No.

In the Supreme Court of the United States

JERYME MORGAN,

Petitioner,

v.

MINH SCHOTT, TIM VEATH, AND HUDSON MAYNARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an inmate is penalized for a disciplinary infraction, prison officials may impose durational sanctions (*e.g.*, revoking good-time credits) or non-durational sanctions (*e.g.*, reducing prison privileges). Often, officials will impose both durational and non-durational sanctions in the same disciplinary proceeding—a so-called "mixed-sanctions" case.

Heck v. *Humphrey*, 512 U.S. 477 (1994), and *Edwards* v. *Balisok*, 520 U.S. 641 (1997), bar an inmate from seeking damages under 42 U.S.C. § 1983 for disciplinary action resulting in durational sanctions unless the adverse disciplinary findings have been invalidated or set aside in a separate proceeding. In contrast, this "*Heck* bar" does not apply to an inmate seeking damages under § 1983 for non-durational sanctions. The question posed in this case involves application of the *Heck* bar to a mixed-sanctions case—a frequently recurring issue that is the subject of an acknowledged circuit split.

Specifically, the question that has split the circuits, presented cleanly here, is whether *Heck* bars § 1983 claims for damages in mixed-sanctions cases where the inmate challenges only the non-durational elements of the sanction, expressly forfeiting the right to challenge any addition to the length of his criminal sentence.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, plaintiff-appellant below, is Jeryme Morgan.

Respondents, defendants-appellees below, are Lieutenant Minh Schott, Officer Tim Veath, and Officer Hudson Maynard.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeryme Morgan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 914 F.3d 1115 and reproduced at Pet. App. 1a-13a. The district court's order granting summary judgment is unreported and is reproduced at Pet. App. 14a-20a.

JURISDICTION

The judgement of the United States Court of Appeals for the Seventh Circuit was entered on February 5, 2019. Pet. App. 21a. This Court granted an extension of time to file this Petition through and including July 5, 2019. No. 18A1113. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

INTRODUCTION

This case arises out of courts' continued confusion over the interplay between 42 U.S.C. § 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254.

In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), this Court held that an inmate could not use § 1983 to compel prison authorities to restore lost good-time credits. As the Court explained, such a claim "attack[ed] the validity of the fact or length" of the prisoner's confinement and was therefore cognizable only in habeas corpus. *Id.* at 490-491. The Court extended this principle to actions for money damages in *Heck* v. *Humphrey*, 512 U.S. 477 (1994). *Heck* held that

> when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 478. *Edwards* v. *Balisok*, 520 U.S. 641 (1997), later held that *Heck*'s "favorable termination" requirement applied to an inmate's use of § 1983 to challenge prison disciplinary sanctions if the challenge "would, if [successful], necessarily imply the

invalidity of the deprivation of his good-time credits." *Id.* at 646.

Heck thus applies only to a subset of § 1983 claims by inmates challenging prison disciplinary proceedings. See *Wilkinson* v. *Dotson*, 544 U.S. 74, 83-84 (2005). The *Heck* bar, requiring an inmate to successfully challenge an adverse disciplinary-hearing finding before seeking damages under § 1983 for the resulting sanctions, is not implicated "by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence." *Muhammad* v. *Close*, 540 U.S. 749, 751 (2004). An inmate therefore may seek damages under § 1983 for violations of his rights in disciplinary proceedings that affect only non-durational conditions of confinement (such as the pre-hearing detention in *Muhammad*) and not the length of the inmate's term of imprisonment.

This case presents a frequently recurring question left open by *Heck* and *Balisok*. After finding Morgan guilty of disciplinary offenses, a prison disciplinary committee sanctioned Morgan with one year of segregation and various status and access restrictions. The committee also revoked three months of good-time credits, later reduced to one month on administrative review. Morgan's subsequent § 1983 claim challenged the constitutionality of the process he received in his disciplinary proceedings. In light of *Heck* and *Balisok*, Morgan formally "abandon[ed] any and all present and future challenges" to his loss of good-time credits, limiting his damages request to the non-durational sanctions—segregation and his status and access restrictions. Pet. App. 25a-26a.

Even though Morgan expressly waived any challenge to the durational (good-time) disciplinary sanction, the Seventh Circuit held that *Heck* barred his § 1983 claim unless and until he overturned the board's disciplinary ruling. In so doing, the Seventh Circuit expressly rejected an alternative rule—followed by other circuits—that would allow Morgan's § 1983 claim to proceed because he has waived any challenge to his loss of good time. Moreover, the rule followed by the Seventh Circuit, in line with other circuits on its side of the split, is impossible to square with this Court's precedent. This case presents an ideal vehicle to resolve the ongoing confusion over this significant and recurring issue.

STATEMENT OF THE CASE

A. Morgan's Disciplinary Proceedings

In 2011 and 2012, Morgan was incarcerated at Menard Correctional Facility Center ("Menard") in Southern Illinois. On January 27, 2012, Menard issued a disciplinary report alleging that Morgan participated in an October 25, 2011 assault on two other inmates. See Case No. 3:13-cv-881-SCW (S.D. Ill.), Dkt. 100, Ex. B (Disciplinary Report). Morgan filed a grievance over the report and was granted a hearing before the Prison Adjustment Committee on January 31, 2012. *Id.*, Ex. C (Grievance Form).

Prior to the hearing, and as permitted by prison rules, Morgan requested in writing that James Lewis appear as a witness to testify to Morgan's whereabouts during the assault. *Id.*, Ex. B. The Committee did not call Lewis as a witness and incorrectly stated that Morgan did not request a witness to present testimony. It imposed sanctions of

one year of C-grade status,[1] one year of segregation, one year of commissary restriction, three months of yard restriction, six months of contact visits restriction, and revocation of three months of good-time credit. *Id.*, Ex. D (Final Summary Report).

Morgan filed another grievance on February 19, 2012, alleging that the Committee's failure to call James Lewis violated his right to due process. *Id.*, Ex. H (Grievance Form). The Grievance Officer found no such violation. *Id.*, Ex. I (Response to Grievance). The Chief Administrative Officer concurred. *Ibid.*

Morgan appealed the adverse findings to the Administrative Review Board on or about March 22, 2012. On June 7, 2012, the Board ruled that Morgan's witness request did not meet the requirements for such requests because Morgan did not identify his witness or describe his testimony. *Id.*, Ex. J (ARB Letter). The Board struck two of the charges against Morgan (for impeding or interfering with an investigation and for dangerous contraband) but upheld the remaining charges. *Ibid.* The Board also reduced Morgan's loss of good-time credits from three months to one month. *Id.*, Ex. L (Good-Time Recommendation).

B. Morgan's Federal Lawsuit

On February 21, 2013, Morgan filed a *pro se* complaint in the U.S. District Court for the Southern District of Illinois. Case No. 3:13-cv-182-SCW, Dkt. 1. He alleged violations of various federal constitutional rights under 42 U.S.C. § 1983, including a violation of due process based on the Prison Adjustment

[1] Inmates assigned to C-grade status are denied certain privileges. See 20 Ill. Admin. Code 504.130.

Committee's failure to call Morgan's requested witness.[2]

Before the district court, Morgan submitted an affidavit waiving all present and future challenges to any sanctions arising from the Adjustment Committee hearing that could affect the duration of his confinement. The affidavit stated in pertinent part:

> 11. I affirm that my due process claim in this action does not challenge the sanctions arising from the January 31, 2012 Prison Adjustment Committee hearing that affect the duration of my confinement, namely the revocation of one month of good time credits.
>
> 12. I affirm that I hereby abandon any and all present and future challenges that I may have relating to any sanctions arising from the January 31, 2012 Prison Adjustment Committee hearing that affect the duration of my confinement, namely the revocation of one month of good time credits.
>
> 13. I am waiving for all times all claims relating to any sanctions arising from the January 31, 2012 Prison Adjustment Committee

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[2] The original complaint raised retaliation and due process claims against Minh Schott, Tim Veath, and Hudson Maynard (Respondents here) and unrelated claims against additional defendants. On August 27, 2013, the district court severed the claims against Respondents into a separate suit. Case No. 3:13-cv-881-SCW, Dkt. 1; see *George* v. *Smith*, 507 F.3d 605, 607 (7th Cir. 2007) ("[u]nrelated claims against different defendants belong in different suits"). On January 25, 2016, the district court granted summary judgment to Respondents on the retaliation claim only. Case No. 3:13-cv-881-SCW, Dkt. 63.

