No. 19-1380

IN THE
SUPREME COURT OF THE UNITED STATES

Terry Olson,

Petitioner,

v.

Janis Amatuzio, et al.,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES AND SESSION LAWS

FEDERAL RULES

OTHER MATERIALS

BRIEF IN OPPOSITION

Respondents Paul Schnell, Tom Roy, and Joan Fabian respectfully request that the Court deny Petitioner Terry Olson's petition for a writ of certiorari seeking review of the panel decision by the U.S. Court of Appeals for the Eighth Circuit. The court's unpublished decision is at *Olson v. Amatuzio*, 799 F. App'x 433 (8th Cir. 2012). The district court's unpublished decision is at *Olson v. Amatuzio*, No. 18-cv-124 (DWF/TNL), 2018 WL 4087944 (D. Minn. Aug. 27, 2018). These opinions are reproduced in Olson's appendix. (App. 1a-25a.)

PARTIES TO THE PROCEEDINGS

The proper state respondents are Schnell, in his official capacity only, and Roy and Fabian, in their individual capacities only. Schnell is the current Commissioner of the Minnesota Department of Corrections, and Roy and Fabian are his predecessors. The other respondent, who is not a current or former state employee, is retired medical examiner Dr. Janis Amatuzio.

STATEMENT OF THE CASE

This case addresses the ability of a plaintiff who believes he should have been paroled on a particular date to seek relief under 42 U.S.C. § 1983 (2018) for allegedly unlawful incarceration without first establishing in a habeas or other proceeding that his incarceration was invalid, as required by *Heck v. Humphrey*, 512 U.S. 477 (1994).

Olson was convicted of second-degree murder in 2007 for an offense committed in 1979. *State v. Olson*, No. A08-0084, 2009 WL 2147262, at *1 (Minn. Ct. App. July 21, 2009). In the early 1990s, the Minnesota Legislature had changed the state's criminal sentencing laws from providing indeterminate sentences to imposing determinate sentences. In 1979, state courts imposed indeterminate prison sentences, meaning that the defendant received a maximum term of imprisonment but the parole authority could potentially parole the defendant earlier. Minn.

Stat. § 609.12, subds. 1, 3 (1978). Minnesota law now generally requires courts to impose determinate prison sentences, meaning that those sentenced to prison presumptively serve two-thirds of the sentence in prison and one-third on supervised release in the community, although the term of imprisonment may be lengthened and the supervised-release term commensurately shortened for disciplinary violations in prison. *E.g.*, Minn. Stat. §§ 244.05, subd. 1b, 244.101 (2018).

After a jury found Olson guilty of second-degree murder, Olson asked the state district court to sentence him under the 1979 sentencing law rather than the 2007 law. *Olson v. State*, No. A11-696, 2012 WL 254485, at *1 (Minn. Ct. App. Jan. 30, 2012). Over the prosecutor's objection, the court honored Olson's request, imposing an indeterminate sentence of up to forty years in prison and committing him to the Minnesota Commissioner of Corrections' custody. Minn. Stat. § 609.19 (1978); *Olson*, 2012 WL 254485, at *1.

Olson apparently assumed that the commissioner would grant him parole early into his prison sentence. But a prison sentence in 1979 was subject to a wholly discretionary parole system, in which the parole authority could grant an inmate parole based on its view of the inmate's rehabilitation and amenability to parole and the public interest. *See* Minn. Stat. §§ 243.05, 609.12, subd. 1 (1978) (giving Minnesota Corrections Board discretion to parole); 1983 Minn. Laws ch. 274, § 4, at 1172-73 (transferring parole authority from corrections board to commissioner).

