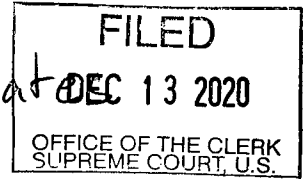


20-7420 ORIGINAL

In The
Supreme Court Of The United States
December Term 2020
No. _____



Tobi Kilman,
Petitioner,
— against —
Dean Williams, et al.,
Respondents

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The 10th Circuit

Tobi Kilman
#866024
Arapahoe County Detention Facility
P.O. Box 4918
Centennial, CO 80155-4918

Question Presented

Whether a prisoner has a liberty interest in receiving time-credits toward the service of his sentence, when said credits are mandated by statute and have been denied without review.

Parties

The Petitioner is Tobi Kilman, an inmate at the Arapahoe County Detention Facility in Centennial, Colorado. He was incarcerated in the Colorado Department of Corrections at the time of his claim.

The Respondents are past and present Executive Directors of the Colorado Department of Corrections. Their names are: Walter Kautzky, Frank Gunter, Aristedes Zavares, Joe Ortiz, John Suthers, Tom Clements, James Ricketts, Rick Raemisch, Dean Williams, and any Unnamed Former Executive Director of the C.D.O.C. circa 1990-2019.

Table Of Contents

Question Presented	1
Parties	1
Note On Format	2
Table Of Authorities	3-4
Decisions Below	4
Jurisdiction	4
Constitutional And Statutory Provisions Involved	4-6
Statement Of The Case	7-15
Basis For Federal Jurisdiction	15
Reasons For Granting The Writ	
A. Conflicts With Decisions Of Other Courts	16-18
B. Importance Of The Question Presented	18-21
Conclusion	21
Declaration Under Penalty Of Perjury	22
Appendix	
Decision Of The United States Court Of Appeals	A.1
Recommendation Of The United States District Court	A.7
Relevant Colorado Revised Statutes	A.14- A.28

Note On Format

The Petitioner in this matter is an inmate at the Arapahoe County Detention Facility, and does not have access or means to prepare this document in the form prescribed by USCS Supreme Ct R 33(1)-(2). Since such preparation is impossible at this time, Petitioner uses the exemption described in USCS ~~Supreme~~ Supreme Ct R 39(3), and he apologizes for the inconvenience.

Table Of Authorities

Cases:

Bergen v. Spaulding, 881 F.2d 719, 721 (9th Cir. 1989)	18
Campbell v. Peters, 256 F.3d 695, 700 (7th Cir. 2001)	20
Davis v. Hall, 375 F.3d 703, 718-19 (8th Cir. 2004)	20
Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc)	18, 20
Heck v. Humphrey, 512 U.S. 477 (1994)	15-19
McCurry v. Moore, 242 F.Supp. 2d 1167, 1180 (N.D. Fla. 2002)	20
Plumb v. Prinslow, 847 F. Supp. 1509, 1521 (D.Or. 1994)	20
Sample v. Diecks, 885 F.2d at 1109-10 (3d Cir. 1989)	20
Sample v. Diecks, 885 F.2d at 1099, 1114 (3d Cir. 1989)	18
Sanford v. Manternach, 601 N.W. 2d 360, 366-68 (Iowa 1999)	19
Sandin v. Conner, 515 U.S. 472, 477-78, 115 S.Ct. 2293 (1995)	17

Sandin v. Conner, 515 U.S. at 484 (1995) — 7, 17, 19
Toney El v. Franzen, 777 F.2d 1224, 1226-27 (7th
Cir. 1985) ————— 18

Decisions Below

The decision of the United States Court of Appeals for the 10th Circuit is unreported. A copy is attached as Appendix A.1 to this petition. The order of the United States District Court for the District of Colorado is not reported. A copy is attached as Appendix A.7.