> hearing that affect the duration of my confinement in order to proceed with claims challenging the sanctions affecting the conditions of my confinement.

Pet. App. 25a-26a. Morgan further stated (at ¶ 10) that his due process challenge pertained only to the sanctions that affected his conditions of confinement: his C-grade status, segregation, and commissary, yard, and contact visit restrictions. Pet. App. 25a.[3]

C. The District Court's Ruling

On May 16, 2016, the district court granted summary judgment to Respondents on Morgan's due process claim and dismissed that claim with prejudice, holding that it was bared by *Heck*. The Court reasoned that "a plaintiff cannot present a version of facts in a civil suit that implies that a conviction is invalid, even if the plaintiff is not seeking relief for the invalid conviction." Pet. App. 19a.

D. The Seventh Circuit's Decision

The Seventh Circuit affirmed. The court rejected Morgan's reliance on *Peralta* v. *Vasquez*, 467 F.3d 98 (2d Cir. 2006), in which the Second Circuit held that an inmate facing both durational and non-durational sanctions could bring a § 1983 suit by agreeing to waive any claims or relief concerning the durational elements of the challenged disciplinary proceeding. Pet. App. 8a-9a. The Seventh Circuit had previously rejected *Peralta* in *Haywood* v. *Hathaway*, 842 F.3d 1026 (7th Cir. 2016), and the court declined to revisit that conclusion here. Pet. App. 9a. The court accordingly dismissed the action after modifying the

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[3] The original affidavit, with exhibits, is at Case No. 3:13-cv-881-SCW (S.D. Ill.), Dkt. 97.

judgment to one for dismissal without prejudice to account for "the possibility of future state-court proceedings" invalidating the disciplinary findings as the *Heck* bar requires. Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

The decision below exacerbates an entrenched split over the proper interpretation of *Heck*'s "favorable termination" rule in mixed-sanction cases. Had Morgan's case arisen in the Second, Ninth, or Tenth Circuits (and quite likely in the Eleventh), he could have proceeded with his § 1983 action for damages arising from his non-durational disciplinary sanctions. But in the Seventh Circuit—as in the Eighth Circuit and consistent with reasoning in the D.C. Circuit—*Heck* bars his claim because his disciplinary sanction included *some* loss of good-time credits, regardless of the fact that Morgan waived any challenge to that durational component of the sanction. As the Seventh Circuit's holding in this case confirms, the two sides in this split are entrenched.

The rule applied below for mixed-sanction cases is also in conflict with this Court's precedent. And Morgan's case presents a clean vehicle to address the pervasive confusion over the appropriate role for 42 U.S.C. § 1983 in the mixed-sanction context. The Court should grant certiorari to resolve the circuit split and provide much-needed guidance on this important question.

I. The Lower Courts Are Intractably Divided Over The Rule To Follow In Mixed-Sanctions Cases Like Morgan's.

The substance and scope of the *Heck* rule has long "generated confusion in the lower courts," *Jenkins* v. *Haubert*, 179 F.3d 19, 25 (2d Cir. 1999), which "have

struggled with application of [this Court's] holdings" in the area, *Dotson* v. *Wilkinson*, 329 F.3d 463, 466 (6th Cir. 2003). Mixed-sanctions cases are no exception. From the beginning, members of this Court have expressed concern that "serious difficulties will arise whenever a prisoner seeks to attack in a single proceeding both the conditions of his confinement and the deprivation of good-time credits." *Preiser*, 411 U.S. at 508 (Brennan, Douglas & Marshall, JJ., dissenting); see also *Bressman* v. *Farrier*, 498 U.S. 1126 (1991) (White & O'Connor, JJ., dissenting from denial of certiorari) (urging Court to grant certiorari to address standards for claims "which include challenges to the conditions, as well as to the length or duration, of confinement"). These same difficulties arise where, as here, an inmate subject to mixed sanctions brings a § 1983 claim seeking damages only for his non-durational conditions of confinement.

As the Seventh Circuit recognized, the federal Courts of Appeals do not treat these cases uniformly. This acknowledged split warrants Supreme Court review.

A. At Least Three Circuits Do Not Apply The *Heck* Bar To § 1983 Claims In Mixed-Sanction Cases.

At least three circuits permit inmates like Morgan to bring § 1983 damages claims, without application of the *Heck* bar, so long as the inmate challenges only the non-durational component of a mixed prison disciplinary sanction. Case law in a fourth circuit suggests that it too would allow such claims to proceed.

Second Circuit. Two decades ago, the Second Circuit observed that this Court's decision in *Balisok*

left open whether in a mixed-sanctions case a prisoner "could proceed separately with his § 1983 claim as to those portions of his sentence which affected only the conditions of his confinement." *Jenkins*, 179 F.3d at 25 (citing *Balisok*, 520 U.S. at 648). In *Peralta*, the Second Circuit answered that question in the affirmative. 467 F.3d at 103-106; see also *McEachin* v. *Selsky*, 225 F. App'x 36, 37 (2d Cir. 2007).

Following a prison disciplinary proceeding, the inmate in *Peralta* received sanctions of two years of confinement; two years' loss of packages, commissary, and telephone privileges; and two years' loss of good-time credits. The inmate then brought a § 1983 action alleging that prison officials had denied him "adequate assistance, witnesses, and a fair and impartial hearing officer" at his hearing. 467 F.3d at 101. Like Morgan, the inmate in *Peralta* sought damages "only for those sanctions affecting his conditions of confinement and not for the loss of his good-time credits." *Ibid.* The district court held that the § 1983 suit was *Heck*-barred. *Ibid.*

The Second Circuit reversed, reasoning that a § 1983 claim aimed only at the non-durational components of a mixed prison disciplinary sanction "threatens no consequence for [a] conviction or the duration of [a] sentence" and therefore raises "no impediment under *Heck*." *Id.* at 104 (citing *Muhammad*, 540 U.S. at 751-752). A prisoner who agrees to waive all present and future challenge to the durational element of his sanction therefore is not subject to the *Heck* bar. *Ibid.*

The doctrine of judicial estoppel, the court continued, gives teeth to such a waiver, ensuring that an inmate who "abandons any duration of imprisonment claims arising out of the same

disciplinary process, is, substantively, in the precise condition" as the plaintiff in *Muhammad*. *Id*. at 105-106. When a prisoner executes a waiver, his only surviving claim is "a § 1983 cognizable (conditions of confinement) suit." *Id*. at 106. And because "the survival of that suit does not in any way implicate the concerns animating *Heck* and [*Balisok*]," *Heck*'s favorable-termination rule "does not apply." *Ibid*.

In the wake of *Peralta*, prison litigants in the Second Circuit routinely submit "*Peralta* waivers" and are permitted to bring § 1983 suits, indistinguishable from Morgan's here, in mixed-sanctions cases. See, *e.g.*, *Jackson* v. *Gokey*, 2017 WL 1317122, at *2 (W.D.N.Y. Apr. 10, 2017); *McCaskill* v. *Caldwell*, 2016 WL 908297, at *2 (N.D.N.Y. Jan. 19, 2016); *Read* v. *Calabrese*, 2013 WL 5506344, at *2 (N.D.N.Y. Aug. 29, 2013); see also *Riddick* v. *Semple*, 2019 WL 203118, at *3-4 (D. Conn. Jan. 15, 2019) (directing plaintiff to file *Peralta* waiver or face dismissal of his claims).