Contrary to Olson's assertion that he indisputably would have been paroled after spending 86 months in prison if he had been convicted in 1979, the record instead establishes no such guarantee ever existed. (Pet. 4). The 1979 parole guidelines contained a matrix grid that outlined possible parole dates based on offense severity and the inmate's risk of failure on

parole. The matrix included a box for second-degree murder that identified 86 months as one possible outcome. Minn. Corr. Bd., *Parole Decision-Making Guidelines* § 7-105.09 (July 1979). But the guidelines expressly reserved the parole authority's right not to follow the matrix in any case and stated that departures should occur in cases involving great bodily harm. *Id.* §§ 7-104.2.b, -104.5.j. The parole authority could set the target release date for parole to reflect whatever length of time it deemed to be most appropriate for the individual. *Id.* § 7-104.2.b; *see also id.* §§ 7-104.1-.2.b. (stating parole authority's goals and reserving right to consider any factors related to inmate's risk of failure, the severity of his crime of commitment, his conduct while incarcerated, and any other aggravating or mitigating factors).

In setting Olson's target release date for parole, the commissioner carefully reviewed Olson's crime of commitment and noted several aggravating factors, including that Olson severely beat the victim and left him to die on the side of the road, that Olson knew the victim and contributed to his vulnerable state, and that Olson had made homophobic remarks about the victim. Additionally, before entering prison Olson accumulated a significant and troubling criminal history that raised concerns about his amenability to parole and the risk to the public. He had multiple driving-while-intoxicated convictions, including one offense that caused another's death, and he had convictions for stalking, engaging in disorderly conduct, and violating an order for protection. Olson also failed to satisfy a directive to participate in chemical-dependency treatment while incarcerated. Based on all of this information, the commissioner set a target release date for parole at 204 months.

Olson challenged his conviction, his sentence, and the commissioner's administration of his sentence in various proceedings. He first unsuccessfully appealed his conviction. *Olson*, 2009 WL 2147262, at *3. He then sought postconviction relief, seeking resentencing under

Minnesota's 1980 sentencing guidelines.[1] *Olson*, 2012 WL 254485, at *1. Within his postconviction petition to his original state sentencing court—and instead of in a civil state habeas corpus proceeding to which the commissioner would have been a party—Olson also challenged the commissioner's administration of his sentence, arguing that a target parole date beyond 86 months violated his due-process and equal-protection rights. *Id.* at *2-3; *see also State v. Schnagl*, 859 N.W.2d 297, 302-03 (Minn. 2015) (holding that proper forum for challenging administration of sentence is proceeding where commissioner is party). On appeal, he further argued that the commissioner subjected him to an ex post facto law. *Id.* at *4. The state court of appeals affirmed the denial of his postconviction petition. *Id.* at *1. The court held that Olson received the sentence he requested, that he had no right to a particular parole date, that alleged data about other inmates' parole dates did not establish an equal-protection violation, and that he failed to preserve his ex post facto claim. *Id.* at *2-4. In a second postconviction petition, Olson again unsuccessfully challenged his conviction. *Olson v. State*, No. A14-1632, 2015 WL 4877691, at *2 (Minn. Ct. App. Aug. 17, 2015).

In 2015, Olson sought federal habeas relief. He again challenged his conviction and parole date, and for the first time did so in a proceeding to which the commissioner was a party. The magistrate judge recommended dismissing the petition without prejudice because most claims were either unexhausted or procedurally defaulted.

[1] While still using a parole system, Minnesota had created a commission that developed sentencing guidelines to take effect in 1980. *E.g.*, Minn. Stat. §§ 244.08-.09 (1978). The presumptive guidelines sentence under 1980 law would have been 116 months. *Olson*, 2012 WL 254485, at *1 (noting 1980 guidelines and stating that prosecutor in Olson's case had sought 367 months under 2007 sentencing law).

