NO. 18-6239

IN THE

SUPREME COURT OF THE UNITED STATES

# SEAN P. REILLY,

*Petitioner,*

VS.

GUELSY M. HERRERA,
Individual capacity,
ERIC ABRAHAMSEN,
Individual capacity,
JENNIFER CHRISTINE DAVIS,
JIM H. DAVIS,
CARMEN I. GONZALEZ, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR THE REHEARING OF AN ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

Sean P. Reilly DC#N21886
SOUTH BAY CORRECTIONAL FACILITY
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## QUESTIONS PRESENTED

## SYNOPSIS

On December 1, 2013, Sean P. Reilly was released from state prison. While incarcerated, Mr. Reilly challenged the validity of his confinement in state court. Upon filing a § 1983 action, the Federal District Court determined that his claims were barred under *Heck v Humphrey*, 512 US 477, 129 L Ed 2d 383, 114 S Ct 2364 (1994) for failing to satisfy the favorable termination requirement. The Eleventh Circuit *incorrectly* agreed that Mr. Reilly was barred by *Heck*.

However, due to Mr. Reilly's release from prison he could not meet the "in custody" requirement for § 2254 federal habeas relief. Thus, it was impossible for him to satisfy the "favorable termination" requirement.

Therefore, § 1983 is the *only* federal forum available for Mr. Reilly.

## QUESTION ONE (RESTATED)

Whether a plaintiff who has been, but is no longer, "in custody" may bring a § 1983 suit challenging the validity of his confinement (i.e., his prior placement in state prison) without first satisfying the favorable termination requirement of *Heck v Humphrey*, 512 US 477, 129 L Ed 2d 383, 114 S Ct 2364 (1994)? [1]

[1] This question was asked, but left unresolved, by the U.S. Supreme Court in *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978 (1998) and *Muhammad v. Close*, 540 US 749, 124 S Ct 1303 (2004). Since then, there has been a deep split amongst the Federal Circuits whether a former prisoner, who does not have access to § 2254, can proceed under §1983. This question is in dire need of a resolution.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

## REASONS FOR GRANTING REHEARING

In this rehearing, Mr. Reilly presents intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. He filed an Amended Petition for a Writ of Certiorari while the initial certiorari petition was pending. The Supreme Court did not have the opportunity to review the updated petition. Petitioner raises a substantial ground that was not previously presented; this is an important issue that must be resolved.

This Court granted certiorari in *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978 (1998) and *Muhammad v. Close*, 540 US 749, 124 S Ct 1303 (2004) to resolve, but did not settle, the very question offered herein. Justice and judicial economy would require this Court to grant certiorari in his case to dismantle this *Heck* barrier that has been incidentally created for ex-convicts and address this unsettled law.

**Whether a plaintiff who has been, but is no longer, "in custody" may bring a § 1983 suit challenging the fact of his confinement (i.e., his prior placement in state prison) without first satisfying the favorable termination requirement of *Heck v Humphrey*, 512 US 477, 129 L Ed 2d 383, 114 S Ct 2364 (1994)?**

This case presents an issue that will significantly impact the landscape of civil rights litigation. The day to decide the constitutional question the Supreme Court left open is now upon us. The Court made an impetuous decision in denying certiorari and should reconsider this case to resolve the conflict to open a federal forum to former prisoners who wish to challenge the validity of their convictions.

The question above is the exact question asked, but not comprehensively answered by *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978 (1998) and *Muhammad v. Close*, 539 U.S. 925, 123 S. Ct. 2573 (2003). The Court decided in those cases that

the proper factual circumstances did not exist to properly resolve the issue. Mr. Reilly now submits that this case presents the ideal platform from which to answer this question, to wit: Mr. Reilly is unable to pursue § 2254 relief and the Eleventh Circuit has barred him under *Heck* from proceeding under 42 U.S.C. § 1983. *Heck* acknowledged the possibility that a prisoner no longer 'in-custody' for the purposes of federal habeas corpus might not be permitted to bring an action under § 1983 when the § 1983 action implicated the validity of his underlying conviction because he or she could not achieve favorable termination of the conviction.

This issue has been acknowledged and addressed by at least five Supreme Court Justices, and also by the federal Circuit Courts of Appeal which remain divided regarding the lawful treatment of claims under the current paradigm. Specifically, whether the *Heck* favorable-termination requirement applies universally, or if the statements by the Justices in *Spencer* articulate with finality, a lawful exception to Section 1983 plaintiffs who diligently pursued favorable termination, or if some other standard actually applies.

