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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition confirms the need for review. Respondents acknowledge that the circuits are divided, seven to four, over proper resolution of the question presented regarding the meaning of the *Heck* favorable-termination rule. Opp. 4-5. They evidently recognize that this case would have been decided differently had it arisen in one of the circuits that applies the majority approach. They do not deny that the question is a very important one that arises with great frequency; indeed, since the filing of this petition, another petition for certiorari posing the same question has been filed. See *Gause* v. *Haile*, No. 13-1518. And respondents do not even attempt to defend the merits of the rule applied below.

Instead of contesting any of these points, respondents offer alternative reasons why they might ultimately prevail in this litigation if petitioner succeeded in this Court and his constitutional claim went forward. But, as respondents repeatedly and expressly acknowledge, these arguments were "not addressed by either of the courts below." Opp. 5. See also Opp. 2. In these circumstances, this Court should grant certiorari to resolve the issue actually decided by the lower courts and determine whether a substantial class of individuals should be denied a remedy for the deprivation of their constitutional rights, leaving any remaining issues to be addressed on remand—where, in fact, there is every reason to believe that respondent *will* prevail.

A. Respondents' alternative arguments simply have no bearing on the necessity for review of the question presented.

The bulk of respondents' brief (Opp. 5-11) contends that, wholly apart from the availability of a Section 1983 action under *Heck,* petitioner's complaint "fails to state a claim." *Id.* at 5. But their arguments on this point are immaterial here because both lower courts chose *not* to make these arguments the basis for their decisions. Respondents repeatedly acknowledge as much: the "district court dismissed the complaint * * * based solely on *Heck*" and "did not address [r]espondents' alternate argument." *Id.* at 2. Likewise, "the court of appeals affirmed the district court's dismissal, again without reference to [r]espondents' alternate arguments." *Ibid.* Respondents appreciate that *all* of the arguments they now assert to this Court were "not addressed by either of the courts below." *Id.* at 5.

In these circumstances, the Court should grant certiorari to resolve the important question actually decided below and presented in the petition—a question that respondents appear to recognize warrants review. Respondents' alternative arguments—to the extent that they were not waived—may be considered below on remand. The Court consistently takes this approach when presented with a meritorious petition, leaving alternative grounds for the lower courts to address in the first instance. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009); *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999). That approach is particularly appropriate here because, when this Court "reverse[s] on a threshold question," as it should in this case, it "typically remand[s] for resolution of any

claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012). That is reason enough to dismiss the arguments in the brief opposing review.

B. Respondents' alternative arguments are wrong on their own terms.

Although the grant of certiorari is warranted for that reason alone, we also note, for the sake of completeness, that the particular alternative arguments advanced by respondents themselves lack merit.

1. Respondents first contend that petitioner's complaint fails to assert a claim because it does not adequately allege respondents' personal involvement in petitioner's excessive incarceration. Opp. 5-8. But "there can be no doubt that imprisonment beyond one's term constitutes punishment within the meaning of the [E]ighth [A]mendment." *Sample* v. *Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989). As respondents acknowledge (Opp. 6), a prison official violates this constitutional right if he or she is deliberately indifferent to a known risk that a prisoner is being incarcerated beyond the expiration of the governing sentence. *Id.* at 1110. And that is precisely what petitioner alleges occurred here: petitioner asserts that he "repeatedly demanded to be released upon the expiration of his maximum sentence;" that he informed officials as to the error by the Pennsylvania Board of Probation and Parole (the "Board"); that respondents nonetheless were deliberately indifferent in continuing to "unlawfully imprison[]" him; and that their acts caused him injury. Ct. App. J.A. 15-16. On the face of it, that states a valid constitutional claim. Respondents' argument to the contrary disregards a central aspect of this suit—that the action is ad-

vanced against the *Board* officials who directly made the erroneous determination. See Pet. App. 14a.

Although respondents acknowledge that petitioner alleges he alerted them to his unlawful confinement (Opp. 6), they nonetheless assert that the complaint has insufficient detail. *Id.* at 5, 7-8. But respondents offer no basis to believe that the pleading burden is so high. And even if respondents were correct, petitioner has the right to amend a first Section 1983 suit "which is dismissable for lack of factual specificity." *Darr* v. *Wolfe*, 767 F.2d 79, 81 (3d Cir. 1985), abrogated on other grounds by *Alston* v. *Parker*, 363 F.3d 229, 233 (3d Cir. 2004).

2. Respondents' next argument—that the Board correctly calculated petitioner's sentence (Opp. 8-11)—fails on multiple levels.

First, respondents did not advance this argument in the district court, which they appear to implicitly acknowledge. See Opp. 2-3; Br. in Supp. Mot. to Dismiss, *Deemer* v. *Beard*, No. 12-1143 (M.D. Pa.) (filed Sept. 6, 2012). "It is well established that failure to raise an issue in the district court constitutes a waiver of the argument." *Brenner* v. *Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991).

Second, respondents' argument to this Court—that Pennsylvania will not credit time served outside the Commonwealth (Opp. 9)—is at odds with the Board's own prior explanation for denying petitioner's claim. The *only* basis the Board provided for rejecting petitioner's request for crediting time served in New Jersey was its assertion that he "was serving another sentence" during that time. Ct. App. J.A. 17. But petitioner alleges (and respondents do not now

dispute) that the Board erred factually on this point (*id*. at 14), which perhaps explains why respondents have devised a new explanation.

Third, respondents are simply wrong on the law. In *Martin* v. *Pennsylvania Board of Probation & Parole*, 840 A.2d 299, 309 (Pa. 2003), the Supreme Court of Pennsylvania established a clear rule: when "confinement is the result of both a Board warrant and pending criminal charges" and "there is no period of incarceration imposed" for the new charges, the time spent incarcerated *must* be credited to the old sentence. *Id*. at 309.[1] That is just what occurred here. See Pet. App. 3a; Pet. 6-7.

