutional confinement because he had not previously succeeded in obtaining invalidation of that confinement through a habeas proceeding—even though petitioner does not now have, and never had, practical recourse to habeas. Three other courts of appeals have embraced the Third Circuit's rule. But seven more have rejected that approach as illogical, inequitable, and ungrounded in the language or policy of either Section 1983 or the federal habeas statute.

The question whether *Heck*'s favorable-termination rule applies in these circumstances is one of considerable importance. It is often the case that persons challenging the constitutionality of their conviction or confinement had no recourse to habeas because they "were merely fined, * * * [or] have completed short terms of imprisonment, probation, or parole, or * * * discover[ed] (through no fault of their own) a constitutional violation after full expiration of their sentences" (*Heck*, 512 U.S. at 500 (Souter, J., concurring)); in such cases, the Third Circuit's understanding of the *Heck* rule often means that the plaintiff has *no* remedy for a claim of unconstitutional confinement, as it does in this case. Moreover, the question arises frequently; we have found more than 150 cases implicating the issue that were decided by federal courts within the past few years.

And the approach taken by the court below is wrong. The *Heck* favorable-termination rule is directed at statutory reconciliation: because the more specific federal habeas statute supplants the more

general Section 1983 remedy, habeas implicitly preempts Section 1983 where the statutes would otherwise conflict. But in a case like this one, where there is *no* possibility of conflict, habeas cannot displace Section 1983. No favorable termination of the plaintiff's incarceration is required in these circumstances.

Such an issue is ripe for definitive resolution by this Court. Indeed, the Court previously granted certiorari to consider this issue, but resolved that case on a different ground. See *Muhammad*, 540 U.S. at 752 n.2. The Court should now grant review in this case—where the question is both squarely presented and dispositive—to conclusively decide whether the *Heck* favorable-termination rule applies to Section 1983 plaintiffs who had no practical opportunity to challenge their conviction or confinement in a habeas proceeding.

A. The Circuits Are Widely Divided On The Question Presented Here.

The conflict among the courts of appeals on the question presented in this case is well-recognized, longstanding, and persistent. Here, both the Third Circuit (App., *infra*, 8a-9a) and the district court (*id.* at 19a) expressly recognized the conflict.

Numerous other courts of appeals also have recognized the disagreement among the circuits. See, *e.g.*, *Poventud* v. *City of New York*, 2014 WL 182313, at *36 (2d Cir. 2014) (en banc) (Jacobs, J., dissenting) ("[A] Circuit split has opened as to whether some exceptions to *Heck* may be permitted."); *Harrison* v. *Mich.*, 722 F.3d 768, 773-774 (6th Cir. 2013) (noting the "circuit split"); *Burd* v. *Sessler*, 702 F.3d 429, 435 n.3 (7th Cir. 2012) (noting the "split among the cir-

cuits"); *Cohen* v. *Longshore*, 621 F.3d 1311, 1315 (10th Cir. 2010) (noting that the "circuits have split"); *Wilson* v. *Johnson*, 535 F.3d 262, 267 (4th Cir. 2008) (noting "the circuit split"). That observation undeniably is correct.

1. Seven circuits do not apply Heck*'s favorable termination-requirement in circumstances like those here.*

Contrary to the rule applied below, seven circuits recognize that *Heck* does *not* foreclose claims by a litigant like petitioner who, through no fault of his or her own, lacked recourse as a practical matter to federal habeas to challenge the fact or duration of confinement. Had petitioner's suit been brought in one of these circuits, the *Heck* rule would not apply to his claims.

Most recently, the **Tenth Circuit** canvassed the "circuit split" and joined the majority of circuits that hold *Heck* is not applicable in circumstances where, through no fault of the claimant, federal habeas is unavailable. *Cohen*, 621 F.3d at 1315. There, an individual in immigration custody challenged his incarceration via a federal habeas petition but was transferred out of custody prior to decision, mooting the habeas action. *Ibid.* The court concluded that "[i]f a petitioner is unable to obtain habeas relief—at least where this inability is not due to the petitioner's own lack of diligence—it would be unjust to place his claim for relief beyond the scope of [Section] 1983." *Id.* at 1316-1317. The court thus held "that a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a [Section] 1983 claim." *Id.* at 1317.

In so concluding, the court drew on and endorsed the **Sixth Circuit's** holding in *Powers* v. *Hamilton County Public Defender Commission*, 501 F.3d 592 (6th Cir. 2007). Reviewing *Heck* and *Spencer*, that court determined that *Heck* does not apply "if the plaintiff was precluded 'as a matter of law' from seeking habeas redress," although it does apply "if the plaintiff could have sought and obtained habeas review while still in prison but failed to do so." *Id.* at 601. Applying this rule, the Sixth Circuit held that *Heck* did not defeat the plaintiff's claim because "his term of incarceration—one day—was too short to enable him to seek habeas relief." *Ibid.*

The **Fourth Circuit** reached the same result on facts similar to those of this case. In *Wilson*, 535 F.3d at 263, a prisoner's release date was extended approximately three months. The prisoner filed administrative grievances challenging the legality of the extension, but the Virginia Department of Corrections did not resolve his claim administratively prior to his release. *Id.* at 263-264. Because the period of incarceration was so short, the prisoner could not obtain relief via federal habeas. *Id.* at 268 n.8. The court concluded that the *Heck* rule does not apply in such circumstances, where "a prisoner could not, as a practical matter, seek habeas relief." *Id.* at 268. The court "d[id] not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court." *Ibid.*

The **Ninth Circuit** also declines to apply *Heck* when circumstances render federal habeas unavailable. See *Nonnette* v. *Small*, 316 F.3d 872, 876-877 (9th Cir. 2002). Instead, like the Fourth, Sixth, and Tenth Circuits, the Ninth Circuit has held that the

Heck rule applies only where a plaintiff's inability to pursue a federal habeas action stems from his or her own conduct, such as a failure to timely file. See *Guerro* v. *Gates*, 442 F.3d 697, 703-705 (9th Cir. 2006).

The **Second Circuit** similarly permits Section 1983 claims where federal habeas is impossible. See *Huang* v. *Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *Leather* v. *Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (finding *Heck* inapplicable where a plaintiff was never incarcerated and thus "has no remedy in habeas corpus").[4]

The **Seventh Circuit**, too, holds that, "where a plaintiff cannot obtain collateral relief to satisfy *Heck*'s favorable termination requirement, his action may proceed under [Section] 1983 without running

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[4] Recently, a panel of the Second Circuit applied its understanding of the *Heck* favorable-termination rule to permit a plaintiff, who was no longer incarcerated, to pursue a Section 1983 claim asserting that his conviction was tainted by a *Brady* violation. See *Poventud* v. *City of New York*, 715 F.3d 57, 60 (2d Cir. 2013). Subsequently, the en banc Second Circuit decided the case on different grounds, concluding that, because the litigant *had already* obtained favorable termination in state court of the conviction at issue in the Section 1983 suit, the plaintiff "did exactly what *Heck* required of him." *Poventud* v. *City of New York*, 2014 WL 182313, at *1 (2d Cir. 2014). The court, accordingly, had "no need to address the question of whether a plaintiff who challenges his allegedly unconstitutional conviction or incarceration, but is no longer in custody and therefore has no access to habeas, has recourse to a federal remedy under [Section] 1983." *Id*. at *1 n.1. No judge on the en banc court questioned the settled Second Circuit rule that *Heck* has no application when the plaintiff had no recourse to habeas.

afoul of *Heck*." *Burd*, 702 F.3d at 435. See also *Simpson* v. *Nickel*, 450 F.3d 303, 307 (7th Cir. 2006).

Finally, the **Eleventh Circuit** adopted the Second Circuit's position that "'five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, [Section] 1983 must be.'" *Harden* v. *Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003) (quoting *Jenkins* v. *Haubert*, 179 F.3d 19, 26 (2d Cir. 1999)). *Heck* thus does not apply where, for example, "the alleged length of unlawful imprisonment—10 days—is obviously of a duration that a petition for habeas relief could not have been filed and granted while Plaintiff was unlawfully in custody." *Morrow* v. *Fed. Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010).

Petitioner's case would not have been dismissed had it been litigated in any of these circuits. As we have noted, he acted diligently to set aside his unlawful incarceration, seeking relief under state law from the Board of Probation and Parole and, when that was denied, from state court. While those actions were pending, federal habeas relief was categorically unavailable to petitioner because he had not yet exhausted his state remedies. And once petitioner was released, he was no longer in custody and therefore unable to invoke a federal court's habeas jurisdiction. See pages 6-8, *supra*. In such circumstances, "a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a [Section] 1983 claim." *Cohen*, 621 F.3d at 1317.

