No. 21-7075

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Ian T. Cooke,
Petitioner.

v.

John R. Williams,
Respondent.

On Petition for Writ of Certiorari to the
Connecticut Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

QUESTION PRESENTED

Does the justiciability bar articulated by Heck v. Humphrey, 512 U.S. 477 (1994) requiring criminal plaintiffs to favorably terminate their conviction prior to commencing certain tort actions apply to a cause of action sounding in legal malpractice?

LIST OF PARTIES

- Ian T. Cooke, petitioner (plaintiff)
- John R. Williams, respondent (defendant)
- John R. Williams & Associates, LLC., respondent (defendant)

LIST OF CASES

- Cooke v. Williams, NNH-CV18-5041290-s (Conn. Super. Ct.)
- Cooke v. Williams, 206 Conn. App. 151, ___A.3d___ (2021)
- Cooke v. Williams, 339 Conn. 919, ___A.3d___ (2021)

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I. PETITION FOR WRIT OF CERTIORARI

Ian T. Cooke petitions the Court for a writ of certiorari to review the judgment of the Supreme Court for the state of Connecticut.

II. OPINIONS BELOW

The Connecticut Appellate Court's published opinion affirming in part and reversing in part the petitioner's appeal from the pre-trial dismissal of the case is reported at 206 Conn. App. 151, ___A.3d___ (2021) and attached as Appendix A.

The Connecticut Superior Court's unpublished opinion dismissing the case is unreported at NNH-CV18-5041290, 2018 WL 4865688 (Conn. Super. Ct. 9/17/18) and attached as Appendix B.

The Connecticut Supreme Court's published decision denying certification to review is reported at 339 Conn. 919 ,___A.3d___ (2021) and attached as Appendix C.

III. JURISDICTION

The Connecticut Supreme Court entered judgment on November 9, 2021. See Appendix C. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 USC §1257 (a).

IV. CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the justiciability bar enunciated by Heck v. Humphrey, 512 U.S. 477 (1994) to legal malpractice claims brought by a convicted criminal plaintiff against

their former defense counsel. This application of Heck implicates plaintiffs' rights to access the courts to seek redress and the concomitant right to due process of law as protected by the First and Fourteenth Amendments to the United States Constitution.

> U.S. Const. Amendment I - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.
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> U.S. Const. Amendment XIV §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.

V. STATEMENT OF THE CASE

A. Introduction

This petition arises from the pre-trial dismissal of a case alleging misconduct committed by an attorney and his law firm acting in a professional capacity during the representation of the petitioner in a post-conviction habeas corpus petition in state court.

Petitioner is incarcerated upon conviction for, inter alia, capital felony. Petitioner's conviction was affirmed on direct appeal. State v. Cooke, 134 Conn. App. 573, 39 A.3d 1178, cert. denied 305 Conn. 903, 43 A.3d 662 (2012). Petitioner then filed a habeas corpus petition alleging ineffective assistance of trial counsel. Petitioner privately retained the respondents to represent all efforts at obtaining a full exoneration.

Respondents were professionally negligent throughout their representation. These deficiencies included the failure to comprehend the facts of the underlying criminal case, failure to investigate the claims being presented, failure to obtain and direct relevant expert witnesses, and failure to present necessary legal argument. Respondents committed further misconduct wherein they misled petitioner as to their billing rates and likely expenditures incident to the habeas petition. Respondents also misappropriated funds intended for investigation and expert witnesses.

The habeas petition was denied. Thereafter the respondents were fired. The appeal from this denial was presented by petitioner proceeding pro se. The denial was affirmed. Cooke v. Commissioner of Correction, 194 Conn. App. 807, 222 A.3d 1000 (2019), cert. denied 335 Conn. 911, A.3d (2020).

Petitioner filed a civil action alleging, inter alia, legal malpractice against the respondents. Respondents moved to dismiss arguing that the case is unripe and that the court lacks subject matter jurisdiction due to the petitioner's outstanding criminal conviction. The trial court dismissed the case following the "favorable termination" requirement enunciated by Heck v. Humphrey, supra, 512 U.S. 477 and adopted by Connecticut to legal malpractice claims in Taylor v. Wallace, 184 Conn. App. 43, 194 A.3d 343 (2018).

