

In the
Supreme Court of the United States

TAYLOR CARLISLE, INDIVIDUALLY AND AS
REPRESENTATIVE MEMBER OF A CLASS, ET AL.,

Petitioners,

v.

JOSEPH P. LOPINTO, III, SHERIFF AND ADMINISTRATOR OF THE
JEFFERSON PARISH CORRECTIONAL CENTER, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Participants in a drug court probation program that conducts its business in closed, unrecorded meetings were repeatedly incarcerated by the Sheriff for significant periods, in the absence of a judicial proceeding or compulsory due process, and were denied statutorily mandated earned jail credits. The incarcerations are memorialized only by cryptic clerk “minute entries” citing if the detention was a “sanction” for noncompliance/contempt, or other reason, which the Court held to be “valid orders” dismissing the 42 U.S.C. § 1983 claims as barred by *Heck* or *Preiser*. The court also dismissed claims for over-detention based on denial of jail credits toward post-revocation sentences, as a “mis-reporting violation,” distinguishable from the pled claims alleging denial of earned jail credits, and denied amendment.

The Questions Presented Are:

1. In the absence of judicial proceedings conducted *on the record* with due process, are the minute entries “orders” and are the sanctions within the class of “convictions or sentences” considered in *Heck v. Humphrey* and *Preiser v. Rodriguez*?
2. Are the 42 U.S.C. § 1983 over-detention claims for damages/injunctive relief barred by *Heck*, *Preiser*, or permitted under *Spencer v Kemna*? Is the court’s narrow construction of the credits claim a restriction on current Fed. R. Civ. P. 8 and 15 liberal construction?
3. Are “due process waivers” executed at plea, applicable to drug court “contempt” sanctions; do they provide qualified immunity to licensed private health-care providers contracted to provide clinical supervision to the drug courts?

PARTIES TO THE PROCEEDINGS

Petitioners And Plaintiffs-Appellants Below

- Taylor Carlisle, Individually and as Representative Member of a Class
- Emile Heron, Individually and as Representative Member of a Class

Respondent and Appellee Below

- Joseph P. Lopinto, III, Sheriff and Administrator of the Jefferson Parish Correctional Center

Respondents and Defendants-Appellees Below

- Newell Normand, former Sheriff and Administrator of the Jefferson Parish Correctional Center*
- Joe McNair Director of Counseling of the 24th JDC Drug Court Intensive Probation Program, also known as Joseph Thomas McNair
- McNair & McNair, LLC
- Philadelphia Indemnity Insurance Company

*Note: The original defendant was the Sheriff of Jefferson Parish, Louisiana, Mr. Newell Normand. Upon his retirement, while this matter was pending, Mr. Normand appointed Mr. Joseph A. Lopinto, III, as the Acting Sheriff. Mr. Lopinto was thereafter elected to the position of Sheriff. The appointment, according to the lower court, made Mr. Lopinto the appropriate defendant under Fed. R. Civ. P. 25 in the matter, although the Defendants did not move to substitute him as a party. However the Fifth Circuit Court of Appeal retained Mr. Normand as “Defendant-Appellee” in its caption, and Mr. Lopinto as “Appellee”.

LIST OF PROCEEDINGS

Direct Proceedings

The U.S. Court of Appeals for the Fifth Circuit Proceeding on Review

In No.22-30031 the Parties are Plaintiffs-Appellants, Taylor Carlisle and Emile Heron. Defendant-Appellees are Joe McNair, McNair & McNair, LLC; Philadelphia Indemnity Insurance Company; Newell Normand, and Joseph P. Lopinto, III.

The Decision was entered May 10, 2023 (Higginbotham, Southwick, Willett, Circuit Judges) Affirmed, Per Curiam, Not Designated for Publication.

Rehearing was denied June 22, 2023.

Prior (Interlocutory) Appeals in the Fifth Circuit

In No. 21-90012 the Defendant-Respondent is Joseph P. Lopinto, III.

Judgment was filed May 3, 2021.

In No. 19-30027, Plaintiffs-Appellants are Taylor Carlisle and Emile Heron. Patricia Klees is the Defendant-Appellee.

Decision was filed December 4, 2019.

In No. 18-30002, Plaintiffs-Appellants are Taylor Carlisle and Emile Heron.

Tracy Mussal, as Program Supervisor, Keven Theriot as Probation Coordinator, Kristen Becnel, as Administrator are the Defendants—Appellees.

Decisions were filed on August 14, 2019 and on April 17, 2018.

**U.S. District Court for the Eastern
District of Louisiana**

In No. 2:16-cv.03767, Taylor Carlisle and Emile Heron are the Plaintiffs.

Sheriff Newell Normand, Kristen Becnel as Administrator, Tracy Mussal as Program Supervisor, Kevin Theriot, as Probation Coordinator, Joe McNair, as Director of Counseling, the La. Public Defender Board, Richard M. Thompson District Defender #24, and Staff Counsel, Joe Marino are the Defendants.

Final Judgment was entered January 19, 2022.

RELATED HABEAS PROCEEDINGS

**United States Court of Appeals
for the Fifth Circuit**

In No. 17-30226, and No. 20-30720 Taylor Carlisle is the Petitioner-Appellant. Newell Normand and Joseph P. Lopinto III, are the Defendant-Appellees.

Order in No. 17-30226 was entered January 3, 2018.

Order in No. 20-30720 was entered on June 1, 2022.

**United States District Court for the
Eastern District of Louisiana**

In No. 16-838-WBV Taylor Carlisle is the Petitioner and Newell Normand is the Defendant.

Final Decision was rendered Oct. 22, 2020.

RELATED STATE COURT PROCEEDINGS

Louisiana Supreme Court

In No. 2015-2078, 184 So.3d 709, an Application for Writ of Supervision, the parties are State of Louisiana, as Respondent and Taylor Carlisle as the Petitioner.

Order was entered January 15, 2016.

Louisiana Fifth Circuit Court of Appeal

In No. 2015-KH-597 the parties are State of Louisiana, as Respondent and Taylor Carlisle as the Petitioner.

Order entered October 14, 2015.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Taylor Carlisle and Emile Heron, individually and as representatives of a class, through undersigned counsel, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and opinions below.



OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals in No. 22-0031, under the caption, *Carlisle, et al. v. McNair, et al.* is reported at 2023 U.S. App. LEXIS 11495; 2023 WL 3340080, was filed on May 10, 2023 and is reprinted in the Appendix (“App.”) at 1a. The Petition for Rehearing *En Banc* was denied on June 22, 2023. App.194a.

The Final Judgment of the District Court for the Eastern District of Louisiana, in No. 16-03767, under the caption, *Taylor Carlisle, et al. v. Newell Normand, et al.* is reported at 2021 U.S. Dist. LEXIS 251438. App.196a.

The interlocutory opinions of the United States District Court for the Eastern District of Louisiana that are relevant to the judgment on review and address the questions before the Court have not been published in the Federal Reporter but are reported under the case name, *Taylor Carlisle, et al. v. Newell Normand, et al.*, in Case No. 17-03767, Sec. H. They are as follows:

- December 21, 2021, Order and Reasons, reported at 2021 U.S. Dist. LEXIS 242876; 2021 WL 6050079. App.7a.
- November 3, 2021 Order and Reasons, reported at 2021 U.S. Dist. LEXIS 251438; 2021 WL 6615139. App.18a.
- March 23, 2021, Order and Reasons, reported at 2021 U.S. Dist. LEXIS 53884; 2021 WL 1109488. App.27a.
- January 23, 2020, Order and Reasons, reported at 2020 U.S. Dist. LEXIS 261663; 2020 WL 12917351. App.43a.
- August 7, 2019, Order and Reasons, reported at 2019 U.S. Dist. LEXIS 132384; 2019 WL 18053. App.53a.
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- December 19, 2017, Order and Reasons, reported at 2017 U.S. Dist. LEXIS 208194; 2018 WL 4587725. App.103a.