2. Four circuits apply the Heck *favorable-termination rule even when the Section 1983 plaintiff has no recourse to habeas.*

In contrast, the First, Third, Fifth, and Eighth Circuits hold that *Heck*'s favorable-termination rule applies even to a Section 1983 plaintiff who never had practical recourse to federal habeas.

In rejecting petitioner's claim in this case, the **Third Circuit** noted that it had joined "three other courts of appeals" that "impose a universal favorable termination requirement on all [Section] 1983 plaintiffs attacking the validity of their conviction or sentence." App., *infra*, 8a. The court thus applied the holdings of its previous decisions in *Gilles* v. *Davis*, 427 F.3d 197, 209-210 (3d Cir. 2005), and *Williams* v. *Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006), which had embraced and applied that rule.

In *Gilles*, after voluntarily entering a court-supervised probation program, which resulted in the expungement of his criminal charges, a Section 1983 claimant challenged the constitutionality of his arrest and the legal proceedings brought against him. 427 F.3d at 208-209. Although the court recognized that "concurring and dissenting opinions in *Spencer* * * * question the applicability of *Heck* to an individual, such as [the plaintiff], who has no recourse under the habeas statute," it "doubt[ed] that *Heck* has been undermined." *Id.* at 210. It thus expressly "join[ed]" the First and Fifth Circuits in concluding that *Heck* applied in such circumstances. *Ibid.*

And in *Williams*, a plaintiff brought a Section 1983 suit after he had been released from prison; he argued "that because habeas relief is no longer available to him," he should "be permitted to maintain a

[Section] 1983 action." 453 F.3d at 177. Recognizing that the Second Circuit held that *Heck* does not apply in such circumstances, the court "decline[d] to adopt" that approach. *Ibid*. Instead, the court held that "a [Section] 1983 remedy is not available to a litigant to whom habeas relief is no longer available." *Ibid*.

As the Third Circuit noted, the **First Circuit** took the same approach in *Figueroa* v. *Rivera*, 147 F.3d 77, 79-81 (1st Cir. 1998). There, a prisoner died while his habeas action was pending; the court then dismissed the action as moot, which rendered favorable termination impossible. *Ibid*. Members of his family subsequently brought a civil claim under Section 1983, seeking damages against officials who allegedly caused the decedent's unlawful conviction. But the First Circuit declined to "[c]reat[e] an equitable exception" to *Heck*. *Id.* at 81. Doing so, the court reasoned, "would fly in the teeth of *Heck*." *Ibid.*

In *Entzi* v. *Redmann*, 485 F.3d 998, 1003-1004 (8th Cir. 2007), the **Eighth Circuit** followed *Figueroa*, concluding that the "favorable-termination rule bars" a Section 1983 suit even "when habeas corpus relief is unavailable." There, after his release from prison, a Section 1983 plaintiff challenged his loss of sentence-reduction credits; although the relatively short period of incarceration at issue appears to have rendered federal habeas relief impossible, the court nonetheless applied *Heck* to bar the plaintiff's suit. *Id*. at 1003. See also *Marlowe* v. *Fabian*, 676 F.3d 743, 747 (8th Cir. 2012) (a "[Section] 1983 plaintiff must show a favorable termination by state or federal authorities even when he is no longer incarcerated").

Finally, the **Fifth Circuit**, in *Randell* v. *Johnson*, 227 F.3d 300, 301-302 (5th Cir. 2000), likewise followed *Figueroa* in holding that the *Heck* rule applies even if the claimant lacked the ability to pursue habeas relief. The plaintiff there brought a Section 1983 claim, asserting that he was not credited time spent incarcerated; because of the short period of incarceration at issue, federal habeas was not practically available. *Ibid.* But the court refused to "relax *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction." *Id.* at 301.

B. The Question Presented Is Important And Recurring.

As the conduct of extensive litigation that has produced a conflict involving eleven circuits demonstrates, the question presented is important enough to warrant this Court's attention. The Court previously signaled its desire to resolve the question; the issue recurs in the lower courts with great frequency; and the question whether a significant number of persons should be denied *any* opportunity to challenge constitutional violations leading to wrongful incarceration is one of obvious importance. This petition provides a suitable vehicle for resolving the issue.

In *Muhammad*, 540 U.S. at 752 n.2, the Court granted certiorari, in part, to resolve this question. See 539 U.S. at 925 (granting certiorari, in part, to resolve "[w]hether a prison inmate who has been, but is no longer, in administrative segregation may bring a [Section] 1983 suit * * * without first satisfying the favorable termination requirement of *Heck* v. *Humphrey*."). But because the Court decided the case on other grounds, it had "no occasion to settle the is-

sue." *Muhammad*, 540 U.S. at 752 n.2. Since the Court granted review in *Muhammad*, the importance of the issue has only increased as the circuit conflict has expanded.

1. The question presented is one of obvious importance to litigants when it arises. Resolution of the issue will determine whether individuals who assert that they were illegally incarcerated—but who lack meaningful access to federal habeas relief—may vindicate their federal constitutional rights. And "[a]s this Court has constantly emphasized, habeas corpus and civil rights actions are of fundamental importance in our constitutional scheme because they directly protect our most valued rights." *Bounds* v. *Smith*, 430 U.S. 817, 827 (1977) (alteration and quotations omitted).

The matter is put plainly here: although petitioner has a powerful claim that he was unconstitutionally imprisoned for a year and a day beyond the lawful expiration of his sentence, the holding below forecloses *all* avenues of meaningful relief.

Under the lower court's interpretation of *Heck*, petitioner may not pursue a Section 1983 claim in federal court. State courts also generally apply *Heck* to Section 1983 claims; Pennsylvania, for example, applies *Heck* to Section 1983 claims filed in state court. See, *e.g.*, *Redmond* v. *Upper Darby Twp. Police Dep't*, 2012 WL 8679750, at *1 (Pa. Commw. Ct. 2012); *Weaver* v. *Franklin Cnty.*, 918 A.2d 194, 202 (Pa. Commw. Ct. 2007). Petitioner proved unable to obtain resolution of his claim through state-law remedies; he attempted to challenge his incarceration via a state petition for review of the Board's action—the appropriate state court remedy—but, because the period of unlawful confinement ended before the court

addressed the merits of petitioner's claim, the court dismissed the petition as moot. App., *infra*, 4a.[5] And because petitioner is no longer in custody, federal habeas relief is unavailable. *Id*. at 5a.

The question presented in this case accordingly controls whether petitioner may pursue any meaningful legal relief for his claim that he was unlawfully confined for 366 days beyond the expiration of his sentence. It would be quite "an untoward result" if petitioner were foreclosed entirely from asserting the fundamental constitutional rights he is seeking to advance. *Heck,* 512 U.S. at 500 (Souter, J., concurring). An individual "seeking redress for denial of his most precious right—freedom"—should not "be left without access to a federal court." *Wilson*, 535 F.3d at 268.

2. Not only is this question important in individual cases where it arises, but the frequency with which it recurs demonstrates that resolution of this petition is systemically imperative. In the past six years, the issue has arisen in more than 150 cases—and that figure certainly understates the actual number of cases in which the issue did (or could have) come into play.

In the seven circuits that do not apply *Heck* in these circumstances, we have identified ninety-one cases that have confronted this question since 2008—

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[5] Although petitioner attempted to assert state common-law tort claims below, he was forced to abandon those claims because Pennsylvania has declined to waive sovereign immunity for itself and its officials with respect to the kind of claims asserted here. App., *infra*, 21a; 42 Pa. Cons. Stat. §§ 8521-8528; *Orozco* v. *Pa. Dep't of Corr.*, 2014 WL 117475, at *2 (Pa. Commw. Ct. 2014).

twenty-two in the Second Circuit, seven in the Fourth, eleven in the Sixth, nine in the Seventh, twenty-six in Ninth, eight in the Tenth, and eight in the Eleventh. See App. C, *infra*, 22a-33a. And we have found sixty-two cases in circuits that agree with the holding below—four in the First Circuit, seventeen in the Third, twenty-seven in the Fifth, and fourteen in the Eighth. *Ibid*. The issue has also arisen in a district court in the D.C. Circuit. *Id*. at 33a.

Thus, our review reveals at least 154 cases over the past six years that implicated the question presented. And this survey is far from exhaustive: many Section 1983 cases are resolved in unpublished decisions and, in light of circuit precedent, parties likely forgo litigating the question in other cases. In short, the issue arises often, and courts reach different results on that issue based on nothing more than geography.

