No. 23-

IN THE

Supreme Court of the United States

JAMES R. ZUEGEL,

Petitioner,

v.

MARCO GARCIA, OFFICER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's opinion in *Spencer v. Kemna*, 523 U.S. 1 (1998), permit an individual, who has completed his probation, to pursue a 42 U.S.C. section 1983 civil rights action establishing the unconstitutionality of his conviction?

PARTIES TO THE PROCEEDING BELOW

The parties in the District Court and Ninth Circuit Court of Appeal were Petitioner James R. Zuegel, and Respondents Marco Garcia, Patrick Ward, Britton Moore, and City of Mountain View. California Governor Gavin Newsome and Attorney General Roy Bonta were dismissed from the case while it was still pending in the District Court.

RELATED CASES

Zuegel v. Mountain View Police Department et al., United States District Court for the Northern District of California, Case No. 17-cv-3249. Judgment entered November 23, 2020.

Zuegel v. Mountain View Police Department et al., United States Court of Appeal for the Ninth Circuit, Case No. 21-16277. Judgment entered March 8, 2024.

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STATUTES AND OTHER AUTHORITIES

PETITION FOR CERTIORARI

Spencer v. Kemna, 523 U.S. 1 (1998), is a split decision of this Court which has engendered much confusion regarding whether, and under what circumstances, a person released from prison, parole or probation, may pursue relief in a 42 U.S.C. section 1983 action because habeas corpus is no longer available. Not only is this Court's decision in *Spencer v. Kemna* split, but the United States Courts of Appeal for the various circuits have split regarding the proper interpretation of *Spencer*. In *Mohammad v. Close*, 540 U.S. 749 (2004), this Court acknowledged the controversy regarding the import of *Spencer*, but concluded that "[t]his case is no occasion to settle the issue." (*Mohammad, supra*, fn. 2) Furthermore, scholarly opinions have commented upon the lack of clarity in defining the reach and limits to *Heck v. Humphrey*, 512 U.S. 977 (1994), and the divergent interpretations of it within the federal courts.

Twenty-six years after the decision in *Spencer*, the time has come to resolve the ambiguity arising from this Court's split decision and the subsequent circuit split, by providing a definitive interpretation of its opinion in *Spencer v. Kemna.*

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeal (unpublished), Ninth Circuit denial of rehearing en banc, and opinions of the United States District Court for the Northern District of California (unpublished), are contained in the appendix hereto.

JURISDICTION

The Ninth Circuit Court of Appeal rendered its Memorandum Decision on March 8, 2024. The Ninth Circuit Court of Appeal denied rehearing en banc on April 17, 2024, and this Petition for Certiorari is timely filed within 90 days of said denial. Petitioner invokes jurisdiction of this Court pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section one of the Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunity 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."

U.S. Const. amend. XIV, § 1.

Section 1983 of Title 42 provides:

> 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 any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Petitioner, James R. Zuegel, while on probation, filed a section 1983 action seeking both relief from his conviction and monetary damages for unlawful arrest in his home without benefit of an arrest warrant or search warrant. The District Court ruled that, per the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), Zuegel was barred from collaterally attacking his conviction in the section 1983 action, and could only attack the conviction via writ of habeas corpus. On the other hand, Zuegel could pursue claims regarding the manner of his arrest, in the section 1983 action.

The section 1983 action proceeded to a jury verdict in Zuegel's favor based on the manner of his arrest. Meanwhile, Zuegel exhausted his state habeas remedies through the level of the California Supreme Court. He

did not file a federal habeas petition because his probation would soon expire, presumably mooting such a petition.

After Zuegel's probation did expire, and after entry of judgment in his original section 1983 case, Zuegel filed a new section 1983 action, seeking relief from conviction and explicitly citing this Court's opinion in *Spencer v. Kemna*, 523 U.S. 1 (1998). The District Court dismissed the new section 1983 action, opining that Zuegel had not been sufficiently "diligent" in pursuing his remedies, particularly because he did not pursue federal habeas corpus.