- October 31, 2017, Order and Reasons, reported at 2017 U.S. Dist. LEXIS 180057; 2017 WL 4918997. App.117a.
- August 1, 2017, Order and Reasons, reported at 2017 U.S. Dist. LEXIS 120541; 2017 WL 11661097. App.151a.
- May 23, 2017, Order and Reasons, reported at 2017 U.S. Dist. LEXIS 78021;2017 WL 2256789. App.155a.*

Relevant opinions of the Louisiana state court respecting the questions presented herein are reported at *State of Louisiana v. Taylor Carlisle*, 15-KH-597 (La. App. 5th Cir. Order October 16, 2015), writ denied. App.189a; and *State of Louisiana v. Taylor Carlisle*, No.2015-KK-2078, 184 So.3d 709 (La. January 16, 2016), writ denied, decision without published opinion. App. 187a.

* Note Regarding References to the Record Below.

1. Reference to pages cited from the Pacer Record made available during the Appeal below in the Fifth Circuit Court of Appeals is as follows: "R.____" (page number).
2. Reference to the Record Document filed in the Eastern District of Louisiana record is to Document number and page as follows: "Doc.____, p.____"
3. Reference in this Petition to the Appendix herein is as follows "App.____" (page number).



BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed the district court final judgment, on May 10, 2023. App.1a. Petitioners timely filed a Petition For Rehearing *En Banc* from Panel Decision Rendered May 10, 2023 on May 24, 2023 which was denied on June 22, 2023 by the United States Court of Appeals for the Fifth Circuit. App.194a. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) and file within the time required, from the date of the denial of the Petition for Rehearing or Rehearing En Banc from Panel Decision Rendered May 10, 2023.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional, Statutory and Regulatory Provisions involved are set forth in the Appendix at App.197a-213a.



STATEMENT OF THE CASE

A. Summary of The Legal Issues Raised by the Petition

This case involves a drug court probation and deferred prosecution program, which programs generally have the goal of achieving both rehabilitation and efficient processing of cases. This Jefferson Parish, Louisiana program claims to operate within a collaborative, non-adversarial, setting. A team of judges and staff typically hold weekly closed meetings¹ in which staff make recommendations, *ex parte*,² for the sanctioning of those they alleged to be noncompliant with the program's rules.³ Thereafter participants make their weekly appearance in closed courtrooms,⁴ where they may be addressed by the judge, after which the sanction is swiftly imposed, often in the form of significant jail terms.

However, in the Jefferson Parish drug court, as in many of the nation's approximately 3,700 adult drug courts, prior to incarceration, participants receive no notice of the staff's allegations of noncompliance. Nor is there a record of what is said at either the staff weekly meeting, nor the weekly appearances that follow, because these meetings are not recorded.⁵ The

¹ Doc.1-3, pp.91-2.

² Doc.117, ¶119-20.

³ Rules at Doc.1-3, p.39-41, 77.

⁴ Doc.19-3, p.7 ¶38 (Kosak Aff.).

⁵ Doc.19-3, p.6 ¶35 (Kosak).

participants are not afforded an opportunity, indeed they are denied the right, to defend against the sanction or other incarceration, through putting on witnesses or other evidence.⁶

The state courts, including the Louisiana court in this case, defend the practice based on the fact that participants, at the time of the original plea, are required to and have signed waivers of all due process.⁷

As a consequence, the Petitioners in this case were repeatedly incarcerated by the local Sheriff for significant periods, based on “flat time”—time served without benefit of earning credit for good time guaranteed to non-violent/non-sexual offenders⁸ with no record of judicial proceedings,⁹ and no judicial orders. Sometimes the Sheriff’s incarcerations have nothing to do with noncompliance, but were imposed “to await the next staffing meeting” or to “await a bed” in a certified treatment and rehabilitation program (“CTRP”) facility.

After sentence completion, petitioners are returned to the drug court, placed under added restrictions, usually to repeat an earlier phase of the program, thus extending their previously agreed probation periods.

⁶ Doc.1-3, p. 97-98 (Lemoine).

⁷ Doc.1-3, p. 98. *See*, waiver (R.92-94) “of all due process under the U.S. Constitution and the Constitution of Louisiana involved in the administration of Drug Court and in particular the imposition of sanctions by the Drug Court Judge.”

⁸ *See*, La. Rev. Stat. Ann. 15:571.3; *State v. Wiley*, 68 So.3rd 583 (2011), No. 10-811 (La.App. 5th Cir 4/26/11).

⁹ Doc.19-3, p.7 ¶37 and App.189a (La.App. 5th Cir.).

The Sheriff¹⁰ defended against the § 1983 claims brought against him for unlawful imprisonment by pointing to cryptic minute entries, issued by a deputy clerk,¹¹ citing the petitioners for “noncompliance/*contempt/flat time*” and memorializing the sentence imposed in the absence of any judicial proceedings or other judges’ orders.

The drug “court” employs the subterfuge of casting the noncompliance as a contempt under Louisiana Code Crim. Proc. Ann. §§ 21-25 because it lacks authority to impose parish jail terms under La. Rev. Stat. Ann. 13:5304.¹² 24th Judicial District Court (24th JDC) Judge Scott Schlegel, testified to this fact before the Louisiana Legislature, Judiciary Committee B, with Appellee, Joseph P. Lopinto, III by his side, in May of 2016, when seeking support for Mr. Lopinto’s bill to amend the probation articles to allow judges to sanction participants up to 180 days in a local facility, removing provisions requiring courts to impose probation violations under Art. 900 (which required notice and hearing)¹³ and to ensure credit would not be earned.¹⁴ The amendment did not become law.

¹⁰ The Sheriff is a “municipal actor” under *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978).

¹¹ Doc. 19-3, p.7 ¶36.

¹² App.207a; La. Rev. Stat. Ann. § 13:5304(C)(2)(b) and App.202a. La. Rev. Stat. Ann. § (B)(3)(a).

¹³ See Original HB 328. April 11, 2016 La. Fiscal Office note; HLC-16RS-681.

¹⁴ R.8037 (manual attachment); *see also*, http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2016/apr/042-16_

The Louisiana Supreme Court Drug Court Office (“SCDCO”), a non-party who oversees drug court grant funding, opposed Plaintiffs’ Fed. R. Civ. Proc. 45 class action discovery of the Jefferson Parish program’s records under 42 U.S.C. § 290dd-2(a), but advised the Magistrate Judge in writing, as follows :

794 people were participants between 1/1/2005 through 1/1/2016 and ALL were sanctioned with jail time as “treatment.”

...We believe that 99% of the participants had a sanction and nearly all sanctions related to treatment.

R.2678, Doc.284-15 (filed 03/30/18) p.1 of 4.

Louisiana has 64 parishes; reportedly at the time of these events, 50 operated drug courts. The size of the problem is significant.

