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**United States Court of Appeals  
for the Eighth Circuit**

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No. 18-3084

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Terry Lynn Olson,  
*Plaintiff-Appellant,*

v.

Janis Amatuzio, Former Wright County Medical  
Examiner, Tom Roy, Commissioner, Minnesota  
Department of Corrections, Joan Fabian, former  
Commissioner, Minnesota Department of Corrections,  
*Defendants-Appellees.*

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Appeal from United States District Court  
for the District of Minnesota

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Submitted: October 17, 2019  
Filed: January 3, 2020  
[Unpublished]

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Before SMITH, Chief Judge, GRUENDER and BEN-  
TON, Circuit Judges.

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PER CURIAM.

Terry Olson appeals the district court's<sup>1</sup> dismissal of his complaint because it determined *Heck v. Humphrey*, 512 U.S. 477 (1994), and the Minnesota statute of limitations, Minn. Stat. § 541.05, subd. 1(5), barred his claims. We affirm.

In 1979, police found a dead body on a road in Wright County, Minnesota. *State v. Olson*, No. A08-0084, 2009 WL 2147262, at \*1 (Minn. Ct. App. July 21, 2009). “The police investigation was inconclusive and the case eventually went cold.” *Id.* In 2005, after police reopened the investigation, then Wright County Medical Examiner Janis Amatuzio changed the classification of the death from undetermined to homicide. A grand jury indicted Olson later that year, and Amatuzio testified at Olson’s trial in 2007 that the 1979 death was caused by one or two blows to the head. *Id.* at \*1, \*4. A jury convicted Olson of second and third degree murder. *Id.* at \*3.

After his direct appeal and petitions for state post-conviction relief, Olson filed a petition for a writ of habeas corpus in federal court. The petition was eventually resolved when the county prosecuting authority stipulated “to the issuance of a Conditional Writ of Habeas Corpus.” The stipulation stated that the prosecuting authority did “not admit any fault or wrongdoing in the original sentence” but agreed to a modification of the sentence “in an effort to bring finality to [the] proceeding and the underlying conviction.” The district

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<sup>1</sup> The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

court issued a writ and order remanding the case to state court for resentencing. Olson was resentenced and released, and he stipulated to dismissing all his habeas claims with prejudice. The district court subsequently vacated its writ and dismissed the case with prejudice.

Then, in January 2018, Olson filed a complaint against Amatuzio and the current and former commissioners of the Minnesota Department of Corrections, Tom Roy and Joan Fabian respectively (collectively, “Commissioners”). Under 42 U.S.C. § 1983, Olson alleged that the Commissioners violated his substantive due process, equal protection, and Eighth Amendment rights by “imposing and maintaining” an objectively unreasonable sentence, and he argued that the sentence they imposed violated his rights under the Ex Post Facto Clause of the United States Constitution. Also under § 1983, Olson alleged that Amatuzio violated his substantive due process rights, and he brought a negligence claim against her for her decision to change the classification of the 1979 death from undetermined to homicide.

Amatuzio and the Commissioners filed motions to dismiss, *see* Fed. R. Civ. P. 12(b)(6), and the district court—the same district court that issued the conditional writ of habeas corpus—granted their motions. It determined that Olson’s § 1983 claims were *Heck*-barred. It also determined that Olson’s negligence claim was barred by the statute of limitations. Olson appeals.

We review *de novo* the district court's dismissal of Olson's claims under Rule 12(b)(6). *Minter v. Bartruff*, 939 F.3d 925, 926 (8th Cir. 2019). To survive a motion to dismiss under Rule 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Olson first argues that his § 1983 claims are not barred by *Heck v. Humphrey*. In *Heck*, the Supreme Court held that to recover damages under § 1983 for an alleged "unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486-87. If a plaintiff cannot make this showing, dismissal is appropriate. *Id.* at 487.

Olson argues, as he did before the district court, that the district court's writ of habeas corpus called into question his sentence. He highlights the fact that the district court's order said that "the interests of fairness, justice, and equity will be served by the issuance of an order."

We begin by emphasizing that the same judge who issued the federal writ of habeas corpus also decided this matter. In finding that the § 1983 claims were

*Heck*-barred, the district court judge said Olson’s “shortened sentence was achieved via a stipulation between the parties and wherein the state expressly disavowed any illegality with respect to Olson’s sentence.” It noted that “[t]he stipulation and the Court’s subsequent writ did not mention the . . . administration of Olson’s sentence” and determined that there was “no finding that the [Minnesota Department of Corrections] unlawfully incarcerated Olson.” Moreover, the district court later vacated its writ after the parties’ agreement was achieved, meaning it was “as if it had never been written.” *Medici v. City of Chicago*, 856 F.3d 530, 533 (7th Cir. 2017); *see also Vacate*, Black’s Law Dictionary (11th ed. 2019) (“To nullify or cancel; make void; invalidate”). Under *Heck*’s plain language, we agree with the district court that neither Olson’s conviction nor his sentence were called into question by the (later vacated) conditional writ issued in this case. We thus conclude that the district court properly dismissed Olson’s § 1983 claims.

Olson next argues that the district court erroneously determined that his negligence claim against Amatuzio is barred by the statute of limitations. In his complaint, Olson says Amatuzio was negligent by relying on eyewitness testimony “in changing the manner of [the 1979 death] from ‘undetermined’ to ‘homicide,’ an[d] by failing to conduct an objectively reasonable investigation as to the manner of [the] death.” According to Olson, the eyewitness testimony was not credible. His complaint also says that Amatuzio admitted in a January 2012 affidavit and in her testimony during his

post-conviction proceedings that if she had known the eyewitness was not credible, she would not have reclassified the cause of death.

Amatuzio changed the classification of the 1979 death in 2005 and testified at Olson’s trial in 2007. Olson did not file his complaint until 2018, well after Minnesota’s six-year statute of limitations had run. Minn. Stat. § 541.05, subd. 1(5); see *Hermeling v. Minn. Fire & Cas. Co.*, 548 N.W.2d 270, 274 (Minn. 1996) (explaining that the statute of limitations begins to run from the date of the action that caused the injury), *overruled on other grounds by Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000).

Olson nevertheless argues that the statute of limitations should be tolled because Amatuzio “fraudulently concealed the facts underlying his cause of action” when she testified at his trial. The district court dismissed Olson’s claim because it determined that Olson did not plead sufficient facts that Amatuzio concealed the facts relevant to the cause of action. See *Guy v. Swift & Co.*, 612 F.2d 383, 385 (8th Cir. 1980) (per curiam) (“Where it appears from the face of the complaint itself that the limitation period has run, an action is properly subject to dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6).”). We agree.

“Fraudulent concealment tolls the statute of limitations until the party discovers, or has a reasonable opportunity to discover, the concealed defect.” *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 918 (Minn. 1990). To “make a valid claim of fraudulent

concealment sufficient to toll the statute of limitations,” a plaintiff must show that (1) the defendant made “a statement or statements that concealed [the] potential cause of action, (2) the statement or statements were intentionally false, and (3) the concealment could not have been discovered by reasonable diligence.” *Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. Ct. App. 2003).

Olson claims that Amatuzio concealed the reason why she changed the classification of the 1979 death by implying in her testimony that she made the change based on forensic science rather than witness testimony. But according to the transcript excerpt of Amatuzio’s testimony in Olson’s complaint, Amatuzio testified that she based her decision to change the classification on her “review of the evidence.” She did not say she based her decision on the “forensic science,” nor, based on the excerpt in the complaint, did she give any indication which evidence ultimately influenced her decision. Olson’s complaint says Amatuzio did not “clarify that the sole reason she changed the manner of death” was the eyewitness testimony, but “[i]n no case . . . is mere silence or failure to disclose sufficient in itself to constitute fraudulent concealment.” *Goellner v. Butler*, 836 F.2d 426, 431 (8th Cir. 1988) (interpreting Minnesota law). Olson’s factual allegations do not support an inference that Amatuzio intentionally concealed his cause of action.

We also agree with the district court that Olson’s complaint does not contain facts that suggest he could not have discovered the alleged concealment by

reasonable diligence. *See Clark v. Fabian*, No. A08-0308, 2008 WL 4977605, at \*5 (Minn. Ct. App. Nov. 25, 2008) (“Nor does [the plaintiff] provide any allegations that, if true, would support a determination that this concealment could not have been discovered with due diligence before the statutes of limitations ran.”). For example, Olson’s complaint does not contain facts showing that he could not have asked Amatuzio to clarify upon which evidence she relied in making her decision during cross examination at his trial. *Cf. Wild v. Rarig*, 234 N.W.2d 775, 795 (Minn. 1975) (“The party claiming fraudulent concealment has the burden of showing that the concealment could not have been discovered sooner by reasonable diligence on his part and was not the result of his own negligence.”). Olson thus did not “state with particularity the circumstances constituting fraud.”<sup>2</sup> *See* Fed. R. Civ. P. 9(b); *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011) (“Under Rule 9(b)’s heightened pleading

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<sup>2</sup> After the parties submitted their briefs, Olson submitted a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, arguing that the Supreme Court’s decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), “bears directly” on the statute of limitations issue. But *McDonough* involved a fabricated evidence claim under § 1983, where the Supreme Court determined the statute of limitations did not begin to run until “the criminal proceeding has ended in the defendant’s favor,” 139 S. Ct. at 2158, not a negligence claim under Minnesota state law, where the statute of limitations begins to run from the date of the action that caused the injury, *Hermeling*, 548 N.W.2d at 274. *See McDonough*, 139 S. Ct. at 2155 n.2 (“Accordingly, we do not address what the accrual rule would be for a claim rooted in other types of harm independent of a liberty deprivation, as no such claim is before us.”).



standard, allegations of fraud, including fraudulent concealment for tolling purposes, must be pleaded with particularity.” (internal quotation marks and brackets omitted)).