Jurisdiction

The judgement of the United States Court of Appeals for the 10th Circuit was entered on October 19, 2020. Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

Constitutional And Statutory Provisions Involved

- This case involves Amendment VIII to the United States Constitution, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case involves Amendment XIV to the United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

These Amendments are enforced by Title 42,
Section 1983, United States Code:

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement Of The Case

The Petitioner was a Colorado state prisoner for a total of 165 months between the years of 1997 and 2017. At no time was he ever awarded Good Time pursuant to Colorado Revised Statute 17-22.5-301 or Earned Time pursuant to Colorado Revised Statute 17-22.5-302, even though he routinely observed the proper activities and behavior prescribed in said state statutes. The wording of these statutes presents that these time-credits shall be awarded as long as an inmate earns them with his conduct. Said statutes do not condone arbitrary withholding of these credits and they point to withholding of time-credits to be dictated by the conduct of the inmate, C.R.S. 17-22.5-301. The statutes in question had not been repealed as of the filing of the Complaint.

The Petitioner asserts that the above statutes create a liberty interest for the inmate because the challenged actions cause the prisoner to spend more time in prison, Sandin v. Conner, 515 U.S. at 484. When this liberty interest is deprived it leads to excessive confinement, which

is a form of torture, and is cruel and unusual punishment and a violation of Petitioner's rights under the 8th Amendment.

This is also a due process claim under the 14th Amendment for the following reasons. Not only do the time-credits in question produce a state-created liberty interest that is enforced by the Due Process Clause, but the way in which they were denied lacked any review whatsoever, which is why the Petitioner did not pursue this matter until recently. If one were to peruse time-computation spreadsheets from the Colorado Department of Corrections for the Petitioner, Tobi Kilman, one finds that these time-credits are not accounted for and no explanation is given for their denial. The only time-credits awarded to the Petitioner were Earned Time credits pursuant to C.R.S. 17-22.5-405.

When one reads C.R.S. 17-22.5-301, Good Time, one finds that it calls for a 15 day time-credit toward service of sentence per month. C.R.S. 17-22.5-302, Earned Time, calls for another 5 days

per month. Mr. Kilman was only credited pursuant to C.R.S. 17-22.5-405, Earned Time-earned release time-achievement earned time, usually in the amount of 10 days per month. As we can see, the Petitioner should have received 30 days credit toward his sentence for most months, on top of the time he actually served.

The district court possesses unaltered copies of the Petitioner's time-computation reports from the Colorado Department of Corrections as part of the case file. The Petitioner's personal time-computation calculations are corollary to these. These reports also serve to exhibit to the Court that the time-credits in dispute were not subject to review.

The Petitioner served 165 months of actual calendar time in the Colorado Department of Corrections in order to get credit for 217 months toward his prison sentences, which was what was needed to secure his release from prison. If Good Time and Earned Time were properly credited to Mr. Kilman, he would have served 109 months to be credited with 217. $165 \text{ minus } 109 \text{ is } 56$. This

difference between how much time he did serve and how much time he should have served amounts to 56 months of excessive confinement. This excessive confinement caused pain and suffering upon the Petitioner, as well as deprivation of liberties and privileges, and may have contributed to psychiatric symptoms from conditions such as post-traumatic stress disorder, institutionalization, social anxiety disorder, and other anti-social tendencies.

C.R.S. 17-22.5-302(1), states: "In addition to Good Time authorized in section 17-22.5-301, Earned Time, not to exceed thirty days for every six months of incarceration, may be deducted from the inmate's sentence upon a demonstration to the department by the inmate that he has made substantial consistent progress..."

While this excerpt prescribes 5 days time credited pursuant to this statute, per month, it also points out that Good Time and Earned Time are two different time credits and are to be awarded in conjunction with each other. Further into said statute, subsection 1.5(a) states: "In addition to the thirty days of earned time

authorized in subsection (1) of this section, an inmate who makes positive progress. . . shall receive earned time pursuant to section 17-22.5-405. . . ." Here we are instructed that inmates shall receive Earned Time credits pursuant to multiple statutes at the same time, as long as this inmate has earned them.

