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

APPLICATION TO JUSTICE RUTH BADER GINSBURG FOR SUSPENSION OF THE ORDER DENYING CERTIORARI

Sean P. Reilly DC#N21886
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SOUTH BAY, FLORIDA 33493

QUESTIONS PRESENTED

SYNOPSIS

On December 1, 2013, Sean 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

Whether a Section 1983 Plaintiff, who diligently sought favorable termination according to the requirements of *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994), but for whom § 2254 is unavailable, should be able to proceed with an action under 42 U.S.C. § 1983?[1]

QUESTION TWO

If Question One is answered in the affirmative, when does the Section 1983 limitations period begin to accrue for a former prisoner's cause of action?

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[1] This question was asked, but left unresolved, by this 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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Petitioner respectfully prays that this Court issue a stay while pending review of the judgment below.

OPINIONS BELOW

[✕] For cases from federal courts:
The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[✓] reported at *Reilly v. Herrera*, 2018 U.S. App. LEXIS 8690 (11th Cir. 2018); or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

[ ] For cases from state court:
The opinion of the of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

JURISDICTION

[×] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was April 3, 2018. A copy of that decision appears at Appendix A.

[ ] No petition for rehearing was timely filed in my case.

[×] A timely petition for rehearing was denied by the United States Court of Appeal on the following date: June 14, 2018 and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____.

[ ] For cases from state court:

[ ] The date on which the highest state court decided my case decided my case was _____. A copy of that decision appears at Appendix _____

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was thereafter denied on the following date _____ and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

TABLE OF AUTHORITIES CITED

CASES

IN THE SUPREME COURT OF THE UNITED STATES

SEAN P. REILLY,

Petitioner,

v. **No. 18-6239**

GUELSY M. HERRERA, et al.,

Respondent.
_____/

APPLICATION TO JUSTICE GINSBURG FOR A SUSPENSION OF THE ORDER DENYING CERTIORARI

Petitioner, **SEAN REILLY**, humbly and respectfully applies to the Honorable *Justice Ruth Bader Ginsburg,* pursuant to Supreme Court Rule 16.3, for a suspension of the order denying certiorari, and as basis in support he would show as follows:

1. Mr. Reilly filed a Petition for a Writ of Certiorari in this Court on September 12, 2018. The petition is challenging the lower court's decision that held that *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994) bars a former prisoner from filing a § 1983 action against state officials in the event that § 2254 is unavailable.

2. 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) on the same exact question so this Court should grant certiorari for the above-styled case to finally answer the same constitutional question.

3. The applicant must show a balance of hardships in his favor and that the issue is so substantial that four Justices of the Supreme Court will likely vote to grant a writ of certiorari;

4. There is any reasonable likelihood of the Court changing its position and granting certiorari.

5. The constitutional questions being presented to this Court are as follows:

QUESTION ONE

Whether a Section 1983 Plaintiff, who diligently sought favorable termination according to the requirements of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), but for whom § 2254 is unavailable, should be able to proceed with an action under 42 U.S.C. § 1983?[2]

QUESTION TWO

If Question One is answered in the affirmative, when does the Section 1983 limitations period begin to accrue for a former prisoner's cause of action?

JUSTIFICATION FOR A SUSPENSION

This is an important issue that must be decided by the Supreme Court. 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) involving the same question that needs to be resolved in the instant case. The hardship caused by this Court's decision deprived Mr. Reilly of complete access to the federal court to review the unconstitutional violation of his constitutional rights. This crux of this case is to allow a former prisoner access to a federal courtroom to challenge an

[2] This question was raised, but left unanswered, by this Court in *Muhammad v. Close*, 540 US 749, 124 S Ct 1303 (2004). Since then, there has been a deep split amongst the Circuits whether a former prisoner can proceed under Section 1983.

unconstitutional conviction; a stay would weaken the Eleventh Circuit Court's judgment. A stay would depreciate the value of the court's incorrect ruling.

RELIEF IS NOT AVAILABLE IN ANY OTHER COURT

Relief is not available in any other court. The Eleventh Circuit refused to certify a question to the U.S. Supreme Court and found *Heck* to be controlling law even applied to former prisoners without access to § 2254 to challenge the constitutionality of their convictions. The Eleventh Circuit Court of Appeals will not stay the judgment as it is the Court of last resort and will forever bar Mr. Reilly from challenging the unconstitutional arrest for leaving his home *with permission* from his probation officer. It would be absolutely necessary to stay the judgment to allow Mr. Reilly an opportunity to litigate his case in the Supreme Court. The lower court unfairly concluded that he had no right to challenge the validity of his *unlawful* conviction via § 1983. A stay of the erroneous order from the Eleventh Circuit Court of Appeals would prevent a manifest injustice and allow him to plead his case to the Justices of this Supreme Court. (See Appendix A)

He can demonstrate that there is a reasonable likelihood that four Justices will vote to grant certiorari review as this question has been presented multiple times to the Supreme Court but has never been unequivocally decided.

FOUR JUSTICES OF THE SUPREME COURT INTERESTED IN VOTING TO GRANT CERTIORARI

There is a reasonable probability that four Justices of the Supreme Court would vote to grant certiorari in this case where the questions presented above were discussed *in dicta* in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978 (1998) and, presented again, but left unresolved in *Muhammad v. Close*, 540 US 749, 124 S Ct 1303 (2004). There is a deep split amongst the Circuits Courts of Appeals and resolution in a case of this magnitude is long overdue.

Petitioner believes that there are at least four Justices on this Court who would grant certiorari review to settle this constitutional conundrum. The Eleventh Circuit's judgment is preventing the Petitioner from complete access to a federal court to seek redress of a deprivation of his constitutional rights.