Finally, we conclude that the district court did not abuse its discretion by not granting Olson leave to amend his complaint. *See Soueidan v. St. Louis Univ.*, 926 F.3d 1029, 1036 (8th Cir. 2019) (reviewing the denial of a request to amend a complaint for an abuse of discretion). Olson did not submit a motion to amend his complaint, nor did he submit a proposed amendment, which we have held a party must do to “preserve the right to amend a complaint.” *See Wolgin v. Simon*, 722 F.2d 389, 395 (8th Cir. 1983).

For the foregoing reasons, we affirm.

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**UNITED STATES DISTRICT COURT**  
**District of Minnesota**

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Terry Lynn Olson

**JUDGMENT IN A  
CIVIL CASE**

Plaintiff,

v.

Case Number: 18-cv-124 (DWF/TNL)

Janis Amatuzio  
former Wright County Medical Examiner,  
Tom Roy  
Commissioner, Minnesota Department  
of Corrections,  
Joan Fabian  
former Commissioner, Minnesota Department  
of Corrections

Defendant(s).

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED THAT:**

Defendants' motions to dismiss (Doc. Nos. [8] & [22]) are **GRANTED** and Plaintiff's Complaint (Doc. No. [1]) is **DISMISSED WITH PREJUDICE**.

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Date: 8/30/18

KATE M. FOGARTY, CLERK

s/K. Krulas

(By) K. Krulas ,Deputy Clerk

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Terry Lynn Olson,        Civil No. 18-124 (DWF/TNL)  
Plaintiff,

v.

**MEMORANDUM  
OPINION AND ORDER**

Janis Amatuzio, former Wright County  
Medical Examiner; Tom Roy, Commissioner,  
Minnesota Department of Corrections; and  
Joan Fabian, former Commissioner,  
Minnesota Department of Corrections,  
Defendants.

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Erica Holzer, Esq., Julian C. Zebot, Esq., and Justin  
Philip Rose, Esq., Maslon LLP, counsel for Plaintiff.

Amie E. Penny Sayler, Esq., and Cecilie M. Loidolt,  
Esq., Bassford Remele, P.A., counsel for Defendant  
Janis Amatuzio.

Angela Behrens, Office of the Minnesota Attorney Gen-  
eral, counsel for Defendants Tom Roy and Joan Fabian.

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**INTRODUCTION**

This matter is before the Court on a Motion to Dis-  
miss brought by Defendants Tom Roy and Joan Fabian  
(Doc. No. 8) and a Motion to Dismiss brought by

Defendant Janis Amatuzio (Doc. No. 22). For the reasons set forth below, the Court grants the motions.

### **BACKGROUND**

In 2007, Plaintiff Terry Lynn Olson was convicted for the 1979 second-degree murder of Jeffrey Hammill, a crime Olson maintains he did not commit. (Doc. No. 1 (“Compl.”) ¶ 1.) In 1979, Hammill was discovered dead from a head injury on the side of a county road. (*Id.* ¶ 17.) At the time, Hammill’s death was ruled “undetermined” by the Wright County Coroner, and after an investigation, no charges were filed. (*Id.* ¶¶ 17-24.) Years later, in 2003, the Sheriff’s Office re-opened its investigation of Hammill’s death. (*Id.* ¶ 25.) The Sheriff’s Office asked Amatuzio, the Wright County Medical Examiner at the time, to review the original autopsy, death certificate, and “new evidence.” (*Id.* ¶ 28.) Based on her review, Amatuzio changed the classification of Hammill’s death from “undetermined” to “homicide.” (*Id.* ¶ 28.) Olson alleges that this change was based solely on the fact that investigators told Amatuzio that there was an eyewitness to the murder. (*Id.* ¶ 29.) Olson further alleges that the eyewitness (Dale Todd) gave a statement that contradicted the physical evidence, confessed under coercion, and later recanted his statement. (*Id.* ¶¶ 27-29.)

On November 4, 2005, a grand jury indicted Olson, Todd, and a third person, Ron Michaels, on various charges including first-degree murder. (*Id.* ¶ 31.) Todd pleaded guilty to “aiding an offender” in exchange for

his testimony against Michaels and Olson, while Michaels and Olson maintained their innocence and went to trial. (*Id.*) Michaels went to trial in November 2006, during which Todd changed his testimony and Michaels was acquitted. (*Id.* ¶¶ 32-33.) In response, the state retracted Todd’s cooperation agreement and Todd received a three-year prison sentence. (*Id.* ¶ 34.) Olson also alleges that shortly before Olson’s trial, Todd told a defense investigator that Olson was innocent (*id.* ¶ 36), and that he told an inmate that he was being pressured to testify against Olson (*id.* ¶ 38). At Olson’s trial, Todd testified that he, Olson, and Michaels were involved in Hammill’s death. (*Id.* ¶ 45.) The jury also heard testimony that Hammill was killed with a “blunt, heavy object,” and that Hammill had an abrasion on his wrist, which was likely a “defense-type-injury” that was consistent with Hammill trying to “ward off a blow.” *State v. Olson*, No. A08-0084, 2009 WL 2147262, at \*4 (Minn. App. Oct. 20, 2009), *rev. denied* (Minn. Oct. 20, 2009).<sup>1</sup> In addition, several inmates who served time with Olson testified that he confessed to killing Hammill. *Id.* at \*5. Ultimately, the jury found Olson guilty of second-degree murder. *Id.* at \*3.

Olson appealed his conviction and filed two petitions for post-conviction relief. His conviction was affirmed and both post-conviction petitions were denied. *Id.* at \*6; (affirming Olson’s convictions); *Olson v. State*, No. A11-696, 2012 WL 254485 (Minn. App. Jan. 30,

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<sup>1</sup> The Court may consider the public record related to Olson’s conviction as it is necessarily embraced by the Complaint. *See Porous Media Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

2012) (affirming denial of post-conviction relief), *rev. denied* (April 25, 2012); *Olson v. State*, No. A14-1632, 2015 WL 4877691 (Minn. App. Aug. 17, 2015) (same), *review denied* (Minn. Nov. 17, 2015).

Olson then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court. (Compl. ¶ 74.) In support, Olson claimed that the State concealed evidence and knowingly sponsored false testimony, that he received ineffective assistance of trial and appellate counsel, as well as various violations of due process, equal protection, and cruel and unusual punishment. The Petition was dismissed without prejudice on the grounds that it was a mixed petition, presenting both exhausted and unexhausted claims, and the Court granted Olson a period of thirty days to amend his petition by deleting unexhausted claims. (*Id.*) Before Olson filed an amended petition, the matter was resolved by a stipulation between the parties, pursuant to which the State agreed to sentence Olson under the 1980 sentencing guidelines and Olson agreed to forego any future lawsuits against the county. (Doc. No. 11 (“Behrens Aff.”) ¶ 2, Ex. 2 ¶¶ 2-3; Compl. ¶ 75.)<sup>2</sup> In addition, the state agreed to the issuance of a conditional writ directing that Olson’s sentence be amended pursuant to the guidelines in effect in 1980 with a criminal history of zero. (Behrens Aff. ¶ 2, Ex. 3 ¶ 4.) The state explicitly stated in the stipulation that “in making this stipulation, [the State] does

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<sup>2</sup> Olson maintained that he was given an illegal sentence because had he been charged and prosecuted in 1979, he likely would have received an earlier release date.

not admit any fault or wrongdoing in the original sentence but agrees to this amendment in the interest of justice and equity and in an effort to bring finality to this proceeding and the underlying conviction.” (*Id.* ¶ 6.)

Pursuant to and consistent with the stipulation, the Court issued a Writ and Order remanding the case to the state court with the expectation that it resentence Olson under the 1980 sentencing guidelines, and upon resentencing immediately release Olson from custody. (*Id.* ¶ 2, Ex. 3.) In September 2016, the state district court resentedenced Olson and released him based on the amended sentence. (*Id.* ¶ 2, Ex. 4 ¶ 2.) Pursuant to the parties’ subsequent stipulation, the Court vacated the Writ and Order and dismissed Olson’s petition for a writ of habeas corpus with prejudice. (*Id.* ¶ 2, Ex. 5.)