Ninth Circuit. The Ninth Circuit also permits inmates to bring § 1983 claims premised on the non-durational component of a mixed disciplinary sanction. In *Brownlee* v. *Murphy*, 231 F. App'x 642 (9th Cir. 2007), prison officials imposed status and other sanctions on an inmate, including loss of good time. The inmate brought a § 1983 claim seeking damages for alleged procedural defects, and the district court dismissed on *Heck* grounds. On appeal, the Ninth Circuit agreed that the inmate's complaint would be *Heck*-barred if it challenged "nothing else" but the revocation of good time. *Id*. at 644. But, the court continued, "[t]o the extent the § 1983 claim challenges only the manner of confinement, rather than its duration, *Heck* would not bar it from proceeding." *Ibid*.

A subsequent district court decision in the Ninth Circuit, citing that circuit's decision in *Brownlee* and the Second Circuit's decision in *Peralta*, determined that an inmate's § 1983 mixed-sanctions claim could go forward only if the inmate agreed to waive "any present or future challenge to his 180-days loss of credit." *Brown* v. *Marshall*, 2009 WL 2905779, at *1-2 (E.D. Cal. Sept. 4, 2009).

Tenth Circuit. In *Slack* v. *Jones*, 348 F. App'x 361 (10th Cir. 2009), the Tenth Circuit agreed that an inmate's claim that he was unlawfully denied the opportunity to earn good-time credits was not cognizable under § 1983 "unless he [could] show that the prison proceedings have been invalidated," as *Heck* requires. *Id*. at 364. But, the court continued, *Heck* "is not * * * implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence." *Ibid*. Accordingly, "to the extent [the inmate there] challenged the conditions of his confinement and loss of privileges" rather than his loss of good-time, the court concluded that "*Heck* and [*Balisok*] do not apply." *Ibid*.; see also *Pollard* v. *Romero*, 2008 WL 1826187, at *6 (D. Colo. Apr. 23, 2008) (adopting *Peralta*).

Eleventh Circuit. *Smith* v. *Villapando*, 286 F. App'x 682 (11th Cir. 2008), suggests that the Eleventh Circuit would agree with the Second, Ninth, and Tenth Circuits. In *Smith*, the inmate received two disciplinary reports, one for disorderly conduct and another for disobeying orders. He received thirty days of disciplinary confinement for the disorderly conduct report and another thirty days of confinement, plus the loss of sixty days' good time (called "gain time" in Florida), for the disobeying-orders report. *Id*. at 684. The inmate then brought a § 1983 claim challenging

only the non-durational sanctions imposed based on the disorderly conduct report. *Ibid.*

The Eleventh Circuit reasoned that *Heck* did not apply to the inmate's § 1983 claim because, "[a]lthough he lost gain time based on the disobeying orders [report], Smith does not challenge this [report] in his complaint or seek any relief pertaining to it." *Id.* at 686. The court allowed the claim to proceed even though the inmate received both reports on the same day arising out of the same incident and was adjudged guilty in the same proceeding. *Id.* at 684. Indeed, the inmate filed a parallel habeas corpus petition challenging the disobeying orders report in state court. *Id.* at 684 n.2.[4]

B. Three Circuits Apply The *Heck* Bar To § 1983 Claims In Mixed-Sanction Cases.

In sharp contrast, three circuits hold that *Heck* applies to § 1983 claims challenging prison disciplinary proceedings so long as the original mix of sanctions includes a durational element. And the Seventh Circuit has made clear that that is so even where, as here, the inmate-plaintiff elects to forfeit any present or future challenge to this element and to proceed only against the non-durational sanction.

Seventh Circuit. In *Haywood* v. *Hathaway*, 842 F.3d 1026, an inmate was disciplined with two months of segregation and loss of one month of good-time credit. He pursued a § 1983 suit against prison officials for alleged violations of the First and Eighth

[4] Moreover, although the Third Circuit has yet to address the issue, at least one district court in that circuit has accepted the *Peralta* rule. See *Gardner* v. *Lanigan*, 2018 WL 4144689, at *3 (D.N.J. Aug. 30, 2018).

Amendments and waived any challenge to the duration of his confinement. *Id*. at 1028.

The Seventh Circuit held that the inmate's waiver was "irrelevant" to his ability to bring a federal civil rights claim. *Ibid*. In so doing, *Haywood* squarely rejected the Second Circuit's holding in *Peralta*, which the court concluded was "incompatible with *Heck* and its successors." *Id*. at 1029-1030. The court reasoned that *Heck* was in reality a rule of "issue preclusion," by which an outstanding criminal judgment or disciplinary sanction "blocks any inconsistent civil judgement." *Id*. at 1029. This, the court said, was "a rationale considerably different from the one that *Peralta* attributed to the Court." *Ibid*.

As discussed above (*see supra* pp. 7-8), the Seventh Circuit reached the same result here, reaffirming its holding in *Haywood* and declaring that *Peralta* "rests on a misunderstanding of *Heck*." Pet. App. 8a.

Eighth Circuit. In *Portley-El* v. *Brill*, 288 F.3d 1063 (8th Cir. 2002), an inmate was disciplined with 30 days in punitive segregation plus the loss of 45 days of good-time credits. *Id*. at 1064. He brought a § 1983 action against prison officials alleging that they charged and convicted him based on his race. The Eighth Circuit held that *Heck* barred the claim because it sought damages "for the *imposition* of discipline that *included* the loss of good time credits." *Id*. at 1067 (second emphasis added). The court further held that the inmate could not avoid the *Heck* bar by "abandoning his claim for the restoration of good time credits." *Id*. at 1066. The Eighth Circuit reached the same conclusion in *Sheldon* v. *Hundley*, 83 F.3d 231 (8th Cir. 1996), holding that *Heck* applied not only to an inmate's "claims for good-time credits"

but also to his "claims for money damages" based on "time spent in disciplinary detention," a non-durational sanction. *Id*. at 232-233.

D.C. Circuit. Finally, although without addressing application of an express forfeiture (*Peralta* waiver) like the one here, the D.C. Circuit repeatedly has applied reasoning that would foreclose Morgan's § 1983 claim. In *Skinner* v. *U.S. Department of Justice*, 584 F.3d 1093 (D.C. Cir. 2009), officials at a federal facility in Georgia sanctioned an inmate with the loss of 40 days of good-time credits as well as various non-durational sanctions.

The inmate brought a claim for money damages, alleging that officials suppressed evidence of his innocence in retaliation for his filing an assault complaint against a prison guard. The D.C. Circuit held that the claim was barred by *Heck*. Not only were damages "for loss of good time" off-limits, the court explained, but so too were damages for "other, separate disciplinary harms" like "disciplinary segregation and the loss of visitation rights and commissary privileges." *Id*. at 1099. "[A]lthough those other punishments * * * did not affect the length of Skinner's incarceration," the court reasoned, "they are not 'separate' from the punishment that did." *Ibid*.[5]

* * *

In short, as commentators and the court below

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[5] Because the plaintiff in *Skinner* was a federal inmate alleging deprivations by federal officials, he brought his claim under the Privacy Act, 5 U.S.C. § 552a, rather than 42 U.S.C. § 1983. But the D.C. Circuit has extended the "*Preiser-Heck-Balisok* trilogy" to damages actions under the Privacy Act. *Skinner*, 584 F.3d at 1098-1099 (citing *Razzoli* v. *Fed. Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000)).

have recognized, "the problem of mixed claims" has led to "conflicting decisions by lower courts." Nancy J. King & Suzanna Sherry, *Habeas Corpus & State Sentencing Reform: A Story of Unintended Consequences*, 58 Duke L.J. 1, 33–34 (2008); see also, *e.g.*, Brian R. Means, Federal Habeas Manual § 2:17 (2019 ed.) (noting that the Second Circuit gives prisoners the choice of bringing § 1983 actions in mixed-sanctions cases while the Seventh and D.C. Circuits decline to do so). The circuit split warrants this Court's review.