Notwithstanding the frequent recurrence of this issue, the Court has not been presented in recent years with a suitable vehicle with which to resolve it. But his case offers such a vehicle: the question presented is the sole basis on which the lower courts resolved petitioner's Section 1983 claims;[6] the allegations here demonstrate that petitioner had no practical recourse to federal habeas—or any other mechanism for challenging his period of incarceration;[7] and the issue arises in a straightforward application of

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[6] Cf. *Hamilton Cnty. Pub. Defenders Comm'n* v. *Powers*, No. 07-1318 (alternative grounds); *Walker* v. *Munsell*, No. 08-334 (same).

[7] Cf. *Royal* v. *Durison*, No. 07-1056 (litigant failed to vigilantly press claim).

Heck to a Section 1983 claim.[8] Review by this Court is thus warranted to settle this long-unresolved and important question.

C. The Majority Approach Is Correct.

Although the existence of a deep, pervasive split among the circuits on a question of significant practical importance is sufficient justification for the Court to grant certiorari, the need for review is especially acute because the decision below is wrong.

1. The *Heck* favorable-termination rule derives from the Court's reconciliation of two federal statutes that have the potential to conflict. Although both Section 1983 and the federal habeas statute provide mechanisms for a prisoner to assert that his or her incarceration is unlawful, the habeas statute imposes considerably more restrictive procedural limitations on a claimant than does Section 1983, including the "exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief." *Preiser*, 411 U.S. at 489. Were Section 1983 available without limit to launch *any* constitutional challenge to conviction or incarceration in *all* circumstances, that statute could provide a litigant an avenue to "evade this [exhaustion] requirement" of habeas. *Id*. at 489-490.

When two statutes have the potential to conflict in that way, the Court "must read the statutes to give effect to each," so long as it "can do so while preserving their sense and purpose." *Watt* v. *Alaska*, 451

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[8] Cf. *Thomas* v. *La. Soc. Servs.*, No. 10-1171 (application of *Heck* to state-law claims; alternative state-law grounds); *Mich.* v. *Harrison*, No. 13-451 (application of *Heck* to statute-of-limitations issue; wrong party filed petition for certiorari).

U.S. 259, 267 (1981). It is also "well established" that "the specific governs the general." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2070-2071 (2012) (quotation omitted). And although the Court must harmonize conflicting statutes, it attempts to avoid "repeals by implication," as such repeals "are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui* v. *Castaneda*, 559 U.S. 799, 810 (2010) (quotation omitted).

These rules of statutory construction underlie the favorable-termination requirement of *Heck*. When the statutes conflict, the more specific habeas statute preempts application of the more general Section 1983 remedy. But when habeas relief is *not* available to a claimant, through no fault of his or her own, making Section 1983 available to the claimant could not interfere with an otherwise applicable exhaustion requirement—and Section 1983 is available as a remedy.

This statutory reconciliation was the basis for *Preiser*, the predecessor to *Heck*, in which Section 1983 plaintiffs sought injunctive relief that would shorten their period of incarceration. If a litigant could use Section 1983 to circumvent the procedural requirements of habeas in such circumstances, the Court reasoned, it "would wholly frustrate explicit congressional intent." *Preiser*, 411 U.S. at 489. The Court thus had to reconcile "the interrelationship of two important federal laws." *Id*. at 482. It did so in *Preiser* by concluding that, in situations where "a prisoner's state remedy [is] adequate and available" (*id*. at 493), the specific habeas statute governs the general Section 1983 remedy: "even though the literal terms of [Section] 1983 might seem to cover" a

prisoner's suit challenging his or her confinement, "Congress has passed a more specific act to cover that situation." *Id.* at 489. This demonstrates that "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact of length of their confinement," and thus "that specific determination must override the general terms of [Section] 1983." *Ibid.*

In *Heck*, the Court subsequently considered a suit for damages by a presently incarcerated plaintiff. 512 U.S. at 478-479. The prisoner, who was contesting the legality of his underlying conviction, had previously lost a federal habeas action. *Id.* at 479. *Heck* thus also confronted the "intersection" of Section 1983 and federal habeas (*id.* at 480), extending *Presier*'s "consider[ation] [of] the potential overlap between these two provisions" to the damages-only context. *Id.* at 481. In that setting, the favorable-termination rule avoided the danger that invocation of Section 1983 "would permit a collateral attack on the conviction through the vehicle of a civil suit," circumventing the carefully designed limitations on federal habeas corpus. *Id.* at 484 (quotation omitted). See also *id.* at 498 (Souter, J., concurring).

Accordingly, in the context of a case where the litigant had brought a federal habeas suit and lost (*Heck*, 512 U.S. at 479), the Court explained that "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence" (*id.* at 487). "[I]f it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Ibid.* Otherwise, success in the Section 1983 action could effectively vitiate the result of the prior habeas action—

or, if there had been no prior habeas petition, recourse to Section 1983 would allow the incarcerated plaintiff to circumvent the habeas exhaustion requirement altogether.

Following *Heck*, the Court has confirmed that the favorable-termination rule is coterminous with the practical reach of the federal habeas statute. In *Nelson* v. *Campbell*, 541 U.S. 637 (2004), the Court held that Section 1983 was the appropriate means for the plaintiff to challenge the method of his execution. In finding *Heck* inapplicable, the Court explained that the "'favorable termination' requirement is necessary to prevent inmates from * * * challeng[ing] the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute," but should not "cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination." *Id.* at 646-647.

Likewise, in *Muhammad*, the Court explained that "conditioning the right to bring a [Section] 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies." Where "[t]here is no need to preserve the habeas exhaustion rule," however, there is "no impediment under *Heck*." 540 U.S. at 751-752.

2. The holding below cannot be reconciled with these principles. When a claimant *cannot* bring a federal habeas claim, there can be no conflict between the habeas statute and Section 1983; necessarily, in such cases the habeas statute cannot implicitly repeal the Section 1983 remedy. Any other conclusion would leave broad categories of individuals—such those incarcerated for short periods of time; individuals sentenced only to probation, a fine,

or community service; and persons who uncover evidence of a constitutional violation after release from custody—without any access to a federal forum to challenge the constitutionality of their imprisonment.[9] Nothing in the language, background, or policy of the habeas statute suggests that Congress intended to displace the Section 1983 remedy in such circumstances.

Given that "there can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights" (*Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 700-701 (1978)), a partial repeal of the scope of Section 1983 may not be lightly presumed. See *Wilson*, 535 F.3d at 266 ("Absent a statutory edict to the contrary or a restriction within the common law, the reach of [Section] 1983 should not be compromised."). Section 1983 may be limited only to the extent necessary to prevent plaintiffs from attempting to circumvent the carefully prescribed limitation on federal habeas relief. As seven courts of appeals have concluded, the *Heck* rule does not apply to a litigant who, through no fault of his or her own, had no federal habeas remedy. See *Heck*, 512 U.S. at 500 (Souter, J., concurring). And if this understanding of *Heck* governed petitioner's claim, his suit would proceed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] The practical effect of denying a federal forum is often the denial of *any* forum, as this case illustrates. See pages 16-17, *supra*.

Respectfully submitted.

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MARCH 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1986

JAMES MARTIN DEEMER,
Appellant
v.
JEFFREY BEARD, Former Secretary, Pennsylvania Department of Corrections, in his individual capacity; JOHN KERESTES, Superintendent of SCI-Mahanoy, in his individual capacity; KRIS CALKINS, Records Officer, SCI-Mahanoy, in her individual capacity; DON YOUNG, Records Officer, SCI-Mahanoy, in his individual capacity; CATHERINE C. McVEY, Former Chairperson, Pennsylvania Board of Probation and Parole, in her individual capacity; AMY CLEWELL, Supervisor, Pennsylvania Board of Probation and Parole, in her individual capacity; JOHN DOE NOS. 1 THROUGH X

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. CIVIL NO. 1-12-CV-01143)
District Judge: Honorable William W. Caldwell

Argued: January 16, 2014
Before: RENDELL, ROTH and BARRY, Circuit Judges

(Opinion Filed: February 27, 2014)

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OPINION

BARRY, Circuit Judge

James Deemer, a former Pennsylvania inmate, filed this action under 42 U.S.C. § 1983, alleging that he was confined for a year and a day beyond the date on which his prison sentence should have expired. The District Court granted the defendants' motion to dismiss, finding that Deemer had failed to establish

that his term of incarceration had been overturned, a prerequisite under *Heck v. Humphrey*, 512 U.S. 477 (1994), for challenging the duration of confinement in a § 1983 action. *Heck*, as authoritatively interpreted by our Court, bars Deemer's claim. We, therefore, will affirm.