Zuegel appealed this dismissal to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed dismissal, observing that relief under *Spencer v. Kemna* was limited to "former prisoners challenging loss of good-time credits, revocation of parole or similar matters." (See App. at 4a, citing *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002) and *Guerrero v. Gates*, 422 F.3d 697, 703-705 (9th Cir. 2006)) The Ninth Circuit opinion in this case also stated in a footnote that dismissal was proper because "Zuegel's delay in pursuing state post-conviction proceedings allowed the statute of limitations for seeking federal corpus relief to expire." (App. at 5a)

Zuegel petitioned the Ninth Circuit for rehearing en banc. Said petition was denied on April 17, 2024, and this petition for certiorari follows.

REASON FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORI TO CLARIFY THE IMPORT OF ITS DECISION IN *SPENCER V. KEMNA*, AND RESOLVE THE SPLIT BETWEEN THE CIRCUITS

A. This Court's Split Decision in *Spencer v. Kemna*

Spencer v. Kemna, 523 U.S. 1 (1998), is a split decision of this Court. The question presented was whether an individual could pursue a civil rights action under 42 U.S.C. section 1983, following expiration of his sentence, insofar as habeas corpus relief became unavailable once the individual was no longer in custody. The multiple opinions in *Spencer* rendered it confusing. Justice Scalia, delivering the opinion of this Court, opined that no such section 1983 action could be maintained, the case being moot and therefore failing to satisfy Article III's case or controversy requirement. Justice Souter filed a concurring opinion, taking a substantially different approach, which created an exception to the general rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), that collateral attacks on convictions may only be pursued via habeas corpus and not via 42 U.S.C. section 1983. This concurring opinion, joined by Justices O'Connor, Ginsberg and Breyer, opined in pertinent part that:

> [A] former prisoner, no longer "in custody," may bring a §1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to

> satisfy. Thus, the answer to Spencer's argument that his habeas claim cannot be moot because *Heck* bars him from relief under § 1983 is that *Heck* has no such effect. After the prisoner's release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief.

(*Spencer, supra*, 523 U.S. at 21)

Justice Ginsburg added a separate concurrence observing that she had changed her mind regarding her vote in *Heck*, and that individuals "without recourse to the habeas statute" should be included within the "broad reach" of section 1983. (*Spencer, supra*, 523 U.S. at 21)

Justice Stevens wrote separately, dissenting. After discussing an individual's on-going interest in his good name and reputation, Justice Stevens concluded: "Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as JUSTICE SOUTER explains, that he may bring an action under § 1983." (*Spencer, supra*, 523 U.S. at 22)

If one counts justices supporting Justice Souter's approach versus justices supporting Justice Scalia's approach, it becomes clear that Justice Scalia's approach garnered only four votes, whereas Justice Souter's approach garnered five votes. Therefore, Justice Souter's concurrence should be deemed controlling with regard to the issue that "a former prisoner, no longer 'in custody', may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would

be impossible as a matter of law for him to satisfy." As discussed below, the Circuit Courts have taken widely varying approaches to this confusing situation.

B. United States Circuit Courts' Interpretation of *Spencer v. Kemna*

At the present time, a minority of four circuit courts appear to have rejected Justice Souter's concurrence in *Spencer* as the controlling opinion, while a majority of five circuits have adopted it.

In *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005), a Third Circuit panel, citing First Circuit and Fifth Circuit precedent, declined to follow Justice Souter's opinion in *Spencer v. Kemna*:

> We recognize that concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute. *See id.* at 19-20 (Souter, J., concurring); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). But these opinions do not affect our conclusion that *Heck* applies to Petit's claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in following the Supreme Court's admonition "to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by

> pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.'" *Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1989)); [*see Randell v. Johnson*, 227 F.3d 300, 301-02 (5th Cir. 2000) . . .

(*Gilles, supra*, 427 F.3d at 209-210. Parallel citations omitted.) Notably, Judge Fuentes dissented from the panel opinion, stating that "[u]nder the best reading of *Heck* and *Spencer v. Kemna*, the favorable termination rule [of *Heck*] does not apply where habeas relief is unavailable." (*Gilles, supra*, 427 F.3d at 217)

The Eighth Circuit Court of Appeals has joined the Third Circuit opinion in *Gilles*, the First Circuit opinion in *Figueroa*, and the Fifth Circuit opinion in *Randall*, with its decision in *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007). *Entzi* noted the concurring and dissenting opinions in *Spencer v. Kemna*, but declined to apply an exception to *Heck's* bar "[a]bsent a decision of the [United States Supreme] Court that expressly overrules what we understand to be the holding of *Heck* . . . " (*Entzi, supra*, 485 F.3d at 1003) The Eighth Circuit *Entzi* opinion, like the Third Circuit *Gilles* opinion, the First Circuit *Figueroa* opinion, and the Fifth Circuit *Randell* opinion, is in essence, a call for action from this Court.

