No. 13-1153

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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is application of the *Heck* favorable termination rule excused where a plaintiff's state court challenge to a parole violation maximum date becomes moot upon his release from custody at the expiration of his sentence?

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STATEMENT OF THE CASE

On April 19, 2005, the Pennsylvania Board of Probation and Parole ("Board") released Petitioner, James Martin Deemer, on parole from a two- to six-year sentence imposed for two counts of retail theft. (Pet. App. at 15a). On May 23, 2006, the Board revoked Petitioner's parole for violating parole conditions. (*Id.*). Petitioner again was released on parole on June 25, 2007; but he failed to report to a residential drug treatment program and was declared delinquent on June 27, 2007. (*Id.*).

Petitioner was a fugitive until he was arrested on November 14, 2007, in Warren County, New Jersey, for a drug violation and detained without bail. (*Id.* at 16a). Petitioner was incarcerated in Warren County until November 14, 2008, when the Warren County charges were dismissed and he was transferred to Bergen County, New Jersey, to serve a probation violation sentence. (*Id.*). Petitioner was released by Bergen County on May 13, 2009. (*Id.*).

After Petitioner was returned to Pennsylvania, the Board revoked his parole and calculated his parole violation maximum date as June 17, 2010. (*Id.*). Petitioner challenged his maximum sentence by filing an appeal in the Commonwealth Court of Pennsylvania. The appeal was pending when Petitioner was released from incarceration at the expiration of his maximum sentence on June 17, 2010, and subsequently was dismissed as moot. (*Id.*).

On June 15, 2012, Petitioner filed a complaint in the U.S. District Court for the Middle District of Pennsylvania, alleging that Respondents violated the

Eighth Amendment and the Due Process Clause of the Fourteenth Amendment by keeping him imprisoned for 366 days beyond the expiration of his maximum sentence. (*Id.* at 14a). Respondents are current and former officials and employees of the Board and the Pennsylvania Department of Corrections. (*Id.*).[1]

Respondents moved to dismiss the complaint, based on the favorable termination rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), and for failure to allege that Respondents were personally involved in any alleged deprivation of Petitioner's constitutional rights. The district court dismissed the complaint on March 19, 2013, based solely on *Heck*. The court did not address Respondents' alternate argument. (*Id.* at 14a – 21a).[2] Petitioner appealed the order dismissing the complaint to the U.S. Court of Appeals for the Third Circuit. On February 27, 2014, the court of appeals affirmed the district court's dismissal, again without reference to Respondents' alternate arguments regarding (a) Petitioner's failure to state a § 1983 claim; (b) that the sentence was properly calculated under

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[1] The complaint alleges that Beard was Pennsylvania's Secretary of Corrections; Kerestes was the Superintendent at the State Correctional Institution at Mahanoy; Calkins and Young were Records Officers at the State Correctional Institution at Mahanoy; McVey was the Chairman of the Pennsylvania Board of Probation and Parole; Clewell was a supervisor, employed by the Board at the State Correctional Institution at Mahanoy; and Cope was a parole officer, employed by the Board at the State Correctional Institution at Mahanoy. (Complaint, ¶¶ 6-12).

[2] The opinion and order of the district court is reported electronically at *Deemer v. Beard*, No. 1:CV-12-1143, 2013 U.S. Dist. LEXIS 37496 (M.D. Pa. Mar. 19, 2013).

Pennsylvania law; and (c) that Petitioner had other avenues to seek relief in state court that he did not pursue. (*Id.* at 1a – 13a).[3]

REASONS FOR DENYING THE WRIT

In *Heck v. Humphrey*, this Court established the unequivocal prerequisite that a § 1983 plaintiff seeking damages for an allegedly unconstitutional conviction or imprisonment 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. 512 U.S. 477, 486-87 (1994). The Court made it clear that the favorable termination rule is not a procedural exhaustion requirement that can be excused. Rather, the Court declared that a cause of action simply does not exist until a conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. *Id.* at 489.