In January 2018, Olson filed this action asserting the following causes of action: (1) 42 U.S.C. § 1983-Substantive Due Process (against Amatuzio); (2) Negligence (against Amatuzio); (3) 42 U.S.C. §1983-Substantive Due Process (against Roy and Fabian); (4) 42 U.S.C. § 1983-Equal Protection (against Roy and Fabian); (5) 42 U.S.C. § 1983-Eighth Amendment (against Roy and Fabian); and (6) 42 U.S.C. § 1983- Prohibition Against *Ex Post Facto* Laws (against Roy and Fabian). Defendants move separately to dismiss all claims.



## DISCUSSION

### I. Legal Standard

In deciding a motion to dismiss under Rule 12(b)(6), a court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). In doing so, however, a court need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions drawn by the pleader from the facts alleged, *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). A court deciding a motion to dismiss may consider the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint. *See Porous Media Corp.*, 186 F.3d at 1079.

To survive a motion to dismiss, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a complaint need not contain “detailed factual allegations,” it must contain facts with enough specificity “to raise a right to relief above the speculative level.” *Id.* at 555. As the Supreme Court reiterated, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” will not pass muster under *Twombly*. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). In sum, this standard “calls for enough fact[s] to raise a reasonable expectation

that discovery will reveal evidence of [the claim].” *Twombly*, 550 U.S. at 556.

## II. *Heck* Doctrine

As a threshold matter, Defendants argue that Olson’s claims are barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, a claim is not cognizable under section 1983 when a judgment in favor of a plaintiff on the claim would necessarily imply that the plaintiff’s state conviction or sentence is invalid, unless the conviction has been invalidated. *See Heck*, 512 U.S. at 487; *Wilson v. Lawrence Cty., Mo.*, 154 F.3d 757, 760 (8th Cir. 1998) (citing *Heck*). To demonstrate the invalidity of the fact or length of confinement, a plaintiff must establish that his conviction or incarceration has been “reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.” *Heck*, 512 U.S. at 489. A decision that does not so reverse, expunge, or impugn a conviction or sentence is insufficient to satisfy *Heck*. *See Marlowe v. Fabian*, 676 F.3d 743, 747 (8th Cir. 2012) (affirming the dismissal of a section 1983 claim under *Heck*; holding that the decision to remand plaintiff’s habeas claim and encouraging the department of corrections to seek a resolution did not invalidate plaintiff’s incarceration); *Cooke v. Peterson*, Civ. No. 12-1587, 2012 WL 6061724, at \*2 (D. Minn. Dec. 6, 2012) (holding that *Heck* bars a section 1983 claim based on the allegedly unlawful duration of incarceration; explaining that plaintiff’s release following an administrative appeal is not a prior invalidation of his conviction or sentence).

Here, Olson argues that his release from prison constitutes a favorable termination of his wrongful incarceration. Specifically, Olson submits that his release in September 2016 was the direct result of the Court's favorable consideration of the stipulated Writ of Habeas Corpus. (Behrens Aff. ¶ 2, Exs. 2, 3.) In addition, Olson argues that the Court acknowledged the injustice of Olson's continued incarceration by ordering his release "in the interests of fairness, justice, and equity" and that his sentence was "called into question" by the Court's issuance of the writ. (*Id.*) Olson highlights that in the stipulation itself, the parties agreed that "[i]n the interest of fairness, justice, and equity the prosecuting authority for Wright County, Minnesota agrees to the issuance of a Conditional Writ of Habeas Corpus that the sentence imposed in this matter be amended pursuant to the guidelines in effect in 1980 with a criminal history score of zero." (*Id.* ¶ 2, Ex. 2 ¶ 4.)

The Court disagrees and determines that Olson's section 1983 claims are barred by *Heck*. First, Olson's conviction for second-degree murder is intact, as it has not been reversed on direct appeal, expunged by executive order, declared invalid, or called into question by the issuance of a writ of habeas corpus. Second, because Olson's conviction stands, the only relief Olson obtained was a shorter sentence. Olson, however, has not shown that the length of his incarceration was "reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *See Heck*, 512 U.S. at 489. Instead, his shortened sentence was achieved via

a stipulation between the parties and wherein the state expressly disavowed any illegality with respect to Olson's sentence.<sup>3</sup> In addition, while the Court did issue a writ to facilitate Olson's sentencing under the 1980 guidelines, that writ was conditional and the Court later vacated the writ and dismissed Olson's habeas claims with prejudice.<sup>4</sup>

The Court finds that the Eighth Circuit Court of Appeals' decision in *Marlowe* is instructive. In *Marlowe*, the plaintiff (Marlowe) was serving a sentence for first-degree criminal sexual conduct. 676 F.3d at 745. After Marlowe's release under supervision, Marlowe was unable to find approved housing and his supervised release was revoked. *Id.* Marlowe filed a petition for a writ of habeas corpus alleging unlawful imprisonment. *Id.* at 746. The petition was denied and, on

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<sup>3</sup> The stipulation and the Court's subsequent writ did not mention the Department's administration of Olson's sentence. Therefore, there is no finding that the Department unlawfully incarcerated Olson. In addition, Olson does not allege that Amatuzio imposed Olson's sentence. Indeed, Olson's claims against Amatuzio involve his conviction, which remains intact.

<sup>4</sup> This fact distinguishes this case from *Wilson v. Lawrence Cty., Mo.*, 154 F.3d 757, 761 (8th Cir. 1998). In *Wilson*, the Eighth Circuit Court of Appeals held that a gubernatorial pardon constituted an expungement by executive order. *Wilson*, 154 F.3d at 760. However, in *Wilson*, there was no doubt that the pardon invalidated the offender's conviction and satisfied *Heck*. *Id.* (noting that the pardon specifically stated that the plaintiff did not commit the underlying crime). Here, the habeas stipulation addressed only Olson's sentence, not his conviction, and expressly disavowed any illegality with respect to his sentence. The writ did not find or imply that the Department unlawfully incarcerated Olson.

appeal, remanded to the district court without ordering Marlowe's release. *Id.* However, the Minnesota Court of Appeals instructed the Department of Corrections to "consider restructuring Marlowe's release plan" and to "seek to develop a plan that can achieve Marlowe's release from prison and placement in a suitable and approved residence." *Id.* (citation omitted). A few months later, a suitable residence found space, the county agreed to provide supervision, and Marlowe's counsel indicated that he would consider the habeas matter "resolved" if Marlowe was released. *Id.* Marlowe was released and subsequently sued officials at the department of corrections under section 1983 for violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments. Specifically, Marlowe argued that the officials unlawfully imprisoned him by incarcerating him beyond the date on which he became eligible for supervised release. *Id.* at 745. The district court granted summary judgment in favor of defendants after finding that Marlowe's section 1983 claims were barred by *Heck*. Marlowe appealed and the Eighth Circuit Court of Appeals affirmed the decision, explaining that to avoid being barred by *Heck*, a plaintiff must show a "favorable termination by state or federal authorities even when he is no longer incarcerated." *Id.* at 747 (citation omitted). Despite the fact that the Minnesota Court of Appeals remanded his habeas claim to the trial court, this action did not satisfy the "favorable termination" requirement because Marlowe's incarceration was not "reversed, expunged, invalidated, or called into question." *Id.*

Similarly here, by issuing the conditional writ pursuant to the parties' stipulation, the Court did not invalidate or call into question the legality of Olson's imprisonment. Instead, the Court directed resentencing based on the parties' stipulation and later vacated the writ and dismissed Olson's habeas petition with prejudice. Therefore, the Court concludes that Olson's section 1983 claims are barred by *Heck*.<sup>5</sup> Because the Court concludes that Olson's section 1983 claims are barred by *Heck*, it need not reach the alternative arguments for dismissal of those claims. Counts I, III, IV, V, and VI are properly dismissed with prejudice.

### **III. Negligence (against Amatuzio)**

Olson also asserts a negligence claim against Amatuzio. Amatuzio argues that this claim is barred by the statute of limitations and otherwise fails to state a claim for relief. Under Minnesota law, the statute of limitations for a negligence claim is six years. Minn.

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<sup>5</sup> In the alternative, Olson argues that the Court should decline to apply *Heck* given the unique factual circumstances that led to Olson's release. In particular, Olson asserts that because he abandoned his habeas petition only because he was released, the favorable-termination rule should not be required. However, under the law of this Circuit, *Heck* still applies to the facts of this case. *See, e.g., Newmy v. Johnson*, 758 F.3d 1008, 1011 (8th Cir. 2014) (noting a circuit split on whether *Heck* bars section 1983 claims when the plaintiff cannot bring a habeas action; explaining that the Eighth Circuit adheres to the conclusion that *Heck*'s favorable termination rule still applies when a plaintiff is not incarcerated (and therefore cannot bring a habeas claim)); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) (holding that *Heck* applies even when habeas relief is unavailable).