On the other hand, a majority of five Circuit Courts already apply Justice Souter's opinion in *Spencer v. Kemna* as controlling. The Second Circuit in *Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001), noting the views of five justices in *Spencer v. Kemna*, concluded that "where

federal habeas is not available to address constitutional wrongs, §1983 must be." Plaintiff's case was therefore allowed to proceed. (*Huang, supra*, 251 F.3d at 67. Accord, *Leather v. Ten Eyck*, 180 F.3d 420 (2d Cir. 1999))

The Seventh Circuit in *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000), discussing *Spencer*, observed that "five justices now hold the view that a § 1983 action must be available to challenge constitutional wrongs where habeas is not available." (*DeWalt, supra*, 224 F.3d at 614 et seq. Accord *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999)) The Seventh Circuit section 1983 actions were therefore allowed to proceed.

The Sixth Circuit's treatment of Justice Souter's concurrence in *Spencer v. Kemna* accords with the Seventh Circuit's treatment. (See *Powers v. Hamilton County Pub. Defender Commission*, 501 F.3d 592 (6th Cir. 2007); *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999)) So does the Eleventh Circuit's treatment of the subject. *Harden v. Pataki*, 320 F.3d 1289 (11th Cir. 2003), notes that "five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." (*Harden, supra*, 320 U.S. at 1298)

C. The Ninth Circuit's Improper Narrowing of *Spencer*

As for the Ninth Circuit, that Court, in *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), recognized Justice Souter's concurrence as the controlling opinion in *Spencer v. Kemna*, but unfortunately has incrementally narrowed the scope of the rule to the extent that it is now

incompatible with the language of Justice Souter's opinion in *Spencer.* Footnote seven in *Nonnette* stated:

> We do not share the State's concern that our holding will encourage prisoners to delay their challenges to loss of good-time credits until their release is imminent or accomplished. The possibility of release from incarceration is the strongest incentive for prisoners to act promptly to challenge such administrative action by habeas corpus after administrative remedies are exhausted. We also emphasize that our holding affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus. *See Spencer*, 523 U.S. at 7-12.

(*Nonnette v. Small*, 316 F.3d 872, 878, fn. 7 (9th Cir. 2002))

Nonnette mischaracterizes the holding in *Spencer* insofar as Justice Souter's opinion in *Spencer* expressly states that "[A] former prisoner, no longer "in custody," may bring a §1983 action *establishing the unconstitutionality of a conviction*," and not merely such lesser matters as revocation of good-time credits and the like. Moreover, footnote 7 in *Nonnette* was followed by *Guerrero v. Gates* 442 F.3d 697 (9th Cir. 2006), which purports to impose a requirement of "diligence" before a former prisoner may avail himself of the benefits of the *Spencer* opinion.

Although the plaintiff in *Spencer* did show diligence in pursuing habeas remedies prior to his release, Justice Souter's opinion in *Spencer* does not impose a requirement of diligence. *Nonnette's* footnote 7, which addresses the subject of delay, should not be permitted to metastasize into a substantive restriction on the relief available, gutting the holding of Justice Souter's opinion in *Spencer.*

What is more, the Ninth Circuit panel in *this* case strongly implied that "diligence" requires a plaintiff to file a federal habeas petition in order to avail himself of relief under *Spencer.* (See fn. 2, App. at 5a) This conflicts with the express language of Justice Souter's opinion in *Spencer*, which states that: "After the prisoner's release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief." (*Spencer, supra*, 523 U.S. at 21)

D. Scholarly Comment and the Need for a Definitive Explication of *Spencer*

Scholarly journals have commented upon the lack of clarity in this area of the law. (See Note: *Defining the Reach of Heck v. Humphrey, Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?* 121 Harv. L. Rev. at 889) The lack of clarity effects numerous cases, and conflicting cases will continue to proliferate absent an opinion of this Court. (See Fein, 28 New Eng. J. on Crim. and Civ. Confinement at 25, observing that "The issue has and will continue to occur, given the numerosity of 1983 and 2254 cases.")