It is important to mention that the Complaint is not an equal protection claim. The Petitioner is not contending that he was missing out on time-credits that other inmates were receiving. It happens that at some point in the early 1990's, when the Colorado State Legislature passed its mandatory parole laws, the Department of Corrections ceased to award time-credits pursuant to C.R.S. 17-22.5-301, 302, and proceeded only to award time-credits pursuant to C.R.S. 17-22.5-405. This is despite the fact that nothing in these statutes makes these time-credits exclusive from one another.

By the time the Petitioner first entered into C.O.D.C. custody, time-computation reports no longer mentioned Good Time at all, and Earned Time

was only the 10 days called for by C.R.S. 17-22.5-405. Good Time had been swept under the rug so fully that no one the Petitioner had ever talked to had any inkling that we were due multiple types of time-credits, and it was generally thought that "Good Time" and "Earned Time" were different words for the same thing. In fact, Mr. Kilman was not aware of the multiplicity of "available" time-credits until 2018 when he was randomly leafing through a copy of Title 17 of the Colorado Revised Statutes and just happened upon them. So when the lower courts cited a lack of diligence on the Petitioner's part, because he did not use available habeas remedies, these courts were ignoring the fact that these discrepancies between state-policy and C.D.O.C. practice were seemingly unknown by any of the inmates ~~that~~ that were affected at the time. To use a lack of diligence argument as a grounds for dismissal in this case was an abuse of discretion on the ~~court's~~ court's part.

This Petitioner is suing past and present Executive Directors of the Colorado Department of Corrections because administration of time-credits

in C.D.O.C. is their direct responsibility, conferred by law. See here C.R.S. 17-22.5-306, Transfer of Functions:

The executive director shall, on and after July 1, 1984, execute, administer, perform, and enforce the rights, powers, duties, functions, and obligations formerly vested in the state board of parole with respect to the earned time provisions of section 17-22.5-302.

Notwithstanding any other provision of law to the contrary, the state board of parole shall carry out all of its other functions as if this section had not been enacted.

While this statute does not directly mention C.R.S. 17-22.5-301, 405, it does mention 302, which is a link between all three types of time-credits, and 306 clearly places time-credits under the auspices of the office of the Executive Director.

The list of Defendants starts with Walter Kautzky because the practice of arbitrarily and capriciously withholding Good Time pursuant to C.R.S. 17-22.5-301 and Earned Time pursuant to

C.R.S. 17-22.5-302 began under his watch, and this decision by Mr. Kautzky affected time-computation practice going forward. Subsequent former Executive Directors that are listed as Defendants are guilty of continuing this practice while the Petitioner was incarcerated. While Mr. Kilman does not pursue the current Executive Director of C.D.O.C. for compensatory damages, he does for punitive damages in that Dean Williams continues a practice that has affected Mr. Kilman in the past and may affect him in the future. He also pursues Mr. Williams for damages as a deterrent to continuing these practices in violation of others rights.

The Petitioner has sued these parties in their individual capacity because no reasonable person that was an Executive Director of C.D.O.C. after the passing of C.R.S. 17-22.5-306 into law could not have known that time-credit calculation fell under his authority, and no person in this situation could not have known that deprivation of time-credits that are mandated by law would deny inmates in their custody of a state-created liberty interest.

The district court dismissed this action pursuant to the rule in *Hedg v. Humphrey*, 512 U.S. 477 (1994) as legally frivolous. The U.S. Court of Appeals for the Tenth Circuit affirmed this decision.

Basis For Federal Jurisdiction

This case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. 1331.

Reasons For Granting The Writ

A. Conflicts with Decisions of Other Courts

The Appellate Court affirmed the District of Colorado's application of *Heck v. Humphrey* to this matter despite the fact that that case was nothing like this one and is too different to be used here as a precedent. According to Black's Law Dictionary, a precedent is:

1. Something of the same type that has occurred or existed before.
2. An action or official decision that can be used as support for later actions or decisions; esp., a decided case that furnishes a basis for determining later cases involving similar facts or issues.

Aside from the fact that this Petitioner and *Heck* were both incarcerated at the time of filing, these cases similarities are negligible.