I. BACKGROUND[1]

On June 25, 2007, Deemer was released on parole from a Pennsylvania prison, where he was serving a two-to-six year sentence for his conviction on two counts of retail theft. At the time of his release, he had 489 days remaining on his sentence.

One of the conditions of Deemer's parole was that he enroll in a residential drug treatment program. He failed to report to the program, however, and, two days after he was paroled, the Pennsylvania Board of Probation and Parole ("Board") declared him delinquent and issued a detainer warrant. He remained a fugitive until November 14, 2007, when he was arrested in Warren County, New Jersey and charged with a violation of New Jersey law. For the next 366 days until the Warren County charges were dismissed, he was detained by the County without bail.[2]

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[1] The facts are drawn from the well-pleaded allegations in the complaint, which we assume to be true, and judicial and administrative orders that form part of the record of the case, documents which can be considered by us in reviewing a motion to dismiss. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 258 n.1, 260 (3d Cir. 2006).

[2] After the Warren County charges were dismissed, Deemer was transferred to Bergen County, New Jersey, and served time on an unrelated conviction for which parole had been revoked.

Following his detention in New Jersey, Deemer was returned to Pennsylvania and incarcerated at SCI Mahanoy. The Board conducted a parole violation hearing and, by written decision, determined that he had violated the terms of his parole and that his sentence would now expire on June 17, 2010. In arriving at that new maximum sentence date, the Board determined that 489 days, the entire amount remaining on his sentence as of his June 2007 release, had yet to be served. The Board rejected his contention that he should receive credit against his sentence for the 366 days of custody by Warren County. He was ultimately released from Pennsylvania prison on June 17, 2010.

While he was incarcerated, Deemer challenged through several avenues the Board's decision to imprison him for a full 489 days. He filed a petition for administrative review with the Board that it denied on December 18, 2009. He then appealed the Board's decision to the Commonwealth Court of Pennsylvania. That appeal remained pending, without decision, as of the date of his release from SCI Mahanoy on June 17, 2010. Once Deemer was released, the Board filed an application with the Commonwealth Court to dismiss the appeal as moot, which the court granted on June 23, 2010. Two months earlier, in April 2010, Deemer filed in the Schuylkill County Court of Common Pleas a petition for a writ of habeas corpus based on the alleged illegality of his continued confinement. In addition, while in prison, he directed correspondence to various agencies and individuals, explaining that he had served his full sentence and asking to be released.

The period of incarceration in Bergen County is not relevant to Deemer's § 1983 claim.

Deemer filed this § 1983 action for damages following his release. He alleged that the Board's failure to credit against his remaining sentence the 366 days spent in Warren County's custody had resulted in incarceration beyond the maximum sentence imposed by the court of conviction, in violation of both Pennsylvania law and the Eighth and Fourteenth Amendments of the U.S. Constitution. His complaint identified a number of individual defendants who, he alleged, were responsible for his unlawful incarceration. The defendants moved to dismiss.

The District Court granted the defendants' motion, relying on the Supreme Court's decision in *Heck v. Humphrey*. *Heck* holds that a plaintiff may not challenge the constitutionality of his conviction or sentence in a § 1983 action unless he can demonstrate that the prior criminal proceeding terminated in his favor. Although Deemer had made previous attempts to overturn the Board's decision, none had yielded a favorable disposition. Therefore, he did not satisfy the mandate of *Heck* and the Court found that this action was barred. Moreover, the Court felt constrained by binding precedent from this Court to apply the *Heck* favorable termination rule even if to do so would effectively deny Deemer another forum in which to challenge the Board's decision, given that he was no longer in custody and could not pursue a habeas claim. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the Court's ruling on a motion to dismiss, and assess the sufficiency of the well-pleaded allegations in the

complaint under the familiar plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206, 209-11 (3d Cir. 2009).

III. ANALYSIS

Deemer argues that the District Court erred in applying the *Heck v. Humphrey* favorable termination bar to the facts of his case. He contends that *Heck*'s rule does not, and should not, apply to § 1983 plaintiffs who, like him, are no longer in custody and who, through no fault of their own, never had alternate access to the federal courts' habeas corpus jurisdiction. In view of our existing precedent, we disagree.

In *Heck v. Humphrey*, the Supreme Court announced that a plaintiff cannot attack the validity of his conviction or sentence in a § 1983 damages action without proving that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254."[3] 512 U.S. at 486-87. *Heck* determined that this requirement emanated from § 1983 itself. Recognizing that § 1983 creates a particular kind of liability for constitutional torts, the Court turned to common-law tort principles to in-

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[3] Deemer does not dispute that his § 1983 claim, predicated as it is on the Board's alleged miscalculation of his remaining sentence, is an attack on the duration of his confinement otherwise subject to *Heck*'s favorable termination rule. *See Williams v. Consovoy*, 453 F.3d 173, 176-77 (3d Cir. 2006) (applying *Heck* to claim of unlawful detention based on parole board decision).

form its interpretation of the federal civil rights statute. It first concluded that the common-law tort of malicious prosecution "provides the closest analogy" to § 1983 claims for damages predicated on the unconstitutionality of a conviction or sentence. *Id.* at 484. That being so, § 1983 claims of this sort, like the common-law cause of action for malicious prosecution, require a showing that the prior criminal proceeding terminated in the plaintiff's favor. *Heck* went on to state that "the principle barring collateral attacks" on a conviction or sentence, which motivates the favorable termination requirement, "is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n.10.

In a concurring opinion, Justice Souter endorsed the majority's favorable termination rule, but found that it applied only to those individuals in state custody, as they had access to federal habeas relief under 28 U.S.C. § 2254 and were required to first challenge their sentence or conviction through that mechanism. *Id.* at 498-500 (Souter, J., concurring). He explained that imposing a categorical favorable termination requirement would have the "untoward result" of denying any federal forum to claimants who were not in state custody and could not invoke federal habeas jurisdiction. *Id.* at 500.

Subsequently, in *Spencer v. Kemna*, 523 U.S. 1 (1998), five of the justices, in three concurring and dissenting opinions, adopted the reasoning of Justice Souter's concurrence in *Heck*. *Id.* at 19-21 (Souter, J., concurring, and joined by O'Connor, Ginsburg, and Breyer, JJ.); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). Because the concurring and dissenting justices did not coalesce behind an authoritative majority opinion, however, it

has remained an unsettled issue before the Supreme Court whether the "unavailability of habeas . . . may . . . dispense with the *Heck* requirement." *Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam).

The main dispute between the parties before us is in identifying the position staked out by this Court. Taking a cue from the five-justice *Spencer* plurality, seven courts of appeals have found that the *Heck* favorable termination rule does not apply to plaintiffs for whom federal habeas relief is unavailable, at least where the plaintiff is not responsible for failing to seek or limiting his own access to the habeas corpus remedy. *See Burd v. Sessler*, 702 F.3d 429, 435 (7th Cir. 2012); *Cohen v. Longshore*, 621 F.3d 1311, 1315-17 (10th Cir. 2010); *Wilson v. Johnson*, 535 F.3d 262, 267-68 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 602-03 (6th Cir. 2007); *Harden v. Pataki*, 320 F.3d 1289, 1298-99 (11th Cir. 2003); *Nonnette v. Small*, 316 F.3d 872, 876-77 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001).

We have not adopted this approach. We, along with three other courts of appeals, have declined to follow the concurring and dissenting opinions in *Spencer*, and have interpreted *Heck* to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence. *See Williams*, 453 F.3d at 177-78; *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir. 2005); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam); *Figueroa v. Rivera*, 147 F.3d 77, 80-81 & n.3 (1st Cir. 1998); *see also Cohen*, 621 F.3d at 1315 (finding our Court has aligned itself

with the First, Fifth, and Eighth Circuits on this question); *Powers*, 501 F.3d at 602 (same). Thus, our decisions in *Gilles v. Davis* and *Williams v. Consovoy* already resolved the issue raised in this case, concluding, as they did, that *Heck*'s favorable termination rule applies to all § 1983 plaintiffs, not just those in state custody.

In *Gilles*, one of the § 1983 claimants, Timothy Petit, was arrested for disorderly conduct after he videotaped an associate preaching controversial views on a college campus. Petit voluntarily entered into a court-supervised probation program and, after its successful completion, the charge was expunged from his criminal record. In the § 1983 action that he later filed, Petit argued that he had been engaged in protected First Amendment speech rather than disorderly conduct, a claim that would have invalidated his placement under court supervision. Because Petit's probation bore several features that were "not consistent with innocence," we found that participation in the program did not constitute a favorable termination of his criminal charge and we dismissed his suit pursuant to *Heck*. *Gilles*, 427 F.3d at 211.