There were four Justices in *Heck* that expressed the view that the proper way to resolve the case was to construe § 1983 in light of the habeas corpus statute and its explicit policy of exhaustion. (Souter, J., joined by Blackmun, Stevens, and O'Connor, JJ.)

Again, in *Spencer*, there were four Justices that expressed the view that a former prisoner, no longer in custody, may bring a 42 USCS § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law to satisfy. (Souter, J., joined by O'Connor, Ginsburg, and Breyer JJ.)

These are critical questions that need to be resolved by this Court because the lower federal courts are in dire need of the Supreme Court's guidance in handling cases presented by former prisoners who have been unable to challenge the validity of their respective convictions in a § 2254 federal habeas petition.

Moreover, it seems clear that the Supreme 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.

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.

REASONABLE LIKELIHOOD THAT THE JUDGMENT BELOW WILL BE REVERSED

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").[3]

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

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[3] *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)

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?")

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 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 in Ground One that he has been diligent in seeking favorable-termination in the state courts. This is why the Judgment of the Eleventh Circuit Court of Appeals must be stayed.

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.

This case is the proper vehicle for 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. *Heck v. Humphrey* does not control in the scenario above where a plaintiff's prison sentence expired depriving him access to the federal court via § 2254 federal habeas corpus.

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."[4]

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

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[4] *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)

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.

Mr. Reilly's situation grows even more complex, however, when considered in light of the 4-year limitations period in the State of Florida for § 1983 actions. Notwithstanding the Eleventh Circuit's statement that Mr. Reilly did nothing to timely pursue favorable termination in his case, where Mr. Reilly did exhaust his direct appeals, and also filed a timely motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 (which has now been pending at the trial court level for over 3 years), even were the Petitioner to achieve the favorable termination prescribed by *Heck*, he would still be foreclosed from pursuing a § 1983 action because, through no fault or action of his own, the limitations period has now expired for doing so. Thus, cognizant of the potential for the limitations period to so expire, Petitioner timely filed his § 1983 complaint only to be told he cannot pursue § 1983 relief because of *Heck*. This leaves the Petitioner where? Forever foreclosed, completely denied even the ability to seek redress for constitutional violations that occurred in his case.

It is acknowledged by the Petitioner that this is a complex legal issue, and that the ramifications of a decision in favor of providing § 1983 access to diligent plaintiff's who would otherwise be barred by *Heck* cannot be immediately known, except to that extent that several circuits that already recognize the so-called *Spencer* exemption, must grapple a number of issues such as the question of when the limitations period for the § 1983 actions should begin to accrue for persons who may have suffered deprivations of their federally protected rights related to a criminal conviction but who spent either the majority, or the entirety of the limitations period in their respective state, in pursuit of the favorable termination prescribed by *Heck*. Circuit courts faced with these, and other thorny questions regarding what standards to apply to persons attempting to enter the federal gateway through *Spencer* and progeny cannot know if a comprehensive, final ruling will "tip over the applecart" on the standards that they have been applying until now, if the Supreme Court will adopt some standards from certain circuits, reject others, or promulgate new standards altogether.

Potential § 1983 plaintiffs will certainly continue attempts to assert and protect their federally protected rights, the burden on judicial resources for federal courts required to wade through these complexities without the benefit of comprehensive guidance from the Supreme Court will not soon abate (and will likely increase), nor is pressure from the lower courts, for the long-overdue resolution to this matter, likely to decrease.

Mr. Reilly submits that this Court should explicitly rule on whether a plaintiff may bring a § 1983 action in the event that habeas relief is unavailable, even if success on the merits would call into question the validity of a conviction. Mr. Reilly's case fits within the framework of scenarios mentioned in Justice Souter's *Spencer* concurrence, as he has diligently exhausted available state court remedies. This is the case to resolve the issue, once and for all.

Under the current paradigm with the circuits very nearly evenly split on this issue, former prisoners for whom favorable termination is no longer possible despite erstwhile diligent pursuit, cannot challenge the constitutionality of their convictions through § 1983 without running afoul of *Heck*. The Petitioner respectfully submits that this was not a result intended by *Heck*, insofar as it unfairly thwarts access to the federal courts for litigants with legitimate constitutional claims based on a standard that should no longer apply to them.

In essence, the purpose of this case would be to expand 42 U.S.C. § 1983 to include former convicts or ex-offenders, who were diligent in their pursuit of favorable termination but no longer "in custody" for habeas purposes, to seek redress for civil rights violations in federal court. This issue is important because litigants such as the Petitioner are simply unable to seek redress for civil rights violations related to their convictions (in certain geographical areas) – absent an express ruling from the Supreme Court.

"This simply leads to the question of what is to happen when, for example the possibility of a *Heck* problem prevents the court from considering the merits of a §

1983 claim." *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091 (2007) (J. Breyer dissenting).

Addressing this issue will provide a method for persons faced with this dilemma to present meaningful claims. Usually, private attorneys eschew such lawsuits by inmates because the Prison Litigation Reform Act (PLRA) removes financial incentive for their pursuit. There are many different scenarios that demonstrate valid reasons why a former prisoner cannot seek favorable-termination of their conviction:

For example, where a person received only fines[5] and not imprisonment, or the accused received time-served in jail for the alleged transgression and the state courts delay the disposition of all available remedies: rendering any subsequent federal petition for writ of habeas corpus moot as well as the injuries or damages caused by state actors to become irremediable in the federal courts. A comprehensive ruling in this case will remove these inequities from the current jurisprudential schema. *See Maleng v. Cook*, 490 U.S. 488, 492 (1989) (petitioner whose sentence expired not "in custody" precluding direct attack on expired sentence); *Mays v. Dinwiddie*, 580 F. 3d 1136, 1140-41 (10th Cir. 2009) (petitioner serving concurrent state sentences not "in custody" for expired sentence); *Diaz v. State of Fla. Fourth Judicial Circuit ex rel. Duval County*, 683 F.3d 1261 (11th Cir.