The federal habeas case ultimately ended when the county attorney's office, as the prosecuting authority, agreed to resentencing.[2] (App. 31a-33a.) That office and Olson entered a stipulation reflecting that Olson was sentenced as he wanted under the 1979 law, that he now wanted to be resentenced under the 1980 sentencing guidelines, and that the prosecutor consented to resentencing. (*Id.*) They expressly denied any fault with the original sentence and did not mention Olson's parole date or the commissioner's administration of his sentence. (*Id.* at 32a.) Based on the stipulation, the court issued a writ remanding the case to the state court with the expectation that it would resentence Olson under the 1980 sentencing guidelines. (*Id.* at 27a-28a.)

In September 2016, the state district court resentenced Olson to 121 months in prison, which amounted to the time he had served. (*Id.* at 29a.) Because Olson's sentence expired, the commissioner released him. (*Id.*) Olson then stipulated to dismissing all of his habeas claims, including those against the commissioner, with prejudice. (*Id.*) The federal court vacated the writ and dismissed the entire case with prejudice. (*Id.* at 26a.)

In 2018, Olson began the current section 1983 litigation, alleging that the then-current and former commissioners, Roy and Fabian, violated his constitutional rights by setting his parole date later than he hoped. (*Id.* at 34a-67a.) He also sued the medical examiner who testified at his trial. (*Id.* at 37a.) Relevant to the commissioners, he alleged that they violated his

[2] Olson details an alleged letter he received from the prosecutor that stated Olson had served more time in prison than he should have. (Pet. 5.) This letter is not in the record. Further, in Minnesota, neither a prosecutor nor a sentencing court has authority over parole; parole is exclusively the commissioner's province. Minn. Stat. § 243.05, subd. 3 (vesting commissioner with parole authority); *id.* § 388.051, subd. 1(c)(2018) (vesting authority to prosecute crimes in county attorneys). To the extent that the prosecutor had an opinion about Olson's parole date, it is irrelevant. Similarly, the prosecutor's motivation for agreeing to resentencing and resolving the claims related to the criminal proceeding is irrelevant to Olson's claims against the commissioners.

substantive-due-process and Eighth Amendment rights by not paroling him after 86 months and his equal-protection rights by allegedly treating him differently for his offense committed in 1979 than six people released on parole in 1978 for murder. (*Id.* at 56a, 61a-65a.) He further alleged that the commissioners applied an ex post facto law by assessing his actual risk to the public rather than the hypothetical risk that may have existed if he had entered custody in 1979. (*Id.* at 65a-66a.) Olson sought damages. (*Id.* at 66a.)

The district court dismissed Olson's complaint, holding that *Heck* barred his claims because granting any relief against the commissioners would require a finding that Olson had been unlawfully incarcerated past his desired parole date, and Olson had not first established unlawful incarceration in a habeas or other proceeding as required by *Heck*. (Pet. 19a.) The court—through the same judge who presided over the habeas proceedings—held that its first habeas order did not find or imply that the commissioners unlawfully incarcerated Olson. (*Id.* at 19a-20a & n.3.) The court did not reach the commissioners' numerous alternative grounds for dismissal, which included sovereign immunity, issue and claim preclusion, qualified immunity, and failure to state a claim. While Olson's appeal was pending, Schnell replaced Roy as the commissioner, resulting in the automatic substitution of Schnell for Roy, in his official capacity. Fed. R. App. P. 43(c)(2).

A panel of the Eighth Circuit affirmed, emphasizing that the writ that procedurally allowed the state court to resentence Olson was vacated—"as if had never been written"—and that all of Olson's claims were dismissed with prejudice, including those related to his parole date. (App. 5a.) He therefore failed to satisfy *Heck*. The court applied its precedent and did not address Olson's arguments about non-binding cases from other circuits. While briefed, the court

did not reach the commissioners' alternative grounds for affirming. Olson did not seek en banc review.