Most egregious, based on the time being served “flat,” or styled as “contempt,” the Sheriff admitted in deposition it is his policy to deny all drug court participants earned credits while in the parish jail, as well as credits toward their new sentences after revocation, despite statutes mandating credit. This is despite the fact that Louisiana Code Crim. Proc. Ann. § 880A¹⁵ and La. Rev. Stat. Ann. § 13:5304(D)(3)(c), entitle them to “credit for the time served in any cor-

CJ and Doc.117, 2nd Supplementing/Amending Complaint, ¶208-210).

15 App.201a.

rectional facility in connection with the charge before the court”¹⁶ including contempt time.¹⁷

Additionally, Department of Public Safety and Corrections (DOC) Department Regulations, No. B-04-003 01 (August 2012, p.3, no.8) and Louisiana Revised Statutes Ann. § 15:828(B) entitle them to CTRP credits for time in continuous custody on the same docket.¹⁸ The Sheriff had no explanation for why he does not credit CTRP facilities or time “awaiting a bed” despite Department Of Safety and Corrections (“DOC”) regulations to the contrary.

The Complaint claims damage and injunctive and declaratory relief under 42 U.S.C. § 1983 for violations of the Fifth, Sixth, and Fourteenth Amendment Due Process provisions, individually and on behalf of a class similarly situated.

B. Note Regarding the District Court Opinion

The court below issued numerous opinions, discussed in detail *infra*. p.23-31. In sum, she rejected Petitioners’ § 1983 claims for damage and injunctive relief, and denied certification of a class, concluding the clerk minute entries are “valid orders” despite the absence of any judicial proceedings or a record supporting the sentences, the noncompliance or “contempt.”

¹⁶ 16 App.208a-209a.

¹⁷ See, e.g. *State v. Bridgewater*, 800 So.2d 964,968 (La. App. 5th Cir. 2002)(contempt time receives credit under La. Code Crim. Proc. § 880 A).

¹⁸ See, e.g. App.212a. Louisiana Administrative Code, Title 22, Part IX, Ch.3 § 305. Credit for Time Served A. (*pub’d* June, 2023) effective January 1992.

She also held the clerk minute entries are within the class of “convictions or sentences” protected from § 1983 challenge under *Preiser v. Rodriguez*¹⁹ and *Heck v. Humphrey*²⁰ in the absence of some other favorable determination, such as the grant of a writ of habeas corpus.

She followed Fifth Circuit precedent respecting the conflict following this Court’s decision in *Spencer v. Kemna*,²¹ relative to § 1983 actions brought after the party is no longer in custody. She narrowly construed Fed. R. Civ. P. 8 and 15, dismissing claims for the Sheriff’s denial of credits toward post-revocation sentences as “not pled” and denying amendment to the pleadings, as discovery just began and three years before trial, the date for which at that time had not been selected.

The court additionally granted private medical contractors, charged with providing clinical supervision of the participants, “qualified immunity” respecting “personal capacity” claims, based on “due process waivers²² executed at time of plea.

¹⁹ 411 U.S. 475 (1973).

²⁰ 512 U.S. 477 (1994).

²¹ *Spencer v. Kemna*, 523 U.S. 1 (1998).

²² Doc.1-3; Doc.19-3, p.33.

C. Note Regarding the Fifth Circuit Opinion

In all respects the Fifth Circuit affirmed the District Court,²³ with respect to the questions raised in this petition, as discussed *infra. at* 31.

The Fifth Circuit also stated that Petitioners a) “did not “contest that authorities detained them at all times pursuant to court orders,” and b) did not “challenge the district court’s determination that McNair retained qualified immunity” and did not argue on appeal McNair owed any duty to them” and c) “don’t argue on appeal that McNair owed them any duty.”²⁴ Petitioners respectfully disagree. Their challenge to the minute entries as NOT “court orders” is express in the Complaint, the memoranda, and in the briefs, as in the latter Petitioners stated:

The unsigned minute entries, issued by the Clerk do not substitute for “judicial orders” directing the Sheriff to arrest and imprison.
The *issue is not the absence of a transcript, it is the absence of any record whatsoever.*

No.22-30031, Doc.43, p.68, emphasis in the original. *See also*, p.23 and R.1804, the “sheriff enforced *facially invalid orders* for contempt and flat time.”

Most important, as this Petition demonstrates, the challenge is evident from several interlocutory orders, outlined *infra.*, pp.23-31, acknowledging and addressing Petitioners’ challenge to these minute entries and to the absence of genuine judicial orders supporting the incarcerations.

23 App.1a

24 Doc.98-1, p.4.

Petitioners respectfully also refer the Court to the their challenge to the district court’s grant of qualified immunity, in the appeal briefs, filed in No. 22-30031 as well, namely in the Original brief, Doc. 43, pp. 66-67, the Reply, Doc.66-1 including in Section “McNair Arg.1” beginning at p.9 (qualified immunity identified at top.) and from p. 10 continuing through p. 15, as well as in the discussion of the district court’s failure to require a “knowing and intelligent waiver,” briefed at Doc.66-1, p. 11.

Lastly, the district court acknowledged McNair’s duty in her decisions therefore Petitioners did not exhaust the court’s time with additional argument.

Consequently, Petitioners submit, no issue has been waived.

D. Relief Sought

This Petition seeks certification, due to first, the conflict between the Fifth Circuit’s view and this Court’s decision in *Boumediene v. Bush*,²⁵ implying a conviction or sentence must spring from a “judicial proceeding, on the record” for *Heck’s* or *Preiser’s* state court deference to apply, and due to the states’ divided approach to whether compulsory due process is required in drug court when imposing sanctions. The “over detention and jail credit issue” has become a state wide emergency, as demonstrated by a January 25, 2023, letter from the United States Justice Department to Louisiana Governor John Bell Edwards reporting “a pattern and practice of violation resulting in unlawful incarcerations past legal release dates... in large part caused and exacerbated by systemic defi-

²⁵ 553 U.S. 723 (2008).

ciencies in LDOC’s policies and procedures related to the receipt of sentencing documents, computation of an incarcerated individuals’ release dates, and employee training.²⁶

Second, the decision below deepens the divide that already exists between the federal circuits regarding the dismissal of claims for “lack of standing” based on “completed” incarcerations. Third, injustice resulted in this case due to the conflict between the overly strict pleading and amendment policies of the court below, in conflict with the liberal pleading rules of Fed. R. Civ. Proc. 8 and R.15. This is evident from the district court’s expressions of lament at the overwhelming evidence Plaintiffs produced of the Sheriff’s post-revocation jail credit violation, which she struck as “not having been pled” before discovery had hardly begun. Fourth, the states are divided, respecting the lawfulness of drug court due process waivers, and the court’s application of such waivers to drug court private contractors as occurred herein to grant qualified immunity to the licensed treatment and clinical supervisor.

E. Facts Established in Record Below

Petitioner Taylor Carlisle (“Carlisle”), an electrician assistant, and with joint custody of a two-year-old, was stopped by a Jefferson Parish Deputy Sheriff on November 9, 2012 while parked in his mother’s vehicle at a Walmart. By December he was charged with and pled knowingly or intentionally possessing a controlled dangerous substance, to wit: Oxycodone (three Percocet pills), the maximum sentence for which was five (5)

²⁶ <https://www.justice.gov/opa/press-release/file/1564046/>

years²⁷ and possession of very small amount of marijuana. It was his first drug offense.²⁸

Emile Heron (“Heron”), married, father of five, minister, and river boat captain, was arrested on April 17, 2012 for possession of five (5) pills (oxycodone), and entered a plea of Guilty to one (1) count of La. Rev. Stat. Ann. § 40:966(C), on February 19, 2013, deferred.²⁹

Both agreed to participation in the fee-based parish drug court program³⁰ as a condition of probation, authorized by Louisiana Revised Statutes Ann. § 13:5304, et. seq. App.201a.³¹ If successfully completed, both would likely have been granted acquittal.