II. The Decision Below Conflicts With This Court's Precedent.

This Court's review also is warranted because the Seventh Circuit's decision conflicts with this Court's § 1983 precedent. *Heck* applies where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. The doctrine is focused solely on the need "to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement." *Dotson*, 544 U.S. at 81. Accordingly, as the Court recognized in *Muhammad*—a decision that the Seventh Circuit did not cite—*Heck* does not apply to a claim that cannot be "construed as seeking a judgment at odds with * * * the State's calculation of time to be served in accordance with the underlying sentence." *Muhammad*, 540 U.S. at 754-755.

Morgan's suit does not "seek to invalidate" the duration of his confinement. On the contrary, Morgan

clearly and unequivocally agreed to *abandon* any such challenge.[6]

Success in Morgan's § 1983 case thus would not "mean immediate release from confinement or a shorter stay in prison." *Dotson*, 544 U.S. at 82. Put another way, because Morgan's claim does not—and, given the doctrine of judicial estoppel, could not—"necessarily spell speedier release," it does not "lie[] at 'the core of habeas corpus'" and is therefore cognizable under § 1983. *Ibid.*[7]

The Seventh Circuit rejected Morgan's § 1983 claim on the ground that *Heck*'s favorable-termination rule is "a version of issue preclusion" and not "a procedural hurdle that plaintiffs can skirt with artful complaint drafting." Pet. 8a-9a. But *Heck* is not a rule of issue preclusion, as this Court explained in that decision. See 512 U.S. at 480 n.2 (distinguishing the *Heck* bar from the preclusive effect of state court judgments in a § 1983 action); see also *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83-84 (1984).

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[6] This case is thus unlike *Balisok*, where (the Court noted) the inmate "expressly reserved the right" to seek restoration of lost good-time credits "in an appropriate forum." 520 U.S. at 644.

[7] See *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (explaining that judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase") (quoting *Pegram* v. *Herdrich*, 530 U.S. 211, 227 (2000)). Application of judicial estoppel principles in the § 1983 context is not novel. Courts routinely apply the doctrine to plaintiffs bringing § 1983 claims. See, *e.g.*, *Janusz* v. *City of Chicago*, 832 F.3d 770 (7th Cir. 2016); *Thore* v. *Howe*, 466 F.3d 173 (1st Cir. 2006); *Johnson* v. *Lindon City Corp.*, 405 F.3d 1065 (10th Cir. 2005).

The Seventh Circuit also reasoned that Morgan's claim was "incompatible" with *Heck*'s holding that certain § 1983 claims do not accrue until favorable termination of the underlying conviction. Pet. App. 9a. But that *assumes* that *Heck* precludes a § 1983 mixed-sanction claim predicated only on the non-durational component of the sanction. Whether Morgan's non-durational challenge is *Heck*-barred is precisely the question presented in this case.

Finally, the Seventh Circuit criticized Morgan's affidavit as an "opportunistic" effort to "skirt" this Court's rulings. Pet. App. 8a. By executing a waiver, however, Morgan was attempting to *abide by*, not avoid, this Court's precedents. Indeed, by waiving the right to relief for the loss of his good-time credits, he agreed to permanently forego the right to the "type of relief which is probably most important" to prisoners in his position. *Dixon* v. *Chrans*, 101 F.3d 1228, 1231 (7th Cir. 1996).[8]

As the Second Circuit has recognized, moreover, the decision below not only conflicts with this Court's precedent but also creates an "undesirable incentive" for prison officials to include durational sanctions in disciplinary sanctions to preclude prisoners from

[8] This Court's decisions in the federal habeas context confirm that Morgan's waiver of certain *Heck*-barred claims was proper. A prisoner seeking habeas relief from a state court judgment must show that he has exhausted all of his claims in state court before a federal court will entertain his petition. See 28 U.S.C. § 2254(b)(1)(A), (c); *Rose* v. *Lundy*, 455 U.S. 509, 518-519 (1982). But this Court has long recognized that if a petitioner presents both exhausted and unexhausted claims in a single petition—a "mixed petition"—the prisoner has the option of amending his petition to delete the unexhausted claims and proceed only on the exhausted ones. See *Rhines* v. *Weber*, 544 U.S. 269, 278 (2005) (citing *Lundy*, 455 U.S. at 520).

bringing § 1983 claims. *Peralta*, 467 F.3d at 106 n.8. Even setting aside the problem of incentives, the rule creates perverse results.

Imagine two inmates, charged with the same disciplinary violations, assessed the same non-durational sanctions after the same administrative process, and wishing to bring the same due process challenge to their disciplinary procedures. Imagine too that the first inmate, but not the second, is docked one day of good time as a sanction for his violation. There is no reason why federal law should treat these inmates' claims differently. But the Seventh Circuit's rule does just that. Under that rule, even if the first inmate is willing to forever waive a challenge to the one-day loss of good time, that inmate may not proceed under § 1983. Nothing in this Court's § 1983 jurisprudence supports these disparate outcomes.

III. This Case Offers An Ideal Vehicle To Answer A Recurring And Important Question.

This case provides an ideal vehicle to resolve the circuit split over whether § 1983 suits arising from mixed disciplinary sanctions are subject to the *Heck* bar. Morgan has executed a *Peralta* waiver making clear that he seeks to waive for all time any challenge to his loss of good-time credit. And the decision below addresses the question squarely, leaving no doubt that his case would come out differently under the *Peralta* rule followed in other circuits. Indeed, the Seventh Circuit used this case to make clear that it "remain[s] convinced that '*Peralta* is incompatible with *Heck* and its successors.'" Pet. App. 9a.

The question of how to treat mixed-sanction claims also has enormous practical significance. As the Court recognized in *Heck*, the federal habeas

statute and § 1983 are the "two most fertile sources of federal-court prisoner litigation." 512 U.S. at 480. And much of that litigation will raise the question presented here, for prison disciplinary proceedings commonly result in mixed sanctions. In one twelve-month period, for example, approximately 7,000 of 17,000 total disciplinary determinations by the New York State Department of Correctional Services included both durational and non-durational sanctions. Reply in Support of Certiorari, *Jones* v. *Peralta*, No. 06-1307, 2007 WL 1702106, at *2 n.1 (June 11, 2007).

Confusion and ancillary litigation over the appropriate vehicle for mixed-sanction prisoner civil rights claims wastes scarce time and resources and does not benefit prisoners, defendants, or courts. *Cf.* *Lapides* v. *Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 621 (2002) ("jurisdictional rules should be clear"). Indeed, this Court has stressed "the importance of providing clear guidance to the lower courts" about the boundaries of § 1983 and habeas corpus in particular. *Skinner* v. *Switzer*, 562 U.S. 521, 535 n.13 (2011). A clear and uniform rule is equally important for litigants, many of whom are unrepresented for much or all of their proceedings.

In short, this Court's intervention is needed to resolve the deep and entrenched split over the frequently recurring question this case presents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2019

APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 16-2384

JERYME MORGAN,
Plaintiff-Appellant,

v.

MINH SCHOTT, TIM VEATH, and
HUDSON MAYNARD,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.

No. 13-cv-0881-SCW – Stephen C. Williams,
Magistrate Judge.

Argued: September 5, 2018
Decided: February 5, 2019

Before KANNE, SYKES, and ST. EVE, *Circuit Judges*.