Petitioner appealed arguing the inapplicability of Heck/Taylor to the case. The Connecticut Appellate Court disagreed, holding that Heck bars a legal malpractice action brought by a criminal plaintiff against their former defense counsel, commonly referred

to as "criminal malpractice," if the criminal conviction has not been favorably terminated through, e.g., habeas corpus or a pardon. See Appendix A at A006-015. The Appellate Court further opined that claims couched in fraud for alleged billing irregularities were not barred by Heck, remanding the case in part. See Appendix A at A015-027.

Petitioner sought certification to the Connecticut Supreme Court citing numerous distinctions between Heck/Taylor and the instant case rendering the favorable termination requirement inapplicable. The Connecticut Supreme Court denied certification. See Appendix C at A033.

B. How the Question Presented was Raised and Decided Below

a. The trial court declared petitioner's case unripe and non-justiciable because if successful it would undermine the validity of the criminal conviction.

The trial court's memorandum of decision dismissing Petitioner's case contains just two pages of analysis. See Appendix B. It begins by reciting Heck that "if success in a tort action would necessarily imply the invalidity of a conviction, the action is to be dismissed unless the underlying conviction has been invalidated." Appendix B at A030 citing Heck v. Humphrey, supra, 512 U.S. 489-90.

The trial court ignored the distinctions argued by petitioner, namely that the instant case is against habeas counsel not trial counsel, thus insulating the criminal conviction. In other words proof of malpractice may imply deficiency of the respondents in

the habeas but this has no bearing on the validity of the criminal trial nor the effectiveness of trial counsel.

b. The Appellate Court declined to address arguments distinguishing the case from Heck.

The Appellate Court's opinion affirming the dismissal of legal malpractice declined the opportunity to address several arguments made by petitioner distinguishing the case from Heck/Taylor. See Appendix A at A006-015. In a somewhat contradictory manner the court did recognize a distinction between causes of action; legal malpractice and fraud, holding that certain claims would be permissible if properly framed such that they don't undermine the conviction. See Appendix A at A015-027.

The Appellate Court extended the holding in Heck to equate the malpractice cause of action to a collateral attack on the underlying conviction. See Appendix A at A012. The court reasoned that proof of malpractice in this case would necessarily imply the invalidity of the conviction because to prove malpractice a criminal plaintiff "would have to prove that he would not have sustained the injury had professional negligence not occurred." (id.) The supposed injury being wrongful incarceration.

Petitioner argued that the malpractice cause of action is presently ripe because all of the elements of malpractice have been satisfied and the injury has already occurred making the claims justiciable. n.1

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n.1 The elements of legal malpractice are (1.) the existence of an attorney-client relationship; (2.) the attorney's wrongful act or omission; (3.) causation; and (4.) damages. See Appendix A at A010.

The only injury claimed by petitioner is the loss of funds paid to the respondents incident to their representation of the habeas case. The damages resulting from this injury are direct and calculable by a trier of fact, not hypothetical based on a theory of incarceration that hasn't yet been proven wrongful. In declining to acknowledge this distinction the Appellate Court found the pro se pleadings tantamount to a collateral attack on the conviction and therefore barred by Heck. See Appendix A at A014-015.

c. In denying certification the Supreme Court held that the Heck justiciability bar requiring favorable termination applies to all legal malpractice claims brought by a convicted criminal plaintiff regardless of whether the claim would necessarily imply the conviction is invalid.

The Connecticut Supreme Court's decision denying certification was a lost opportunity to assess the application of the Heck justiciability bar to legal malpractice. n.2

Petitioner argued that a singular standard requiring favorable termination based on the conclusions of Heck was inappropriate because the Appellate Court had ignored the fundamental principle of Heck requiring an individualized assessment of the facts in the context of the cause of action. Heck bars a cause of action if and only if the outcome of the proceedings will "necessarily" imply the invalidity of the conviction. Heck v. Humphrey, supra, 512 U.S. 487 n.7. Courts outside of Connecticut have interpreted Heck to

n.2 Connecticut's Appellate Court has addressed Heck in this context on three occassions: Taylor, Dressler v. Riccio, 205 Conn. App. 533, ___A.3d___ (2021); and the instant case. The Connecticut Supreme Court has never reviewed this application of Heck.

permit cases that may make subsequent efforts at exoneration "more likely" as long as the judgment itself "necessarily implies nothing at all about the plaintiff's conviction." See, e.g., McKithen v. Brown, 481 F.3d 89, 103 (2d Cir. 2007).