After his plea, on January 31, 2013, Carlisle expected to be released. The Sheriff detained him in the jail however until order issued on March 7, to transport him (on March 15),³² to “await a bed” in a CTRP facility in Baton Rouge, where he spent another 30 days, until he was returned to Jefferson Parish Correctional Center (“JPCC”) until release on or about April 18, 2013.

Heron was similarly detained for four months awaiting a CTRP during 2013.

27 Louisiana Revised Statutes Ann. § 40:966.C.

28 Doc.19-3, p.3, 31.

29 *State v. Heron*, Cr. Act. No. 12-05437 (24th J.D.C.. Jeff. Parish, La.).

30 Carlisle’s mother reported he incurred 12,787 dollars in fees while in the program. Doc.19-3, p.3.

31 See, Doc.19-3, p.35 Plea of Guilty under 13:5304.

32 Doc.117, ¶118 (Note, the year of alleged events is 2013).

A member of the team described the program's operation³³ as follows:

Every Monday [there would be] a “staffing meeting” with Drug Court Administrators, probation officers, assigned Assistant District attorney, and counselor(s). At this meeting, every Drug Court participant who was to attend court the next day (Tuesday) would have his record reviewed.”... “A “non-compliance” list presented by the probation officer was also reviewed. Sanctions may have been proposed by the probation officer with respect to any such participant.”³⁴

Remaining “drug free” is no guarantee of freedom from jail. Even though no treatment is provided in the jail, jail sanctions styled as “contempt” were imposed for minor infractions, for example, “plugging in a cell phone in the probation office waiting area, being late for a meeting, failing to complete AA paperwork on time for the weekly appearance, missing family counseling, missing a drug screen.³⁵

Carlisle complains of being jailed between April, 2013 and August 25, 2015 on four occasions for “contempt”—totaling more than 260 days in all—*even though he passed without a single failure between 500*

33 R.3160-3163 (Marino discovery response).

34 R.3161 Marino Answer to Interrogatory No. 2.

35 Doc.19-3, p.4, p.5 ¶19 (Kosak Affidavit) and R.217 (1st Amending Complaint, ¶77). On January 14, 2014, petitioner Heron was sanctioned again for allegedly “missing a meeting” and “failing to attend a drug test on January 3, 2014”—60 days flat jail time.

*and 600 random drug tests*³⁶ and he attended 385 AA meetings.³⁷ Heron reports losing 504 days of freedom, (R.9956) none of which had to do with using drugs.

The team member continued his description of the process as follows:

On Tuesday mornings at 8:30 a.m., the “morning judges” (Faulkner and Daresburg) would jointly meet [with Drug Court affiliated individuals] and go through the list of “compliant” and “non-compliant” individuals.

At 9:00 a.m., one of the judges would take the bench and, with the Drug Court participants present, review the list of compliant and non-compliant participants. For non-compliant individuals, sanctions may be “ordered” by the judge, at the discretion of the judge.³⁸

When the Tuesday meeting is over the “non-compliant” are swiftly detained by the deputy sheriff and taken to the parish jail to complete their sanction.

The court room was closed to all but the team and the participants.³⁹

36 Doc.19-3, p.4 ¶16 (Kosak Affidavit). *See, also* discussion of the Heron sanctions at Doc.14, (1st Amending Complaint, pp.2-7 ¶70-86); and Carlisle sanctions at (Doc.1 Original Complaint, ¶25-34) and R.7740-42 and R.8038 analysis of 60 Sanction sheets produced by SCDCO.

37 Doc.19-3, ¶15.

38 R.3161.

39 *See, Doc.19-3, p.4 ¶13 (Kosak Affidavit) See also, in appeal record: Affidavit of Emile Heron, ¶4, R.3183-3184; Affidavit of Angela Fourreaux ¶5 R.3187; Affidavit of Tugg Plaisance, dated 3/9/16, R.170: Affidavit of Sandy Meynard, dated 3/9/16, R.171-173: Affi-*

The incarcerations are involuntary but no judicial orders issue.⁴⁰

There is no means to record the appearances or what goes on.⁴¹

Thus there is no judicial record of what is said by participants to the judge, or what was said, *ex parte*, by the staff to the judge that resulted in sanction and jail time.

The drug “court”⁴² is simply not a “court of record.”

Arrests and detentions are often also initiated merely by phone calls from staff to the Sheriff’s office.

The Sheriff for example received Carlisle on August 25, 2015, after he was “picked up” by Gretna police at 11:16 a.m. and transported to the Sheriff’s jail, for alleged failure to appear at drug court that morning, and booked at the JPCC lockup at 15:14,⁴³ based, as the Sheriff testified, on a “phone call from staff stating he had not appeared at drug court.”

Several eyewitnesses provided affidavits in this case that Carlisle actually *had* appeared at the August 25, 2015 weekly meeting, admitted to not having completed and turned in the paperwork documenting his

davit of Steven Lemoine dated 4/18/16; R.174-176: and Affidavit of Steven Lemoine dated 3/30/16.

40 Doc.19-3, p.6 ¶35, n.18.

41 R.169.

42 The assigned judge, Lee Faulkner, when responding to the state court of appeals, only referenced the drug court within quote marks, *i.e.* drug “court.”

43 Doc.19-3, p.13 ¶64.

required attendance at Alcoholics Anonymous (“AA”) meetings for the week.⁴⁴ Carlisle *had been dismissed* to go discuss his (staff imposed) curfew with his probation officer, precisely because the judge said 10:00 a.m.—4:00 p.m. and nighttime work schedule⁴⁵ was “interfering with his AA meetings.” (Carlisle had been “directed” in July 2015 by McNair to leave his family home and live under curfew at “Oxford House” a fee based “halfway house” as an additional “sanction” after he was released on July 26, 2015 from a 90 day contempt sanction issued April 27, 2016 as “not in full compliance.”⁴⁶ This imposed an additional cost on Carlisle of 500.00 dollars per month despite having been completely drug free.⁴⁷ The assigned judge, later said, “Taylor was allowed to leave Court to meet with his probation officer.”⁴⁸

Three “minute entries” were issued by the deputy clerk on August 25, 2015 relative to Carlisle’s arrest. One minute entry cited Carlisle for “six months/flat time contempt” for “failure to appear” on August 25, 2015 and attachment issued under the clerks signature block.⁴⁹ It conflicts with a second minute entry, of the

⁴⁴ Doc.19-3, p.10 ¶52.

⁴⁵ See, Doc.19-3, p.15.

⁴⁶ Doc.1-3, p.89; Doc.19-3, p.5 ¶22-30 (Kosak).

⁴⁷ Doc.19-3, p.6 ¶30.

⁴⁸ See, App.189a.

⁴⁹ Doc.1-3, p.83-84.

same day stating Carlisle “appeared in court.” Doc.1-3, p.85.⁵⁰

The State Appeals Court Ruling Was Based on a Due Process Waiver.