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[5] In *Leather v. Eyck*, 180 F.3d 420 (2nd Cir. 1999), the defendant was successfully prosecuted for driving while impaired and was assessed a $300 fine as well as a $25 surcharge, and his driver's license was suspended for 90 days. He did not appeal his conviction, but brought a § 1983 action. *Leather* was not, and never was "in-custody" of the state, he has no available § 2254 remedy. The Second Circuit Court of Appeals ruled that Leather was permitted to present his § 1983 claims (despite his ostensible lack of diligence).

2012) (a petitioner in federal custody after state sentence expired not "in custody" for purpose of expired sentence).

CONCLUSION

Due to the circumstances of this case, Mr. Reilly has been prevented access to a federal court on the Fourth Amendment violation. Mr. Reilly asserts that this Court should stay the lower court judgment because his case presents the exact scenario[6] that this Court has been waiting for regarding former state prisoners caught at the intersection of § 1983 and § 2254.

WHEREFORE, Mr. Reilly respectfully requests this Honorable Court to grant a suspension of the order denying certiorari to provide him, and other former prisoners, with meaningful access to federal courts around the country to remedy constitutional violations.

Respectfully Submitted,

/s/ Sean P. Reilly

Sean P. Reilly #N21886
South Bay Correctional Facility
P.O. Box 7171
South Bay, FL 33493

[6] These questions were addressed but were left open in *Heck*, *Spencer*, and *Muhammad*.

NO. 18-6239

IN THE SUPREME COURT OF THE UNITED STATES

SEAN P. REILLY– PETITIONER

VS.

GUELSY M. HERRERA – RESPONDENT

PROOF OF SERVICE

I, SEAN P. REILLY, do swear or declare that on this date, January 31, 2019, as required by Supreme Court Rule 29 I have served the enclosed **APPLICATION TO JUSTICE GINSBURG FOR SUSPENSION OF THE ORDER DENYING CERTIORARI** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The name and addresses of those served are as follows:

Office of the Attorney General, The Capitol – Suite PL01, Tallahassee, FL 32399; Guelsy Hererra, Eric Abrahamsen, Jennifer C. Davis, Jim H. Davis, Carmen I. Gonzalez.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 31st day of January 2019.

Sean P. Reilly #N21886
South Bay Correctional Facility
P.O. Box 7171
South Bay, FL 33493

APPENDIX

A

SEAN P. REILLY, Plaintiff - Appellant, versus GUELSY M. HERRERA, individual capacity, ERIC ABRAHAMSEN, individual capacity, JENNIFER CHRISTINE DAVIS, JIM H. DAVIS, CARMEN I. GONZALEZ, et al., Defendants-Appellees.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 8690
No. 16-17527 Non-Argument Calendar
April 3, 2018, Decided
April 3, 2018, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Rehearing denied by, Rehearing, en banc, denied by **Reilly** v. Herrera, 2018 U.S. App. LEXIS 16100 (11th Cir. Fla., June 14, 2018)

Editorial Information: Prior History

Appeal from the United States District Court for the Southern District of Georgia. D.C. Docket No. 1:13-cv-23077-WJZ.Reilly v. Herrera, 622 Fed. Appx. 832, 2015 U.S. App. LEXIS 12912 (11th Cir. Fla., July 27, 2015)

Disposition:
AFFIRMED.

Counsel For **SEAN** P. **REILLY**, Plaintiff - Appellant: **Sean** P. **Reilly**, South Bay CF - Inmate Legal Mail, SOUTH BAY, FL; South Bay CF Warden, South Bay CF - Inmate Trust Fund, SOUTH BAY, FL.

Judges: Before MARCUS, JORDAN, and ROSENBAUM, Circuit Judges.

Opinion

PER CURIAM:

Sean P. **Reilly**, proceeding *pro se*, appeals from the district court's denial of three post-judgment motions-a Rule 60(b) motion, a Rule 59(e) motion, and a motion for reconsideration-in his 42 U.S.C. § 1983 action, alleging, in part, that the defendants violated his Fourth and Fourteenth Amendment rights by conspiring to unlawfully seize him and send him to jail for a supervised release violation. Because Mr. Reilly's post-judgment motions essentially challenge our ruling in his previous appeal, his claim is barred by the law-of-the-case doctrine. Accordingly, we affirm.

I

Mr. **Reilly** originally filed his civil rights complaint in 2013. The district court dismissed the claim *sua sponte*, ruling (as relevant here) that the favorable-termination requirement of *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), barred the complaint because it challenged the revocation of Mr. Reilly's supervised release. Mr. **Reilly** appealed the dismissal, arguing that a

concurring opinion in *Spencer v. Kemna*, 523 U.S. 1, 18-21, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (Souter, J., concurring), provides an exception to *Heck* that allows him to challenge his supervised release revocation under § 1983 because he is no longer in custody pursuant to the challenged conviction. We affirmed the dismissal of his complaint, concluding that Mr. Reilly's claim falls squarely within the purview of *Heck*. *See* ***Reilly*** *v. Herrera*, 622 F. App'x 832, 834-35 (11th Cir. 2015) ("***Reilly*** *I*").

Mr. **Reilly** filed a petition for rehearing *en banc*, arguing that the panel erred in finding that he did nothing to challenge his supervised release revocation while he was in custody. He asserted-for the first time-that he had appealed his revocation in state court. Mr. **Reilly** also claimed that the panel's decision conflicted with the "authoritative decisions of other United States Courts of Appeal" that have addressed *Heck*'s favorable-termination bar. We denied his petition in September of 2015.