In concluding that the claim was precluded, the *Gilles* Court did not mention Justice Souter's concurrence in *Heck* and did not so much as intimate that *Heck*'s favorable termination rule was anything less than a categorical requirement stemming from § 1983 itself. We acknowledged that the concurring and dissenting opinions in *Spencer* "question[ed] the applicability of *Heck*" to Petit's case, as he was not in state custody and "ha[d] no recourse under the habeas statute." *Id.* at 209-10. Yet, we determined, "these opinions do not affect our conclusion that *Heck* applies to Petit's claims." *Id.* at 210. We doubted that

the pronouncements in *Spencer* by Justices Souter, Ginsburg, and Stevens undermined *Heck*, and, even if they did, we joined with the First and Fifth Circuits in leaving it to the Supreme Court to scale back or overrule *Heck*'s holding. *Id.* (citing *Randell*, 227 F.3d at 301-02; *Figueroa*, 147 F.3d at 81 n.3).

Less than a year later, in *Williams*, we again addressed *Heck*'s reach. In 1997, John Williams was arrested as a parole violator, his parole was revoked, and he was re-incarcerated. After his release, in 2001, Williams brought a § 1983 action challenging, among other things, the legality of his arrest and parole revocation. We affirmed the dismissal of Williams' action for failure to comply with the *Heck* favorable termination rule and reiterated that *Heck* applied across the board, stating that "a § 1983 remedy is not available to a litigant[, like Williams,] to whom habeas relief is no longer available." *Williams*, 453 F.3d at 177. We again noted that the holding in *Heck* had not been undermined by the several, disparate opinions in *Spencer*, and specifically rejected the Second Circuit's position, in reliance on *Spencer*'s non-majority opinions, that § 1983 relief must be available where a federal habeas corpus remedy is not. *Id.* (rejecting the reasoning of *Huang*, 251 F.3d at 75).

Notably, in neither *Gilles* nor *Williams* did we find at all salient the reason why the § 1983 claimant could not access the federal courts' habeas corpus jurisdiction. We, therefore, see no cause to distinguish between the plaintiffs in those cases, who seem to have voluntarily relinquished the ability to launch a

federal habeas challenge,[4] and Deemer, who arguably lacked access to federal habeas relief solely due to the short duration of his confinement.

Gilles and *Williams* dictate that, under *Heck*, any claimant, even if the door to federal habeas is shut and regardless of the reason why, must establish favorable termination of his underlying criminal proceeding before he can challenge his conviction or sentence in a § 1983 action. We are bound by that precedent.[5] *See* 3d Cir. I.O.P. 9.1; *Mariana v. Fisher*, 338 F.3d 189, 201 (3d Cir. 2003). The fact that a cobbled-together majority of the justices in *Spencer* endorsed a different course does not permit us to deviate from our authoritative interpretation of *Heck*. If subsequent opinions of the Supreme Court undermine or supersede *Heck*, we leave it to that Court to declare so. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Gilles*, 427 F.3d at 210.

IV. CONCLUSION

For the foregoing reasons, we will affirm the order of the District Court.

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[4] Petit voluntarily "waive[d] his right to prove his innocence" by entering into Pennsylvania's pre-trial probationary program, *Gilles*, 427 F.3d at 209, and Williams sat on his habeas rights for three years while he was incarcerated, challenging the loss of parole only after he was released from custody, *see Williams*, 453 F.3d at 175-76 & n.1.

RENDELL, J., concurring:

While I agree with the majority that our precedent dictates that we must reject James Deemer's argument, I believe that the principles that animated the Supreme Court's opinion in *Heck* should lead to a different result, were the Court to consider the issue anew in the fact pattern before us.

In *Heck*, the majority noted that the issue presented was at the intersection of the habeas corpus statute, 28 U.S.C. § 2254, and the civil rights statute, 42 U.S.C. § 1983. *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) ("This case lies at the intersection of the two most fertile sources of federal-court prisoner litigation - [] 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254. Both of these 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.") A concern was expressed that permitting suits via § 1983 without the favorable termination of the conviction would lead to inconsistent results. *Id.* at 484-85. That is, an award of damages for wrongful incarceration would be inconsistent with the fact of the prisoner's 'lawful' incarceration.

However, these concerns disappear once the defendant is no longer incarcerated. Not only does the possibility of inconsistent results disappear, but as some of our sister courts of appeals have noted, it could be said that fairness mandates that a former prisoner, who no longer has habeas review available, should be permitted via § 1983 to seek recourse for alleged violations of his rights. *See infra Cohen v.*

Longshore, 621 F.3d 1311, 1316-17 (10th Cir. 2010); *Wilson v. Johnson,* 535 F.3d 262, 268 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 603 (6th Cir. 2007). Given the scope and history of § 1983 as designed to redress constitutional violations, I think that fairness is a persuasive consideration.

A judgment in Deemer's favor, post-release, would only vindicate his rights in the face of unlawful state action – serving the exact purpose of § 1983 – not create the inconsistent result of continued incarceration and a favorable civil judgment. Absent the availability of § 1983, a former prisoner is left with no recourse through no fault of his own. As Justice Ginsberg noted, such individuals "fit within § 1983's broad reach." *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Ginsberg, J., concurring) (internal quotations omitted). Why should the former prisoner be denied even the opportunity for such vindication?

As the majority notes, reasonable minds differ as to the reach of *Heck*. *Compare Wilson*, 535 F.3d at 267 ("[W]e are left with no directly applicable precedent upon which to rely.") *to Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (*Heck* directly applicable as a bar to former prisoner's § 1983 action). I, for one, believe that it should not reach to deny Mr. Deemer the opportunity for vindication via § 1983. Even so, until the Supreme Court decides this issue, we will continue to hold that *Heck's* majority, and not the "cobbled-together" group of judges who have expressed concern regarding the denial of § 1983 relief for someone in Mr. Deemer's position, must dictate the fate of persons like Mr. Deemer. Thus, I concur in the result

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES MARTIN DEEMER,
Plaintiff

vs. : CIVIL NO. 1:CV-12-1143

JEFFREY A. BEARD, et al. (Judge Caldwell)
Defendants

MEMORANDUM

I. INTRODUCTION

Plaintiff, James Martin Deemer, has filed a 28 U.S.C. § 1983 action alleging that the defendants violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment by improperly keeping him imprisoned for 366 days beyond the expiration of his maximum sentence. At the time he filed his complaint, Plaintiff had been released from confinement, so he seeks only compensatory and punitive damages. The defendants are officials and employees of the Pennsylvania Department of Corrections and members and officers of the Pennsylvania Board of Probation and Parole (Parole Board).

Defendants have filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), arguing in part that Plaintiff fails to state a claim because the challenged confinement was not invalidated in prior proceedings, as required by *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L.Ed.2d 383 (1994), and its progeny. In opposition, Plaintiff admits that he was unsuccessful

in state court in invalidating the legality of the confinement. However, he strenuously argues that the *Heck* rule should not apply to his case because he had diligently pursued his state-court remedies and his challenge to his confinement was unsuccessful only because the state court dismissed it as moot upon his release from incarceration.

Plaintiff's argument is not without force, but the Third Circuit has decided otherwise. Hence we will dismiss his Complaint.

II. STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(6), we must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 120 (3d Cir. 2012) (quoted cases and internal quotation marks omitted). With this standard in mind, we set forth the background to this case, as Plaintiff alleges it. As will be seen below, the period of confinement at issue is the year and a day Plaintiff was detained in Warren County, New Jersey, awaiting disposition of drug charges there.

III. BACKGROUND

On April 19, 2005, the Parole Board released Plaintiff on parole from a two-to six-year sentence imposed for two counts of retail theft. (Compl. ¶ 14). On May 23, 2006, Plaintiff was recommitted as a parole violator. (*Id.* ¶ 15). Plaintiff was again released on parole on June 25, 2007. (*Id.* ¶ 16). Plaintiff failed to report to a residential drug treatment program and was declared delinquent on June 27, 2007. (*Id.*).

Plaintiff was a fugitive until he was arrested on November 14, 2007, in Warren County, New Jersey, for a drug violation. He was detained without bail. (*Id.* ¶ 17). Plaintiff was incarcerated in the Warren County prison until November 14, 2008, when the Warren County charges were dismissed. (*Id.* ¶ 20). Plaintiff was then transferred to Bergen County, New Jersey, to serve time on a probation violation in that County. (*Id.* ¶ 22). On May 13, 2009, he was released on parole. (*Id.*).