This did not stop the courts from applying *Heck* to this case. In fact, the Tenth Circuit has shown a propensity for injudiciously applying

Heck to any lawsuit that disputes time-computation practices, even though Heck had nothing to do with time-computation, rather it was an attempt to overturn his conviction by circumventing the courts that are actually responsible for those decisions. The Tenth is using this bit of case law as a rote response to any lawsuit that litigates an inmate's time spent in prison, regardless of what the actual cause of action or circumstances around it happen to be.

The proper precedent for this case is the liberty interest criteria set down in Sandin v. Conner, 515 U.S. 472, 477-78, 115 S.Ct. 2293 (1995), where Good Time, which was conferred by state statute and could only be revoked on a finding that the prisoner had committed serious misconduct, was an interest of "real substance" protected by due process.

Prisoners have liberty interests when the challenged action causes the prisoner to spend more time in prison, Sandin v. Conner, 515 U.S. at 484. Sandin—like Heck—was a precedent setting

decision. Further, it is much more pertinent to this case. Applying Heck is directly contradictory to the fact that prisoners have a liberty interest in being released on time, in conformity with the sentence imposed and with other relevant laws such as those providing for Good Time, Sample v. Diecks, 885 F.2d 1099, 1114 (3d Cir. 1989); Bergen v. Spaulding, 881 F.2d 719, 721 (9th Cir. 1989); Toney El v. Franzen, 777 F.2d 1224, 1226-27 (7th Cir. 1985); Haygood v. Younger, 769 F.2d 1350, 1354 (4th Cir. 1985) (en banc).

B. Importance of the Question Presented

This case presents a fundamental question of the interpretation of this Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994). The question presented is of great public importance because it affects the operations of the prison systems in all 50 states, the District of Columbia, and hundreds of city and county jails. It affects prisoner's ability to receive fair decisions in proceedings that may result in months or years of added incarceration of an excessive nature that is in defiance of their state-created

liberty interests.

The issue's importance stems from the fact that the lower courts (especially the Tenth Circuit) have been applying Heck as a precedent for cases that argue against prisons denial of state-created liberty interests. These are clearly not lawsuits that are arguing against the validity of one's convictions or the sentences imposed, which is what the rule in Heck was presumably intended for, given that that lawsuit pertained to the validity of Heck's conviction. Courts should not be applying Heck to state-created liberty interest lawsuits.

Courts have refrained from invoking Heck in cases that were almost identical to the Petitioner's claim and have found in favor of the plaintiffs. An Iowa court held that their good time statutes creates a liberty interest because it inevitably affects the length of time the prisoner serves, Sanford v. Manternach, 601 N.W. 2d 360, 366-68 (Iowa 1999). This decision was post-Heck and it pointed to Sandin v. Conner, 515 U.S. at 484, which is the proper precedent

here.

Where Executive Directors of the Colorado Department of Corrections have knowingly denied statutorily mandated time-credits to inmates that have earned them, they have been deliberately indifferent. Most courts hold that due process is denied if a prisoner is not released on time as a result of deliberate indifference, Davis v. Hall, 375 F.3d 703, 718-19 (8th Cir. 2004), and the deliberate indifference standard governs both due process and Eighth Amendment claims, McCurry v. Moore, 242 F. Supp. 2d 1167, 1180 (N.D. Fla. 2002), where courts have held that deliberate indifference resulting in excessive confinement constitutes cruel and unusual punishment, Campbell v. Peters, 256 F.3d 695, 700 (7th Cir. 2001); Sample v. Diecks, 885 F. 2d at 1109-10; Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc); Plumb v. Prinslow, 847 F. Supp. 1509, 1521 (D. Or. 1994).

With specificity to the state of Colorado; the great importance of this case is not just the deprivation of the rights and privileges of

the Petitioner, but that these same rights and privileges are being denied to all inmates currently in C.D.O.C.'s custody, and this lawsuit could provide as a deterrent to state prison's continuation of corrupt time-computation practices. It has been widely conveyed that the Colorado Department of Corrections is overcrowded and badly in need of reform. What better remedy than to acknowledge the rule of law, and adhere to what has already been established.

Conclusion

For the foregoing reasons, certiorari should be granted in this case.