In 2016, Mr. **Reilly** filed the first two motions at issue in the present appeal-a Rule 60(b) motion in May and a self-styled Rule 59(e) motion in July-challenging our rulings in ***Reilly*** *I*. Mr. **Reilly** argued that relief under Rule 60(b) was appropriate because he could show sufficiently extraordinary circumstances to justify relief. He further asserted that we erred in declining to apply Justice Souter's proposed *Heck* exception (as set out in his *Spencer* concurrence) to his claim because he had appealed his supervised release revocation in state court and had sought state post-conviction relief-the same arguments he raised in petitioning for rehearing *en banc*. Mr. **Reilly** also argued that our decision in ***Reilly*** *I* created a "*de facto* exhaustion requirement" for § 1983 plaintiffs with no clear standard or guidance for how the requirement should be applied.

The district court denied Mr. Reilly's motions because they were untimely and did not state a cognizable basis upon which relief could be granted from our rulings. Mr. **Reilly** then moved for a certificate of appealability, which the district court construed as a notice of appeal. He also moved for reconsideration of the denial of his motions - the third motion at issue in this appeal. The district court denied his motion for reconsideration because the notice of appeal divested it of jurisdiction over matters involved on appeal. Thereafter, Mr. **Reilly** filed a formal notice of appeal.

On appeal, Mr. **Reilly** reasserts the arguments he raised in ***Reilly*** *I* and in his petition for rehearing *en banc*. He also argues that his post-judgment motions were not untimely because they were filed within a reasonable time after the Supreme Court denied his petition for certiorari. He further contends that the district court abused its discretion in denying the post-judgment motions because he established that we relied on erroneous facts when we decided ***Reilly*** *I*. Finally, he argues that the district court erred when it failed to consider his motion for reconsideration because it misconstrued his application for a certificate of appealability as a notice of appeal.

In addition, Mr. **Reilly** has moved for us to certify a question of law to the United States Supreme Court pursuant to 28 U.S.C. § 1254(2). He essentially requests that we "certify" a condensed version of the arguments he raises on appeal directly to the Supreme Court.

II

We review the denial of post-judgment motions under Rules 60(b) and 59(e) for an abuse of discretion. *See Bender v. Mazda Motor Corp.*, 657 F.3d 1200, 1202 (11th Cir. 2011); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013). We likewise review a district court's ruling on a motion for reconsideration for abuse of discretion. *See Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001). As a general matter, we may affirm on any ground supported by the record. *See LeCroy v. United*

States, 739 F.3d 1297, 1312 (11th Cir. 2014).

III

To the extent that Mr. **Reilly** seeks to challenge our decision in ***Reilly I***, his contention is barred by the law-of-the-case doctrine. *See Mega Life & Health Ins. Co.*, 585 F.3d at 1405. Under this doctrine, findings of fact and conclusions of law by an appellate court generally are binding in all later proceedings in the same case in the trial court or on a later appeal. *See Mega Life & Health Ins. Co. v. Pieniozek*, 585 F.3d 1399, 1405 (11th Cir. 2009). The doctrine, however, does not bar reconsideration of an issue if (1) a later trial produces substantially different evidence; (2) controlling authority has since made a contrary decision of law applicable to that issue; or (3) the prior decision was clearly erroneous and would work a manifest injustice. *Id.*

Mr. **Reilly** does not allege that a later trial produced substantially different evidence or that any new controlling authority applies to his claim. As such, neither exception to the doctrine applies. Instead, the thrust of Mr. Reilly's current argument is that he would have been entitled to relief under *Spencer* but for our erroneous finding that he failed to pursue state court remedies.

Under § 1983, a person acting under color of state law may be held liable for causing the deprivation of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. A § 1983 suit for damages must be dismissed, however, if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. In a concurring opinion in *Spencer*, Justice Souter discussed the implications of *Heck* and opined that a "former prisoner, no longer 'in custody'" should be allowed to "bring a § 1983 claim establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Spencer*, 523 U.S. at 21 (Souter, J., concurring). To date, however, neither the Supreme Court nor this Court has applied the exception described in Justice Souter's concurrence in a published opinion.

Justice Souter's concurring opinion in *Spencer* did not overturn *Heck*'s bar on § 1983 actions challenging the validity of the claimant's conviction or sentence. *See Heck*, 512 U.S. at 487. Therefore, even if we erred in finding that Mr. **Reilly** had not pursued his state court remedies, our ruling was not clearly erroneous and did not result in manifest injustice because *Heck* is still controlling law. *See Mega Life & Health Ins. Co.*, 585 F.3d at 1405. Mr. **Reilly**, therefore, does not satisfy the third exception to the law-of-the-case doctrine.

In addition, Mr. Reilly's argument that he diligently pursued and exhausted state court remedies challenging his revocation of supervised release fails because he did not assert it in the initial brief in ***Reilly I***. In fact, he did not raise this argument until he filed a petition for rehearing *en banc* in ***Reilly I***. We have repeatedly declined to consider issues raised for the first time in a petition for rehearing. *See, e.g., United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005); *United States v. Martinez*, 96 F.3d 473, 475 (11th Cir. 1996); *Scott v. Singletary*, 38 F.3d 1547, 1552 (11th Cir. 1994); *Dunkins v. Thigpen*, 854 F.2d 394, 399 (11th Cir. 1988); *Holley v. Seminole County Sch. Dist.*, 763 F.2d 399, 400-01 (11th Cir. 1985). Mr. **Reilly** cannot now seek to press an issue that he failed to properly present in his first appeal, and which we have already declined to hear in his petition for rehearing *en banc*.