On September 1, 2015 a family lawyer, Steven Lemoine with permission attended the weekly closed drug court “meeting” and in the courtroom made an oral motion for a continuance to gather evidence for a hearing, with witnesses, to challenge or to offer mitigation of the August 25, 2015 contempt for non-appearance.⁵¹ Mr. Lemoine provided two detailed sworn affidavits.⁵² The judge denied continuance and hearing request,⁵³ and rejected the District Attorney’s suggestion that Mr. Lemoine be allowed to make a proffer (*id.*) because Carlisle “waived all constitutional and due process rights when “agreeing” to the probation program.”⁵⁴ Mr. Lemoine’s affidavits are the only memorialization whatsoever of the motion or the “ruling” given no record is created of the Tuesday appearances.

Carlisle (who remained in jail until revoked in August 2016) filed on September 24, 2015 for emergency appellate review of the August 25, 2015 contempt, cataloguing the closed meetings, absence of a record, the contradictory minute entries, contempt for failing

⁵⁰ R.97-98 (Compl.).

⁵¹ Doc.1-3, p.97-98.

⁵² Doc.1-3, pp. 93-99.

⁵³ Doc.1-3, p.97 (Lemoine) and Doc.19-3, p.7, ¶38.

⁵⁴ Doc.1-3. p.98.

to appear when he had in fact appeared, the absence of a judicial proceeding.⁵⁵

La. Const. Art. I, § 9 and § 13 (App.198a) requires a “record before imprisonment.”

The state court of appeal acknowledged: “[T]hese proceedings were held in closed court without a court reporter... without a record, we cannot review the proceedings below” and ordered on September 29, 2015, a per curiam from the district court “explaining the lack of a record, the factual basis for the contempt finding, and the statutory authority for the penalty imposed.” App.190a.

The state court then accepted the judge’s explanation that “[i]t is not protocol to record the weekly court meetings of drug “court.”

It denied supervisory relief based on the waiver even though Carlisle’s writ produced the participants’ Handbook which expressly states that “jail service” for the most severe “noncompliance”— a level Tier III — is limited to “multiple days or Termination,”⁵⁶ and the waiver could hardly be “knowing and intelligent” respecting six month sentences for the separate offense of “contempt.”

The Supreme Court denied review⁵⁷ but not until the staff, *ex parte*, presented the assigned drug court judge with a story as to why they had Carlisle detained, on August 25, 2015, contending he “lied to staff” and violated curfew which became incorporated into a second

⁵⁵ Doc.19-3, p.11 ¶58-9.

⁵⁶ R.9954; Doc.1-3, p.30.

⁵⁷ R.92-94.

per curiam delivered, also *ex parte*, to the Louisiana Supreme Court, without copy to Petitioner, while the review petition was pending.

Heron was last detained by the Sheriff at direction of a drug court staff immediately after the December 15, 2015 weekly meeting had ended, *although the judge had dismissed him without sanction*. The minute entry that subsequently issued stated “non-compliant” and “hold for staffing.” The Sheriff then prepared his own arrest warrant charging “CCRP 21 contempt” without court order whatsoever.⁵⁸ Heron was held “indefinitely” in the jail without probable cause or bond hearing. A clerk minute entry setting out a six month “sanction” did not issue until nearly five weeks later, on January 19, 2016, when because they “were waiting to see what would happen with Taylor Carlisle.”⁵⁹ That is when he learned he was being held in contempt flat time/six months.⁶⁰

The Sheriff denied credits toward Post Revocation Sentences through omission of Jail Time from the Master Record, thus unlawfully extending the incarcerations in violation of the revocation orders.

Like Carlisle (and so many others), having spent more time in the parish jail fulfilling “flat time” sanctions than if they had entered into a plea and

58 R.9925-26,59.

59 R.9960 ¶18.

60 See, R.558 (M.E.); Heron Affidavit R.9956-7.

probation program, Heron “self-revoked” in August, 2016.⁶¹

State Judge Scott Schlegel, sentenced each of them to forty (40) months hard labor in August, 2016 with a boilerplate provision for “credit for time served in accordance with Code Crim. Proc. Art. 800 (*sic*) and La. Rev. Stat. Ann. 13:5304.”⁶² The Sheriff was familiar with this provision but ignored it.⁶³ Petitioners were transferred to state facilities to fulfill their new sentences. With application of earned jail credits, they expected to be released from state facilities in 2017.

DOC delegates the local sheriffs with providing, at time of transfer, a pre-sentencing package including a “master record” outlining the time spent in the local jail, from which DOC assigns jail credit, and calculates the release date. R.8293-8298.

DOC did not timely release the petitioners in 2017.

After being finally released in late 2018, through discovery, Plaintiffs received copies of their “Master Records” the Sheriff had prepared. When confronted during R.30(b)(6) deposition, the Sheriff admitted to a policy and practice of deliberately omitting all drug court probationers’ “flat time” and “contempt” time and CTRP, from the master record.⁶⁴

61 R.9963,9939.

62 R.7813 (Heron Order); Carlisle’s at R.7761.

63 R.8293-8298 (testimony).

64 R.8293-8298 (Tr. 30(b)(6) Testimony Deposition Commander Abadie, pp. 43,45-60); ROA.6132-6140, 6392-95, 7481, 7780-86 (Testimony Sheriff Lopinto).

F. First Question Was Presented.

Carlisle filed a § 1983 class action complaint in federal district court, on April 27, 2016, which Heron joined in August 2016. ROA.249. Both had completed their last sanctions and were still in jail. Petitioners claimed damage and injunctive relief under § 1983 challenging the legal validity of the clerk’s minute entries in the absence of a judicial proceeding and record, as well as the Sheriff’s policy of depriving them jail credits based on the minute entries and the waiver.⁶⁵ (R.93, ¶4). The court provides a general summary of her decisions regarding Question 1 in the Background section of the final December 21, 2021 Order.⁶⁶

2017 Orders

The court dismissed claims seeking injunctive and declaratory relief, as against Appellee McNair relying on *Preiser v. Rodriguez*, on August 1, 2017. App.137a-139a. She dismissed for lack of standing, concluding the challenge was to “the fact or duration of the plaintiffs’ physical imprisonment” and, for “immediate release or a speedier release,” thus the sole federal remedy is a writ of habeas corpus, and “because Plaintiffs were no longer in the parish drug court program at time of decision” they cannot show they are “likely to suffer future injury.”⁶⁷

⁶⁵ Orig. Complaint, Doc.1 at 27-28.

⁶⁶ See, App.7a., p.2-3.

⁶⁷ App.142a.

She rejected Plaintiff's *Spencer*⁶⁸ argument "that a majority of the Supreme Court now only believe *Heck* applies to prisoners still serving the sentence of which they complain" citing to *Black v. Hathaway*, 616 F. App'x 653 (5th Cir. 2015), even as she acknowledged "the conflict within the circuits..." *Id*

In response to Plaintiffs' challenge to the minute entries as "insufficient to support incarceration" she stated:

...as Heck repeatedly uses "incarceration" interchangeably with "sentence" Petitioner's contention *that* the minute entries are not "*valid judicial orders*" does not change the analysis that *Heck* applies...

App.142a. She challenged Plaintiffs " cite to no authority suggesting otherwise."⁶⁹

The court compared the minute entries with the "deferred adjudication orders" at issue in *DeLeon v. City of Corpus Christi*, 488 F3d 649 (5th Cir. 2007). She found the latter "similar to the sanctions imposed here." App.103a, App.142a, n.59. Petitioners had argued, without effect, the *DeLeon* orders deferring adjudication are final precisely *because* they involve a "judicial *finding* that the *evidence* substantiates the defendant's guilt, followed by conditions of probation that may include a fine and incarceration." *DeLeon*, at 656.