Petitioner highlighted the difference between the standards of proof for habeas corpus and legal malpractice. Ineffective assistance of counsel is comparatively more difficult to prove than deficiency and causation for malpractice. Proof of the latter does not necessarily imply anything of the former.

This distinction also emphasizes the fallacy in the concern over inconsistent judgments that has been spirited by the Appellate and trial courts. See Appendix A at 013-014; Appendix B at 031-032. The courts' concern is that a judgment against the respondents finding them liable for malpractice could be inconsistent with any future claim against them alleging their ineffective assistance during the habeas proceedings. See Appendix A at A013-014. The fallacy being that this concern fails to heed the disparate standards of proof between habeas and malpractice. It also fails to recognize the instances where inconsistent judgments already may occur and are permissible. For example, consider a criminal case and a civil suit brought by the alleged victim of said crime: there is no mandated consistency between these cases because the arbiters are trying two different issues regardless of the common factual predicates.

VI. REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve a conflict

among the states regarding the application of the favorable termination requirement enunciated by Heck v. Humphrey, supra, 512 U.S. 477 to legal malpractice claims brought by convicted criminal plaintiffs against their former attorneys. Lower courts have repeatedly required this Court's guidance on the application of Heck in different circumstances. n.3 This court has not assessed the Heck favorable termination requirement in legal malpractice cases previously. This case presents an issue of first impression for this Court.

A. Reading Heck to foreclose all legal malpractice claims creates a conflict among the twenty seven jurisdictions that have adopted the favorable termination requirement and the eighteen jurisdictions that have not.

The favorable termination requirement has been assessed by 45 different states and the District of Columbia at either the Appellate or Supreme Court level, albeit not always under the logic and guidance of Heck. There are at least ten different legal standards utilized across the country ranging from a very strict favorable termination requirement to no restriction on cases alleging criminal malpractice.

n.3 See, e.g., Edwards v. Balisok, 520 U.S. 641 (1997) (analyzes Heck in prison disciplinary proceedings); Wilkinson v. Dotson, 544 U.S. 74 (2005) (analyzes Heck in parole eligibility); Mayle v. Felix, 545 U.S. 644 (2005) (analyzes Heck in federal habeas alleging tortious police misconduct); Skinner v. Switzer, 562 U.S. 521 (2011) (analyzes Heck in lawsuit seeking DNA testing relating to underlying criminal case).

On the strict interpretation side are the jurisdictions requiring, e.g., actual innocence plus legal innocence: Florida, Nevada, New Hampshire, Virginia, and Washington; innocence of the charge and all lesser included offenses: West Virginia; and post-conviction relief plus proof that the attorney acted recklessly: Pennsylvania. In total there are twenty seven jurisdictions requiring some form of favorable termination pre-requisite to a criminal malpractice claim becoming ripe. See, N. Van Cleve, Amending the Peeler Doctrine: How to Provide Convicted Plaintiffs an Equitable Opportunity to Pursue Legal Malpractice Claims, 56 Hous. L. Rev. 927 (2019) (collecting cases). n.4

On the more lenient side there are a number of jurisdictions with equivalent civil and criminal malpractice standards: Arkansas, Colorado, Delaware, Indiana, Louisiana, Michigan, Montana, New Mexico, North Dakota, Ohio, and Utah. Others require a "legally cognizable injury," before commencement of the action: Alabama, District of Columbia, Georgia, Nebraska, and Rhode Island. One jurisdiction permits claims against habeas attorneys but not trial attorneys: Oregon. In total there are eighteen jurisdictions that do not follow a favorable termination requirement. (id.) n.5