*Heck* generally bars any challenges to a previous conviction unless the conviction "has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487. This is known as the "favorable-termination" requirement.

In a concurring opinion in *Spencer*, Justice Souter, joined by three other Justices, suggested an exception to *Heck's* general rule. The exception would allow plaintiffs who are no longer "in custody" to bring actions under § 1983 without

having to satisfy the favorable-termination requirement. *See Spencer*, 523 U.S. at 20-21. As he had earlier explained in his *Heck* concurrence:

> If [those] individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences), like state prisoners, were required to show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment, the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason, of course, is that individuals not "in custody" cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result. *Id.*

The problem articulated by Mr. Reilly herein, has been vexing the circuit courts of appeals for years. There is a deep divide amongst the circuits as to whether the decision in *Spencer*, 523 U.S. 1, 118 S. Ct. 978 (1998) in which four Supreme Court Justices indicated that a person for whom federal habeas relief pursuant to § 2254 is not available, through no fault of their own, should not be barred for failing to achieve favorable termination under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). The refusal of the Supreme Court to address this important issue, allows § 1983 actions to proceed in some jurisdictions, while barring them in others, has meant that justice has been available to some, but denied to others by no other qualifying circumstance other than mere geography.

The Petitioner resides within the Eleventh Circuit, which is itself divided on this issue: *Harden v. Pataki*, 320 F. 3d 1289 (11th Cir. 2003) (*Heck* does not bar an action if a habeas remedy is unavailable); *Abu Said v. Hillsborough County Board of County Commissioner*, 405 F. 3d 1298 (11th Cir. 2005) (citing *Spencer*, and noting

in dicta that the Eleventh Circuit had not "weighed in on this issue" whether *Heck* barred a civil rights action if a habeas remedy was unavailable); contrast: *Vickers v. Donahue*, 137 Fed. Appx. 285, 287 (11th Cir. 2005) (concluding that the plaintiff's § 1983 action was barred under *Heck* because it would necessarily undermine his underlying conviction, and declining to address the issue of the unavailability of habeas relief); *Reilly v. Herrera*, 622 Fed. Appx. 832 (11th Cir. 2015).

Moreover, it seems clear that the Court would very well likely conclude that a person who has been diligent in his or her pursuit of favorable termination, but who, for example, have completed their sentences, or where other circumstances may have rendered federal habeas relief unavailable, should be permitted to bring meritorious § 1983 claims to the courts without facing the arbitrary and capriciously applied barriers that now exist.

It also seems to be logical that the problem stems in large part from the construction applied to the decision in *Spencer* by the various circuits where some have concluded that the five justices concurring on this issue amounts to binding law, and others deciding that because the comments of, for example, Justice Ginsburg appear in *dicta*, that the opinions stated therein are not binding on the lower courts.

The Five Justice Majority in *Spencer* were prepared to modify the *Heck* rule to the extent that situations in which the § 2254 is unavailable "further complicat[es] this already complex area of the law." *Federal Habeas Corpus Practice and Procedure, 7th Ed.*, § 9.1 at Page 518. *See Bradley v. Evans*, 2000 U.S. App. LEXIS 22403 at *12-*13 (6th Cir. August. 23, 2000), *cert. denied*, 531 U.S. 1023

(2000) ("This area of the law...remains in flux...A guiding hand from the Supreme Court...seems very much in order to prevent future courts from losing their way in this forest of uncertainty."); *Jenkins v. Haubert*, 179 F.3d 19, 25 (2nd Cir. 1999) (*Preiser, Heck, and Edwards* "have generated confusion in the lower courts").[2]

The circuits are split on the proper rule to apply when a Plaintiff in a § 1983 action brings an action that challenges the validity of a conviction and sentence or the fact or duration of confinement in which federal habeas review has not taken place or is otherwise unavailable. *See, e.g., Covey v. Assessor*, 777 F.3d 18, 19 (4th Cir. 2015) ("Although circuits are split on this issue, our Court follows the majority view- based on [Justice] Souter's analysis – that *Heck* does not apply to claimants no longer in custody, and without access to habeas relief, at least when the claimant is not responsible for failing to seek or limiting his own access to habeas relief."); *compared with Teichmann v. New York*, 769 F. 3d 821, 829-30, 831 (2nd Cir. 2014) (Calabresi J., concurring) ("[I]f we accept that a § 1983 suit does 'necessarily' attack a conviction or sentence, what happened if the plaintiff is no longer in custody and therefore cannot challenge the lawfulness of his confinement through habeas?")