While Plaintiff was incarcerated in New Jersey, the Parole Board had lodged a detainer against him. (*Id.* ¶ 9). Plaintiff was returned to Pennsylvania. (*Id.* ¶ 23). "By decision mailed June 22, 2009," the Parole Board recommended that he be "recommitted as a technical parole violator with a parole violation maximum date of June 17, 2010." (*Id.*).

Plaintiff claims he was entitled to credit on his Pennsylvania sentence for the 366 days he spent awaiting charges in Warren County. (*Id.* ¶ 25). He made this claim "at several different levels, including an appeal to the [Pennsylvania] Commonwealth Court from the Board's decision." (*Id.* ¶ 26). Plaintiff alleges that under *Martin v. Pennsylvania Bd. of Prob. & Parole*, 576 Pa. 588, 605, 840 A.2d 299, 309 (2003), and *Hears v. Pennsylvania Bd. of Prob. & Parole*, 851 A.2d 1003, 1006 (Pa. Commw. Ct. 2004), he was entitled to credit because the time he spent in Warren County had not been credited to any other sentence. (Compl. ¶¶ 29-30). Plaintiff's appeal to the commonwealth court "was still pending as of his release from incarceration on June 17, 2010, and his appeal was thereafter dismissed as moot." (*Id.* ¶ 26).

In addition to his state-court appeal, Plaintiff had also filed a petition for a writ of habeas corpus in

county court and had written to various persons and agencies, including the defendants, seeking immediate relief. (*Id.* ¶ 28).

IV. DISCUSSION

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Supreme Court ruled that a section 1983 claim for damages arising from a criminal conviction does not accrue "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," until the plaintiff proves 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, 114 S.Ct. at 2372 (footnote omitted).

Heck has been extended to civil-rights cases challenging detention in other contexts. In *Williams v. Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006), the Third Circuit relied on *Heck* to dismiss a section 1983 challenge to a parole-revocation decision. In *McKinney v. Pennsylvania Bd. of Prob. & Parole*, 405 F. App'x 646 (3d Cir. 2010) (nonprecedential), the court of appeals relied on *Heck* to dismiss a section 1983 claim that the plaintiff "had been imprisoned beyond the maximum terms of his sentences" "because success on his claims would necessarily imply the invalidity of the fact and the duration of his state confinement, which have not been elsewhere invalidated." *Id.* at 647. *See also Royal v. Durison*, 254 F. App'x 163, 165 (3d Cir. 2007) (nonprecedential) (*Heck* bars a claim that the plaintiff was held six months beyond his maximum allowable sentence). It follows that *Heck* defeats

Plaintiff's claim here as well, as noted, a claim that he had been kept incarcerated beyond his maximum sentence date.

Plaintiff opposes this conclusion with the following arguments. First, *Heck* should not bar his claim when he has acted in a timely manner and cannot now use other proceedings either because they were mooted by his release or cannot be invoked because he is no longer in custody. We reject this argument. It may succeed in other circuits. *See Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001). But the Third Circuit has rejected it. *Williams, supra*, 453 F.3d at 177-78; *Gilles v. Davis*, 427 F.3d 197, 209-10 (3d Cir. 2005).

Second, Plaintiff argues *Heck* does not apply because he is not challenging the underlying conviction or sentence, just "the administrative miscalculation of his release date." (Doc. 7, Opp'n Br. at p. 7). We disagree. Even a challenge to an "administrative" calculation calls into question the validity of the confinement, especially here when the challenge is a substantive one, based on the proper way of calculating credit for time served. *See Royal*, *supra*, 254 F. App'x at 165 (applying *Heck* against the plaintiff's claim that he was "not calling into question the validity of the sentence or the conviction, but rather just the calculation of time served").

Third, Plaintiff argues we should not follow *Williams* and *Gilles* because they were decided before the Supreme Court's decision in *Wallace v. Cato*, 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). Plaintiff argues that his claim is analogous to a claim for false imprisonment, and the Supreme Court held in *Wallace* that *Heck* did not apply to a false-imprisonment claim because a plaintiff on such a

claim is not being held pursuant to legal process. (Doc. 7, Opp'n Br. at p. 10). As part of this argument, Plaintiff reiterates his position that he is "simply challenging the administrative calculation of his release date." (*Id.*).

We reject this argument. Plaintiff misinterprets *Wallace*. That case dealt with the issue of when the statute of limitations for a section 1983 cause of action for false imprisonment begins to run. The Court held that the cause of action accrued, and hence the limitations period began to run, when the plaintiff was subjected to legal process after his arrest, because that was when his false imprisonment ended. 549 U.S. at 390, 127 S.Ct. at 1096. In making this decision, the Court rejected an accrual date, based on *Heck*, running from the date charges were dropped. The Court said that *Heck* was not relevant because *Heck* only applies when there is a conviction or sentence that has not been invalidated, *id.* at 393, 127 S.Ct. at 1097, and the tort of false imprisonment accrues at a time before there is a conviction or sentence. *Id.*, 127 S.Ct. at 1098.

Plaintiff is therefore incorrect is asserting that *Wallace* held that *Heck* did not apply to a false-imprisonment claim because a plaintiff on such a claim is not being held pursuant to legal process. Moreover, Plaintiff's claim is not analogous to one for false imprisonment in any event. The Parole Board's calculation of the remaining time to be served on his sentence arises from a conviction and sentence, as his own Complaint makes clear.

Finally, citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), and *Heck's* discussion of *Wolff*, 512 U.S. at 482-83, 114 S.Ct. at 2370, Plaintiff argues that *Heck* does not apply be-

cause he is challenging the procedures used to determine his release date, not the lawfulness of his incarceration. We disagree. Plaintiff's Complaint does not challenge procedures, only the substance of the decision under Pennsylvania case law in setting his release date.[1]

We will issue an appropriate order. We note that Plaintiff had set forth a state-law claim for false imprisonment in Count II of the Complaint, but that he consents to the dismissal of that count. (Doc. 7, Opp'n Br. at p. 3 n.1).

/s/William W. Caldwell
William W. Caldwell
United States District Judge

Date: March 19, 2013

[1] Plaintiff also cites *Lee v. Stickman,* 357 F.3d 338 (3d Cir. 2004), but that case does not assist him. It held that exhaustion of state-court remedies was excused for a 28 U.S.C. § 2254 petition when the state courts had failed to address the merits of the petitioner's claims for eight years.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

James Martin Deemer,
Plaintiff

vs. : CIVIL NO. 1:CV-12-1143

JEFFREY A. BEARD, et al. (Judge Caldwell)
Defendants

ORDER

AND NOW, this 19th day of March, 2013, upon consideration of Defendants' motion (Doc. 4) to dismiss, it is ordered that:

1. The motion (Doc. 4) is GRANTED.

2. Plaintiffs Complaint (Doc. 1) is hereby DISMISSED.

3. The Clerk of Court shall close this file.

/s/William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX C

CASES IN WHICH THE QUESTION PRESENTED HAS ARISEN: 2008-PRESENT

First Circuit: 4 Cases.

Batavitchene v. *O'Malley*,
2013 WL 1682376 (D. Mass. 2013)

Traudt v. *Roberts*,
2013 WL 3754862, at *6-7 (D.N.H. 2013)

Aljammi v. *Wall*,
2009 WL 3615977, at *3 (D.R.I. 2009)

Chasse v. *Merrill*,
2009 WL 837720, at *1 (D. Me. 2009)

Second Circuit: 22 Cases.