REASONS FOR DENYING THE PETITION

No compelling reasons warrant review in this case. Sup. Ct. R. 10. Although a circuit split exists over whether *Heck* applies when habeas relief is unavailable, the circumstances of this case make it a poor vehicle for addressing that split. Resolving any circuit split will not aid Olson. Even the circuit cases that Olson favorably cites overlook *Heck* only when habeas relief was unavailable despite the plaintiff's diligence. In this case, Olson was responsible for the unavailability of habeas relief. Olson repeatedly and unsuccessfully raised his claims in various proceedings, then filed a federal habeas petition, and then voluntarily waived his claims. The procedural event he is trying to escape is not an inability to first pursue habeas relief, but the dismissal of his habeas claims with prejudice. Further, a *Heck* ruling in Olson's favor would not ultimately provide him any relief because his underlying claims lack merit based on this Court's well-established precedent.

Finally, in addition to this case being a poor vehicle for resolving any circuit split, review is unnecessary because the Eighth Circuit has properly applied *Heck*'s plain language.

I. RESOLVING ANY CIRCUIT SPLIT WILL NOT AID OLSON.

This case is a poor vehicle for resolving a circuit split over the applicability of *Heck* because, even if the Court were to overrule its precedent and create a new test that considers a plaintiff's diligence in seeking appropriate relief before applying *Heck*, Olson's claims would fail. Further, review is inappropriate because numerous alternative grounds supported the dismissal of Olson's complaint. *See* Stephen Shapiro et al., *Supreme Court Practice* § 4.4(e)-(f) (11th ed. 2019) (recognizing Court generally denies review when alternative grounds for

resolving case exist and when circuit conflict is irrelevant to ultimate outcome).

A. Olson Did Not Diligently Pursue Habeas Relief Against the Commissioners and His Federal Habeas Claims Were Dismissed with Prejudice.

Olson emphasizes that some circuit courts of appeals have not followed *Heck* when a section 1983 plaintiff can no longer pursue habeas relief. But even those courts have considered a plaintiff's diligence in seeking habeas relief. *See*, *e.g.*, *Guerrero v. Gates*, 442 F.3d 697, 704-05 (9th Cir. 2006) (affirming dismissal based on *Heck* because plaintiff did not timely pursue appropriate relief). And none of the cases Olson favorably cites involved a prior dismissal with prejudice. Because of these facts, even if the Court were to overrule *Heck* to adopt the new legal standard that Olson seeks, Olson would not benefit.

Olson was not diligent in pursuing a claim of unlawful incarceration based on the administration of his sentence. Olson claims that he should have been paroled several years earlier, and he spent years litigating his allegations. But at no point did he ever follow the proper avenue for challenging the legality of his incarceration based on his parole date: filing a state habeas petition against the commissioner pursuant to Minn. Stat. ch. 589. *See Schnagl*, 859 N.W.2d at 302-03 (recognizing that challenges to administration of sentence are not properly part of criminal or postconviction proceedings). He instead raised the issues in proceedings in which the commissioner would not be heard and the parole decision could not be properly reviewed.

Nonetheless, Olson's attempts were uniformly unsuccessful because his claims lacked merit. And he ultimately agreed to dismiss his federal habeas claims against the commissioner *with prejudice*. While Olson implies that his federal habeas claims against the commissioner were so strong they led to his release, the record contradicts him. When the prosecutor decided to resolve years of Olson challenging his conviction, the procedural posture of Olson's claims

against the commissioner was the magistrate judge's recommendation that all but one be dismissed on procedural grounds. At no time did the commissioner concede or imply his claims had any merit.

Similarly, Olson raises policy-based concerns about *Heck*. But none of the concerns he identifies apply to him. For example, Olson cites the difficulties that people with short sentences may face in first pursuing habeas relief. (Pet. 20.) Olson did not have a short sentence. The court sentenced him to up to forty years in prison and he was incarcerated for nine years before resentencing resulted in his release.