Stat. § 541.05, subd. 1(5). The cause of action for negligence accrues from the date of the occurrence that caused the injury. *Hermeling v. Minn. Fire & Cas. Co.*, 548 N.W.2d 270, 274 (Minn. 1996) (*overruled on other grounds by Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000)). Here, Olson alleges that Amatuzio was negligent by “relying solely on Dale Todd’s testimony in changing the manner of Hammill’s death from ‘undetermined’ to ‘homicide,’ and by failing to conduct an objectively reasonable investigation as to the manner of Hammill’s death.” (Compl. ¶ 88.) Amatuzio changed the classification of Hammill’s death in 2005 and during her testimony at Olson’s trial in 2007. Olson, however, did not file the present action until 2018, well after the six-year statute of limitations had run.

Olson argues that the statute of limitations was tolled by fraudulent concealment. Specifically, Olson argues that Amatuzio testified under oath at trial that she changed Hammill’s manner of death from undetermined to homicide based on forensic science, but that she concealed the true reason that she changed the death classification, which was the change was made based on the statements of Todd. (*Id.* ¶¶ 40-41.) Olson also asserts that he did not learn of Amatuzio’s concealment until January 18, 2012, when Amatuzio stated in an affidavit that the sole reason she changed the manner of death was Todd’s statement to the police in 2003 and that, absent that statement, she would not have changed the death certificate. (*Id.* ¶¶ 43-44.)

Normally, the expiration of a limitations period is an absolute bar to the plaintiff’s claim. *Minn. Laborers*

*Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509, 514 (Minn. 2014). However, a defendant's fraudulent concealment will toll the statute of limitations until the plaintiff discovers or has reasonable opportunity to discover the concealed facts. See *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 918 (Minn. 1990). Fraudulent concealment is the intentional and affirmative concealment of the facts which establish the cause of action. *Id.* In order to toll the limitation period on the grounds of fraudulent concealment, a plaintiff must establish the following: "(1) Defendant[s] concealment of Plaintiff[s] cause of action, (2) failure by Plaintiff[] to discover the existence of [his] cause of action, and (3) due diligence by Plaintiff[] in attempting to discover the claim." *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016, 1022 (D. Minn. 1997). Here, the Court determines that Olson failed to establish that tolling applies. Notably, Olson has not sufficiently pleaded that Amatuzio concealed the very existence of the facts which establish the cause of action or that Olson exercised due diligence to discover his claim. Olson was represented by counsel at his trial, listened to Amatuzio testify, and through his attorney had the opportunity to interview and cross-examine Amatuzio. While Olson alleges that Amatuzio failed to offer information relevant to her reliance on Todd's statement, Olson has not pleaded facts showing diligence on his part to attempt to discover the facts underlying his claim. In particular, Olson could have sought information about Amatuzio's testimony during trial via cross-examination. Therefore, even accepting Olson's allegations as true, there is no basis to determine that



Olson could not have reasonably discovered the facts regarding Amatuzio's testimony during trial. The Court concludes that the equitable doctrine of fraudulent concealment does not toll the statute of limitations. Therefore, Olson's negligence claim against Amatuzio is barred by the statute of limitations.

**ORDER**

Based on the files, records, and proceedings herein, and for the reasons stated above, **IT IS HEREBY ORDERED** that Defendants' motions to dismiss (Doc. Nos. [8] & [22]) are **GRANTED** and Plaintiff's Complaint (Doc. No. [1]) is **DISMISSED WITH PREJUDICE**.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: August 27, 2018

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Terry Lynn Olson,  
Petitioner,

Civil No. 15-4380  
(DWF/SER)

v.

Tom Roy, Commissioner,  
Minnesota Department of  
Corrections,

Respondent.

**ORDER FOR  
DISMISSAL WITH  
PREJUDICE**

The above captioned matter came on for decision before the undersigned based on the stipulation (Doc. No. [42]) of the parties hereto. The Court being fully apprised of the circumstances of the matter and the stipulation, **HEREBY ORDERS** that the Writ and Order filed on September 8, 2016 (Doc. No. [41]) be **VACATED** and that the Petition for a Writ of Habeas Corpus (Doc. No. [1]) be **DISMISSED WITH PREJUDICE**.

Dated: September 20, 2016 s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District  
Judge

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Terry Lynn Olson,  
Petitioner,

Civil No. 15-4380  
(DWF/SER)

**WRIT AND ORDER**

v.

Tom Roy, Commissioner,  
Minnesota Department of  
Corrections,

Respondent.

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David T. Schultz, Esq., and Erica Holzer, Esq., Maslon  
LLP, counsel for Petitioner.

Greg T. Kryzer, Assistant Wright County Attorney,  
Wright County Attorney's Office; James B. Early and  
Matthew Frank, Assistant Attorneys General, Minne-  
sota Attorney General's Office, counsel for Respondent.

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The above captioned matter came on for decision before the undersigned pursuant to the stipulation of the parties. (Doc. No. [38].) The Court, being fully apprised of the circumstances of the matter and the stipulation, and concluding that the interests of fairness, justice, and equity will be served by the issuance of an order, consistent with the stipulation, hereby issues this Writ and Order remanding this case to the Wright County District Court in the Tenth Judicial District. The Court respectfully directs that Petitioner Terry Lynn Olson be resentenced pursuant to the 1980 Minnesota sentencing guidelines and, upon

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resentencing, be immediately released from custody on such terms and conditions as the Wright County District Court shall order.

Dated: September 8, 2016     s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District  
Judge

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Terry Lynn Olson,  
Petitioner,

Civil File No.: 15-CV-4380  
(DWF/SER)

vs.

**STIPULATION FOR  
DISMISSAL**

Tom Roy, Commissioner,  
Minnesota Department of  
Corrections,

Respondent.

**STIPULATION**

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their respective counsel, as follows:

1. On September 8, 2016, pursuant to the stipulation of the parties, the Court issued a Writ and Order directing the Petitioner to be resentenced pursuant to the 1980 Minnesota Sentencing Guidelines.

2. On September 13, 2016, the Wright County District Court resentenced the Petitioner to 121 months which is a 1980 Minnesota Sentencing Guidelines Sentence. The Petitioner has now been released from custody.

3. The Conditional Writ issued by the Court has been complied with and can now be vacated, and the allegations asserted in this proceeding can be denied with prejudice.

Dated: September 14, 2016

**MASLON LLP**

By: /s/ David T. Schultz  
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**ATTORNEYS FOR TERRY LYNN OLSON**

Dated: September 14, 2016

**WRIGHT COUNTY ATTORNEY'S  
OFFICE**

By: /s/ Greg T. Kryzer  
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Email: greg.kryzer@co.wright.mn.us

**ATTORNEYS FOR THE RESPONDENT**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Terry Lynn Olson,  
Petitioner,

Civil No. 15-4380  
(DWF/SER)

v.

Tom Roy, Commissioner,  
Minnesota Department of  
Corrections,

**AMENDED STIPULA-  
TION FOR ISSUANCE  
OF CONDITIONAL  
WRIT OF HABEAS  
CORPUS**

Respondent.

**STIPULATION**

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their respective counsel, as follows:

1. Following a jury trial held on August 10-17, 2007, Terry Lynn Olson was found guilty of second and third-degree murder, in connection with the 1979 death of Jeffrey Hammill.

2. On October 17, 2007, Mr. Olson requested and received an indeterminate sentence of 40 years. Mr. Olson at the time of sentencing anticipated a target release date of 86 months.

3. Mr. Olson is requesting to be resentence pursuant to the 1980 Minnesota Sentencing Guidelines.

4. In the interest of fairness, justice, and equity, the prosecuting authority for Wright County, Minnesota agrees to the issuance of a Conditional Writ of

Habeas Corpus directing that the Sentence imposed in this matter be amended pursuant to the guidelines in effect in 1980 with a criminal history score of zero.

5. Under the 1980 Minnesota Sentencing Guidelines Murder in the Second Degree was a level X, with a criminal history score of zero, the presumptive sentence range would be 111-121 months.

6. The prosecuting authority for Wright County, in making this stipulation, does not admit any fault or wrongdoing in the original sentence but agrees to this amendment in the interest of justice and equity and in an effort to bring finality to this proceeding and the underlying conviction.

7. The victim's family has been notified about this agreement and they have no objection to the relief sought by the parties.

Dated: September 6, 2016

**MASLON LLP**

By: /s/ David T. Schultz

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Erica A. Holzer (#0395234)

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**ATTORNEYS FOR TERRY LYNN OLSON**



33a

Dated: September 6, 2016

**WRIGHT COUNTY ATTORNEY'S  
OFFICE**

By: */s/ Greg T. Kryzer*

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**ATTORNEYS FOR THE RESPONDENT**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

<p>Terry Lynn Olson, Plaintiff,</p> <p>v.</p> <p>Janis Amatuzio, former Wright County Medical Examiner; Tom Roy, Commissioner, Minne- sota Department of Corrections; and Joan Fabian, former Commissioner, Minnesota Department of Corrections.</p> <p style="text-align: center;">Defendants.</p>	<p>Court File No.</p> <hr style="border: 0.5px solid black;"/> <p style="text-align: center;"><b>COMPLAINT</b></p>
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**PRELIMINARY STATEMENT**

1. In 2007, Terry Lynn Olson was convicted of second-degree murder in the 1979 death of Jeffrey Hammill, a crime he did not commit. Olson would not have been indicted, or later convicted, but for the unreasonable and negligent conduct of Defendant Janis Amatuzio, former Wright County Medical Examiner. In 2005, Defendant Amatuzio changed the classification of Hammill’s death from “undetermined” to “homicide”—not based on any scientific principle—but solely because law enforcement told her they had an eyewitness to Hammill’s assault. If Defendant Amatuzio had conducted a reasonable independent investigation, she would have determined that this “eyewitness,” Dale Todd, was mentally ill, that his

statement contradicted known physical evidence from the crime scene, and that his statement bore the hallmarks of a coerced false confession. Todd later recanted his statement under oath and testified to Olson's innocence.