**Should the Supreme Court's Holding in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994), be Reconsidered For Former Prisoners, Whom Are No Longer in Custody for Habeas Purposes?**

It seems clear that the United States Supreme Court will eventually have to resolve this issue. The Petitioner, who is not an attorney and not trained in the law, does not presume to understand all the ramifications of an ultimate ruling by the

[2] *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827 (1973); *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997)

Court on this matter. Nevertheless, the questions asked by the Petitioner are these: Why not this case? Why not now? It is the function of the Supreme Court to interpret the law and instruct the lower courts on its application. The Petitioner, throughout his legal travails, has diligently pursued his constitutional rights in both criminal and civil contexts. For him, a decision denying or granting certiorari on this matter has crucial implications in terms of his criminal convictions, and because state officials, acting under color of law, engaged in activity which deprived him of his liberty in the criminal context, of his constitutional civil rights as well but, under the current erroneous holding by the Eleventh Circuit, where it stated that the Petitioner did not pursue favorable termination, the Petitioner cannot seek redress for these civil rights violations:

The Petitioner has, in fact, diligently pursued this issue through state and federal litigation. On appeal from the dismissal of his federal Section 1983 claim in *Reilly v. Herrera,* 622 Fed. Appx. 832 (11th Cir. 2015), which asserted that he is not entitled to bring his claim under the exception articulated in *Spencer v. Kemna, supra,* the Eleventh Circuit stated:

> "Mr. Reilly's case does not fit within the framework of scenarios mentioned in Justice Souter's *Spencer* concurrence ... During his three year term of imprisonment, Mr. Reilly had ample time to pursue and an appeal, or other post-conviction remedies on the supervised release revocation, yet he did not avail himself of any of them. **We doubt that Justice Souter intended to propose a broad exception to include prisoners who had the opportunity to challenge their underlying convictions but failed to do so."** *Ibid.*

Mr. Reilly respectfully submits that the Eleventh Circuit's conclusion in that appeal was incorrect. Mr. Reilly did, in fact, diligently pursue all appeal and post-

conviction remedies available to him during his three-year term of incarceration. During the exact three-year term of imprisonment referenced by the Eleventh Circuit in its *Heck*/diligence-based dismissal of his § 1983 action, Mr. Reilly has demonstrated above that he has been diligent in seeking favorable-termination in the state courts. The failure to accept this case makes the Court complicit with the barrier created for former prisoners. It is time to break down this barrier.

Mr. Reilly submits that the decision of the Eleventh Circuit was erroneous where the court specifically stated that its rationale in denying Mr. Reilly's appeal was that he had taken no actions to diligently pursue his rights. This is particularly egregious where the Eleventh Circuit's order contains specific language inferring that if Mr. Reilly had been diligent, his Section 1983 action may have been permitted to proceed.

If it is accepted by this Honorable Court that Mr. Reilly did actually and diligently pursue favorable termination on the revocation of supervised release, then the next logical conclusion would be that Mr. Reilly's situation does fall squarely within the ambit of cases described by Justice Souter in his *Spencer* concurrence and Mrs. Justice Ginsburg's concurrence as well.

Accepting the premise above, that Mr. Reilly's case is a valid situation in which the narrow exception articulated in *Spencer* applies, then, now is the appropriate time for the Eleventh Circuit and possibly the Supreme Court to instruct us with finality as to whether persons' in the Petitioner's situation are entitled to seek civil redress under 42 U.S.C. § 1983 when, through no fault or intentional delay of their own, relief under § 2254 is no longer available?

Mr. Reilly submits that the answer to the above question is yes. This question has existed and confused the federal district and circuit courts for years now. Significantly, the fact that the *Heck* ruling is considered by some circuits to have been modified by the Court's subsequent ruling in *Spencer* because five Justices expressed that *Heck* should not apply to persons who arrive at the intersection of § 1983 and § 2254 after diligent efforts to achieve favorable termination. *See Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010) ("[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 § 1983 claim); *Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2006) ("[Plaintiff] cannot ... use his failure timely to pursue habeas remedies as a shield against the implications of *Heck*."). The question that the Petitioner seeks to have answered by this court and the high court in part is this: If plaintiffs' cannot use failure to timely pursue favorable termination as a shield, can the opposite be true? Can a plaintiff for whom the implications of *Heck* would otherwise apply, use diligence in pursuit of favorable termination – as a key to unlock *Heck's* door and enter the doors of the federal courts?