The court's description of the Petitioners' "jail credit claims" in the October 31, 2017 order is worth

⁶⁸ *Spencer v. Kemna*, 523 U.S. 1 (1998).

⁶⁹ App.142a.

noting as it contradicts her later conclusion that the claim for post revocation credits is distinguishable as a “miscalculation claim” that was never pled under Fed. R. Civ. P. 8 although she had earlier unequivocally expressed her understanding the § 1983 complaint allegations were directed at *both* the denial of both good time credit as well as post-revocation credits:

[Plaintiffs argue... harm from the imposition of flat time sentences because they should be able to apply against their current post-revocation sentences good time credit that they earned while imprisoned for the allegedly unlawful sanctions [and for]

And...

they should receive *credit toward their current post revocation sentences for all time served while in the Drug Court* because the underlying infractions were the same events that led to their revocations.”

App.137a, *emphasis supplied*.

2018 Orders

On September 25, 2018, the lower court dismissed the damage and injunctive relief claims against the Sheriff based on *Heck v. Humphrey*. Once again the court treated the clerk minute entries as valid orders:

Heck... precluded plaintiffs’ claims against the Sheriff to the extent that Plaintiffs sought relief for detention based on judicial incarceration orders *that had not been invalidated*.

App.8a, 20a, 29a, 90a.

On December 12, 2018, she again acknowledged the claim is that the minute entries are not valid orders:

Plaintiffs essentially argue that judicial orders contained in minute entries are not judicial orders.

App.95a.

Plaintiffs argued that their claim does not implicate *Heck*'s positive outcome rule which requires plaintiffs to 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, under 28 U.S.C. § 2254.

The claim will not demonstrate "the invalidity of any outstanding "conviction or sentence" against the plaintiff,⁷⁰ because the minute entries, in the absence of a judicial proceeding, on the record, are not within the class of "convictions or sentences" to be protected by *Heck*'s "positive outcome rule."

G. Second Question Was Presented 2019 Orders

Plaintiffs requested delay of submission, of opposition to the Sheriff's R. 56 Motion (Doc.443 filed December 13, 2018) to obtain the Sheriff's R. 30(b)(6) deposition (finally obtained in November 2020). Plaintiffs prepared an amended complaint and moved for

⁷⁰ See, e.g.(emphasis supplied) *Heck*, 512 U.S. at 487; *Black v. Hathaway*, 616 F. App'x at 51-52.

leave to file, in January 2019. Only limited class certification discovery had been initiated. There was neither scheduling order nor trial date in place yet. Depositions were not yet taken as the magistrate had granted to the Sheriff, over Plaintiffs' objection, a stay of all discovery pending resolution of the R. 12 and R. 56 motions at the Sheriff's request.⁷¹ On March 28, 2019 the Sheriff filed his first discovery answers, explaining the use of master records to award credits, and produced the records on February 24, 2020. R.7481, 7508-7521.

The court held that "the Sheriff could reasonably rely on the minute entries when determining who to incarcerate and for how long" granting the Sheriff's Motion for Summary Judgment in part. She found (1) that "valid orders" (i.e. the minute entries) undermine *most* of Plaintiffs' claims for wrongful imprisonment and (2) therefore Plaintiffs failed to demonstrate that they were wrongfully denied good time credit despite Judge Schlegel's revocation orders granting credits.

The court:

...acknowledge[d] that Plaintiffs have presented evidence that the Sheriff's Office was indeed reporting less than the actual time a prisoner served to the DOC in derogation of Civil Code of Procedure Article 880.⁷²

However, in a reversal of her prior characterization in the October 31, 2017 Order, App.137a, ruled that the claims for credits post revocation, is a "inaccurate reporting" claim which was not pled. App.20a; App.39a,

71 July 2018 on Sheriff's motion. R.3210-11.

72 App.39a, n.34.

n.34; App.68a. She rejected Plaintiffs' argument that reporting the credits on the master records for the DOC, was merely the *mechanism* for committing the same violation that Plaintiffs had previously pled.

Citing "undue delay" and the magistrate's belief the amendment was filed to "get around" summary judgment, she denied Plaintiffs' amendment of the complaint to cure what the court perceived was a pleading deficiency, in the jail credit claim but which Plaintiffs submits is a semantical objection. App.23a-25a.

2020-2021 Orders

By October 23, 2019 other judges within the circuit, most specifically Martin C. Feldman, in *Johnny Traweek v. Marlin Gusman*, et al., No. 19-1384, 414 F.Supp.3d 847 (E.D.LA. Sec. "F" decided October 23, 2019)⁷³ addressing § 1983 claims of widespread abuse of inmates due to a deliberate policy of "over detention beyond their release dates." *Id.*, n.9-10, held that claims brought for the intentional practice of holding prisoners indefinitely beyond their release date, *by denying them earned jail credits*, was actionable under § 1983 and NOT barred by *Heck v. Humphrey*, because "judgment in favor of the plaintiff would [not] necessarily imply the invalidity of his conviction or sentence." *Id.*, at 487 (emphasis supplied).

⁷³ See also, *Grant v. Gusman*, 17-cv-02797, R. Doc. 46 (E.D. La. March 16 27, 2018)(Brown, C.J.)(*Heck* was held not to apply to § 1983 claim the defendant was not released timely and *Thomas v. Gryder*, 2019 U.S. Dist. LEXIS 192737, at *1 (M.D. La. Nov. 6.2019).

Plaintiffs filed R. 56 partial summary judgment. (R.7803). On March 3, 2021, the court denied class certification she denied Plaintiffs' R.56 Motion. (Appeal was preserved under R.23(f). App.177a)

She again characterized the claim as an “inaccurate reporting claim” that had “not been pled” denying on November 21, 2021, (App.23a-25a, 38a) reconsideration.

However, by that time the magnitude of the Sheriff’s violation was apparent, and the Court expressed regret:

The Court laments that Plaintiffs’ inaccurate reporting claim was not timely brought before the Court as *Plaintiff’s evidence demonstrates cause for concern.*⁷⁴

On November 3, 2021 the court distinguished *Trawek*, as involving “bureaucratic incompetence”). App.22a.⁷⁵ She repeatedly acknowledged that Petitioners’ claim is “that their incarcerations during Drug Court were... not the result of a *conviction*” thus *Heck* does not apply.” *See, e.g.* App.142a.

She granted dismissal of the remaining claims against the Sheriff based on *Heck v. Humphrey*, (App. 18a) and denied reconsideration.

⁷⁴ 74 App.39a, n.34.

⁷⁵ The court also, inexplicably, quoted from Plaintiffs’ brief a single sentence in which the word “not” was obviously inadvertently omitted as evidence of plaintiffs’ “admission” *Heck* applies.

2022 Orders

The Court dismissed Heron's remaining claims for having been jailed from December 15, 2015 based on the "affidavit" from a court clerk and sheriff clerk "swearing to" the existence of the clerk's January 19, 2016 minute entry, recently discovered, holding Heron in contempt and sentencing him for six months (App.15a) which the court said was "sufficient" to prove Heron was incarcerated "pursuant to a valid court order."