In response to the argument that a released prisoner would not be able to obtain habeas relief, this Court expressly declined to depart from the longstanding and deeply-rooted principle barring collateral attacks based simply on the fact that a convicted criminal is no longer incarcerated. *Id.* at 490 n.9. Later, in *Spencer v. Kemna*, the Court affirmed the dismissal of a habeas petition as moot, despite the

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[3] The unpublished opinion of the court of appeals is reported electronically at *Deemer v. Beard*, No. 13-1986, 2014 U.S. App. LEXIS 3737 (3d Cir. Feb. 27, 2014).

argument that the petitioner would be foreclosed from a damages claim by *Heck*, calling it "a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." 523 U.S. 1, 17 (1998).

Against this clear legal landscape, Petitioner filed a § 1983 complaint alleging that he was held beyond his true maximum sentence because the Pennsylvania Board of Probation and Parole failed to properly calculate his sentence after he had absconded and his parole consequently was revoked. However, Plaintiff also pled that his state court challenge to the Board's calculation was dismissed as moot after he was released at the expiration of his sentence.

The district court dismissed the complaint based on *Heck*. On appeal, the Third Circuit affirmed the district court's dismissal. Following its precedent in *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005), the court of appeals rejected Petitioner's claim that his release from prison while his state court appeal was pending obviated the need for favorable termination under *Heck*. The Third Circuit acknowledged in *Gilles*, as do the Courts of Appeals for the First, Fifth, and Eighth Circuits, that this Court has recognized no exceptions to the favorable termination rule announced in *Heck*. *See Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007); *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998).

Petitioner says he seeks intervention from this Court because seven courts of appeals, based primarily on the concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), have excused favorable termination in certain circumstances. *See Burd v.*

Sessler, 702 F.3d 429 (7th Cir. 2012); *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010); *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007); *Harden v. Pataki*, 320 F.3d 1289 (11th Cir. 2003); *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001).

Despite Petitioner's argument that this Court should re-examine its decision in *Heck* because several courts of appeals have not applied the *Heck* rule in certain circumstances, this Court should decline to choose this case as a vehicle to do so. As repeatedly asserted by Respondents throughout the history of this case (but not addressed by either of the courts below), Petitioner clearly fails to state a claim against Respondents. The petition also does not otherwise present any compelling reason for this Court to exercise its discretionary review.

I. There is no need to address the favorable termination requirement in this case, as the complaint does not state a claim against Respondents or assert a claim that is otherwise compelling.

It is well-established that for a plaintiff to state a claim for damages against a person under 42 U.S.C. § 1983, the plaintiff must allege (and prove) that the defendant had personal involvement in the alleged wrong. *Parratt v. Taylor*, 451 U.S. 527, 537 n.3 (1981). In this case, the complaint does little more than identify the Respondents. Noticeably absent from the complaint is an averment that any Respondent actually participated in the calculation of Petitioner's parole violation maximum sentence. Other than their

identities, the only factual averment remotely relating to Respondents is contained in paragraph 28 of the complaint:

> Further, plaintiff directed correspondence to persons and agencies, including the defendants, in which he repeatedly expressed his belief that his maximum sentence had expired, and requested immediate relief.

(Pet. App. at 17a).

The Third Circuit, in *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989), provided to individuals an avenue to recover damages under § 1983 for detention beyond the termination of a sentence if the plaintiff can show deliberate indifference to the risk of unwarranted detention by the named defendants. Petitioner has not stated a cognizable claim under this sensible regime long-established in the Third Circuit.

In *Sample*, the court of appeals recognized that prison and parole officials are routinely inundated with communications from inmates who claim they are not guilty or that their sentence has been miscalculated. However, "not every official who is aware of a problem exhibits deliberate indifference by failing to resolve it." *Id.* at 1110. Thus, to establish liability under *Sample*, a plaintiff must demonstrate (1) knowledge of the problem and the risk of unwarranted punishment; (2) that the official failed to act or took ineffectual actions; and (3) a causal connection between the official's response and the unjustified detention. *Moore v. Tartler*, 986 F.2d 682 (3d Cir. 1993). In this case, even if Petitioner's complaint were found to satisfy the

first factor,[4] it offers nothing that can support a claim that Respondents failed to act or took ineffectual action.