Is reasonable diligence a precondition for adjudication of a civil rights complaint on the merits? Section 1983 plaintiffs in several federal circuits encounter a court-fashioned diligence barrier to pursuit of their petitions.

It is the continued pursuit of a fair opportunity to present his meritorious civil rights complaints to the federal courts for which the Petitioner now makes his entreaty to this Honorable Court. This, in hopes that this panel will recognize and acknowledge that the Petitioner is asking for nothing more (and nothing less) than

for the proper administration of justice which is the right of every person in our country. The Petitioner now has no other method to seek help than to come before this panel and to humbly ask for this situation to be recognized and addressed. It is difficult for the Petitioner, who is not an attorney, and who is uncertain about how to best navigate the technical aspects of seeking review of these constitutional claims, and about if, in fact, this appeal will ever reach the lofty heights to which it is directed – to the Supreme Court Justices.

However, should this appeal reach its intended destination, the Petitioner entreats and respectfully asks this Court to carefully consider the actual legal situation of Petitioner and the law as it stands today? Should this appeal fail, the Petitioner will be precluded from ever having his claims properly heard. It is unquestionably difficult in any instance to be granted certiorari by the Supreme Court. For this *pro se* Petitioner, who is basically self-taught in the law, who has assiduously and diligently fought to protect his constitutional rights throughout his case, and for whom the inconceivably complex legal issues surrounding federal habeas corpus and § 1983 remain all but opaque, this is a final cry for justice, a final attempt to find someone in a position of power who may deign to hear this cry and to answer it. The Petitioner is certain that he has been deprived of his constitutional rights in both the criminal and civil contexts. The Petitioner is seeking a method by which he may present his civil claims for consideration by the federal courts without being told that he is barred on a procedural ground, which is based on a procedure that is simply, and through no fault of his own, unavailable to him. The failure to address this issue makes this Court complicit with the barrier.

**This case is the proper vehicle to resolve conflict between the Circuits**

The question of diligent pursuit of favorable termination is a very illustrative example of the divide that exists amongst the circuit courts in applying the provision of *Heck* to Section 1983 plaintiffs:

11th Circuit – *Reilly v. Herrera*, 622 Fed. Appx. 832 (11th Cir. 2015) (must demonstrate diligence through 'exhaustion of state remedies')

10th Circuit – *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010) (must demonstrate 'some sort' of diligence)

9th Circuit – *Guerrera v. Gates*, 442 F.3d 697 (9th Cir. 2006) (diligence required)

4th Circuit – *Covey v. Assessor*, 777 F.3d 18 (4th Cir. 2015) (diligence required)

*But see:*

7th Circuit – *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999) (no diligence required)

2nd Circuit – *Leather v. Eyck*, 180 F.3d 420 (2nd Cir. 1999) (no diligence required)

Other circuits bar potential § 1983 litigants under *Heck* completely without reference to diligence: (8th, 5th, 3rd, and 1st Circuits).

**GUIDANCE FROM THE SUPREME COURT IS NEEDED**

Guidance from the Supreme Court is needed. The Circuit Courts are deeply split, with some holding that the five Justices appearing to agree in *Spencer* provide an exception to the *Heck* favorable termination rule, and others holding that it does not:

> "A landscape consisting of *Heck* and the collection of opinions in *Spencer* has resulted in a conflict in the circuits about the scope of *Heck's* favorable-termination rule. Several courts – counting up the five Justices who opined in concurring and dissenting opinions in *Spencer* – have concluded that the *Heck* bar does not apply to a § 1983 plaintiff who cannot bring a habeas action. *See 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, 599-605 (6th Cir. 2007); *Nonnette v. Small*, 316 F.3d 872, 875-78 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 73-75 (2d Cir. 2001); *Carr v. O'Leary*, 167 F.3d 1124, 1125-28 (7th Cir. 1999). Four other circuits, including this one, have adhered to the conclusion – set forth in footnote 10 of *Heck* – that favorable-termination rule *still applies when a § 1983 plaintiff is not incarcerated.*

> *Entzi v. Redmann,* 485 F.3d 998, 1003 (8th Cir. 2007) (saying that "dicta" in Spencer did not override Heck); *Gilles v. Davis,* 427 F.3d 197, 208-12 (3d Cir. 2005); *Randall v. Johnson,* 227 F.3d 300, 301-02 (5th Cir. 2000) (per curiam); *Figueroa v. Rivera,* 147 F. 3d 77, 80-82 (1st Cir. 1998)."