2. Defendant Amatuzio admitted during Olson's post-conviction proceedings, in an affidavit dated January 18, 2012, and at a subsequent evidentiary hearing, that if she had been aware of these facts, she would not have reclassified Hammill's death from undetermined to homicide. Defendant Amatuzio's January 18, 2012 affidavit was the first time Olson discovered Defendant Amatuzio's wrongful and negligent actions.

3. In addition to the harm of being wrongfully indicted and convicted, Olson was given an illegal sentence. If Olson had been charged and prosecuted in 1979, he would have most likely been assigned a target release date for parole at 86 months. Yet the Department of Corrections ("DOC") set his target release date for parole at 204 months—between 140% and 240% longer than any other offender convicted of the same offense in 1978, which ranged from 85 months to 145 months. The DOC illegally set Olson's target release date at 204 months either by relying on conduct that occurred after the alleged crime and/or by applying a severity level analysis that was in effect in 2007 rather than—as required—under the 1979 matrix.

4. In August 2016, in response to Olson's Petition for Writ of Habeas Corpus, Wright County acknowledged that Olson had served four years longer than he

would have most likely received under the 1979 parole matrix and offered to immediately release Olson from prison without any post-release supervision, as long as he agreed to release Wright County Officials from any and all wrongdoing, and forego any future lawsuits against Wright County and its agents. Accepting Wright County's offer was Olson's only option for immediate release from state custody, which he had already endured as an innocent man for over eleven years. Accordingly, while incarcerated and under duress, Olson agreed to release Wright County from liability. Olson was subsequently released from prison on September 13, 2016.

5. Olson brings this suit under 42 U.S.C. § 1983, seeking damages to remedy Defendants' violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution, and Minnesota state law.

### **JURISDICTION**

6. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331 and pursuant to 28 U.S.C. § 1343(a)(3) and (a)(4). This Court has supplemental jurisdiction over Plaintiff's state law claim pursuant to 28 U.S.C. § 1367.

### **VENUE**

7. Venue in this Court is proper as to all Defendants pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2)

because the events giving rise to this complaint occurred within this district and all defendants are residents of the state of Minnesota.

### **PARTIES**

8. Plaintiff Terry Lynn Olson is a citizen of Minnesota. From November 4, 2005, until October 21, 2007, Olson was incarcerated at Sherburne County Jail in Elk River, M N. From October 21, 2007, until September 13, 2016, Olson was incarcerated at MCF-St. Cloud, MCF-Stillwater, MCF-Lino Lakes, and MCF-Faribault.

9. Defendant Janis Amatuzio is a citizen of Minnesota, a board certified forensic pathologist, and at the time of the events described herein was the Wright County Medical Examiner. She is sued in her individual capacity.

10. Defendant Tom Roy is a citizen of Minnesota and is the Commissioner of the Minnesota Department of Corrections. He is sued in his individual and official capacities.

11. Defendant Joan Fabian is a citizen of Minnesota and at the time of the events described herein was the Commissioner of the Minnesota Department of Corrections. She is sued in her individual and official capacities.

12. With respect to all facts and violations alleged in this complaint, Defendants acted within the scope of their employment and under color of state law.

**STATEMENT OF FACTS**

13. Jeffrey Hammill died of a basilar skull fracture in 1979. Twenty-six years later, on November 4, 2005, Terry Lynn Olson, Ron Michaels, and Dale Todd were indicted for his murder. The indictment resulted from a 2003 confession made by Dale Todd implicating the three men. It was this statement, presented to Wright County medical examiner, Defendant Amatuzio, as an eyewitness statement, which in turn caused her in 2005 to change Hammill's 1979 death certificate from "undetermined" to "homicide," allowing the grand jury indictment and prosecution to proceed.

14. On November 7, 2006, a Wright County jury acquitted Ron Michaels on all charges when Dale Todd, while testifying for the prosecution at the trial, repudiated his 2003 confession, testifying that all three men were innocent and that he lied because he was scared.

15. Terry Olson's case went to trial on August 10, 2007, before the Honorable Kim R. Johnson. At Olson's trial, Dale Todd contradicted his testimony from Michaels' trial, once again implicating himself, Michaels, and Olson in Hammill's death. On August 20, 2007, the jury convicted Olson on one count each of second-degree and third-degree murder, and acquitted him on all remaining counts, including two counts of first-degree premediated murder.

16. The district court imposed an indeterminate sentence of zero to 40 years imprisonment with eligibility for parole and a target release date of 86 months.

On March 10, 2010, the DOC illegally set Olson's target release date at 204 months, 240% of the presumptive release date.

### **I. HAMMILL'S DEATH AND THE 1979 INVESTIGATION**

17. Jeffrey Hammill was discovered dead from a head injury on the side of rural County Road 12 at 4:00 a.m. on August 11, 1979. Chief Deputy James Powers, one of the first Sheriff's deputies at the scene, believed Hammill's death was an accident; likely caused by Hammill being struck by a protruding piece of equipment on a passing farm vehicle or truck. After a local pathologist conducted an autopsy, the county coroner ruled the manner of Hammill's death undetermined.

18. During their investigation, officers learned that Dale Todd and Terry Olson had spent the night of August 10, 1979, socializing at a bar in Rockford, Minnesota, where they ran into Hammill. Though not well acquainted with Hammill, they agreed to give him a ride after Hammill said some guys at the bar wanted to beat him up. The three drove in Todd's car from Rockford to Olson's sister, Debra Segler's, house in Montrose. On the way into Montrose, Todd's car got a flat tire. Todd and Olson stole a tire from a nearby service station, fixed the flat, and then went into Segler's house, where Segler and her boyfriend, Jeffrey Cardinal, were hosting a party. Cardinal's good friend, Ron Michaels, was at the party, where he met Todd and Olson for the first time. Because he found no one at the

party willing to drive him home to Buffalo at 2:30 a.m., Hammill started walking home, heading north on County Road 12.

19. At approximately 4:00 a.m., Wright County Sherriff Chief Deputy James Powers, along with others, responded to a report of a body—later identified as Hammill—found along County Road 12. The deputies found Hammill lying on his back on the shoulder of the road, dressed entirely in black, dead of an apparent head injury. Hammill’s clothes were not torn, damaged or dirty. There was no blood spatter on his face, clothes, or the surrounding pavement. It did not appear Hammill had been punched or hit in the face or body.

20. Dr. Bozanich, a local pathologist, performed a full autopsy hours after Hammill’s body was discovered. He determined Hammill likely died from a basilar skull fracture. Hammill had no other injuries aside from a laceration on the left side of his scalp, a bruise or abrasion on the right side of his forehead, a puncture or tear in his right earlobe, and a small bruise on his left wrist. The Wright County Coroner, Dr. Bendix, reviewed Dr. Bozanich’s autopsy findings. The cause of death—a basilar skull fracture—was clear, but the manner of death (*e.g.*, accident, homicide, etc.) was not. Dr. Bendix ruled the manner of death “undetermined.”

21. After observing the autopsy, Chief Deputy Powers returned to where the body had been found and, with other deputies, scoured the area. They searched for footprints, cigarette butts, beer cans, and any other physical evidence. They looked for kicked up



dirt, matted grass, or any other sign of a struggle. They studied the roadway for tire tracks or other evidence. They found nothing.

22. Although the Sheriff's Office investigated the case as though it were a homicide, Chief Deputy Powers became convinced that Hammill's death was an accident; that he was struck by something protruding from a passing vehicle. In his experience, Hammill's injuries and the physical evidence at the scene simply did not match an assault.

23. During their investigation, officers took statements from nearly 70 people, including people at the bar where Todd and Olson met up with Hammill and people who had attended Segler's party. Police also seized Todd's car and searched it thoroughly for any sign of blood but found none. They took sports equipment, including a baseball bat, from the trunk and tested it for blood and, later, DNA evidence. They found none.

24. The investigation did not lead police to a suspect, and no one was charged with Hammill's death.

## **II. The 2003 Investigation**

25. Twenty-four years later, Hammill's daughter came to the Sheriff's Office to learn more about her father's death. This inquiry prompted the Sheriff's Office to re-open its investigation. By 2003, however, important evidence had been lost, including the statements from, and polygraph test results of, Todd, Olson,

and Michaels. With no new leads, or forensic evidence, the Sheriff's Office decided to question Todd again. On September 23, 2003, BCA agents Ken McDonald and Dennis Fier approached Todd at the end of his shift at work and brought him to the Hutchinson Police Department where they interrogated him for five hours. Todd, by his own admission an extremely anxious person, denied recalling much about the events that occurred twenty-four years earlier on August 10-11, 1979.