Olson's section 1983 complaint does not represent the claims of someone who had no reasonable opportunity to be heard before losing the opportunity to seek habeas relief; it represents someone attempting yet a third bite at the apple and trying to escape the adverse outcomes of his prior cases. Even if the Court concluded that *Heck* is not a bar when habeas relief is no longer available to a plaintiff who diligently sought to first properly invalidate his incarceration, Olson's claims would still fail both because they were previously dismissed with prejudice and because he was not diligent in raising them against a proper party in a proper forum.

B. A *Heck* Ruling in Olson's Favor Would Not Ultimately Provide Him Relief.

The case is also not an appropriate one for resolving a circuit split because a *Heck* ruling in Olson's favor would not ultimately secure him any relief. Shapiro et. al., *supra*, § 4.4(e)-(f). All of his claims are foreclosed by his prior cases and this Court's well-established precedent.

Res judicata, collateral estoppel, and the *Rooker-Feldman* doctrine prevent Olson from relitigating claims that have either been dismissed with prejudice or otherwise decided in a state court proceeding. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) (state court

judgment); *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (res judicata); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (collateral estoppel); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (state court judgment). Similarly, sovereign immunity indisputably bars Olson's claims against Schnell in his official capacity and qualified immunity bars his claims against Roy and Fabian in their individual capacities. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (providing that qualified immunity bars individual-capacity claims for damages unless defendant violated clearly established right); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (holding that sovereign immunity bars damages claim against state unless immunity has been abrogated or waived).

And, finally, Olson's claims lacked merit. The Court has long recognized that no fundamental right to parole exists. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7-8 (1979). Olson received a prison sentence of up to forty years and had no right to an earlier release under Minnesota's discretionary parole laws that applied to his court-imposed sentence. Nor did Olson allege a valid equal-protection violation, claiming only that six people were *released* in 1978 after serving between 85 and 145 months in prison for murder convictions. (Pet. 35a.) Even assuming the allegation is true, it established only a broad range of potential discretionary parole outcomes for people who committed offenses years before Olson did. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985) (recognizing equal-protection clause requires treating similarly situated people alike and distinctions need only satisfy rational state interest when difference does not implicate fundamental right or suspect class); *see also Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464-65 (1981) (holding that even if pardon board granted most applicants clemency, plaintiff was not constitutionally entitled to same relief); *Leis v. Flynt*,

439 U.S. 438, 444 n.5 (1979) (noting constitutional entitlement cannot "be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past"). Olson also failed to identify any ex post facto law applied to him. The punishment for his offense was up to forty years in prison and he did not allege he was held past forty years. *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (holding ex post facto clauses prohibits states from punishing acts that were not punishable when committed or increasing the prescribed punishment).

Because all of Olson's claims facially lack merit, regardless of whether *Heck* applies, the Court should deny his petition.

II. NO SPLIT IN AUTHORITY REQUIRES THE COURT TO REVISIT WHEN *HECK* APPLIES BECAUSE THE EIGHTH CIRCUIT HAS PROPERLY INTERPRETED *HECK*.

Olson asserts that this Court must clarify whether *Heck* applies when a section 1983 plaintiff cannot seek habeas relief to raise claims of unlawful incarceration. Review is unnecessary because *Heck* already answered this question and Eighth Circuit precedent is consistent with *Heck*.

If a section 1983 claim necessarily implies the invalidity of the fact or length of a person's incarceration, then the plaintiff must first establish invalid incarceration in another proceeding. *Heck*, 512 U.S. at 486-87. The plaintiff must do so by proving that the fact or length of his incarceration was reversed, expunged, declared invalid, or otherwise called into question by a federal writ of habeas corpus. *Id.* at 486-87, 489; *see also Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (applying *Heck* to incarceration resulting from executive action).

