No. 19-1380

In The Supreme Court of the United States

TERRY LYNN OLSON,

Petitioner,

v.

JANIS AMATUZIO, FORMER WRIGHT COUNTY MEDICAL EXAMINER, TOM ROY, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS, JOAN FABIAN, FORMER COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The question now before the Court is not how many circuits read *Heck v. Humphrey*, 512 U.S. 477 (1994), as allowing an exception to the favorable-termination requirement if habeas relief is unavailable. Nor does the Court have to decide at the petition stage how broad the exception should be or whether Petitioner will come within that exception. And the Court surely is not being asked to decide at all whether Petitioner will ultimately prevail on the merits of his Section 1983 claim. The only question that the Court must decide at this stage is whether to grant review on the reach of *Heck* and resolve a deep circuit split that is not going away.

Respondents rely on issues not addressed in the opinions of the district court or the Eighth Circuit, and that are not raised by Petitioner. Their attempts to distinguish and cabin circuit court opinions interpreting *Heck* merely demonstrate the uncertainty surrounding the scope of this Court's holding. Certiorari should be granted to resolve the clear, well-developed circuit split and provide clarity to Section 1983 claimants who are no longer in custody and without access to federal habeas relief.

ARGUMENT

I. Respondents' Arguments Are Irrelevant at the Petition Stage.

A. The Court Cannot Yet Determine Whether Petitioner Will Benefit from a *Heck* Exception.

Though Respondents agree that a deep circuit split exists regarding the scope of *Heck*, they speculate that Petitioner would not benefit from its resolution because he is unlikely to satisfy any exception to the favorable-termination rule. Respondents assert that because Petitioner agreed to forgo his pending habeas petition in order to obtain his release from prison, he cannot claim he was reasonably diligent in pursuing habeas relief. In other words, Respondents would require Petitioner to have remained in prison if he wanted to maintain his right to bring a Section 1983 claim.

But this merits question is inappropriate at the petition stage. The Court must first determine whether an exception exists at all, as well as its scope, before determining Petitioner's eligibility. By asking the Court to deny certiorari due to Petitioner's alleged inability to meet an as-yet-undetermined standard, Respondents impermissibly request a ruling on the merits of the petition that this Court cannot reach at the petition stage. Such a requirement would make certiorari intrinsically dependent on the ultimate outcome of the case.

Nor is there sufficient evidence in the record to make such a determination. Whether the stipulated

release of claims applies to Respondents (who were not parties to that stipulation), and, if so, whether that agreement was voluntary, are questions of fact that are well beyond the scope of this petition and cannot be determined without further fact development.

In the related context of agreements to dismiss criminal charges in exchange for a release of Section 1983 claims, this Court has held that the release must be "voluntarily made, not the product of prosecutorial overreaching, and in the public interest." *Town of Newton v. Rumery*, 480 U.S. 386, 401 (1987). Among the factors considered is whether the defendant was in custody when the alleged waiver was made. *Hall v. Ochs*, 817 F.2d 920, 923–24 (1st Cir. 1987) (citing *Rumery*, 480 U.S. at 393–94) (invalidating release-dismissal agreement that was a condition of release from jail).

Here, Petitioner was in custody and agreeing to waive future claims against Wright County was his only route to immediate release. "No waiver executed under such circumstances can be called voluntary." *Id.* at 924. At the very least, Petitioner will be entitled to a decision on the merits as to whether this "agreement" applies to Respondents, was voluntary, or demonstrates a lack of diligence. It certainly is not an issue that is subject to summary adjudication at the petition stage.[1]

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[1] Respondents similarly argue this Court should deny certiorari because they believe the Eighth Circuit's interpretation of *Heck* is correct, essentially asserting that the Court should decide the merits of Petitioner's appeal at the petition stage.

Respondents' attempt to downplay and recharacterize the circumstances of Petitioner's release from prison is telling. In its unsolicited July 29, 2016 letter to Petitioner's counsel, the Wright County Attorney's Office stated that Petitioner's habeas petition had caused the office to review Petitioner's sentence and length of incarceration. The letter acknowledged that under the 1979 parole matrix, Petitioner would have received 86 months imprisonment, but that upon arriving at prison, Petitioner was instead given 204 months. Although the letter did not expressly assign fault to the State Respondents, it did acknowledge expressly that Petitioner's target release date was based on the 2007 Minnesota sentencing guidelines, not the 1979 parole matrix, as required. The letter further stated, "Your client has now served over 130 months for this offense. This is four years longer than he would have received under the 1979 parole matrix."

Both the Wright County Attorney's Office and the federal judge presiding over Petitioner's habeas proceedings recognized that the State Respondents were unlawfully detaining Petitioner. These are the circumstances the district court was referring to when it stated in its Writ of Habeas Corpus ordering

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Respondents have the framework backwards: if "a legal issue appears to warrant review," this Court "grant[s] certiorari in the expectation of being able to decide that issue." *Schiro v. Farley*, 510 U.S. 222, 229 (1994). By Respondents' logic, the Court would grant review only if it prejudged the issue as requiring reversal. And a denial of certiorari in deference to the Eighth Circuit's position would have no effect on the majority of circuits who follow what Respondents believe to be the incorrect approach.

Petitioner's immediate release that it was "fully apprised of the circumstances of the matter." After a direct appeal, appeals of two petitions for postconviction relief, and a habeas petition, Petitioner finally achieved his release from prison, precisely *because* of his diligence, not his lack of it.