Brown v. *Wagner*,
2014 WL 234821 (W.D.N.Y. 2014)

Houston v. *City of New York*,
2013 WL 1310554 (E.D.N.Y. 2013)

Chillemi v. *Town of Southampton*,
943 F. Supp. 2d 365, 375 (E.D.N.Y. 2013)

Zomber v. *Stolz*,
2012 WL 252844 (E.D.N.Y. 2012);

Smith v. *Duquesnay*,
2012 WL 1116450 (E.D.N.Y. 2012)

Page v. *Vermont Dep't of Corr.*,
2012 WL 2153496 (D. Vt. 2012)

Barmapov v. *Barry*,
2011 WL 32371, at *3-4 (E.D.N.Y. 2011)

Greenwald v. *Town of Rocky Hill*,
2011 WL 4915165 (D. Conn. 2011)

Hirsch v. *Desmond*,
2010 WL 3937303, at *4 n.5 (E.D.N.Y. 2010)

Rodriguez v. *Fischer*,
2010 WL 438421, at *4 (E.D.N.Y. 2010)

Major Tours, Inc. v. *Colorel*,
720 F. Supp. 2d 587, 600 n.7 (D.N.J. 2010)

Morse v. *Nelson*,
2010 WL 466157, at *4 (D. Conn. 2010)

Rosato v. *N.Y. Cnty. Dist. Att'ys Office*,
2009 WL 4790849, at *4 (S.D.N.Y. 2009)

Miner v. *Goord*,
646 F. Supp. 2d 319, 323 (N.D.N.Y.),
aff'd, 354 F. App'x 489 (2d Cir. 2009)

Wheeler v. *Pataki*,
2009 WL 674152, at *6 (N.D.N.Y. 2009)

Crowell v. *Kirkpatrick*,
667 F. Supp. 2d 391, 402 (D. Vt. 2009),
aff'd, 400 F. App'x 592 (2d Cir. 2010)

Bock v. *Gold*,
2009 WL 2365330, at *2 (D. Vt. 2009)

Tapp v. *Tougas*,
2008 WL 4371762, at *1 n.1 (N.D.N.Y. 2008)

Jean-Laurent v. *Hennessy*,
2008 WL 5274322, at *3 (E.D.N.Y. 2008)

El Badrawi v. *Dep't of Homeland Sec.*,
579 F. Supp. 2d 249, 273 (D. Conn. 2008)

Davis v. *Travis*,
2008 WL 5191074, at *2 (S.D.N.Y. 2008)

Peek v. *Cummins*,
2008 WL 5110988, at *2 n.2 (W.D.N.Y. 2008)

Third Circuit: 17 Cases.

Wells v. *Office of Dist. Att'y for Philadelphia Cnty.*
468 F. App'x 180, 181 (3d Cir. 2012) (per curiam)

Kohler v. *Pa.*,
438 F. App'x 120, 124 (3d Cir. 2011) (per curiam)

Mendoza v. *Meisel*,
270 F. App'x 105, 107 (3d Cir. 2008) (per curiam)

Abbott v. *Pa. Dep't of Corr.*,
426 F. App'x 42, 43 n.1 (3d Cir. 2011) (per curiam)

Hyde v. *Northumberland Cnty. Prob. Dep't*,
2013 WL 5924502, at *7 (M.D. Pa. 2013)

Bronowicz v. *Allegheny Cnty.*,
2013 WL 5724520, at *11 (W.D. Pa. 2013)

Powell v. *Weiss*,
2013 WL 1883235 (M.D. Pa. 2013)

Smith v. *Easton Police Dep't*,
2013 WL 135233, at *1 n.1 (E.D. Pa. 2013)

Shahid v. *Borough of Eddystone*,
2012 WL 1858954 (E.D. Pa.),
aff'd, 503 F. App'x 184 (3d Cir. 2012)

Wilson v. *Daub*,
2012 WL 686837, at *2 (E.D. Pa. 2012)

Walthour v. *Miller*,
795 F. Supp. 2d 317, 324 n.6 (E.D. Pa. 2011)

Kuniskas v. *Walsh*,
2010 WL 1390870, at *3 (M.D. Pa. 2010)

Burch v. *Pa.*,
2010 WL 1133336, at *4 (W.D. Pa. 2010)

Wood v. *Pa. Bd. of Probation & Parole*,
2009 WL 1913301, at *5 (W.D. Pa. 2009)

Derrickson v. *Nolan*,
2008 WL 2888621, at *5 n.4 (W.D. Pa. 2008)

Ference v. *Twp. of Hamilton*,
538 F. Supp. 2d 785, 790 (D.N.J. 2008)

Jones v. *Yale*,
2008 WL 2522427, at *2 (E.D. Pa. 2008)

Fourth Circuit: 7 Cases.

Wilson v. *Johnson*,
535 F.3d 262 (4th Cir. 2008)

Wilson v. *Byras*,
2012 WL 6849872 (D.S.C. 2012), aff'd, 532 F. App'x 324 (4th Cir. 2013) (per curiam)

Martin v. *Brackett*,
2012 WL 2501094 (D.S.C.), aff'd, 485 F. App'x 634 (4th Cir. 2012) (per curiam)

Clark v. *Humane Soc'y of Carroll Cnty., Inc.*,
2011 WL 2791041 (D. Md. 2011), aff'd, 468 F. App'x 342 (4th Cir. 2012) (per curiam)

Oliver v. *Conway City Magistrate Ct.*,
2010 WL 844646, at *4 n.5 (D.S.C. 2010)

Davis v. *Ozmint*,
2010 WL 1294117, at *5 (D.S.C. 2010)

Brown v. *Ozmint*,
2009 WL 2595633, at *5 n.8 (D.S.C. 2009)

Fifth Circuit: 27 Cases.

Morris v. *McAllester*,
702 F.3d 187, 192 (5th Cir. 2012)

Thomas v. *La., Dep't of Soc. Servs.*,
406 F. App'x 890, 898 (5th Cir. 2010) (per curiam)

Patton v. *Bryant*,
2014 WL 36618 (S.D. Miss. 2014)

Stone v. *Fahey*,
2013 WL 3356399, at *2 n.2 (N.D. Tex. 2013)

Salinas v. *Valdez*,
2013 WL 820793, at *2 (W.D. Tex. 2013) aff'd,
2014 WL 465752 (5th Cir. 2014) (per curiam)

Warren v. *Estate of Wade*,
2012 WL 4069230, at *2 (N.D. Tex. 2012)

Hernandez v. *Bouchard*,
2012 WL 987507, at *3 (N.D. Tex. 2012)

Daniels v. *Miss.*,
2012 WL 1712280, at *2 n.6 (S.D. Miss. 2012)

Zey v. *Miss.*,
2012 WL 627549, at *3 (S.D. Miss. 2012)

Woods v. *Epps*,
2012 WL 3704699, at *2 (S.D. Miss. 2012)

Ross v. *Cole*,
2011 WL 196172, at *2 & n.13 (N.D. Tex. 2011)

Ngoc-Chi Huynh v. *City of Houston*,
2011 WL 6250792, at *6 (S.D. Tex. 2011)

Johnson v. *Thaler*,
2011 WL 2792339, at *8 (S.D. Tex. 2011)

Clemments v. *Burnett*,
2011 WL 2601543, at *2 (E.D. Tex. 2011)

Ross v. *Cole*,
2011 WL 196172, at *2 & n.13 (N.D. Tex. 2011)

Reece v. *Owens*,
2011 WL 3239958, at *6 (E.D. Tex. 2011)

Jefferson v. *La. Dep't of Pub. Safety & Corr.*,
2010 WL 2360713, at *3 n.1 (W.D. La. 2010)

Roberson v. *Owens*,
2010 WL 5185056, at *2 (E.D. Tex. 2010)

Tippett v. *Foster*,
2010 WL 2891119, at *2 (N.D. Tex. 2010)

Joseph v. *Tex. Bd. of Pardons & Paroles*,
2010 WL 723428, at *2 n.9 (W.D. Tex. 2010)

Whitehurst v. *Reece*,
2009 WL 2757203, at *2 n.2 (E.D. Tex. 2009)

Roberson v. *Davis*,
2009 WL 4884101, at *3 (N.D. Tex. 2009)

Kupka v. *Livingston*,
2009 WL 820002, at *3 (S.D. Tex. 2009)

Brown v. *Miss. Dep't of Corr.*,
2008 WL 4960467, at *4 n.2 (S.D. Miss. 2008)

Hearron v. *Miss. Dep't of Corr.*,
2008 WL 4167796, at *2 (S.D. Miss. 2008)

Coleman v. *Angelina Cnty. 217th Dist. Ct.*,
2008 WL 4755600, at *3 (E.D. Tex. 2008)

Timmons v. *Quarterman*,
2008 WL 483450, at *2 (N.D. Tex. 2008)

Sixth Circuit: 11 Cases.

Harrison v. *Mich.*,
722 F.3d 768 (6th Cir. 2013)

S.E. v. *Grant Cnty. Bd. of Educ.*,
544 F.3d 633, 639 (6th Cir. 2008)

Embassy Realty Inv., LLC v. *City of Cleveland*,
877 F. Supp. 2d 564, 574-575 (N.D. Ohio 2012)

Thomas v. *Bivens*,
2011 WL 32207 (E.D. Tenn. 2011)

Victor v. *People of Mich.*,
2011 WL 3440094 (E.D. Mich. 2011)

Zar v. *Payne*,
2011 WL 93857, at *5 n.3 (S.D. Ohio 2011)

Kirk v. *Muskingum Cnty.*,
2010 WL 3719286, at *3 (S.D. Ohio 2010)

Williams v. *Caruso*,
2009 WL 960198, at *10-11 (E.D. Mich. 2009)

Ballinger v. *City of Lebanon*,
2008 WL 4279583, at *4-5 (S.D. Ohio 2008)

Denton v. *Hanifen*,
2008 WL 655984, at *3 (W.D. Ky. 2008).