The *Heck* doctrine is commonly referred to as a "favorable-termination" rule because a plaintiff must first successfully establish unlawful incarceration in another proceeding before pursuing section 1983 relief. The Court concluded that this is necessary in part by analogizing to

malicious-prosecution claims. *Heck*, 512 U.S. at 484. The Court then expressly held that, in the context of a section 1983 claim, favorable termination requires the plaintiff to first prove that his confinement was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issue of a writ of habeas corpus." *Id.* at 489. The Court emphasized that it was not engrafting an exhaustion requirement onto section 1983 claims, but "rather deny[ing] the existence of the cause of action." *Id.* The Court expressly rejected any suggestion that the requirement was tied to a plaintiff's custody status. *Id.* at 490 n.10.

Consistent with *Heck*'s clear statement of the prerequisites for pursuing section 1983 claims based on unlawful incarceration, the Eighth Circuit has held that a plaintiff cannot pursue section 1983 claims based on unlawful incarceration without first establishing that the incarceration was reversed, expunged, declared invalid, or called into question by a writ of habeas corpus. *E.g.*, *Newmy v. Johnson*, 758 F.3d 1008, 1011-12 (8th Cir. 2014), *cert. denied* 574 U.S. 1047 (2014). *Heck* applies even when an offender can no longer seek habeas relief. *Id.*; *Marlowe v. Fabian*, 676 F.3d 743, 747 (8th Cir. 2012), *cert. denied*, 568 U.S. 1030 (2012); *Entzi v. Redmann*, 485 F.3d 998, 1002-03 (8th Cir. 2007), *cert. denied*, 552 U.S. 1285 (2008). The First, Third, Fifth, and Seventh Circuits have similarly applied *Heck*'s plain language to reach the same conclusion. *Savory v. Cannon*, 947 F.3d 409, 425 (7th Cir. 2020), *petition for cert. filed* (U.S. June 11, 2020) (No. 19-1360); *Williams v. Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006); *Randell v. Johnson*, 227 F.3d 300, 30102 (5th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); *Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998).

Olson correctly notes that not all circuits follow *Heck*'s plain language and some courts have relied on dicta in *Spencer v. Kenma*, 523 U.S. 1, 21 (1998) (Souter, J., concurring), to

permit section 1983 claims when habeas relief is no longer available to a plaintiff. The Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits consider the reason habeas relief is unavailable, assessing whether a plaintiff was diligent in pursuing proper relief before bringing a section 1983 action. *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010); *Wilson v. Johnson*, 535 F.3d 262, 267–68 (4th Cir.2008); *Powers v. Hamilton Cty. Pub. Defender Comm'n*, 501 F.3d 592, 601-02 (6th Cir. 2008); *Guerrero*, 442 F.3d at 704-05; *Harden v. Pataki*, 320 F.3d 1289, 1298–99 (11th Cir. 2003); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001). Plaintiffs who were not diligent in pursuing available remedies are still *Heck*-barred. *E.g.*, *Guerrero*, 442 F.3d at 705 (affirming dismissal based on *Heck* because plaintiff did not timely pursue appropriate relief).

These courts have not followed *Heck*. The *Spencer* dicta arose in a habeas case and represented speculation in a concurrence about the impact of the Court's mootness holding on the plaintiff's future claims. *Spencer*, 523 U.S. at 21 (Souter, J., concurring). Litigants cannot create new precedent to overrule prior decisions by cobbling together views that individual justices may have expressed in other opinions. *Agostini v. Felton*, 521 U.S. 203, 217 (1997). This Court's holding in *Heck* is clear and the Eighth Circuit has faithfully applied it.[3] The Court should deny Olson's petition.

[3] The district court and Eighth Circuit held that Olson did not satisfy *Heck*, and Olson does not raise this issue in his petition. This is appropriate because his entire time in the commissioners' custody was pursuant to a warrant of commitment for a second-degree murder conviction that remains intact. And the amount of time he was resentenced to—121 months—was longer than the 86 months he claims he was entitled to.

CONCLUSION

Because this case does not present any legal questions that warrant this Court's review, the respondents respectfully request that the Court deny Olson's petition.

Dated: July 15, 2020

Respectfully submitted,

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