SYKES, Circuit *Judge*:

Illinois prison officials issued a disciplinary report charging inmate Jeryme Morgan with offenses stemming from a violent assault on fellow prisoners. Morgan disputed the charges and asked the authorities to call a witness to testify at his Adjustment Committee

hearing. But the Committee never called Morgan's witness. He was found guilty and the Committee imposed punishment of one year of segregation, various status and access restrictions, and revocation of three months of good-time credits. Morgan filed a grievance challenging his punishment on due-process grounds and appealed its subsequent denial to the Administrative Review Board ("the Board"). The Board adjusted the revocation of good-time credits to one month but affirmed the Committee's due-process ruling, concluding that Morgan's witness request did not comply with prison rules.

Alleging a raft of constitutional violations, Morgan sued three officers for damages under 42 U.S.C. § 1983 claiming that the failure to call his witness violated his right to due process. The officers moved for summary judgment citing the favorable-termination rule announced in *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* holds that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in [his] favor . . . would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. Where a favorable judgment would have that effect, no § 1983 claim has accrued and "the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* Morgan countered that *Heck* is inapplicable due to his waiver of all claims relating to the revocation of his good-time credits. A magistrate judge rejected Morgan's attempt to skirt *Heck* and ruled that his due-process claim was not cognizable under § 1983.

We affirm. Prisoners cannot make an end run around *Heck* by filing an affidavit waiving challenges to the portion of their punishment that revokes good-

time credits. We recently addressed that very tactic and found it incompatible with the *Heck* line of cases. *Haywood v. Hathaway*, 842 F.3d 1026 (7th Cir. 2016). Morgan provides no reason to question *Haywood*, and we reaffirm its reasoning. Morgan's attempt to analogize his case to *Wilkinson v. Dotson*, 544 U.S. 74 (2005), and *Skinner v. Switzer*, 562 U.S. 521 (2011), misunderstands those decisions. Judgment in Morgan's favor would necessarily imply the invalidity of his prison discipline. Thus, no § 1983 claim has accrued. This suit is premature and must be dismissed without prejudice.

I. Background

Morgan is serving sentences for robbery, armed robbery, and sexual assault. For most of his incarceration—and at all times relevant to this case—he has been housed at Menard Correctional Center ("Menard"). In January 2012 Officer Hudson Maynard issued a disciplinary report accusing Morgan of taking part in an assault that occurred three months earlier in Menard's east yard. The report charged Morgan with conspiring to attack the victims, joining the attack, possessing dangerous contraband, causing a disturbance, interfering with prison investigations, and engaging in unauthorized organizational activities.

Menard gives prisoners an opportunity to formally request witnesses at a disciplinary hearing; the disciplinary report provides a space to do so. If called, those witnesses testify at the prisoner's Adjustment Committee hearing. Morgan's request was not a model of clarity. On the line requesting a description of the subject of the witness's testimony, Morgan wrote the name "James Lewis" followed by the words "where abouts." On the line reserved for the witness's

name and other identifying information, Morgan again wrote "James Lewis" but nothing else.

At Morgan's Adjustment Committee hearing on January 31, prison officials did not call James Lewis. The Committee, which included Lieutenant Minh Schott and Officer Tim Veath, found Morgan guilty and recommended revoking three months of good-time credits and adding one year of segregation, one year of lowered status, and several access restrictions. Morgan filed a grievance arguing that the Committee's failure to call Lewis violated his right to due process. Morgan's grievance was denied, so he appealed to the Board. The Board ruled that Morgan's witness request did not meet the minimum requirements under prison rules. Illinois regulations require that such requests "shall be in writing on the space provided in the disciplinary report and shall include an explanation of what the witnesses would state." ILL. ADMIN. CODE tit. 20, § 504.80(f)(2). Because Morgan failed to adequately identify his witness or describe his testimony, and because officials failed to locate a James Lewis at Menard, the Board concluded that Morgan's hearing comported with due process.

Rather than challenge the Board's ruling in state court, Morgan filed a pro se complaint in the Southern District of Illinois seeking damages under § 1983. He alleged numerous constitutional violations ranging from excessive force to deliberate indifference. Those claims were severed and proceeded as a separate case. The district court did not initially identify a due-process claim in Morgan's complaint. However, a magistrate judge later found that Morgan had adequately alleged a violation of due process against Lieutenant Schott and Officer Veath based on the Committee's failure to call James Lewis. Schott and Veath moved

for summary judgment, arguing that Morgan's claim was barred by *Heck*, no reasonable jury could find a constitutional violation, and qualified immunity applies.

As part of Morgan's strategy to avoid the *Heck* bar, he filed an affidavit purporting to "abandon any and all present and future challenges" and "waiv[e] for all times all claims" pertaining to the portion of his punishment that impacted the duration of his confinement. He preserved only "claims challenging the sanctions affecting the conditions of [his] confinement." Morgan argued that his affidavit rendered *Heck* inapplicable, citing the Second Circuit's decision in *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006).

The magistrate judge concluded that *Heck* barred Morgan's suit and entered summary judgment for Schott and Veath, dismissing Morgan's due-process claim with prejudice. The judge rejected Morgan's attempt to use strategic waiver to "dodge" *Heck*. He said Morgan's due-process claim "call[s] into question the validity of the prison discipline[] because to accept that claim necessarily implie[s] that the discipline was somehow invalid."

II. Discussion

We review a summary judgment de novo, reading the record in the light most favorable to Morgan and drawing all reasonable inferences in his favor. *Tolliver v. City of Chicago*, 820 F.3d 237, 241 (7th Cir. 2016). Morgan renews his strategic-waiver argument in an effort to avoid the *Heck* bar. He also attempts to evade *Heck* by arguing that success on the merits would mean at most a new hearing, not a reduction of his term of imprisonment.

We begin with an overview of the favorable-termination rule established in *Heck v. Humphrey*. Federal law affords state prisoners two venerable gateways to relief: the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, and habeas corpus review of state adjudications under 28 U.S.C. § 2254. They are not interchangeable. The Supreme Court made this fact crystal clear in a line of cases barring § 1983 suits predicated on claims reserved for habeas challenges. In *Preiser v. Rodriguez*, 411 U.S. 475, 476 (1973), the Court evaluated a § 1983 claim attacking prison discipline proceedings on constitutional grounds and seeking restoration of good-time credits. The Court explained that habeas corpus—not § 1983—is the "specific instrument to obtain release" from unlawful imprisonment. *Id.* at 486. Thus, when a prisoner challenges "the fact or duration of his confinement," he fails to state a cognizable § 1983 claim. *Id.* at 489.

The Court expanded on *Preiser* in *Heck v. Humphrey*, 512 U.S. at 486-87, in which the prisoner-plaintiff sought damages for wrongful conviction. Heck claimed that Indiana prosecutors had destroyed exculpatory evidence and engaged in an "unlawful, unreasonable, and arbitrary investigation." *Id.* at 479. The Court held that

> in order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 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.

Id. at 486-87. The Court distinguished *Wolff v. McDonnell*, 418 U.S. 539 (1974), in which there was no "reason to believe[] that using the wrong procedures necessarily vitiated the denial of good-time credits." *Heck*, 512 U.S. at 483. Conversely, a judgment in Heck's favor would "necessarily imply the invalidity of [Heck's] conviction or sentence." *Id.* at 487. When a judgment for the plaintiff would have that effect, no § 1983 claim accrues until the plaintiff succeeds in invalidating the underlying conviction or sentence.