Taking each of Mr. Reilly's remaining arguments in turn, the district court did not abuse its discretion when it concluded that the post-judgment motions were untimely. Rule 59(e) allows a party to move to alter or amend judgment in a civil case no later than 28 days after entry of the judgment. *See* Fed. R. Civ. P. 59(e). "A court must not extend the time to act under Rule [59(e)]." Fed. R. Civ. P. 6(b)(2). *See also Green v. DEA*, 606 F.3d 1296, 1300 (11th Cir. 2010) (finding that Rule 6(b)(2) prohibits extending

the time to file a Rule 59(e) motion, even where the district court erroneously grants a defendant an extension of time to file a motion for reconsideration). However, when a Rule 59(e) motion is filed more than 28 days after the entry of judgment and the grounds stated would be a basis for Rule 60(b) relief, the district court may treat it as a motion for relief from judgment under Rule 60(b). *See Nisson v. Lundy*, 975 F.2d 802, 806 (11th Cir. 1992).

Under Rule 60(b), a court may relieve a party of a final order or judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not previously have been discovered with reasonable diligence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a void judgment; (5) a judgment that has been satisfied, released, or discharged, that is based on an earlier judgment that has been reversed or vacated, or that it would no longer be equitable to apply prospectively; or (6) any other reason that justifies relief. *See* Fed. R. Civ. P. 60(b). A motion under Rule 60(b) must be made "within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

Mr. Reilly's post-judgment motions were filed more than two years after the district court dismissed his § 1983 action-well beyond the 28-day limitation imposed under Rule 59(e) and the one-year time limit under Rule 60(b)(1), (2), and (3). Mr. **Reilly** also specifically invoked Rule 60(b)(6), a subsection which provides that the court may relieve a party from a final order based on "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Although this catch-all provision has no strict time limitation, it is intended "only for extraordinary circumstances." *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1288 (11th Cir. 2000). Thus, "[Mr. **Reilly**] must do more than show that a grant of [his] motion might have been warranted. [He] must demonstrate a justification for relief so compelling that the district court was *required* to grant [his] motion." *Rice v. Ford Motor Co.*, 88 F.3d 914, 919 (11th Cir. 1996).

Even assuming that Mr. **Reilly** filed his Rule 60(b)(6) motion within a "reasonable time," no extraordinary circumstances cause us to conclude that the district court abused its discretion. In addition, Mr. Reilly's post-judgment motions challenged our factual findings and legal conclusions in ***Reilly*** *I*-but neither Rule 60(b) nor Rule 59(e) grants a district court the authority to alter, amend, or grant relief from an appellate court's rulings. The district court's denials of Mr. Reilly's post-judgment motions were not an abuse of discretion because it lacked the authority to grant Mr. **Reilly** the relief he sought. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001).

Likewise, the district court did not err when it interpreted Mr. Reilly's mislabeled "application for a certificate of appealability" as a notice of appeal because the motion, in effect, was cognizable as a formal notice of his intent to request review of the district court's order. "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Hughes v. Lott*, 350 F.3d 1157, 1160 (11th Cir. 2003) (quotation omitted). Here, Mr. Reilly's application for a certificate of appealability clearly expressed an intent to "appeal issues in the . . . [district court's] denial of the Rule 60(b)(6) and Rule 59(e) motions." D.E. 51 at 1. Therefore, the district court properly construed the application as a notice of appealability and appropriately determined that it lacked jurisdiction to consider Mr. Reilly's subsequent motion for reconsideration.

Finally, as to Mr. Reilly's request that we certify a question to the Supreme Court of the United States, we decline to do so. Certification of questions pursuant to 28 U.S.C.A. § 1254 rests in the discretion of the Courts of Appeal and cannot be invoked by a party as a matter of right. *See* 28 U.S.C.A. § 1254. *See also Rutherford v. American Medical Ass'n*, 379 F.2d 641, 644-45 (7th Cir. 1967) (declining to certify plaintiffs' questions where the disposition of the appeal left plaintiffs with the right to seek review by petition to the Supreme Court for a writ of certiorari). Moreover, "the Supreme Court has

discouraged the use of this certification procedure and has accepted certified questions only four times in the last 60 years." *In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015). In fact, the Supreme Court has admonished that the certification procedure is proper only in "rare instances." *See id.* (citing to *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957)) (quotation omitted).

Although Mr. **Reilly** contends that his appeal raises questions of great public importance, the issues he requests that we certify amount to a slightly condensed version of the arguments we reject in this opinion. Therefore, certification is not appropriate.

IV

The district court did not abuse its discretion when it denied Mr. Reilly's post-judgment motions. Accordingly, we affirm.

AFFIRMED.

APPENDIX

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-23077-CIV-ZLOCH

SEAN P. REILLY,

Plaintiff,

vs.

ORDER

GUELSY M. HERRERA, et al.,

Defendants.
_____/

THIS MATTER is before the Court upon Plaintiff's Motion For Relief From Judgment Pursuant To Federal Rule Of Civil Procedure, Rule 60(b)(6) (DE 41), Motion To Alter Or Amend Judgment Pursuant To Fed. R. Civ. P. 59(e) (DE 45), Motion To Hear And Rule (DE 46), and Motion Requesting Magistrate To Hold An Evidentiary Hearing On Pending Motions (DE 48). The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

In the above-styled cause, by its Order (DE 26), the Court approved, adopted, and ratified the Report Of Magistrate Judge Patrick A. White (DE 17). Magistrate Judge White recommended that Plaintiff's Complaint (DE 1) pursuant to 42 U.S.C. § 1983 be dismissed for failure to state a claim. Consistent with that recommendation, the Court dismissed Plaintiff's Complaint (DE 1). See DE 26. Plaintiff then filed a Notice Of Appeal (DE 30). The United States Court of Appeals for the Eleventh Circuit affirmed this Court's Order (DE 26) dismissing Plaintiff's Complaint (DE 1). See DE 39. Plaintiff then sought certiorari review with the United States Supreme Court, which that Court denied. See DE 40.