Petitioner asks this Court to intervene in what is essentially a challenge to completed service of his sentence, as recalculated by the Pennsylvania Board of Probation and Parole. Such challenges to Board recalculation decisions are properly filed (as Petitioner, in fact, did) in the appellate jurisdiction of the Commonwealth Court of Pennsylvania. *See McMahon v. Pa. Board of Probation and Parole*, 470 A.2d 1337 (Pa. 1983). Petitioner's complaint suggests that Respondents had some constitutionally mandated duty to second-guess the parole violation maximum date established by the Board while his appeal was pending in Commonwealth Court. Such a theory of vicarious liability is akin to a claim that prison and parole officials who neither participated in, nor had knowledge of, the criminal prosecution resulting in incarceration have an independent constitutional duty to investigate the legality of a conviction while an appeal of that conviction is pending. Petitioner cited no authority for this alleged duty in the district court, in his appeal to the court of appeals, or in his petition to this Court. And, unsurprisingly, no such precedent exists.

In fact, belying any possible inference that might conceivably be drawn in the petition (or elsewhere in the record) that Respondents are the "prison officials"

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[4] It is not clear whether Petitioner claims his correspondence exhausted state administrative remedies. *See* 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

who improperly calculated his sentence (*see* Pet., p. 2), Petitioner makes no allegation in his complaint that ***any*** Respondent calculated his parole violation maximum sentence. Nor does the complaint allege that Respondents possessed any reason to believe that Petitioner's sentence had not been calculated properly by the Board. Essentially, Petitioner's complaint would require Respondents to resolve the legal issue of whether his parole violation maximum date was calculated in accordance with Pennsylvania's parole statute independently of the appeal that was pending in Commonwealth Court during his allegedly unlawful incarceration. No such duty exists under the law.

As set forth above, the complaint would not have survived Respondents' motion to dismiss even if Petitioner's complaint had not been subject to *Heck*'s favorable termination rule. Because Petitioner has stated no valid claim against Respondents in this case (without regard to the favorable termination requirement), this clearly is not an appropriate case for the Court to accept for examining the apparent split among the courts of appeals in the application of *Heck*'s favorable termination requirement for § 1983 actions. Nor does this case otherwise present a compelling reason for this Court's review.

II. Petitioner's parole violation maximum date was correctly calculated under Pennsylvania law.

Petitioner's claim of constitutional violation and pursuit of damages for unlawful confinement depends upon his legal contention that the Board was required under Pennsylvania law to accord credit on his Pennsylvania sentence for the time that he was

incarcerated in New Jersey. However, this claim is clearly wrong under Pennsylvania law.

Petitioner relies on *Martin v. Pa. Board of Probation and Parole*, 840 A.2d 299 (Pa. 2003), and *Hears v. Pa. Board of Probation and Parole*, 851 A.2d 1003 (Pa. Commw. Ct. 2004), to support his entitlement to credit. But Petitioner fails to note that the Commonwealth Court has determined that *Martin* does not apply to confinement outside the Commonwealth of Pennsylvania. *See Calloway v. Pa. Board of Probation and Parole*, 857 A.2d 218, 222 n.7 (Pa. Commw. Ct. 2004).

After his parole was revoked, Petitioner was entitled to credit for time served on parole in good standing. *See* 1957 Pa. Laws 431.[5] Petitioner's parole violation maximum date was correctly calculated because he was not (as required by Pennsylvania statute) in "good standing" on parole while he was incarcerated in New Jersey.

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[5] The applicable statutory provision in effect at the time relevant to Petitioner's confinement was section 21.1(b) of the now-repealed act known popularly as the Pennsylvania Board of Probation and Parole Law ("Law"), which was previously published at 61 Pa. Stat. Ann. § 331.21a(b). The citation in the text is to the Pennsylvania statutory enactment that last amended section 21.1(b) of the Law before it was repealed in 2009.

The relevant statutory provision that is currently in effect is section 6138(c)(2) of the Prisons and Parole Code, 61 Pa.C.S. § 6138(c)(2) ("If the parolee is recommitted under this subsection [relating to technical violators], the parolee shall be given credit for the time served on parole ***in good standing*** but with no credit for delinquent time and may be reentered to serve the remainder of the original sentence or sentences." (Emphasis added).). Section 21.1(b) of the Law included a similar direction.