Respondent Amatuzio also argues that this Court should deny review because the district court and Eighth Circuit did not adequately address whether the favorable-termination rule applies to the circumstances of Petitioner's case. This specious argument is easily dispensed with. Respondent Amatuzio does not argue that Petitioner waived the issue presented to this Court by failing to raise it with the district court or Court of Appeals. And in the cases cited by Respondent, this Court *remanded* for further development of issues not addressed by the lower courts. (*See* Resp't Amatuzio's Br. at 6–7.) By contrast, Respondent asks this Court to deny review, resulting in a dismissal that would *prevent* this issue from being decided.

B. Whether Petitioner Will Succeed on the Merits of His Section 1983 Claim Is Not Before the Court.

The Court should also ignore Respondents' argument for denial of certiorari due to the existence of supposed alternative reasons for dismissing Petitioner's Section 1983 claims. Although the Court has denied certiorari based on the existence of an alternative grounds for affirmance, it has done so when those

alternative grounds were *actually decided by the lower courts*. For example, in *South Dakota v. Kansas City Southern Industries, Inc.*, the Court denied certiorari to resolve a circuit split regarding the standard for the "sham" exception to the *Noerr-Pennington* doctrine where there was an alternative, exclusively state-law ground for affirming the court of appeals. 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990).

Here, neither the district court nor the Eighth Circuit opinion provided any alternative grounds for dismissal—the decision of those courts is based entirely on *Heck*. Respondents posit theories under which (according to them) the lower courts *could have* dismissed the action. But the lower courts *did not* address those alternative grounds for dismissal, leaving nothing for this Court to review. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (stating this Court "[o]rdinarily . . . do[es] not decide in the first instance issues not decided below").[2] These grounds therefore provide no impediment to granting certiorari.

II. The Court Should Grant Certiorari to Clarify the Reach of *Heck*'s Footnote 10.

Respondent Amatuzio and, to a lesser extent, the State Respondents, argue that *Heck* itself resolves the circuit split because footnote 10 forecloses the possibility of a post-incarceration exception. This is obviously

[2] Respondent Amatuzio improperly relies on this opinion for the opposite proposition – that the Court should decline to consider *the question raised by Petitioner*.

incorrect, as the circuit split persists notwithstanding footnote 10. But more importantly, the courts that have developed exceptions to the *Heck* bar have distinguished footnote 10 because (1) it is not essential to *Heck*'s holding, and (2) this Court's subsequent opinions have called footnote 10's precedential value into question.

First, as Respondent Amatuzio concedes, footnote 10 is dicta because the petitioner in *Heck* was still incarcerated when he brought his Section 1983 claim. *See*, *e.g.*, *Cohen v. Longshore*, 621 F.3d 1311, 1315 (10th Cir. 2010) (noting that *Heck*'s footnote 10 is dicta); *Wilson v. Johnson*, 535 F.3d 262, 266 (4th Cir. 2008) (stating that footnote 10 was "not essential to [*Heck*'s] holding"). This Court is "not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013).

That is exactly what happened in *Spencer v. Kemna*, which, unlike *Heck*, involved a prisoner who was no longer incarcerated. In that case, Justice Souter reiterated his view that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." 523 U.S. 1, 21 (1998) (Souter, J., concurring). Three justices joined in Justice Souter's "better view," including Justice Ginsberg, who stated she had "come to agree with Justice Souter's reasoning" in the time since *Heck*. *Id.* (Ginsberg, J.,

concurring). And Justice Stevens's dissent wholly endorsed Justice Souter's concurrence as well. *Id.* at 23 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U.S.C. § 1983.").

Several circuits have viewed *Spencer* as a *de facto* rejection of *Heck*'s purported application to petitioners for whom, through no fault of their own, habeas relief is unavailable. *See Cohen*, 621 F.3d at 1316–17 (10th Cir. 2010) ("[I]t would be unjust to place [a petitioner's] claim for relief beyond the scope of § 1983 where 'exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.'" (quoting *Spencer*, 523 U.S. at 21 (Souter, J., concurring))); *Wilson*, 535 F.3d at 266 ("We believe that the reasoning employed by the plurality in *Spencer* must prevail in a case . . . where an individual would be left without any access to federal court if his § 1983 claim was barred."); *Jenkins v. Haubert*, 179 F.3d 19, 26 (2d Cir. 1999) ("[F]ive justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be.").

Respondent Amatuzio argues at great length that the plurality in *Spencer* did not overrule *Heck* and therefore suggests that *Spencer* is "immaterial" to the question of whether certiorari in this case should be granted. (Resp't Amatuzio's Br. at 17–21.) This analysis misses the point. "[C]ertiorari jurisdiction exists to

clarify the law." *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774 (2015). Regardless whether *Spencer* overruled *Heck*, it demonstrates a clear division within the Court regarding whether *Heck* bars Section 1983 claimants who are no longer incarcerated—a division this Court has recognized. *See Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004). ("Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement."). Indeed, Respondent Amatuzio concedes that *Spencer* "casts doubt on *Heck*'s favorable-treatment requirement." (Resp't Amatuzio's Br. at 18). Regardless whether the five justices who supported Justice Souter's concurrence in *Spencer* properly constituted the "majority view" of the Court, their views make clear that further guidance is needed.

CONCLUSION

Based upon the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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