Combined these jurisdictions have considered issues against criminal malpractice including: consistency of judgments, preventing

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n.4 The Peeler doctrine is Texas' formulation of the favorable termination requirement as articulated in Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995).

n.5 There are currently five jurisdictions that have not addressed this issue: Hawaii, Maine, South Dakota, Vermont, and Wyoming. Connecticut was undecided at the time of this publication.

criminals from shifting responsibility for their crimes, preserving judicial resources where criminal malpractice claims could overburden courts, protecting the defense bar where the availability of criminal malpractice may discourage practitioners, and preventing criminals from profiting from their crimes. Also considered were issues favoring the availability of criminal malpractice including: protecting individuals from negligent attorneys, promoting confidence in the criminal defense bar, treating attorneys equally instead of providing the criminal defense bar with special protections, and permitting individuals to seek refunds when their attorneys breach contractual or fiduciary obligations. See, N. Van Cleve, supra, 56 Hous. L. Rev. 945-952.

Even a cursory review of these jurisdictions' jurisprudence on the matter reveals highly disparate interpretations. See, e.g., Barker v. Capotosto, 875 N.W.2d 157, 166 (Iowa 2016) (plaintiff must obtain judicial relief from his/her conviction as a prerequisite to malpractice); but see, Kraklio v. Simmons, 909 N.W.2d 427, 439 (Iowa 2018) (holding that "a criminal defendant suing his defense lawyer over a sentencing error must obtain post-judgment relief on the sentencing issue, but need not prove relief from the underlying conviction"). On those opportunities when federal courts have delved into the issue they too have had mixed results. See, McCord v. Bailey, 636 F.2d 606, 611 (D.C.Cir. 1980) (legally cognizable injury requirement); cf Delaney v. District of Columbia, 659 F.Supp.2d 185, 200 n.13 (D.C.Cir. 2009) (holding

that plaintiff may sue individual attorney or assert ineffective assistance of counsel as basis for habeas relief); Amato v. Bray, 83 Fed. App'x. 380, 381 (2d Cir. 2003) (post-conviction relief required); Carr v. Baynham, No. 6:08-cv-12, 2008 U.S. Dist. LEXIS 28917, 2008 WL 1696881 * 2-3 (E.D.Tex. 4/9/2008) (no private cause of action for malpractice, exoneration required, magistrate recommends that the case is Heck barred); Morton v. State Bar of Arizona, No. cv14-1647, 2014 U.S. Dist. LEXIS 113640, 2014 WL 4059710 (D.Ariz. 8/15/2014) (no private cause of action under the Sixth Amendment right to counsel, relief from conviction required); Pelullo v. Nat'l Union Fire Ins. Co., No. cv00-5647, 2004 U.S. Dist. LEXIS 9138 *53, 2004 WL 1102782 (E.D.Pa. 5/17/2004) (lawyer's liability for proximately causing conviction requires proof of innocence of crime and lesser offenses).

The variability between these jurisdictions is broad. The instant case would currently be ripe in nearly half of the country, while in the other half the exact same case is unripe and non-justiciable. Some of the foregoing considerations were addressed by this Court in Heck and its progeny, while others were not. The intricacies of a legal malpractice case militate in favor of granting the writ such that specific guidance may be given by this Court.

B. This Court's intervention is warranted because lower courts continue to apply an unfairly strict justiciability bar to cases that are otherwise ripe resulting in justice delayed and denied.

Courts have repeatedly misread the Heck favorable termination

requirement to preclude any claim of legal malpractice against an attorney involved in the criminal defense process. This Court has already stated that a claim should be permitted so long as it does not "necessarily imply the invalidity of the underlying criminal conviction." Heck v. Humphrey, supra, 512 U.S. 487 n.7. This distinction has been favorably cited by this Court on its prior attempts to clarify the scope of Heck. See, e.g., Wilkinson v. Dotson, supra, 544 U.S. 82. In spite of this, lower courts ignore the importance of the word "necessarily" and automatically bar cases simply because they possess some relationship to the criminal case. This occurs regardless of how far removed the subject case is from the conviction and how benign the nature of the relief sought.