The Court extended *Heck* to the prison-discipline context in *Edwards v. Balisok*, 520 U.S. 641 (1997). Balisok alleged that the presiding officer at his conduct hearing was biased and deprived him of the opportunity to present exculpatory witness testimony. *Id.* at 643. Some of Balisok's good-time credits were revoked. He did not challenge the result of the proceeding or the punishment he received. Instead, he claimed in a § 1983 suit that he was deprived of due process. *Id.* at 645. The Court held that judgment for Balisok would necessarily imply the invalidity of his disciplinary sentence. *Id.* at 648. The Court reasoned that denial of the opportunity to present witnesses was "an obvious procedural defect, and state and federal courts have reinstated good-time credits (absent a new hearing) when it is established." *Id.* at 647. Thus, *Heck*'s favorable-termination rule applied. *Id.* at 648.

A. Strategic Waiver

Morgan argues that challenges to the *conditions* of a prisoner's confinement—as opposed to the *duration* of that confinement—do not implicate *Heck*, so a prisoner should be permitted to challenge a disciplinary proceeding via § 1983 if he waives all challenges to duration-of-confinement sanctions. Morgan's is not a novel argument. We have rejected it before and see no reason to change course.

When an inmate is found guilty of a disciplinary violation, prison officials can apply sanctions reducing the inmate's privileges within the facility. They can also revoke good-time credits, a sanction that has the effect of lengthening the inmate's term of confinement. Morgan relies on *Peralta v. Vasquez*, 467 F.3d 98, in which the Second Circuit considered the mixed-sanctions scenario and chose to embrace strategic waiver as a means of removing the *Heck* bar. The court held that a prisoner facing condition-of-confinement sanctions and duration-of-confinement sanctions could challenge the former under § 1983 without complying with *Heck*'s favorable-termination requirement. *Id.* at 104. All the prisoner must do is "abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking." *Id.*

We rejected *Peralta* in *Haywood v. Hathaway*, 842 F.3d 1026. The approach Morgan urges us to adopt rests on a misunderstanding of *Heck*. The favorable-termination rule is more than a procedural hurdle that plaintiffs can skirt with artful complaint drafting or opportunistic affidavits. Rather, it is grounded in substantive concerns about allowing conflicting judgments. As we explained in *Haywood*, the *Heck* rule is

"a version of issue preclusion (collateral estoppel), under which the outstanding criminal judgment or disciplinary sanction, as long as it stands, blocks any inconsistent civil judgment." 842 F.3d at 1029. Neither *Peralta* nor Morgan can account for this aspect of *Heck*.

Endorsing Morgan's arguments would undercut another feature of the Court's favorable-termination jurisprudence. *Heck* held that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated." 512 U.S. at 489-90 (emphasis added). Morgan's argument is incompatible with that holding. If a prisoner's challenge to a disciplinary hearing implies the invalidity of the resulting sanctions, no § 1983 claim has accrued. And "[i]f the claim has not accrued, it cannot matter what relief a prisoner seeks." *Haywood*, 842 F.3d at 1028. Selective waiver simply doesn't alter the analysis.

Morgan concedes that *Haywood* controls his case and asks us to overrule it. But we do not reverse our precedents lightly; we need "compelling reasons" to do so. *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005). The Supreme Court has not cast doubt on *Haywood*, and it does not represent a minority approach among our sister circuits. *See Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009) (discussing circumstances in which we reconsider our precedents). Moreover, we remain convinced that "*Peralta* is incompatible with *Heck* and its successors." *Haywood*, 842 F.3d at 1030. State prisoners cannot avoid the favorable-termination rule by engaging in strategic waiver. If judgment for a § 1983 plaintiff would necessarily imply the invalidity of his punishment, the *Heck* rule applies and favorable termination of the

underlying proceeding is a prerequisite to relief. *See Nelson v. Campbell*, 541 U.S. 637, 646 (2004).

B. *Dotson* and *Skinner*

Morgan also compares his case to *Wilkinson v. Dotson*, 544 U.S. 74 (2005), and *Skinner v. Switzer*, 562 U.S. 521 (2011), but the analogy is inapt. In *Dotson* the Court dealt with two § 1983 suits challenging the retroactivity of certain state parole-hearing procedures on due-process grounds. The plaintiffs sought declaratory relief and an injunction ordering parole hearings under a different set of rules. *Dotson*, 544 U.S. at 76-77. The Court held that the plaintiffs' claims were cognizable under § 1983 because success would mean "new [parole] eligibility review" for one plaintiff and "a new parole hearing" for the other, neither of which would "necessarily spell immediate or speedier release" or imply the invalidity of their sentences. *Id.* at 81 (emphasis omitted). In *Skinner* the Court allowed a Texas prisoner to seek post-conviction DNA testing using a § 1983 suit because "[s]uccess… gains for the prisoner only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive." 562 U.S. at 525. Thus, judgment for the plaintiff wouldn't necessarily imply unlawful confinement by the State.

It's not clear that Morgan made this argument below. But in the interest of completeness, we address it here. Morgan misses a key distinction between his case and *Dotson* and *Skinner*—a distinction we've discussed before. *See Burd v. Sessler*, 702 F.3d 429, 432-34 (7th Cir. 2012). The plaintiffs in *Dotson* and *Skinner* sought purely prospective relief: parole hearings under different rules in *Dotson*; DNA testing in *Skinner*. As we explained in *Burd*, the *Dotson* and *Skinner*

plaintiffs sought entirely forward-looking relief: access to "procedural pathways that, if successfully employed, *might* [have led] to the overturning of the underlying conviction." *Burd*, 702 F.3d at 433 (emphasis added). Judgment for those plaintiffs would not have implied the invalidity of their convictions or sentences.

Morgan's claim, in contrast, is entirely backward looking. He alleges a due-process violation at the hearing that generated his disciplinary sanctions. A damages judgment for Morgan would amount to a judicial determination that prison officials infringed Morgan's constitutional rights by failing to call a witness in his defense, rendering the proceeding unfair. Such a judgment would straightforwardly imply the invalidity of his punishment, triggering *Heck*'s favorable-termination rule. *Balisok*, 520 U.S. at 648; *see also Lusz v. Scott*, 126 F.3d 1018, 1022 (7th Cir. 1997) (applying the *Heck* bar where the plaintiff argued "that he was denied the opportunity to call requested witnesses in his favor"). We've clarified before that "'[i]mply' is not synonymous with 'invalidate.'" *Hill v. Murphy*, 785 F.3d 242, 248 (7th Cir. 2015). Judgment in Morgan's favor would allow him "to argue that he had been determined by a court to have been unjustly" punished—an outcome that "*Heck* forbids." *Id.*

Morgan argues that Illinois regulations make all the difference. By rule, "[t]he Director, Deputy Director or Chief Administrative Officer shall remand the decision to the Adjustment Committee for new proceedings if the proceedings are found to be defective due to[] . . .[i]mproper exclusion of witnesses." ILL. ADMIN. CODE tit. 20, § 504.90(a)(3). In Morgan's view this provision makes his case like *Dotson* and *Skinner*,

where success merely meant *access* to new proceedings. Morgan claims that a judgment in his favor would bring "a new hearing that appropriately considers previously excluded evidence." The hearing could go either way—like the parole hearings in *Dotson* or the testing in *Skinner*—so *Heck* poses no problem for Morgan's suit.

We disagree. *Heck* is not inapplicable merely because state prison regulations call for replacement proceedings in certain situations. *Heck* prevents the entry of any *judgment* that would cast doubt on the validity of the plaintiff's punishment or conviction. *Burd*, 702 F.3d at 433. To repeat, in *Dotson* the plaintiffs sought entirely forward-looking relief in the form of new hearings under a different set of rules. Judgment granting that relief wouldn't impugn their sentences. Morgan seeks money damages—a classic retrospective remedy. That Morgan might receive additional administrative proceedings as a collateral consequence of receiving a damages judgment does not render that hypothetical judgment any more consistent with the validity of his disciplinary punishment.