Based on a typed "order of attachment" (unsigned) purportedly dated August 25, 2015, for "failure to appear in court" she dismissed the remaining claims brought by Carlisle, for being jailed without orders in August 2015 even as she noted that the "order of attachment" completely contradicted the clerk's August 25, 2015 minute entry-on the point of whether he had appeared in court that day. She stated:

While it does continue to contradict the minute entry from the First MSJ on whether Carlisle appeared in court, the Court finds this inconsistency does not render unlawful any arrest made pursuant to this order.

App.14a.

Once again, however, she added a lament, concluding:

While the Court has serious concerns about a Drug Court that causes defendants to spend significantly more time incarcerated than had they served their original sentences outside Drug Court, what is before this Court

is whether the Sheriff had discretion to deviate from a court order. The answer is he did not.

App.16a.

H. Third Question Was Presented

McNair contracted with SCDCO from 2006 to “provide treatment services for all participants of the Drug Court program as Clinical Supervisor” (R.7045) and to provide “clinical treatment and clinical supervision” pursuant to a 350,000 dollar annual contract. R.6917; Doc.117, ¶105.

On May 23, 2017 Order App.155a, the Court dismissed under R.12(b)(1) § 1983 claims in his personal capacity based on qualified immunity due to the Plaintiffs’ execution of due process waivers (R.7338) in January, 2013 holding: “Plaintiffs could not show that the due process waivers they executed were clearly prohibited by law.” App.163a-164a. She had previously dismissed all official capacity claims against McNair based on sovereign immunity/11th Amendment (August 1, 2017)⁷⁶ as the duties had “an integral relationship with the judicial process.” App.8a, 139a. The interlocutory appeal of the McNair rulings was dismissed on McNair’s motion, but without prejudice, therefore this appeal regarding those claims is timely. *See*, App.181a.

I. The Fifth Circuit Expressly Addressed the Three Questions Presented.

The court’s comments regarding Petitioners’ approach to the orders and qualified immunity issue is addressed *supra*, at p.5. The Fifth Circuit affirmed with respect to the First Question, ruling as follows:

76 App.151a.

“the district court found... authorities detained them at all times pursuant to court orders...” and the dismissal based on *Heck v Humphrey*. App.3a. The Fifth Circuit affirmed the denial of the amendment. App.5a-6a. The Fifth Circuit affirmed the district court’s grant of qualified immunity to McNair. App.5a.



REASONS FOR GRANTING THE PETITION

I. FIRST QUESTION

A. The Extension of *Heck* and *Preiser* to Detentions That Are Memorialized Only by Clerk Minute Entries, in the Absence of Judicial Proceedings on the Record or Signed Judges’ Orders Has Important Implications for All Drug Court Programs, as Well as for the Safety and Liberty of Their Participants. Furthermore, the Minute Entries Are Not “Convictions or Sentences” Under *Heck*.

Valid judicial orders are required prior to imprisonment. *Douthit v. Jones*, 619 F.2d 527, 532 (5th Cir. 1980). However Louisiana, and now the lower court, accepts “it is not protocol to record drug court proceedings.” All that exists to support the incarcerations are a deputy clerk’s “notes” memorializing the decision to sanction, including to impose “flat time.” Any pretense at due process has been eviscerated. The combination of the state court’s acceptance of the “due process waiver” and the federal court’s acceptance of the minute entries as “valid judicial orders” within the class of convictions or sentences barred from § 1983

action in *Heck v Humphrey* has all but ensured that probationers will continue, as they have for decades, spending hundreds of days in jail more than is lawfully required.

“No person shall be subjected to imprisonment... without the right of judicial review based upon a complete record of all evidence upon which the judgment is based.” La. Const. art. I, § 19. App.198a.

In the absence of a record, there is no practical means to protect the right of judicial review, much less prepare a successful habeas corpus petition.⁷⁷ Carlisle arrested on a phone call, on August 25, 2015, detained on a writ of attachment for “failure to appear at drug court” after he had appeared, could not convince the appellate court that the contempt was fallacious as there was no judicial record of the August 25, 2015 “court” meeting.

In *Cooke v. United States*,⁷⁸ by certiorari, this Court reversed Cooke’s sentence, stating:

When the contempt is not in open court, however, there is no such right or reason in dispensing with the *necessity of charges and*

77 The Fifth Circuit in Carlisle’s habeas appeal side-stepped the absence of any record by holding that “verbatim transcripts” are not required. No. 20-30720, 2022 U.S. App. LEXIS 15048 *4; 2022 WL 1778548 (decided June 1, 2022), Southwick, Oldham, and Wilson, Circuit Judges. But the issue was *never* the “absence of a transcript.” It was the state court’s failure to require any record, or judicial proceeding, or judicial orders, whatsoever, prior to incarceration.

78 267 U.S. 517, 535-536 (1925).

the opportunity of the accused to present his defense by witnesses and argument...

[direct criminal contempt that involves] cases of misbehavior of which the judge is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished.

Or, in other words, secret trials “in camera” have not occurred “since abolition of the Court of Star Chamber in 1641.” *In Re Oliver*, 333 U.S. 257, 266 (1947).

The lower court ignored the requirement of a record or proceeding. She wrote: “A judicial order is a judicial order whether it is stated in written reasons or whether it is given orally and recorded for the Record in a minute entry.” App.91a, December 12, 2018 Order.

A minute entry is not the “Record” required by federal law or La. Const. art. I, § 19, it is certainly not “evidence.” *Boumediene v. Bush*, 553 U.S. at 782 (2008) held the “considerable deference” owed [to state court convictions and sentences] is based on the confinement being ordered by *a court of record... [as] it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding*” citing *Brown v. Allen*, 344 U.S. 443, 506 (1953). *See also, DeLeon v. City of Corpus Christi*, 488 F.3d at 656 (held *Heck* applies to deferred adjudication involving a *“judicial finding* that the evidence substantiates the defendant’s guilt...”).

In non-drug “court” circumstances, this Court framed the question as follows:

The question presented is whether revocation of an inmate's good time credits violates the Due Process Clause of the Fourteenth Amendment if the decision of the prison disciplinary board is not supported by evidence?"

and answered its own question as follows:

We conclude that where good time credits constitute a protected liberty interest, a decision to revoke credit had to be supported by some evidence.

Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 447 (1985).

The protected liberty interest a drug court participant has, after entering a probation program, in remaining free from custody is the same interest any other defendant has. Indeed, one might argue it is even greater.

Only a judicial proceeding *on the record with judicial findings* and a judicial order can support a conviction and sentence for contempt. *In Re Oliver*.

The issue is pressing. States in the absence of federal guidance are debating whether drug court "sanctions" require the *same* due process as a revocation proceeding,⁷⁹ or whether the *ex parte* communications

⁷⁹ See, *State v. Rogers*, No. 33935, 144 Idaho 738, 170 P.3d 881, 887 (Idaho, October 22, 2007) (Intermediate sanctions imposed in drug court programs do not implicate the same due process concerns); compare, *In re Miguel*, 63 P.3d 1065, 1065 (Ariz. App. 2003) (possibility of jail or detention sanctions "at a review hearing"..."appeared" to require a hearing, and consequently a record and judicial orders) and *see also, Thorne v. Hale*. No.

support valid incarceration,⁸⁰ or disbarment⁸¹ tripping the same circuit, as the Louisiana court.

The lower court has made drug courts a “special case” where due process is sacrificed on the altar of “collaboration.” This is a constitutional “loophole” through which the drug courts can and are driving a Mack truck.