The only jurisdiction that currently uses a mixed favorable termination rule is Oregon. They prohibit all claims against trial counsel but permit most claims against habeas counsel. In Drollinger v. Mallon, 260 P.3d 482 (Or. 2011) the Oregon Supreme Court reflected that "to the extent that plaintiff alleges damages that do not depend on the certainty of success in obtaining relief from his conviction, pleading and proving that plaintiff would have obtained relief from his conviction would be unnecessary. An example of such an allegation would be one that alleged that plaintiff incurred litigation-related costs that, except for defendant's negligence he would not have incurred." (id., 491). This is precisely what has been alleged by petitioner in the

instant case: money was misappropriated by respondents due to their neglect in understanding and managing the case. See Appendix A at A007-008.

The Oregon Supreme Court had previously analyzed legal malpractice claims against trial counsel and applied the favorable termination requirement. Stevens v. Bispham, 851 P.2d 556 (Or. 1993). In his dissent Justice Unis opined that the creation of a "no exoneration/no harm" rule was riddled with flaws. Namely that a case can remain stale for years, even decades before a plaintiff is exonerated; the court is supplanting the legislature in determining the statute of limitations for a whole class of cases; negligent lawyers are permitted to hide behind their negligence; and that the criminal defendant-cum-plaintiff is having his access to court and due process violated. (id., 571-575) (dissent Unis, J.).

The misuse of the favorable termination requirement to improperly bar criminal plaintiff cases is further exemplified when lower courts conflate a reluctance to permit claims against appointed counsel - those who were not paid by the criminal plaintiff - with the ability to prove injury and damages. It is logical to prohibit malpractice claims against, e.g., public defenders because there could be no pecuniary loss proximate to alleged malpractice. This is not a reason to bar all criminal malpractice claims. Many jurisdictions already have laws protecting

certain classes of attorneys. n.6 Some, like Connecticut, even provide public defenders with statutory immunity. n.7

The sum total of these examples is that lower courts improperly deny criminal plaintiffs their ability to access the courts and their accompanying right to due process through a fundamental misunderstanding of when cases should be Heck barred. As one circuit judge reflected "we are not the first court to struggle applying Heck to 'real life examples,' nor will we be the last." Martin v. City of Boise, 902 F.3d 1031, 1051 (9th Cir. 2018) (dissent Owens, J.), rehearing en banc denied, 920 F.3d 584 (9th Cir. 2019) (analyzes Heck in suit challenging the constitutionality of a public vagrancy ordinance).

This confusing miasma of rules and rights spreading out from the foundation of Heck desperately needs this Court's intervention for clarification as to the appropriate application in legal malpractice cases.

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n.6 Delaware gives public defenders qualified immunity, Browne v. Robb, 583 A.2d 949, 950-51 (Del. 1990); Minnesota and Nevada do not permit suit against public defenders, Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993); Morgano v. Smith, 879 P.2d 735, 736-37 (Nev. 1994)(per curiam); See also, Hoffenberg v. Meyers, 73 Fed. App'x. 515 (2d Cir. 2003) citing Britt v. Legal Aid Soc. Inc., 95 N.Y.2d 443 (2000) (New York's actual innocence favorable termination rule began with the effort to protect non-profit legal aid groups); McCurvin v. Law Offices of Koffsky & Walkley, No.3:98cv182(SRU), 2003 WL 223428 *2 (D.Conn. 1/27/03) (same)

n.7 See, Conn. Gen. Stat. §4-141 et.seq.

VII. CONCLUSION AND PRAYER FOR RELIEF

The country's lower courts need guidance about how to apply the Heck v. Humphrey, supra, 512 U.S. 477 favorable termination requirement to legal malpractice cases brought by criminally convicted plaintiffs. The law is unclear and unevenly applied implicating important constitutional rights.

This Court should grant certiorari to review the Connecticut Supreme Court's judgment denying certification on the issues raised to the Connecticut Appellate Court, summarily reverse the dismissal of the underlying cause of action sounding in malpractice, or grant such other relief as justice requires.

Respectfully Submitted,

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