26. The agents continued to press him, however, even though he said he was scared almost fifty times. They lied to Todd, telling him that blood and hair had been found on the baseball bat taken from his car and that an eyewitness saw him on County Road 12 at 4:30 a.m.

27. Todd cried throughout the interrogation and contradicted himself many times. The story that eventually emerged was that Olson, Todd, and Michaels were driving down the road and saw Hammill. Todd, who was driving, pulled-over and stayed in the car while Olson and Michaels got out to talk to Hammill. Todd said that he saw Olson give Hammill a little push. He offered guesses that were obviously false, telling agents, for example, that he had vomited and Olson had urinated on the side of County Road 12, even though the investigators who had thoroughly processed the scene in 1979 had found neither vomit nor urine in the area. Todd's statement bore all the hallmarks of a coerced false confession.

28. Todd's statement—the only new “evidence” gleaned from the cold case investigation—had a cascading effect, as it directly led to the change in Hammill's death certificate. Because the original pathologist and coroner were dead, the Sheriff's Office asked the then-current Wright County Medical Examiner, Defendant Amatuzio, to review the original autopsy and death certificate and some unspecified “new evidence.” Two and a half years later, after several promptings by Agent McDonald, including a meeting at which an exasperated Agent McDonald opened a three-ring binder and pointed to the typed statement of Dale Todd saying “here [is the new evidence]” you requested, Defendant Amatuzio filed an amended death certificate changing the manner of death from “undetermined” to “homicide.”

29. Defendant Amatuzio did not change the death certificate because new forensic evidence had been found; nor did she change the death certificate because the science of forensic pathology had changed in the intervening quarter century. Rather, Defendant Amatuzio changed the death certificate because Agent McDonald told her investigators had found a credible eyewitness to the murder. The sole basis for McDonald's assertion was Todd's (coerced) confession. Defendant Amatuzio felt pressured by law enforcement to change Hammill's death certificate. She did not attempt to assess the credibility of Todd's confession and law enforcement provided no details of the circumstances under which the confession was extracted.

30. Medical examiners are engaged in a scientific discipline in which the opinions regarding cause of death must be related to findings in the examination, specifically in the case of forensic pathology in the autopsy. Developing an opinion based solely on what someone heard or said constitutes conduct that falls below the standard of care.

31. On November 4, 2005, twenty-six years after Hammill's death, a Wright County grand jury indicted Todd, Michaels, and Olson on various charges including first-degree murder. Todd pleaded guilty to "aiding an offender" in exchange for his testimony against Michaels and Olson. Michaels and Olson maintained their innocence and went to trial.

### **III. RON MICHAELS' ACQUITTAL**

32. Michaels went to trial in November 2006. Todd, the state's star witness, initially testified consistent with his 2003 statement to police on direct and cross-examination. But Todd's testimony in Michaels' trial ended with a dramatic, conviction-averting twist. Todd suddenly changed his story and said, "I didn't do this," and "We didn't do this." When the prosecutor asked Todd why he had told the police that he had been involved in Hammill's murder, he testified, "I didn't want to go to jail for something I didn't do." Todd testified that the "last part" of his statement to agents in 2003 was a lie and that he was "being honest" in his testimony. He further testified: "What I am saying is that nobody wanted to believe me. . . . They kept

hounding me and hounding me and [sic] what they wanted me to say.” Todd explained that he did not leave the party with Michaels and Olson as he had previously testified. He stated, “I can’t do this anymore . . . I can’t do it no more.”

33. On November 11, 2006, the jury acquitted Michaels of all charges.

34. In response, the state retracted its agreement not to seek prison time for Todd in return for his cooperation at Michaels’ trial. Todd received a three-year prison sentence.

#### **IV. TODD’S STATEMENTS AFTER MICHAELS’ TRIAL**

35. Immediately after Michaels’ trial, Todd told a Wright County Jail Nurse about his testimony earlier that day. He told the nurse that he had planned to lie and testify that Olson and Michaels were guilty when they were not so he could get a “good deal,” but changed his mind because he “had to tell the truth.”

36. Seven months later, on June 7, 2007, Todd—now in prison at Rush City—spoke with defense investigator Jill Nitke. He told Nitke that Olson was an innocent man, who should not be in prison. He told her he was being “bullied” by law enforcement and did not want to go through another trial.

37. On August 2, 2007, a week before Olson’s trial, Todd met with Michaels’ civil attorney Fred Goetz and his investigator, Marcus Grundmanis. He

told them he was not involved in, and had no knowledge about, Hammill's death, but had confessed because he was pressured to do so by law enforcement.

38. On August 13, 2007, on the eve of testifying at Olson's trial, Todd told fellow Wright County Jail inmate, Chris Politano, that officers were pressuring him to testify against Olson, despite the fact Olson was innocent. That night, Sheriff Hagerty, accompanied by Todd's parents, visited Todd at the jail. Todd said he wanted to "plead the Fifth" but, he told Politano, the officer said he would get six more months or his plea bargain could get pulled and he could be charged with murder if he did not cooperate. Todd testified the next day.

## **V. TERRY OLSON'S TRIAL**

39. On August 10, 2007, Terry Olson stood trial for the alleged murder of Jeffrey Hammill. Dale Todd was the state's key witness.

40. On August 10, Defendant Amatuzio testified that Hammill's death was a homicide. After detailing her credentials, including the hundreds of autopsies she had performed, Defendant Amatuzio explained that a hospital pathologist (like Dr. Bozanich, who performed the autopsy on Jeffrey Hammill in 1979) did not have specialized training in conducting autopsies that a forensic pathologist like herself had. She testified that today, Hammill's autopsy would be performed by a forensic pathologist. Defendant Amatuzio was

damning with faint praise for Dr. Bozanich, implying that current forensic knowledge was superior:

Q: . . . in your opinion nevertheless . . . the autopsy report was a good autopsy report?

A: It was a very good autopsy report for a hospital pathologist practicing in 1979.

41. After eliciting the fact that Defendant Amatuzio had reviewed the autopsy report and the coroner's observation of the evidence from the scene, prosecutors then elicited testimony that concealed the true reason for Defendant Amatuzio's change to the manner of death, implying instead that it was based upon forensic science rather than anecdotal evidence:

Q: And so you changed it to—from undetermined to homicide, is that correct?

A: That's correct.

Q: And is that based upon your review?

A: That's based upon my review of the evidence, yes

42. Given that the main issue at Olson's trial was whether Hammill's death was an accident or homicide, Defendant Amatuzio's testimony that Hammill's death was a homicide was a direct and proximate cause of Olson's subsequent conviction and related damages.

43. Defendant Amatuzio admitted during Olson's post-conviction proceedings, in an affidavit dated January 18, 2012, and at a subsequent evidentiary

hearing in November 2013, that the sole reason she changed the manner of death from undetermined to homicide was Dale Todd's 2003 statement to police. She further admitted that, if she had known the coercive circumstances under which Todd's statement were made, she would not have changed Hammill's death determination. Defendant Amatuzio's January 18, 2012 affidavit was the first time Olson discovered Defendant Amatuzio's wrongful and negligent actions.

44. At no time during her trial testimony did Defendant Amatuzio clarify that the sole reason she changed the manner of death from undetermined to homicide was Dale Todd's 2003 coerced false statement to police or that, absent that statement, she would not have changed Hammill's death determination.

45. On August 14, with Sheriff Hagerty sitting across from him at the prosecution's table, Todd testified that he, Olson, and Michaels were involved in Hammill's death.

46. The parties were aware that Todd might invoke his Fifth Amendment rights when called to testify at Olson's trial, but the trial court instructed Todd that because he pled guilty to a lesser charge in connection with Hammill's death and had been sentenced, he was "legally obligated to answer any questions" the court directed him to answer. The trial court further instructed Todd that failure to do so could result in Todd being held in contempt and subjected to a maximum penalty of six months incarceration.



47. However, even in this testimony, which Todd fought to avoid, Todd was trying to appease the prosecution without truly implicating Olson. Even then, Todd's testimony conflicted with physical evidence from the scene. Specifically, Todd testified he saw Olson shove Hammill, then walk to the front of the car and urinate; Olson then got back into the car to talk to Todd, while Michaels stayed outside with Hammill. When Michaels returned to the car, Todd testified, he said that Hammill wouldn't be needing a ride anywhere.

48. The jury never heard evidence of Todd's exonerating statements to the Wright County Jail Nurse, Jill Nitke, Marcus Grudmanis, or Chris Politano. Though the jury heard reference to Todd's recantation at Michaels' trial, that evidence was offered only to impeach Todd, not as substantive evidence of Olson's innocence.