In his current series of Motions, Plaintiff contends that the

Eleventh Circuit's Mandate (DE 39) is incorrect, and that this Court should vacate its prior Order (DE 26) dismissing Plaintiff's Complaint (DE 1). Plaintiff has not stated a cognizable basis upon which this Court could grant the relief sought. None of the series of instant Motions, essentially seeking additional review of issues already determined by this Court and the Eleventh Circuit, is timely or in any other way appropriate at this juncture.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Plaintiff's Motion For Relief From Judgment Pursuant To Federal Rule Of Civil Procedure, Rule 60(b)(6) (DE 41), Motion To Alter Or Amend Judgment Pursuant To Fed. R. Civ. P. 59(e) (DE 45), Motion To Hear And Rule (DE 46), and Motion Requesting Magistrate To Hold An Evidentiary Hearing On Pending Motions (DE 48) be and the same are hereby **DENIED.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of November, 2016.

WILLIAM J. ~~BEUCH~~
United States District Judge

Copies Furnished:

All Counsel of Record

Sean P. Reilly, PRO SE
N21886
South Bay Correctional Facility
Inmate Mail/Parcels
P.O. Box 7171
South Bay, FL 33493

APPENDIX

C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17527-FF

SEAN P. REILLY,

Plaintiff - Appellant,

versus

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

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before MARCUS, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX

D

SEAN P. REILLY, Plaintiff - Appellant, versus GUELSY HERRERA, individual capacity, ERIC ABRAHAMSEN, individual capacity, JENNIFER CHRISTINE DAVIS, JIM H. DAVIS, CARMEN I. GONZALEZ, et. al., Defendants - Appellees.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
622 Fed. Appx. 832; 2015 U.S. App. LEXIS 12912
No. 14-11360-DD Non-Argument Calendar
July 27, 2015, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Reilly v. Herrera, 136 S. Ct. 1464, 194 L. Ed. 2d 563, 2016 U.S. LEXIS 2129 (U.S., 2016)

Editorial Information: Prior History

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:13-cv-23077-WJZ.Reilly v. Herrera, 2014 U.S. Dist. LEXIS 186668 (S.D. Fla., Feb. 26, 2014)

Disposition:
AFFIRMED.

Counsel Sean P. Reilly, Plaintiff - Appellant, Pro se, Bethesda, MD.
For Sean P. Reilly, Plaintiff - Appellant: Leon County Jail Warden, Leon County Jail - Inmate Trust Fund, Tallahassee, FL.
For GUELSY M. HERRERA, individual capacity, ERIC ABRAHAMSEN, individual capacity, Jennifer Christine Davis, Jim H. Davis, Carmen I. Gonzalez, Defendants - Appellees: Pam Bondi, Attorney General's Office, Miami, FL.

Judges: Before TJOFLAT, JORDAN and JULIE CARNES, Circuit Judges.

Opinion

{622 Fed. Appx. 832} PER CURIAM:

Mr. Sean P. Reilly, proceeding *pro se*, appeals the district court's *sua sponte* dismissal of his civil rights complaint for failure **{622 Fed. Appx. 833}** to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Because we agree that *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), bars Mr. Reilly's claims, we affirm.

I

On August 26, 2013, Mr. Reilly filed an action under 42 U.S.C. § 1983 against probation officers

Guelsy Herrera and Carmen Gonzalez, private citizens Jim and Jennifer Davis, State Attorney William Meggs, and Assistant State Attorney Eric Abrahamsen. He alleged that Ms. Davis harbored animosity toward him due to a prior failed relationship between them, and Ms. Davis and her father conspired with the other named defendants to send him to jail for a supervised release violation. Mr. Reilly claimed that the defendants' unlawful actions led to the revocation of his supervised release and a sentence of imprisonment of 60 months, in violation of his Fourth Amendment rights. Mr. Reilly was released from prison on the supervised release violation on December 1, 2013, after serving three years, and is currently serving a new sentence for an unrelated crime in the Leon County Jail.

Pursuant to § 1915(e)(2)(B)(ii), the district court dismissed Mr. Reilly's complaint, ruling that *Heck's* favorable-termination requirement barred the complaint because it challenged the revocation of supervised release. The district court also ruled that the defendants either acted within the scope of their authority and were entitled to absolute immunity, or did not act under color of state law. Further, the district court concluded that Mr. Reilly did not raise a cognizable conspiracy claim because he failed to show the existence of an agreement between the defendants and improperly brought a § 1983 action for state tort claims.

On appeal, Mr. Reilly asserts that the district court erred in its determination that *Heck* barred his § 1983 action because an alleged Fourth Amendment violation would not necessarily impugn the validity of his conviction. Mr. Reilly also argues that *Spencer v. Kemna*, 523 U.S. 1, 18-21, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), provides an exception to *Heck* that allows him to challenge his supervised release revocation under § 1983 without satisfying the favorable-termination requirement because he is no longer "in custody," and therefore not entitled to seek habeas relief. Finally, Mr. Reilly raises several other arguments regarding the merits of the district court's order.

II

A district court may dismiss a case filed *in forma pauperis* at any time if it "fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the prisoner can prove no set of facts in support of his claim which would entitle him to relief." *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) (citations omitted). "Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam) (citations omitted). "We review a district court's *sua sponte* dismissal of a suit for failure to state a claim for relief under [§ 1915] *de novo.*" *Harden v. Pataki*, 320 F.3d 1289, 1292 (11th Cir. 2003) (citations omitted).