Under the Pennsylvania Commonwealth Court's decisions in *Ranson v. Pa. Board of Probation and Parole*, 568 A.2d 1334 (Pa. Commw. Ct. 1989); *McFarland v. Pa. Board of Probation and Parole*, 569 A.2d 374 (Pa. Commw. Ct. 1989); and *Obringer v. Pa. Board of Probation and Parole*, 547 A.2d 449 (Pa. Commw. Ct. 1988), it is clear that Petitioner was not entitled to credit while he was detained in New Jersey on other criminal charges, probation violations, or because of a new sentence. The logic behind these cases is set forth in *Ranson*, where the Commonwealth Court clearly stated that "[a]ny time that a parolee spends incarcerated on another charge cannot be considered time served on parole in good standing." 568 A.2d at 1335.

After his release on parole on June 25, 2007, Petitioner was a fugitive. Thereafter, Petitioner was detained in New Jersey because of new criminal charges, a probation violation detainer, and a new sentence. Petitioner did not return to Pennsylvania until after he was paroled from the Bergen County, New Jersey, probation violation sentence. Thus, under Pennsylvania law, the remaining balance of Petitioner's sentence was properly computed from the date he was taken into custody on the warrant of the Board, *i.e.*, February 13, 2009. *See* 1957 Pa. Laws 431;[6]

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[6] As explained in note 5, the applicable statutory provision in effect at the time relevant to Petitioner's case was section 21.1(b) of the now-repealed Pennsylvania Board of Probation and Parole Law. The statutory provision now in effect that governs the recalculation of a parolee's sentence is 61 Pa.C.S. § 6138(c)(3) ("The remainder shall be computed by the board from the time the parolee's delinquent conduct occurred for the unexpired period of

see also Rivenbark v. Pa. Board of Probation and Parole, 501 A.2d 1110 n.2 (Pa. 1985). Consequently, it is clear that Petitioner's claim that he was entitled to credit against his Pennsylvania sentences for time he was incarcerated in New Jersey is without merit as a matter of well-established Pennsylvania law.

As explained above, because Petitioner as a matter of law was not entitled to credit on his Pennsylvania sentence for time spent incarcerated in New Jersey, application of the *Heck* favorable termination rule to Petitioner's complaint was inconsequential to the inevitable dismissal of his § 1983 action. Thus, this case clearly is not suitable for this Court's review of *Heck*'s favorable termination rule. The petition also does not otherwise present compelling reasons for this Court's attention.

III. Petitioner had other avenues for relief in State court that he failed to pursue.

Petitioner argues that this Court should intervene because, despite his diligent efforts to secure release, he could not file a federal habeas petition after he was released. Petitioner's argument ignores other avenues through which he might have met the favorable termination requirement of *Heck*, but that he did not pursue.

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the maximum sentence imposed by the court without credit for the period the parolee was delinquent on parole. The parolee shall serve the remainder so computed from the date the parolee is taken into custody on the warrant of the board."). Section 21.1(b) of the Law included a similar instruction.

Heck did not hold that federal habeas relief is the only means to satisfy the favorable termination requirement. Rather, a § 1983 plaintiff can satisfy the rule by showing that the conviction or sentence was 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. 512 U.S. 477, 486-87 (1994).

If Petitioner's right to relief were as clear as he claims, he could have sought summary relief in the Commonwealth Court. *See* Pa. R.A.P. 1532(b). When the right to relief is clear, a party in the Commonwealth Court may seek summary relief ***at any time***. *Id.* Further, Petitioner could have sought release at what he claims was his minimum sentence by addressing a petition for writ of habeas corpus to the Commonwealth Court's ancillary jurisdiction. *See* 42 Pa.C.S. § 761(c).[7] Petitioner did neither.

Relief obtained under either of these scenarios would have obviated the need for federal habeas relief and, of course, for the § 1983 action for damages that Petitioner now asks this Court to allow him to pursue in the federal court system. Because Petitioner has only himself to blame for not pursuing relief clearly available to him under state law while he was incarcerated (properly so, as explained above), this case

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[7] Although Petitioner claims that he did all he could do under state law by filing a habeas corpus action in Pennsylvania's Court of Common Pleas of Schuylkill County, this filing was improper under Pennsylvania law. *See Com. Department of Corrections v. Reese*, 774 A.2d 1255 (Pa. Super. Ct. 2001).

is not well-suited for this Court's review of the *Heck* favorable termination rule. Nor are there otherwise compelling reasons for this Court's intervention.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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