It's worth noting that Morgan could have challenged the Board's ruling in other ways. *Id.* at 436 (holding that "*Heck* applies where a § 1983 plaintiff *could* have sought collateral relief ... but declined the opportunity"). Under Illinois law the writ of certiorari empowers circuit courts to review administrative determinations "when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides for no other form of review." *Hanrahan v. Williams*, 673 N.E.2d 251, 253 (Ill. 1996). Illinois statutes governing prison discipline do not provide for judicial review, so "prison disciplinary

proceedings are reviewable in an action for *certiorari*." *Fillmore v. Taylor*, 80 N.E.3d 835, 849 (Ill. App. Ct. 2017). Alternatively, Morgan could have asked a state court to issue a writ of mandamus ordering Menard officials to conduct a new hearing. *Dye v. Pierce*, 868 N.E.2d 293, 296 (Ill. App. Ct. 2006) ("An allegation of a due-process-rights violation ... states a cause of action in *mandamus*."). And after exhausting state review, he could have sought relief under the federal habeas corpus statute. Instead he immediately sued for money damages under § 1983—and ran directly into *Heck*.

Although Morgan does not currently have a cognizable § 1983 claim, it is at least possible that he could convince a state court to provide the favorable termination required by *Heck*. Illinois courts apply a six-month limitations period to certiorari actions, but a court might hear a late certiorari action if no "public detriment or inconvenience would result from [the] delay." *Alicea v. Snyder*, 748 N.E.2d 285, 290 (Ill. App. Ct. 2001).

Heck-barred claims must be dismissed. *Johnson v. Winstead*, 900 F.3d 428, 436 (7th Cir. 2018). But given the possibility of future state-court proceedings, Morgan's claim should have been dismissed *without* prejudice. *See Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014); *Polzin v. Gage*, 636 F.3d 834, 839 (7th Cir. 2011). We modify the judgment to reflect a dismissal without prejudice. As modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

JERYME MORGAN,
Plaintiff,

v.

MINH SCHOTT, and TIMOTHY VEATH,
Defendants.

Case No. 13-cv-0881-SCW

[May 16, 2016]

MEMORANDUM AND ORDER

WILLIAMS, *Magistrate Judge*:

Introduction and Procedural History

Plaintiff brought an action for violations of his constitutional rights pursuant to 42 U.S.C. § 1983 that occurred at Menard Correctional Center on February 21, 2013, and that action was captioned as cause No. 13-182. On May 9, 2013, Plaintiff filed a motion to amend his complaint in that case. The Court found that he stated several claims, but also determined that those claims could not proceed together pursuant to *George v. Smith*, 507 F.3d 605 (7th Cir. 2007). (Doc. 1). It split off Plaintiff's claim that he was retaliated against by Defendants into the present suit. (Doc. 1). Specifically, Plaintiff claimed that Maynard wrote a

false disciplinary ticket and that Schott and Veath refused to call Plaintiff's witnesses at the disciplinary hearing in retaliation for a grievance Plaintiff filed on January 25, 2012. (Doc. 1). On August 3, 2015, Plaintiff filed a motion alleging that his original complaint had clearly stated a due process claim against Defendants Schott and Veath for failure to call a witness at his disciplinary hearing, and that this claim had been overlooked on § 1915A review. (Doc. 46). Examination of Plaintiff's original complaint proved him correct, and the Court allowed that claim to proceed. (Doc. 50). Defendants filed an answer to that claim on August 21, 2015. (Doc. 51).

The Court dismissed Plaintiff's claims of retaliation and Maynard in response to an earlier-filed motion for summary judgment. (Doc. 63). However, due to the confusion regarding what claims Plaintiff had stated, the Court permitted Defendants Schott and Veath to file a supplemental motion for summary judgment on whether Plaintiff's due process claim was bared by *Heck v. Humphrey*, 512 U.S. 477 (1994). Defendants filed that motion on February 10, 2016. (Doc. 76). The Court then appointed Plaintiff counsel for the purpose of responding, and if necessary, trying the case. (Doc. 79). Plaintiff filed his response after several extensions on May 2, 2016. (Doc. 96). He was granted leave to file a late affidavit, which he did on May 9, 2016. (Doc. 97). On May 13, 2016, the Court held hearing on the motion. The following is a summary of that ruling.

Summary Judgment Standard

Summary judgment is proper only if the admissible evidence considered as a whole shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Dynegy*

Mktg. & Trade v. Multiut Corp., 648 F.3d 506, 517 (7th Cir. 2011) (citing Fed. R. Civ. P. 56(a)). The party seeking summary judgment bears the initial burden of demonstrating—based on the pleadings, affidavits and/or information obtained via discovery—the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether a genuine issue of material fact exists, the Court must view the record in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

At summary judgment, the Court's role is not to evaluate the weight of the evidence, to judge witness credibility, or to determine the truth of the matter, but rather to determine whether a genuine issue of triable fact exists. *Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508, 512 (7th Cir. 2008).

Factual Background

Plaintiff was incarcerated at Menard from November 2009 until roughly February 2012. (Doc. 48-1, p. 16). He returned to Menard in May 2014 and is currently incarcerated there. (Doc. 48-1, p. 16).

A disciplinary ticket was issued to Plaintiff following an investigation into an assault against two inmates that occurred on the East Yard at Menard and was perpetrated by members of the Latin Folk constellation of gangs. (Doc. 48-2, p. 1). Plaintiff was identified as participating in the assault. (Doc. 48-2, p. 1). Plaintiff was charged with violated assaulted [sic] of any person, dangerous contraband, dangerous disturbances, impeding or interfering with an investigation, and gang or other unauthorized activity. (Doc. 48-2, p. 4). Ultimately, after Plaintiff appealed to the

ARB, the claim about not cooperating with the investigation was stricken because no reviewing officer signed the disciplinary report. (Doc. 2, p. 8). The ARB also stuck [sic] the claim regarding possession of contraband as unsubstantiated. (Doc. 2, p. 8). As a result of the disciplinary report, Plaintiff was sentenced to 1 year C grade, 1 year segregation, 3 months loss of good time credit, 1 year commissary restriction, 3 months yard restriction, and 6 months contact visits restriction. (Doc. 48-2, p. 5).

Plaintiff believes that he was not given due process pursuant to DR-504 procedures because the administrative rules and regulations permit exonerating evidence to be presented at a disciplinary hearing. (Doc. 48-1, p. 22-23). Plaintiff requested that James Lewis be called as a witness. (Doc. 48-1, p. 23) (Doc. 48-2, p. 1). He put the name of his witness on the white copy of the ticket and confirmed that it made it through all of the carbon copies. (Doc. 48-1, p. 23) (Doc. 48-2, p. 1). Plaintiff's witness was not called at the hearing, and the paperwork incorrectly states that he did not request any witnesses. (Doc. 48-1, p. 23) (Doc. 48-2, p. 4). Plaintiff believes that the IDOC could have located James Lewis and that the adjustment committee made no effort to do so. (Doc. 48-1, p. 37). Plaintiff testified that James Lewis was at Menard at the time he wanted to call him. (Doc. 48-1, p. 43). The IDOC website currently lists 10 inmates in custody with the name James Lewis. When the ARB investigated this claim, it found no inmate by that name at Menard. (Doc. 2, p. 9). Plaintiff concedes that he did not have an ID number for James Lewis. (Doc. 48-1, p. 36) (Doc. 48-2, p. 1).

Plaintiff submitted an affidavit that his due process claim does not challenge the sanctions that arise

from the January 31, 2012 Prison Adjustment Committee hearing that affect the duration of his confinement. (Doc. 97, p. 3). Rather, Plaintiff is only challenging the sanctions that affect his conditions of confinement, namely the C-grade status, one year segregation, one year commissary restriction, three months yard restriction, and six months contact visit restriction. (Doc. 97, p. 2-3). Plaintiff is not challenging the loss of his good time credit. (Doc. 97, p. 3). He further waived any right he had to challenge the loss of his good time credit. (Doc. 97, p. 3).