III

Heck generally bars any challenges to a previous conviction unless the conviction "has been reversed on direct appeal, expunged **{622 Fed. Appx. 834}** 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.*Heck*, 512 U.S. at 500 (Souter, J., concurring).

Drawing from Justice Souter's concurrence in *Spencer*, Mr. Reilly argues that *Heck* does not apply to his case because he has been released from custody and cannot pursue post-conviction relief, thereby making *Heck*'s favorable-termination requirement irrelevant. *See Spencer*, 523 U.S. at 21 (Souter, J., concurring) ("[A] former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.").

We have not explicitly ruled on whether a plaintiff may bring a § 1983 action in the event that habeas relief is unavailable, even if success on the merits would call into question the validity of a conviction. We decline to do so here because 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 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. *See Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2003) (ruling that a defendant "cannot now use his 'failure timely to pursue habeas remedies' as a shield against the implications of *Heck*."). Consequently, we conclude that Justice Souter's proposed *Heck* exception in *Spencer*, even if adopted, does not apply to Mr. Reilly's case.

Additionally, Mr. Reilly's claim that the allegations in the complaint did not necessarily impugn the validity of his revocation fails. Mr. Reilly alleged that he never violated the conditions of his supervised release, and that the defendants engaged in a conspiracy to fabricate an arrest warrant and unlawfully seize him out of spite. If the defendants did engage in such actions, **{622 Fed. Appx. 835}** then the arrest would be unlawful and the revocation itself would be invalid. Such a claim falls squarely within the purview of *Heck*. Therefore, we affirm the district court's dismissal of Mr. Reilly's complaint.

IV

For the foregoing reasons, we affirm the district court's dismissal of Mr. Reilly's complaint.

AFFIRMED.

APPENDIX

E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-23077-CIV-ZLOCH

SEAN REILLY,

Plaintiff,

vs.

GUELSY HERRERA et al.,

Defendants.
_____/

FINAL ORDER OF DISMISSAL

THIS MATTER is before the Court upon the Report On Memorandum For TRO Or Preliminary Injunction (DE 11) and the Report of Magistrate Judge (DE 17) filed herein by United States Magistrate Judge Patrick A. White. The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

In his Report On Memorandum For TRO Or Preliminary Injunction (DE 11), Magistrate Judge White recommends that Plaintiff's Motion For A Preliminary Injunction & A Temporary Restraining Order (DE 7) be denied. Further, by his subsequent Report of Magistrate Judge (DE 17), Magistrate Judge White recommends that the above styled cause be dismissed pursuant to 28 U.S.C. § 1915 (e)(2)(B)(ii) for failure to state a claim. The Court adopts Magistrate Judge White's reasoning and conclusions.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Objections (DE 13 & 25) to Magistrate Judge White's Reports be and the same are hereby **OVERRULED**;

2. The Report On Memorandum For TRO Or Preliminary Injunction (DE 11) and the Report of Magistrate Judge (DE 17) filed herein by United States Magistrate Judge Patrick A. White be and the same are hereby approved, adopted and ratified by the Court;

3. Plaintiff's Motion For A Preliminary Injunction & A Temporary Restraining Order (DE 7) be and the same is hereby **DENIED**;

4. The above-styled cause be and the same is hereby **DISMISSED** pursuant to 28 U.S.C. § 1915 (e)(2)(B)(ii) for failure to state a claim; and

5. To the extent not otherwise disposed of herein, all pending Motions be and the same are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of February, 2014.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

Sean P. Reilly, PRO SE
189423
Leon County Jail
Inmate Mail/Parcels
P.O. Box 2278
Tallahassee, FL 32316

APPENDIX

F

SEAN REILLY, Plaintiff, v. GUELSY HERRERA, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2014 U.S. Dist. LEXIS 186692
CASE NO.13-23077-CIV-ZLOCH
January 14, 2014, Decided
January 14, 2014, Entered on Docket

Editorial Information: Subsequent History

Adopted by, Dismissed by **Reilly** v. **Herrera**, 2014 U.S. Dist. LEXIS 186668 (S.D. Fla., Feb. 26, 2014)

Editorial Information: Prior History

Reilly v. **Herrera**, 2013 U.S. Dist. LEXIS 190770 (S.D. Fla., Sept. 17, 2013)

Counsel Sean P. **Reilly**, Plaintiff, Pro se, Crawfordville, FL USA.
Judges: Patrick A. White, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: Patrick A. White

Opinion

REPORT OF MAGISTRATE JUDGE

I. Introduction

Sean **Reilly** filed a pro se civil rights complaint on September 11, 2013, (DE#1) while confined at the Apalachee Correctional Institution.1

This Cause is before the Court for screening of the complaint (DE#1) pursuant to § 1915.

II. Analysis

A. Law for Screening

As amended, 28 U.S.C. § 1915 reads in pertinent part as follows:

> Sec. 1915 Proceedings in Forma Pauperis
>
> * * *
>
> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -
>
> * * *
>
> (B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044, 122 S. Ct. 624, 151 L. Ed. 2d 545 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1979) (quoting Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)). The allegations of the complaint are taken as true and are construed in the light most favorable to Plaintiff. Davis v. Monroe County Bd. Of Educ., 120 F.3d 1390, 1393 (11 Cir. 1997).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)(citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Id. Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." Id. The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." Id. When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred. Id.

B. Facts of the complaint

The plaintiff names **Herrera** and Gonzalez, Senior Probation Officers, William Meggs, Leon County State Attorney and Eric Abrahamsen, Assistant State Attorney for Leon County, Jennifer Davis, a private attorney in Miami, and Davis's father Jim, a private citizen in Tallahassee.