49. The state also introduced the testimony of six jailhouse informants, all in custody on serious federal felony charges. Though each claimed Olson had admitted involvement in Hammill's death, they provided inconsistent accounts of Olson's alleged confessions, many of which contradicted known facts: Donald Myers claimed Olson confessed to beating up Hammill, and, once Hammill died, to cutting off his genitals, a "fact" which was demonstrably untrue. Frank Penny said Olson told him he saw Hammill walking along the roadway and forced him into a car, drove to Olson's sister's home and "did him in." Jomari Alexander claimed Olson told him that he was in the car with Todd while

another man was doing something in the trunk to Hammill. Kiron Williams said he overheard Olson telling another inmate, Kent Jones, that he had “pounded” Hammill a few times but that Michaels had “pounded” him the most. Henry Jones claimed Olson said he had beaten a dude in 1979 and gotten away with murder. David Ehrlich said he overheard Olson confessing to Kent Jones that Todd had gotten Michaels off and would do the same for him..

50. The six inmates were contradicted by four other inmate witnesses. Kent Jones testified—contrary to Williams’ and Erlich’s testimony—that Olson never confessed to Hammill’s murder but rather had always asserted his innocence. Dieter Cafferty testified Williams was actively seeking information against Olson for authorities; he never heard Olson confess to the Hammill murder. Lyle Paton testified Williams admitted the information he had provided to law enforcement about Olson was a lie. Randall Whitefeather testified that after Michaels’ acquittal, Ehrlich and Williams decided to gather information against Olson in order to provide it to law enforcement; that Ehrlich and Williams spent a lot of time together; that Williams had asked him about Olson’s case, but Whitefeather had refused to talk about it; and that Olson’s case was frequently in the newspaper where many inmates read about it. Whitefeather testified Olson always maintained his innocence. Moreover, Whitefeather testified that newspaper and television news accounts of the trial were readily available to the

inmates, providing them the details necessary to fabricate the alleged confessions by Olson.

51. On August 20, 2007, the jury convicted Olson of second- and third-degree murder, but acquitted him on all other charges, including two counts of first-degree murder.

52. On September 11, 2007, Olson's trial judge received a letter from Todd, stating: "We were innocent of the charges. I say things because I was afraid to go to jail for life for something we did not do."

53. The trial court provided the prosecution and defense counsel with the letter, stating that because the letter was "ex-parte communication[] from a non-party" the court could not "ethically read, review, or receive" the letter.

54. Dale Todd, back at Rush City, refused to speak with Olson's attorneys, who did nothing further with the information.

## **VI. TERRY OLSON'S ILLEGAL SENTENCE**

55. On October 12, 2007, the Department of Corrections filed its pre-sentence investigation (PSI) report. The PSI provided two sentencing options. First, Olson could be sentenced under the 2007 Sentencing Guidelines to a presumptive sentence of between 261 months and 367 months imprisonment. Second, Olson could be sentenced based on the 1979 parole matrix to an indeterminate term of zero to 40 years imprisonment with a target release date for parole at 86

months. The 1979 parole matrix lists Olson's conviction offense as a severity level eight with zero risk factors at the time of the offense.

56. The state argued to impose a sentence of between 261 months and 367 months imprisonment. Olson argued that the district court should impose an indeterminate sentence in conformity with the 1979 parole matrix. Data from the Department of Corrections indicated that of the six offenders released for the same second-degree murder offense in 1978, the offenders served between 85 months and 145 months imprisonment.

57. The district court imposed an indeterminate sentence of zero to 40 years imprisonment with eligibility for parole and a target release date of 86 months. Olson was given credit for the two years he was incarcerated during the pendency of his criminal proceedings.

58. On March 10, 2010, the Department of Corrections—despite their data—set Olson's target release date at 204 months instead of 86 months.

59. The DOC and Executive Officer of Hearings and Release, Jeffrey L. Peterson did not give a rationale for this substantial departure from its Parole Matrix guidelines and prior procedure. The letter from Mr. Peterson merely stated that the Commission of Corrections:

followed DOC Policy 203.065, "Review of Pre-Guidelines [1980] Indeterminate-Sentenced Offenders" and took into consideration the Parole Decision-Making Guidelines, Minnesota Corrections Board, July 1979, and the sentencing term embodied in the Sentencing Guidelines promulgated by the Minnesota Sentencing Guidelines Commission. According to policy, the Commissioner, also, reviewed and considered [Olson's] commitment record at time of sentencing.

60. According to Policy 203.065, effective date August 1, 2006, the Commissioner should review several factors five years prior to sentence expiration to determine eligibility for programming and the potential for release prior to expiration. The Factors for eligibility for programming and release are:

- a) offender's overall facility adjustment;
- b) circumstance(s) and severity of commitment offense;
- c) circumstance(s) and severity of offender's prior criminal record;
- d) available programming at the facility;
- e) projected amenability to community supervision

61. Mr. Peterson's letter shows that the Commissioner improperly considered Olson's record of convictions, at the time of sentencing, rather than his record at the time of the offense. This is further shown by Olson's first annual review ordered on October 18, 2007,

and completed November 11, 2008. This initial assessment review shows that Olson was given six points for prior criminal history. At the time Hammill died, Olson had no criminal history, but only minor juvenile offenses from 1976-77.

62. Other than the general guidelines referred to by Mr. Peterson, and Olson's criminal history at the time of sentencing, the DOC did not provide any rationale for the setting of Olson's target release date.

63. Olson's 204-month target release date for parole was arbitrarily and capriciously imposed based upon consideration of inappropriate factors, is inconsistent with the Department of Corrections 1979 parole matrix, and violated Olson's substantive due process rights.

64. To effectuate consistency in assigning target parole dates from offender to offender, the DOC created the Parole Release Date Matrix, which became effective on July 1, 1977. For an offender convicted of second-degree murder (a severity level eight offense) if the offender had a zero risk level at the time of the offense, the target release date for parole is 86 months.

65. Consistent with the parole matrix, in 1978, six offenders convicted of second-degree murder were paroled. Like Olson, these offenders were all sentenced to indeterminate prison terms of zero to 40 years imprisonment, but served between 85 months and 145 months imprisonment before they were paroled.

66. In July 1979, approximately one-month before the charged offense date in Olson's case, the Minnesota Corrections Board issued its parole-decision making guidelines, which re-affirmed its commitment to assigning similar offenders similar target release dates for parole. Specifically, the guidelines provide:

Assigning a target release date:

After implementation of these guidelines, each inmate will be assigned a target release date, either at the inmate's admission hearing or at the inmate's next annual review. It will be the policy of the Minnesota Correction Board that similar inmates committing similar offenses and with similar institutional behavior ought to serve similar periods of incarceration prior to parole.

67. The 1977 parole matrix was adopted as part of the 1979 parole-decision making guidelines. Accordingly, Olson's target release date for parole under the matrix and these guidelines was 86 months.

68. In 2010, however, Olson was assigned a target release date for parole at 204 months. This date is not only inconsistent and contrary to the parole matrix in effect at the time of Olson's conviction offense, but it is also inconsistent with and contrary to the DOC's policy of assigning similarly situated offenders with similar target release dates. In fact Olson's 204-month date is longer—by between 140% and 240%—than any other offender convicted of the same offense in 1978, which ranged from 85 months to 145 months. The

204-month date represents a date applicable to an offender whose risk level was more than five on the parole matrix, while Olson had a risk level of zero on the matrix.

69. Undoubtedly, had the state charged and prosecuted Olson in 1979, he would have been assigned a target release date for parole at 86 months. Olson was treated unfairly differently by the DOC (contrary to the Department's own information), simply because the state brought him to trial in 2007.

70. Because Olson was treated in an unfairly and prejudicially different manner than all other similarly situated offenders, his sentence violated the Equal Protection Clause of the Fourteenth Amendment.

71. Further, because Olson's 204-month target release date for parole was arbitrarily and capriciously imposed, was not predictable, and was disproportionate to others similarly situated who were sentenced under the 1979 matrix, it constituted cruel and unusual punishment under the Eighth Amendment.

72. In addition, the state may not deny parole for arbitrary or impermissible reasons. Here, the DOC set Olson's target release date at 240% of the presumptive release date by either relying on conduct that occurred after the alleged crime and/or by applying a severity level analysis that was in effect in 2007 rather than—as required—under the 1979 matrix. This constituted a violation of Olson's due process rights under the Fourteenth Amendment.



73. Finally, because the DOC applied a 2007 sentencing grid and/or factors that arose long after the alleged offense, Olson’s sentence also violated the Constitution’s stricture against *ex post facto* laws. See U.S. Const. art. I, §§ 9, 10. The “retrospective application of an amended sentencing guideline that makes the sentence more onerous than if the court had applied the guideline in effect at the time the crime was committed violates the Ex Post Facto Clause.” *United States v. Levi*, 2 F.3d 842, 844-45 (8th Cir. 1993). A “retroactively applied parole . . . regulation or guideline violates” this prohibition “if it ‘creates a significant risk of prolonging [an inmate’s] incarceration.’” *Fletcher v. Reilly (Fletcher III)*, 433 F. 3d 867, 877 (D.C. Cir. 2006). See also *Garner v. Jones*, 529 U.S. 244, 253 (2000); *Peugh v. United States*, 133 S. Ct. 2072 (2013).