Analysis

The Court finds that there is a *Heck* bar to Plaintiff's claims. *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Supreme Court stated that a prisoner's § 1983 is not cognizable if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. Thus, a prisoner's claim for damages is barred unless the prisoner can demonstrate the conviction or sentence has previously been invalidated. The Supreme Court extended the *Heck* doctrine to civil rights claims arising out of prison disciplinary hearings. *Burd v. Sessler*, 702 F.3d 429, 434 (7th Cir. 2012) (citing *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) ("[R]espondent's claim[s] . . . that necessarily imply the invalidity of the punishment imposed, [are] not cognizable under § 1983.").

Plaintiff's affidavit that he waives any claim for recovery of his good time credit is not sufficient to dodge the issue in the Seventh Circuit. Although the Second Circuit has recognized that right, it is the only Circuit to explicitly to [sic] so. *See Peralta v. Vasquez*, 467 F.3d 98, 104 (2d Cir. 2006)("[A] prisoner subject to such mixed sanctions can proceed separately, under

§ 1983, with a challenge to the sanctions affecting his conditions of confinement without satisfying the favorable termination rule, . . . only . . . if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement.") (emphasis in original omitted). While Plaintiff has also cited to *Brownlee v. Murphy*, a Ninth Circuit opinion, the Court notes that opinion was never published and has not been extensively cited to by other cases in the Ninth Circuit. 231 F. App'x 642 (9th Cir. 2007). Neither of the precedents cited by Plaintiff are controlling here.

Plaintiff's challenge to the procedures that kept him from calling his witness necessarily implies a challenge to the finding imposing the discipline. In *Tolliver v. City of Chicago*, the Seventh Circuit has held that a plaintiff cannot present a version of facts in a civil suit that implies that a conviction is invalid, even if the plaintiff is not seeking relief for the invalid conviction. —F.3d—, 2016 WL 1425865 at *4 (7th Cir. April 12, 2016). Nor is a disclaimer sufficient to surmount this hurdle. *Okoro v. Callahan*, 324 F.3d 488, 490 (7th Cir. 2003) ("It is irrelevant that [plaintiff] disclaims any intention of challenging his conviction.") Here, Plaintiff's claim that his witness was not called in violation of his due process rights calls into question the validity of the prison discipline, because to accept that claim necessarily implies that the discipline was somehow invalid. *Okoro*, 324 F.3d at 490 (finding that it was irrelevant that there was a hypothetical scenario that accommodated both the conviction and plaintiff's factual situation where the plaintiff insisted on a version of events that cast the conviction into doubt). This case is no different than *Tolliver* and *Okoro*, which are binding precedent in this circuit. The remaining claims in this case are *Heck* barred.

CONCLUSION

For the foregoing reasons, summary judgment is GRANTED, and Plaintiff's due process claim against Schott, and Veath is DISMISSED with prejudice. (Doc. 76). As this disposes of all remaining claims, the Clerk of Court is directed to enter judgment in Defendants' favor and close the case.

IT IS SO ORDERED.

Dated: May 16, 2016

/s/ Stephen C. Williams
STEPHEN C. WILLIAMS
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 16-2384

JERYME MORGAN,
Plaintiff–Appellant,

v.

MINH SCHOTT, TIM VEATH, and
HUDSON MAYNARD,
Defendants–Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.

No. 13-cv-0881-SCW – Stephen C. Williams,
Magistrate Judge.

[February 5, 2019]

BEFORE KANNE, SYKES, and ST. EVE, *Circuit Judges*.

FINAL JUDGMENT

We modify the judgment to reflect a dismissal without prejudice. As modified, the judgment is **AFFIRMED**.

The above is in accordance with the decision of this court entered on this date. Each side to bear its own costs.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS EAST ST. LOUIS DIVISION

JERYME MORGAN, #R-29175,
Plaintiff,

v.

HUDSON MAYNARD, et al.,
Defendants.

No. 13-881-MJR-SCW

AFFIDAVIT OF JERYME MORGAN IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

I, JERYME MORGAN, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 and have personal knowledge of the facts stated herein.

2. I was incarcerated at Menard Correctional Center in Menard, Illinois from approximately November 2009 until approximately February 2012, when I was transferred to various other correctional centers. In approximately November 2014, I returned to Menard Correctional Center, where I am currently incarcerated.

3. On January 27, 2012, I was issued a disciplinary ticket for participation in an assault against two

inmates that occurred in Menard's East Yard involving members of the Latin Folk constellation of gangs on October 25, 2011 ("Disciplinary Ticket). *See* the Disciplinary Ticket attached hereto as Exhibit A.

4. On January 31, 2012, the Prison Adjustment Committee conducted a hearing regarding the Disciplinary Ticket. The Prison Adjustment Committee found that I was guilty of violent assault, dangerous contraband, dangerous disturbances, impeding or interfering with an investigation, and gang or unauthorized activity (the "Prison Adjustment Committee's Finding"). *See* the Adjustment Committee's Final Summary Report attached hereto as Exhibit B.

5. On June 7, 2012, the Administrative Review Board stuck the charges of impeding or interfering with an investigation and dangerous contraband from my disciplinary card, but upheld the other findings by the Adjustment Committee. *See* the Administrative Review Board's June 7, 2012 letter to Jeryme Morgan attached hereto as Exhibit C.

6. As a result of the Prison Adjustment Committee's Finding, I was disciplined with the following sanctions: one year C Grade status, one year segregation, revocation of one month of good time credits, one year commissary restriction, three months yard restriction, and six months contact visits restriction. *See* my Disciplinary Card attached hereto as Exhibit D and the August 14, 2012 Good Conduct Revocation Recommendation Approval attached hereto as Exhibit E.

7. On August 27, 2013, I filed this action claiming that Defendant Maynard falsely wrote the Disciplinary Ticket and that Defendants Schott and Veath refused to call my witnesses during the January 31,

2012 Adjustment Committee hearing in retaliation of a grievance I submitted on January 25, 2012 regarding improperly opened legal mail.

8. On August 14, 2015, my complaint was amended to include a due process claim against Defendants Schott and Veath for their failure to call witnesses during the January 31, 2012 Adjustment Committee hearing.

9. On January 25, 2016, the Court granted Defendants' Motion for Summary Judgment as to my retaliation claims. Accordingly, my due process claim against Defendants Schott and Veath is the only claim remaining in this action.

10. I affirm that my due process claim in this action only challenges the sanctions arising from the January 31, 2012 Prison Adjustment Committee hearing that affect the conditions of my confinement, namely the one year C Grade status, one year segregation, one year commissary restriction, three months yard restriction, and six months contact visits restriction.

11. I affirm that my due process claim in this action does not challenge the sanctions arising from the January 31, 2012 Prison Adjustment Committee hearing that affect the duration of my confinement, namely the revocation of one month of good time credits.

12. I affirm that I hereby abandon any and all present and future challenges that I may have relating to any sanctions arising from the January 31, 2012 Prison Adjustment Committee hearing that affect the duration of my confinement, namely the revocation of one month of good time credits.

13. I am waiving for all times all claims relating to any sanctions arising from the January 31, 2012 Prison Adjustment Committee hearing that affect the duration of my confinement in order to proceed with claims challenging the sanctions affecting the conditions of my confinement.

14. Further Affiant sayeth naught.

/s/ *Jeryme Morgan*
JERYME MORGAN

COUNTY OF Randolph }

}ss

STATE OF Illinois }

Subscribed and sworn to before me,

This 26th day of April , 2016.

/s/ *Shane W. Gregson*
Notary Public

My Commission Expires:

2/25/2019