Respondents assert (Opp. 9) that *Calloway* v. *Pennsylvania Board of Probation & Parole*, 857 A.2d 218, 222 (Pa. Commw. Ct. 2004), limits *Martin* to confinement inside Pennsylvania. But that is not so. Rather, in *Calloway* the defendant was *convicted* in New Jersey and served a sentence there; after his release, the defendant obtained a *retroactive* vacatur of the sentence from the New Jersey court. *Id*. at 220. *Calloway* refused to credit "foreign sentences" that "are *later* vacated or reduced," as that could permit another State to "decide whether Pennsylvania sentences were to run concurrently with that state's sentence by entering an *ex post facto* order 'reducing time' on its sentence when that jurisdiction's time had already been served." *Id*. at 222 (emphasis added). This case presents no such situation.

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[1] Respondents' reliance (Opp. 10-11) on *Ranson* v. *Pennsylvania Board of Probation & Parole*, 568 A.2d 1334, 1335 (Pa. Commw. Ct. 1989), and other decades-old authority is thus misplaced. It is this law that *Martin*, a subsequent decision of the Supreme Court of Pennsylvania, overruled.

C. Petitioner lacked recourse to federal habeas while incarcerated.

Respondents get no further in their contention that there were avenues *other* than federal habeas that petitioner could have pursued to satisfy the *Heck* favorable-termination requirement. Opp. 11-13. One answer to this assertion is that it is immaterial. The seven courts of appeals that disagree with the Third Circuit's approach to *Heck* have held the favorable-termination rule inapplicable when the Section 1983 plaintiff had no practical recourse to *federal habeas*. It is undisputed that petitioner had no such recourse here. The Court accordingly should grant review to determine whether a plaintiff in petitioner's position is entitled to pursue a Section 1983 remedy—as seven circuits have held.

A second answer to respondents' contention is that it is wrong on the facts: petitioner vigorously pursued every available avenue for relief—unsuccessfully—until his efforts were mooted by his release from prison. As we showed in the petition, petitioner lodged a challenge with the Board regarding his proper release date and, after that was denied, filed a procedurally proper appeal of the Board's decision in the Commonwealth Court of Pennsylvania. Pet. App. 4a; Pet. 7; Opp. 1.[2] Petitioner also filed a parallel petition for a writ of habeas corpus in the state Court of Common Pleas. Pet. App. 4a; Opp. 12 n.7.[3] And he repeatedly pressed his claim

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[2] See *Deemer* v. *Pa. Bd. of Probation & Parole*, No. 71-CD-2010 (Pa. Commw. Ct.).

[3] Respondents' suggestion, relying on *Commonwealth* v. *Reese*, 774 A.2d 1255, 1262 (Pa. Super. Ct. 2001), that petitioner could *also* have filed a petition for a writ of habeas

to prison officials, asking to be released. Pet. App. 4a. That these state decision-makers failed to act cannot be thought to deny petitioner recourse to his federal remedy.

Respondents acknowledge that petitioner properly pursued relief in the Commonwealth Court (Opp. 7), which makes dubious their subsequent assertion (*id*. at 12) that he should have done more to invoke that court's jurisdiction. Their contention that petitioner could have sought summary relief in his appeal to the Commonwealth Court is farfetched. A Pennsylvania Rule 1532(b) motion, which is "similar to * * * summary judgment," is appropriate only where "no material issues of fact are in dispute." *Hosp. & Healthsystem Ass'n* v. *Commonwealth*, 77 A.3d 587, 602 & n.18 (Pa. 2013); Pa. R. App. P. 1532(b). But before the Commonwealth Court the Board vigorously disputed a critical fact: whether petitioner was held in Warren County solely pursuant to the Board's warrant, or whether that time was creditable elsewhere. See Br. for Resp. at 7, *Deemer* v. *Pa. Bd. of Probation & Parole*, No. 71-CD-2010 (Pa. Commw. Ct.) (filed May 17, 2010). Although re-

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corpus in the Commonwealth Court (rather than in the Court of Common Pleas, where petitioner did in fact bring a habeas petition) (Opp. 12 & n.7) is incorrect. *Reese* held that a habeas "writ is not a substitute for appellate review;" rather, the proper mechanism to challenge a "Board determination" is via an appeal of that decision to the Commonwealth Court—which is exactly what petitioner did. *Reese*, 774 A.3d at 1260. Because a challenge to a Board order is within the "Commonwealth Court's *appellate* jurisdiction"—not its *original* jurisdiction—petitioner could not have brought a habeas petition directly in the Commonwealth Court. *Ibid*. (emphasis added). See also *Borsello* v. *Colleran*, 833 A.2d 1213, 1215 (Pa. Commw. Ct. 2003).

spondents do not appear to contest that point now, a Rule 1532(b) motion was unavailable given that dispute of fact.

Petitioner made a vigorous, good-faith effort to vindicate his claims while he was incarcerated.[4] His efforts were thwarted solely by his release from custody. Individuals like petitioner, who have been subjected to relatively short periods of unlawful confinement, should not be left without any remedy for such constitutional violations—as seven courts of appeals have held. This Court should grant review to determine whether that result, or the contrary rule stated by four other circuits, is correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] Respondents are wrong in contending that success in Pennsylvania state court "would have obviated the need for * * * the [Section] 1983 action for damages." Opp. 12. Such an order would have *confirmed* that petitioner was unlawfully held in prison beyond the expiration of his sentence. But respondents point to no post-release mechanism by which petitioner could press his claim for damages other than a Section 1983 lawsuit, nor are we aware of any.

Respectfully submitted.

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