## **VII. TERRY OLSON’S PETITION FOR WRIT OF HABEAS CORPUS AND SUBSEQUENT RELEASE**

74. After a direct appeal and appeals of two petitions for post-conviction relief, Olson filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, on December 11, 2015, seeking his immediate release. The Petition was dismissed without prejudice on July 15, 2016, on the grounds it was a mixed petition, presenting both exhausted and unexhausted claims. The Court granted Olson a period of thirty days to file an amended petition and indicated that if Olson filed an amended petition with the unexhausted claims

deleted, it would consider the viability of Olson's "gateway innocence" claim and his Equal Protection claim.

75. Before Olson had a chance to file his amended petition, Wright County officials approached Olson with the unsolicited offer to immediately release Olson from prison without any post-release supervision, as long as he agreed to release Wright County Officials from any and all wrongdoing, and forego any future lawsuits against Wright County and its agents.

76. Agreeing to Wright County's offer was Olson's only option for immediate release from state custody, which he had already endured as an innocent man for over eleven years. Olson's agreement to release Wright County from liability was thus far from voluntary; he was forced to sign the release under duress in order to get out of prison. Given the circumstances under which the Release of Claims agreement was entered into, the release of liability lacks the requisite voluntariness to be enforceable.

77. It is also evident that Wright County approached Olson with its unsolicited offer in an attempt to avoid Olson's valid civil rights lawsuit. Furthermore, precluding Olson from pursuing such claims adversely affects the public interest by protecting the wrongdoing of state officials at the expense of an innocent man in prison.

78. Neither Defendant Amatuzio (an independent medical examiner), nor Defendants Roy or Fabian (the commissioners of the Minnesota Department of Corrections during the relevant time period) qualify as

parties expressly or implicitly released from liability in the Release of Claims. Therefore, the agreement does not preclude the instant suit. But even if Defendants were encompassed by the release, the Release of Claims still would not preclude this lawsuit, because the agreement is invalid and unenforceable.

79. Olson was released from prison on September 13, 2016.

80. As a result of Defendants' acts which are the subject of this complaint, Olson has suffered past and future lost wages, emotional pain, psychological suffering, humiliation, embarrassment, and fear.

## **CAUSES OF ACTION**

### **COUNT ONE**

#### **42 U.S.C. § 1983 – Substantive Due Process (against Defendant Amatuzio)**

81. Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

82. Defendant Amatuzio, acting under color of state law, willfully and maliciously engaged in conduct which violated Olson's right to substantive due process under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

83. Defendant Amatuzio exercised power possessed by virtue of state law and made possible only because she was clothed with the authority of state law

because of her position as Wright County Medical Examiner.

84. Defendant Amatuzio's actions were neither objectively legally reasonable, nor taken with subjective good faith, and those actions violated Olson's clearly established constitutional rights.

85. Defendant Amatuzio misused this official power granted to her by the state in her performance of her duties as Wright County Medical Examiner, thereby causing the harm to Olson in violation of his Fourteenth Amendment right to substantive due process.

**COUNT TWO**  
**Negligence**  
**(against Defendant Amatuzio)**

86. Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

87. By affirmatively changing the earlier findings of a prior forensic pathologist, testifying in the capacity of a board certified physician and expert, and presenting her conclusions as science-based fact, Defendant Amatuzio had a duty to Plaintiff to provide an unbiased evaluation of physical evidence, according to the standard of care recognized by the medical and medical examiner communities, independent from the influence of law enforcement and prosecutors.

88. Defendant Amatuzio breached this duty by relying solely on Dale Todd's testimony in changing the manner of Hammill's death from "undetermined" to "homicide," any by failing to conduct an objectively reasonable investigation as to the manner of Hammill's death.

89. As a direct and proximate result of Defendant Amatuzio's negligent conduct, Plaintiff was wrongfully indicted and did not receive a fair trial, and thereby suffered injuries and damages described herein.

### **COUNT THREE**

#### **42 U.S.C. § 1983 – Substantive Due Process (against Defendants Roy and Fabian)**

90. Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

91. Defendants Roy and Fabian, acting under color of state law, willfully and maliciously engaged in conduct which violated Olson's right to substantive due process under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

92. By imposing and maintaining a sentence so far exceeding the bounds of what could be considered objectively reasonable, Defendant Roy's and Defendant Fabian's conduct is neither objectively legally reasonable, nor was it taken with subjective good faith.

93. By actually keeping Olson incarcerated for this unreasonably long period, despite being notified on several occasions that Olson's sentence was illegal, Defendant Roy's and Defendant Fabian's conduct constituted a continuous and cumulative violation, thereby tolling the statute of limitations until Olson was released from custody.

94. Defendants Roy and Fabian misused this official power granted to them by the state in their performance of their duties as DOC Commissioners, thereby causing the harm to Olson in violation of his Fourteenth Amendment right to substantive due process.

95. Olson's illegal sentence and incarceration by Defendants Roy and Fabian was therefore unauthorized by the United States Constitution and violated Olson's right to substantive due process under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

#### **COUNT FOUR**

##### **42 U.S.C. § 1983 – Equal Protection (against Defendants Roy and Fabian)**

96. Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

97. Defendants Roy and Fabian, acting under color of state law, willfully and maliciously engaged in conduct which violated Olson's right to equal

protection of the law under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

98. By imposing and maintaining a sentence so far exceeding the bounds of what could be considered objectively reasonable, Defendant Roy's and Defendant Fabian's conduct is neither objectively legally reasonable, nor was it taken with subjective good faith.

99. By actually keeping Olson incarcerated for this unreasonably long period, despite being notified on several occasions that Olson's sentence was illegal, Defendant Roy's and Defendant Fabian's conduct constituted a continuous and cumulative violation, thereby tolling the statute of limitations until Olson was released from custody.

100. Defendants Roy and Fabian misused this official power granted to them by the state in their performance of their duties as DOC Commissioners, thereby causing the harm to Olson in violation of his Fourteenth Amendment right to equal protection under the law.

101. The illegal sentence and incarceration imposed by Defendants Roy and Fabian was therefore unauthorized by the United States Constitution and violated Olson's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

**COUNT FIVE**  
**42 U.S.C. § 1983 – Eighth Amendment**  
**(against Defendants Roy and Fabian)**

102. Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

103. Defendants Roy and Fabian, acting under color of state law, willfully and maliciously engaged in conduct which violated Olson's rights under the Eighth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

104. By imposing and maintaining a sentence so far exceeding the bounds of what could be considered objectively reasonable, Defendant Roy's and Defendant Fabian's conduct is neither objectively legally reasonable, nor was it taken with subjective good faith.

105. By actually keeping Olson incarcerated for this unreasonably long period, despite being notified on several occasions that Olson's sentence was illegal, Defendant Roy's and Defendant Fabian's conduct constituted a continuous and cumulative violation, thereby tolling the statute of limitations until Olson was released from custody.

106. Defendants Roy and Fabian misused this official power granted to them by the state in their performance of their duties as DOC Commissioners, thereby causing the harm to Olson in violation of his Eighth Amendment right to be free from cruel and unusual punishment.



107. The illegal sentence and incarceration imposed by Defendants Roy and Fabian was therefore unauthorized by the United States Constitution and violated Olson's right to right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

**COUNT SIX**  
**42 U.S.C. § 1983 – Prohibition**  
**Against *Ex Post Facto* Laws**  
**(against Defendants Roy and Fabian)**

108. Plaintiff incorporates all paragraphs of this Complaint as if fully set forth under this Count and further alleges that:

109. Defendants Roy and Fabian, acting under color of state law, willfully and maliciously engaged in conduct which violated Olson's rights under the Ex Post Facto Clause in Article 1 §10, Clause 1, of the United States Constitution, and 42 U.S.C. § 1983.

110. By imposing and maintaining a sentence so far exceeding the bounds of what could be considered objectively reasonable, Defendant Roy's and Defendant Fabian's conduct is neither objectively legally reasonable, nor was it taken with subjective good faith.

111. By actually keeping Olson incarcerated for this unreasonably long period, despite being notified on several occasions that Olson's sentence was illegal, Defendant Roy's and Defendant Fabian's conduct constituted a continuous and cumulative violation,

thereby tolling the statute of limitations until Olson was released from custody.

112. Defendants Roy and Fabian misused this official power granted to them by the state in their performance of their duties as DOC Commissioners, thereby causing the harm to Olson in violation of the prohibition against *ex post facto* laws under Article 1 §10, Clause 1, of the United States Constitution.

113. The illegal sentence and incarceration imposed by Defendants Roy and Fabian was therefore unauthorized by the United States Constitution and violated Olson's rights under the Ex Post Facto Clause in Article 1 §10, Clause 1, of the United States Constitution, and 42 U.S.C. § 1983.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiff requests the following relief from this Court:

1. Compensatory damages against each Defendant, jointly and severally, for past and future lost wages, past and future pain and suffering, and deprivation of liberty incurred as a result of the Defendants' conduct;
2. Reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and
3. Such further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

The Plaintiff requests a trial by jury on all issues triable by a jury.

Respectfully Submitted,

**MASLON LLP**

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