*Newmy v. Johnson,* 758 F. 3d 1008 (8th Cir. 2014), *cert denied,* 135 S.Ct. 774 (Dec. 8, 2014) at 1010 (Emphasis supplied).

Also:

> "After *Spencer*, the Supreme Court said in *Muhammad v. Close,* 540 U.S. 749, 752 n. 2, 124 S. Ct. 1303, 158 L.Ed.2d 32 (2004) (per curiam), that it had "no occasion to settle" whether the unavailability of habeas may dispense with the *Heck* favorable-termination requirement. We concluded in *Entzi* that the combination of concurring and dissenting opinions in *Spencer* did not amount to a holding that binds this Court. We opted instead to follow footnote 10 in the opinion of the Court in *Heck. Entzi,* 485 F. 3d at 1003." *Id.* at 1011.

In discussing the Supreme Court's statements in *Heck* and *Spencer* the Fourth Circuit also explained that its decision to follow the reasoning of the five-Justice plurality in *Spencer* was based on equitable concerns and consideration of the purpose of § 1983 and cited *Wilson v. Garcia,* 471 U.S. 261, 272-73, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985). The Fourth Circuit also held that it simply "[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." *Id.*

> "Although we implied in *Butler* in dicta that *Heck* does not apply when a habeas remedy is lacking, 482 F.2d at 1278-81, we decline to reach this issue which the Supreme Court has not resolved, *see Close,* 540 U.S. at 752 n. 2, 124 S. Ct. 1303, ***and on which the circuits are split."***

*Vasquez Arroyo v. Starks,* 589 F.3d 1091 (8th Cir. 2009) at 1069 (emphasis added).

> "In the wake of *Spencer*, a circuit split has developed concerning the significance of Justice Souter's concurring opinion, , with several circuits convinced that it must be considered dictum because it was unnecessary to the holding of the case (i.e., that *Spencer's* habeas claim was moot)."

*Harrison v. Michigan*, 722 F.3d 768 (6th Cir. 2013), *cert denied*, 134 S.Ct. 1023, at 773-74.

> "In such circumstances – i.e., where there is no Supreme Court holding in one direction, and there are powerful statements by a majority of the Justices in an opposite direction – it is perfectly appropriate (though not required) for a lower court to embrace the position adopted (albeit in dicta) by that majority. This is precisely what the panels in *Jenkins, Leather, Green,* and *Huang* did."[3]

In *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008), the Fourth Circuit squarely addressed the issue and its divisive effect on the Circuits:

> "[T]he circuits are split on this issue. Four circuits regard the five justice plurality in *Spencer* as dicta, and continue to interpret *Heck* as barring individuals from filing virtually all § 1983 claims unless the favorable termination requirement is met. On the other hand, five circuits have held that the *Spencer* plurality's view allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable termination requirement via a habeas action."

As evidenced by the circuit split, **the Supreme Court has yet to conclusively decide if a former inmate can file a § 1983 claim when his habeas avenue to federal court has been foreclosed.** *See Muhammad v. Close*, 540 U.S. 749, 752 n. 2, 124 S. Ct. 1303, 158 L.Ed.2d 32 (2004) (recognizing, without deciding, that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement.") Even the four judge concurrence in *Spencer* admitted that Heck's 'favorable termination requirement [can be interpreted as] an element of any § 1983 action alleging unconstitutional conviction, whether or not leading to confinement and whether or not any confinement continued when the § 1983 action was filed.' *Spencer*, 523 U.S.