Ferrell v. *Seagraves*,
2008 WL 4763435, at *1 (E.D. Tenn. 2008)

Seventh Circuit: 9 Cases.

Liebich v. *Hardy*,
2013 WL 4476132, at *8 (N.D. Ill. 2013)

Edmonson v. *Desmond*,
2013 WL 3200662, at *3 (E.D. Wis. 2013),
aff'd, 2014 WL 243583 (7th Cir. 2014)

Carter v. *Martin*,
2012 WL 3879923, at *3 (S.D. Ill. 2012)

Menendez v. *McClellan*,
2012 WL 2457872, at *2-3 (S.D. Ind. 2012)

Metcalf v. *Donalds*,
2012 WL 2050823 (E.D. Wis. 2012)

Hadley v. *Quinn*,
2012 WL 4343720, at *2 (S.D. Ill. 2012),
aff'd, 524 F. App'x 290 (7th Cir. 2013)

Pickens v. *Moore*,
806 F. Supp. 2d 1070, 1075 (N.D. Ill. 2011)

Malden v. *City of Waukegan*,
2009 WL 2905594, at *13-14 (N.D. Ill. 2009)

James v. *Ill. Sexually Dangerous Persons Act*,
2009 WL 2567910, at *2 (S.D. Ill. 2009),
aff'd, 373 F. App'x 619 (7th Cir. 2010)

Eighth Circuit: 14 Cases.

Abdullah v. *Minn.*,
261 F. App'x 926, 927 (8th Cir. 2008) (per curiam)

Bandy v. *Comm'r of Corr.*,
2014 WL 28792, at *3 (D. Minn. 2014)

Newmy v. *Johnson*,
2013 WL 2552734 (E.D. Ark. 2013)

Whitehead v. *Garrett*,
2012 WL 13703, at *3 (E.D. Mo. 2012)

Seemiller v. *Barger*,
2012 WL 4092518, at *2 (E.D. Mo. 2012)

Fields v. *Hobbs*,
2011 WL 5869802, at *3 n.3 (E.D. Ark. 2011)

Greene v. *Gassman*,
2011 WL 7462043, at *5 (D. Minn. 2011), aff'd,
489 F. App'x 997 (8th Cir. 2012) (per curiam)

Semler v. *Drennan*,
2011 WL 5325675 (D. Minn. 2011)

Marlowe v. *Fabian*,
2011 WL 2728281, at *4 (D. Minn. 2011), aff'd, 676 F.3d 743 (8th Cir. 2012)

Welsand v. *Heffelfinger*,
2009 WL 5033963, at *2 (D. Minn. 2009)

Odom v. *Kaizer*,
2009 WL 2709395, at *7-8 (D.N.D. 2009), aff'd, 369 F. App'x 767 (8th Cir. 2010) (per curiam)

Clark v. *McLean Cnty.*,
2008 WL 5236036, at *10 (D.N.D. 2008)

Dible v. *Scholl*,
2008 WL 656076, at *4-5 (N.D. Iowa 2008)

Nyssen v. *Minn.*,
2008 WL 4999228, at *5 n.2 (D. Minn. 2008)

Ninth Circuit: 26 Cases.

Silva v. *Andemariam*,
2014 WL 294528, at *4 (W.D. Wash. 2014)

Bell v. *City of Boise*,
2014 WL 295189 (D. Idaho 2014) (holding *Heck* barred claim)

Johnson v. *Swarthout*,
2013 WL 2150333, at *2-3 (E.D. Cal. 2013)

Smith v. *Ulbricht*,
2013 WL 589628, at *2 (D. Mont. 2013)

Gonzalez v. *United States*,
2013 WL 942363, at *7 (C.D. Cal. 2013)

Henderson v. *Carmon*,
2012 WL 6651552, at *3 n.2 (E.D. Cal. 2012)

Phillips v. *DeCamp*,
2012 WL 1980402, at *1 n.1 (D. Or. 2012)

Briscoe v. *DeBower*,
2012 WL 2190765, at *2 (W.D. Wash. 2012)

Magana v. *Cnty. of San Diego*,
835 F. Supp. 2d 906, 912-913 (S.D. Cal. 2011)

Heggem v. *Holmes*,
2011 WL 7758243, at *3 (W.D. Wash. 2011)

McDaniel v. *Clay*,
2011 WL 2554191 (E.D. Cal. 2011)

Quesnoy v. *Oregon*,
2011 WL 5439103, at *15 (D. Or. 2011)

Greene v. *Bd. of Prison Terms*,
2011 WL 4928406, at *1 (E.D. Cal. 2011)

Armstrong v. *Benito*,
2010 WL 2572453, at *2 & n.2 (E.D. Cal. 2010)

Beckway v. *DeShong*,
717 F. Supp. 2d 908, 916-917 (N.D. Cal. 2010)

Soos v. *Mitchell*,
2010 WL 3985037, at *5 (C.D. Cal. 2010)

Medeiros v. *Clark*,
713 F. Supp. 2d 1043, 1055-1056 (E.D. Cal. 2010)

West v. *Mont.*,
2010 WL 2683396, at *3-4 (D. Mont. 2010)
(recognized but not applicable under facts)

Davis v. *Oregon*,
2009 WL 2475442, at *6 (D. Or. 2009)

Flores v. *Morgen*,
2009 WL 1835905, at *8 (W.D. Wash. 2009)

Battle v. *Wick*,
2008 WL 4766818, at *5 (W.D. Wash. 2008)

Nickerson v. *Portland Police Bureau*,
2008 WL 4449874, at *7-8 (D. Or. 2008)

Quoc Xuong Luu v. *Singh*,
2008 WL 961232, at *1 (E.D. Cal. 2008)

Jayne v. *Schwarzenegger*,
2008 WL 780708, at *1 (E.D. Cal. 2008)

Wesbecher v. *Landaker*,
2008 WL 2682614, at *4-5 (E.D. Cal. 2008)
(recognized but not applicable under facts),
aff'd, 371 F. App'x 852 (9th Cir. 2010)

Mitchell v. *City of Gardena*,
2008 WL 4189611, at *5 (C.D. Cal. 2008) (same)

Tenth Circuit: 8 Cases.

Morris v. *Noe*,
672 F.3d 1185, 1193 n.2 (10th Cir. 2012)

Klen v. *City of Loveland*,
661 F.3d 498, 516 (10th Cir. 2011)

Dutton v. *City of Midwest City*,
2014 WL 348982 (W.D. Okla. 2014)

Ortega v. *City & Cnty. of Denver*,
2013 WL 359934, at *5 (D. Colo. 2013)

Fox v. *City of Wichita*,
2013 WL 3287061, at *1 (D. Kan. 2013)

Taylor v. *City of Bixby*,
2012 WL 6115051, at *5-6 (N.D. Okla. 2012)

Harring v. *Catalyst Ivanhoe Behavioral Servs.*,
2011 WL 3418249, at *2 (W.D. Okla. 2011)

Hill v. *City of Oklahoma City*,
2011 WL 1099284, at *4 (W.D. Okla.),
aff'd, 448 F. App'x 814 (10th Cir. 2011)

Eleventh Circuit: 8 Cases.

Ray v. *Judicial Corr. Servs.*,
2013 WL 5428395 (N.D. Ala. 2013)

Barnes v. *City of Dothan*,
842 F. Supp. 2d 1332, 1337 (M.D. Ala. 2012)

Baer v. *Sapp*,
2011 WL 9154681, at *6 (N.D. Fla. 2011)

Domotor v. *Wennet*,
630 F. Supp. 2d 1368, 1375-1380 (S.D. Fla.), aff'd,
356 F. App'x 316 (11th Cir. 2009) (per curiam)

Gray v. *Kinsey*,
2009 WL 2634205, at *9 (N.D. Fla. 2009)

In the Eleventh Circuit, courts also frequently note the disagreement among circuits, but resolve the case on other grounds:

Deters v. *Alcott*,
2009 WL 3674674, at *2-3 (M.D. Fla. 2009)

Messier v. *Devine*,
2009 WL 1321685, at *3-4 (S.D. Fla. 2009), aff'd,
363 F. App'x 690 (11th Cir. 2010) (per curiam)

Baker v. *City of Hollywood*,
2008 WL 2474665, at *6-7 (S.D. Fla. 2008), aff'd,
391 F. App'x 819 (11th Cir. 2010) (per curiam)

D.C. Circuit: 1 Case.

Molina-Aviles v. *Dist. of Columbia*,
797 F. Supp. 2d 1, 6 (D.D.C. 2011).