II. SECOND QUESTION

A. The Decision Deepens the Conflict Already Existing Between the Circuits Regarding the Application of *Heck* and *Preiser* to Plaintiffs Who Are No Longer in Custody—an Issue Left Unresolved in *Heck, Preiser, and Spencer*—and Applies *Heck* to Claims That Do Not Implicate *Heck’s* Positive Outcome Rule, or Challenge “Convictions or Sentences”.

Carlisle and Heron both filed § 1983 class claims in 2016, AFTER they had completed the last of the sanctions of which they complain and did not suffer damage from DOC’s failure to release them timely, until 2017, of which they did not learn the cause until the Sheriff, in his own words, revealed the “mechanism” (R.7481) employed to award or deny the credits, in discovery. The claim did not even accrue until AFTER

1:08cv601 (JCC), 2009 WL 980136 (E.D. Va. Mar. 26, 2009) aff’d, *Thorne v. Hale*, No. 09-2305, WL1018048 (4th Cir. Mar. 19, 2010).

80 See, e.g. *State v. Sykes*, 182 Wa.2d 168, 339 P.3d 972 (Wash. 2014)(open court provisions of Washington Constitution do not apply to drug court meetings).

81 See, e.g. *Ms. Com’n on Jud. Performance v. Thompson*, 169 So.3d 857 (Ms.2015)(suspending drug court judge).

they were held beyond the lawful release date. Yet the lower court dismissed their injunctive and declaratory relief claims filed in 2016 based on *Preiser and Heck and also for lack of standing based on Black v. Hathaway*. *Spencer* compels the opposite conclusion: *Heck*'s favorable-termination rule does not apply to a § 1983 suit by a plaintiff who is no longer in custody.⁸² In *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam) the Court stated that this issue is unsettled. It is time to settle the issue *Spencer* left unresolved—whether *Heck* bars a § 1983 claim brought by a prisoner who was no longer in custody respecting the “conviction” of which he complains.

B. The Lower Court Created a Stricter R. 15 and R. 8 Standard.

The claim – for over detention *based on failure to award credits toward post-revocation sentences*—is a non-*Heck*-barred claim. Judge Schlegel ordered credit for time served in 2016—so no “conviction or sentence” is invalidated. In a semantical twist, the Court called this a “mis-reporting violation” distinguishable from the pled claims alleging “intentional denial of earned jail credits” dismissing the claims and amendment. The ruling should be reversed. Rule 15 demands “liberality” when considering amendments. Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a

⁸² *Cohen v. Longshore*, 621 F.3d 1311, 1315-17 (10th Cir. 2010); *Wilson v. Johnson*, 535 F.3d 262, 265-68 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 599-603 (6th Cir. 2007); *Harden v. Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003); *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 73-75 (2d Cir. 2001); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999).

pleading must contain only a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citing Fed. R. Civ. P. 8) not ‘detailed factual allegations.’” *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

This Court should reverse based on its previous direction to the Fifth Circuit: to “reject[s] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome.” *Delpin Aponte v. United States*, 83 Fed. Cl. 80, 89 (2008) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). *Johnson v. City of Shelby, Mississippi*, 13-1318, 135 S.Ct. 346,47 (decided November 10, 2014), *per curiam* (“For clarification and to ward off further insistence on a punctiliously stated “theory of the pleadings,” reversing and remanding to allow amendment as it is “unnecessary to set out a legal theory for the plaintiff’s claim for relief.”).

III. THIRD QUESTION

A. The Threshold Question Is Whether the Waiver Was Knowing and Intelligent.

Petitioners disagree based on the facts with the Court’s holding that McNair is a “judicial officer” entitled to judicial immunity in his official capacity. McNair is a private contract medical professional charged with supervising treatment, and owes plaintiff a duty against injury.

Private persons may be brought within the reach of § 1983 in their personal capacity when they “agreed

with a state officer to deprive... of constitutional rights.”⁸³

The court granted qualified immunity, based on the *due process waiver* on the basis that Plaintiffs did not demonstrate the waiver violated federal law.

The Court ignored the threshold issue: Plaintiffs claimed the waiver could not possibly be “knowing and intelligent”⁸⁴ as it must be read *in pari materia* with the Handbook limiting the most severe sanction to multiple days in jail or termination. R.9952,54. *See e.g. United States v. Melancon*, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring) (“I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a ‘waiver’ is inherently uninformed and unintelligent.”)

B. The Due Process Waiver Cannot Be Applied to Claims Involving Clinical Treatment.

Second, the SCDCO advised the participants are “treated” with jail sanctions. A *due process* waiver has no relevance to a claim against a medical contractor, respecting a claim for damage based on an intentional *tort* having to do with abusive clinical treatment. The Supreme Court does not “demand precedents applying the right at issue to a “fundamentally similar” factual situation.” Prior decisions must give merely “reasonable warning that the conduct at issue violated constitu-

⁸³ See, e.g., *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009).

⁸⁴ See, e.g., *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 (1942).

tional rights. *United States v. Lanier*, 520 U.S. 259 (1997); *United States v. Guest*, 383 U.S. 745, 759, n. 17 (1966).

The “the error [must] seriously affect the fairness, integrity or public reputation of judicial proceedings[,]” as that test was employed in *United States v. Olano*, 507 U.S. 725, 732 (1993). That test was met.⁸⁵

C. States are Divided as to Constitutional Validity of Drug Court Due Process Waivers Applied to Contempt Sanctions.

This Court is interested in divisions in the states’ highest courts to grant certification. However, due to the “chilling effect” of the drug court setting, few cases make it to the state highest courts. Nevertheless, the New Hampshire Supreme Court set aside the waiver executed during the initial plea, when the issue before it was the due process owed *at termination and* “left for another day” the question of whether a *due process waiver* that expressly discusses confinement for non-compliance styled as “contempt” during the drug court sanctioning process would be sufficient to justify the denial of any due process rights prior to being imposed. *State v. LaPlaca*, 27 A.3d 719 (New Hampshire 2011).

An appeal court in *State v. Kelifa*, No.71949-1-I (Wash. Ct. App. Div. One July 13, 2015) per curiam

⁸⁵ See e.g., discussion, *Hendrick v. Knoeble*, No. 4:15-cv-00045 SEB-TAB (S.D. Indiana, order May 5, 2017) aff’d, No.17-2750, 894 F.3d 836 (7th. Cir 2018)(“provision in Drug Court Agreement waiving right to sue for 42 U.S.C. § 1983 claims “possibly” unenforceable based on lack of parity between the parties and because it absolves drug court program employees of liability for intentional tortious conduct, by a local government performing a public service.).

unpublished Opinion, *relying on the state supreme court’s decision in Washington, State v. Sykes*, 182 Wash. 2d 168, 339 P.3d 972 (2014) (open court provisions of Washington Constitution do not apply to drug court meetings) held that a “closed” staffing meeting where the decision to sanction with jail time is made, does not violate the public trial requirement. However, the Court relied upon the fact that the executed waiver in that case *required the judge to allow the defendant opportunity to offer evidence and to be heard at a subsequent hearing, prior to decision. Ibid.*, n.1. The waiver that Carlisle and Heron executed does NOT provide that right or contain that safeguard.



CONCLUSION

For the foregoing reasons, Taylor Carlisle and Emile Heron, individually and on behalf of the class, respectfully request this Court issue a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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September 20, 2023