The plaintiff contends the above named defendants are liable for engaging in a conspiracy to have him sent to prison on a supervised release violation. He alleges **Herrera** fabricated an affidavit of violation of probation. He claims he was seized in Miami, Florida on September 14, 2010, with an arrest warrant issued by **Herrera** without reasonable suspicion he had violated his community control,

in violation of his right to be free from unlawful seizure.

C. Analysis

Many of the defendants are immune from suits for civil damages or do not act under color of state law.

The plaintiff's claim for damages for any acts that State Attorney Meggs and Assistant State Attorney Abrahamsen committed within the scope of their official duties is subject to dismissal, because the state prosecutor and his assistants are absolutely immune from a § 1983 suit for damages. Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Davis is a private attorney and does not act under color of state law and is entitled to immunity, as is Davis's father Jim, who is a private citizen. See: Polk County, supra.

Probation Officers **Herrera** and Gonzalez acting within the scope of their authority are entitled to immunity. A probation officer's actions intimately associated with the judicial phase of a criminal proceeding are immune from a suit for civil damages. See: Hughes v Chesser, 731 F.2d 1489, 1490 (11 Cir. 1984). The fact that the plaintiff attempts to say that the arrest warrant was false is a conclusory statement with no supporting facts, See: Twombly, supra, and does not invalidate the defendant's immunity.

Conspiracy

The plaintiff attempts to circumvent the immunity of these defendants by alleging they acted outside the scope of their authority and engaged in a conspiracy to see him imprisoned. This conspiracy allegedly resulted from a failed relationship between himself and Davis, a private attorney, who wished to retaliate against him. The conspiracy was then joined by the attorney's father, the Leon County State Attorney, Assistant State Attorney, and two probation officers.

The plaintiff has failed to raise a cognizable constitutional conspiracy claim against these defendants. The Supreme Court has recognized that a conspiracy to violate constitutional rights states a claim in a federal civil rights action. Dennis v. Sparks, 449 U.S. 24, 29, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980); Adickes v. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). However, to establish a prima facie case of conspiracy to violate an inmate's constitutional rights, a plaintiff must demonstrate the defendants 'reached an understanding' to deny the plaintiff his or her rights [and] prove an actionable wrong to support the conspiracy.'" Bailey v. Board of County Commissioners, 956 F.2d 1112, 1122 (11 Cir.) (quoting Bendiburg v. Dempsey, 909 F.2d 463, 468 (11 Cir.), cert. denied, 500 U.S. 932, 111 S. Ct. 2053, 114 L. Ed. 2d 459 (1991)), cert. denied, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 58 (1992). Further, a complaint raising only conclusory, vague, general allegations of conspiracy may be dismissed. Fullman v. Graddick, 739 F.2d 553, 556-57 (11 Cir. 1984)("In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspiracy existed.").

The plaintiff has failed to state a claim for relief with regard to his allegation of a conspiracy among the above-named defendants, because he fails to sufficiently allege the existence of an agreement or mutual understanding among these individuals, and because his complaint is only conclusory and unsupported by specific factual allegations to show the existence of any conspiracy.

Additionally, the plaintiff is essentially contesting the validity of the warrant and his probation violation. These claims, in essence, challenge aspects of his criminal proceedings, and are therefore not cognizable in a civil rights case. A habeas corpus action is the proper vehicle for raising claims that may affect the fact or duration of a criminal defendant's confinement. Preiser v. Rodriguez, 411 U.S. 475, 488-490, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973). If a prisoner brings such claims in a civil rights action, the complaint must be dismissed unless and until the reason for the confinement 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 v. Humphrey, 512 U.S. 477, 486-487, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Heck applies both to actions for monetary damages and for injunctive relief. Wilkinson v Dotson 544 U.S. 74, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005).

The plaintiff's claims of negligence and emotional distress are state tort claims and a § 1983 complaint is not the proper vehicle. Generally, if all federal claims are eliminated before trial, the pendent state claims should be dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). When all federal claims are resolved, it is neither unfair nor inconvenient to the parties to require the plaintiff to pursue his state law claims in state court. Fiscus v. City of Roswell, 832 F. Supp. 1558, 1564-65 (N.D.Ga. 1993)(court declined to retain supplemental jurisdiction over state law claims of intentional infliction of emotional distress, false imprisonment and false arrest after summary judgment for defendants on federal claims of Fourth, Eighth and Fourteenth Amendment violations). See also Brown v. Masonry Products, Inc., 874 F.2d 1476 (11 Cir. 1989), cert. denied, 493 U.S. 1087, 110 S. Ct. 1153, 107 L. Ed. 2d 1057 (1990) (after summary judgment for defendants on all federal claims, the district court was well within its discretion to dismiss state claims because of lack of pendent jurisdiction). These alleged state tort claims should therefore be dismissed.

Lastly, the plaintiff attempts to name Probation Officers Gonzalez and Meggs in their official capacity for promulgating inadequate training policy. Meggs is a policy maker for Leon County, outside the jurisdiction of the Southern District. Further both officers should be dismissed as the plaintiff has failed to demonstrate inadequate training policies.

It is therefore recommended that this complaint be dismissed for failure to state a claim.

III. Recommendation

It is recommended as follows:

1. The complaint be dismissed for failure to state a claim pursuant to 28 U.S.C. 1915(e)(2)(B)(ii).
2. This case should be closed.

Objections to this Report shall be filed within fourteen days following receipt.

Dated this 14th day of January, 2014.

/s/ Patrick A. White

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

He has since been transferred to the Leon County Jail