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[3] *Huang v. Johnson*, 251 F.3d 65 (2nd Cir. 2001); *Leather v. Eyck*, 180 F.3d 420 (2nd Cir. 1999); *Jenkins v. Haubert*, 179 F.3d 19 (2nd Cir 1999); *Green v. Montgomery*, 219 F.3d 52 (2nd Cir. 2000)

at 19, 118 S. Ct. 978." (emphasis added)

Many cases have gone before the Supreme Court that seek to resolve this important issue but the High Court has thus far inexplicably declined to provide a guiding hand in the resolution of these various disputes. Instead, cases that have been accepted that concern this topic have been resolved on different grounds with the *Heck* favorable termination conundrum confined only to mentions in dicta. *See Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct 978 (1998); *Muhammad v. Close*, 540 U.S. 749, 124 S. Ct. 1303 (2004); and, *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091 (2007) as illustrative.

The Petitioner is seeking a method by which he may present his civil claims for consideration by the federal courts without being told that he is barred on a procedural ground, which is based on a procedure that is simply, and through no fault of his own, unavailable to him.

## SIGNIFICANCE OF SOLVING THIS *Heck/Preiser*[4] PUZZLE

If attaining relief in a federal § 1983 civil rights action by a *pro se* state prisoner could reasonably be compared metaphorically with climbing a high and difficult mountain, then the Petitioner is now faced with the prospect of having to batter down a door that has been firmly closed and barred, to even obtain permission to attempt the difficult climb. This is not justice. It is neither equitable nor fair to be told that even though your rights may have been flagrantly violated that unless you perform some extraordinary feat of legal prowess, that you are foreclosed from seeking redress forever, forever.

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[4] *Preiser v. Rodriguez*, 411 US 475, 36 L Ed 2d 439, 93 S Ct 1827 (1973)

The Court cannot underestimate the significance of the fact that should the court not consider Petitioner's dilemma, he would be effectively shut out of Federal Court – without any adjudication of the merits of his claims. This case is precedential and the issue presented is of exceptional importance where "...the doors of the federal courts would be shut on the fingers of millions of citizens." (Senator Edward Kennedy in 1987 speech against confirmation of Robert Bork)

No test has been determined that can be consistently applied by the courts in order to properly quantify whether a § 1983 plaintiff, for whom § 2254 is no longer available, demonstrated sufficient diligence in seeking favorable termination to justify allowing a § 1983 complaint to proceed.

Mr. Reilly respectfully asks the members of this Court to carefully consider this issue, and for the Justices to debate this issue amongst themselves, now that his case does fall within the framework of Justice Souter's *Spencer* concurrence, in order to apply its steadying hand and influence, and above all, its power to clarify and resolve the question presented herein: Whether an otherwise diligent plaintiff who, through no fault of his own, is unable to seek favorable termination as prescribed by *Heck* should be barred from access to redress under 42 U.S.C. § 1983? Mr. Reilly respectfully reiterates his firm belief and conviction that the current state of affairs is confusing regarding this issue which has led all too often to outcomes which are patently unjust for persons who wish to present valid, meritorious civil rights claims in federal court.

Contrary to the Eleventh Circuit's opinion, *Heck* does not control in the scenario presented above where the unavailability of federal habeas review may

dispense with the *Heck* requirement. The failure to grant certiorari has caused Mr. Reilly the hardship of attempting to satisfy the favorable termination requirement, which would be impossible to accomplish, because §2254 is unavailable to him.

## CONCLUSION

As a matter of equity, the petition for rehearing should be granted.

Mr. Reilly respectfully requests this Court to resolve this matter and clarify the issue for future ex-convicts, for whom Section 2254 habeas relief is unavailable, and to set out a test for identifying the level of diligence and/or exhaustion which would be required for a former prisoner prior to seeking redress by means of Section 1983. This Court needs to provide a federal forum for former prisoners to challenge their convictions.

The Petitioner respectfully submits to this judicial panel that the time has come for the Supreme Court to address this issue and to finally resolve the matter. The Court and its members have undoubtedly been aware of the problem, which has existed for years, but the Court has stubbornly refused to provide what has become an urgent need for guidance and resolution. The problem of persons faced with this complex legal dilemma is not going away, and their cries for justice will not abate until a rule is handed down by the High Court.

Dated this ___ day of January 2019.

Respectfully Submitted,

Sean P Reilly DC#N21886

## CERTIFICATION OF A PARTY UNREPRESENTED BY COUNSEL

**I HEREBY CERTIFY that** pursuant to Rule 44 of the Rules of the Supreme Court of the United States that this petition for a rehearing of an order denying a petition for a writ of certiorari is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay.

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