This Court should therefore grant certiorari to provide a definitive statement of law regarding the issues

raised in *Spencer v. Kemna.* Further, this Court should hold that a section 1983 action is always available, within its statute of limitations, when habeas corpus is not, for attacks upon convictions as well as more minor matters. No special "diligence" or exhaustion of federal habeas should be required.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-17021

JAMES R. ZUEGEL,

Plaintiff-Appellant,

v.

MARCO GARCIA, OFFICER; PATRICK WARD, OFFICER; BRITTON MOORE, OFFICER; CITY OF MOUNTAIN VIEW,

Defendants-Appellees.

D.C. No. 5:21-cv-07538-BLF

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California.
Beth Labson Freeman, District Judge, Presiding.

February 12, 2024, Argued and Submitted
March 8, 2024, Filed

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Before: MILLER, BADE, and VANDYKE, Circuit Judges.

James Zuegel appeals from the dismissal of his second 42 U.S.C. § 1983 action arising from his May 2015 arrest, which was also the basis for his first § 1983 action.[1] Zuegel challenges the district court's determination that his Fourth Amendment false arrest claim remains barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). We review de novo, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014) (en banc), and we affirm.

1. Under *Heck*, a claim for damages under § 1983 is barred when success on that claim "would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. To recover damages under § 1983, a plaintiff must satisfy the favorable termination requirement by "prov[ing] that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. In a related appeal, *Zuegel v. Mountain View Police Department*, No. 21-16277, we affirmed the district court's determination that Zuegel's Fourth Amendment false arrest claim is *Heck*-barred.

1. We address Zuegel's claims in his first § 1983 action in a separate disposition, *Zuegel v. Mountain View Police Department*, No. 21-16277.

2. Zuegel has not satisfied *Heck*'s favorable termination requirement; instead, he asserts that the "*Heck*-bar lifted after [his] probation expired, terminating his constructive custody." Zuegel asserts that he pursued relief in state habeas corpus proceedings, which ended when the Supreme Court of California denied relief on July 10, 2019. He did not file a federal habeas petition because he believed that he would be unable to complete a federal proceeding before his probation ended on September 30, 2019, and that the termination of his probation would render a federal habeas petition moot. Thus, he argues that under *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), he may bring his claims under § 1983 without satisfying *Heck*'s favorable termination requirement.

In *Spencer*, the petitioner filed a federal habeas petition seeking to invalidate an order revoking his parole. *Id.* at 3. Because the petitioner had completed his entire sentence, the Supreme Court found the petition moot because it no longer presented a case or controversy under Article III. *Id.* at 3, 12-16. The Court explained that after a sentence has expired, "some concrete and continuing injury other than the now-ended incarceration or parole—some 'collateral consequence' of the conviction—must exist if the suit is to be maintained." *Id.* at 7. The Court stated that it has "been willing to presume that a wrongful conviction has continuing collateral consequences," *id.* at 8, but it declined to extend that presumption "to the area of parole revocation," *id.* at 12, 14. In a concurrence (joined by three other justices), Justice Souter determined that, to avoid an "anomaly," *id.* at 20, "[t]he better view [] is that a

former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound [by *Heck*'s] favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 20-21; *see Galanati v. Nev. Dep't. of Corrs.*, 65 F.4th 1152, 1155 (9th Cir. 2023) (explaining that *Spencer* suggested that *Heck* does not bar a §1983 claim if it would be impossible as a matter of law for a plaintiff to meet the favorable termination requirement due to the unavailability of habeas relief (citing *Spencer*, 523 U.S. at 21) (Souter, J., concurring)).

We have previously stated that the exception to *Heck*, as suggested in *Spencer*, is limited to "former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus." *Nonnette v. Small*, 316 F.3d 872, 878 n.7 (9th Cir. 2002); *see id.* at 875-76 (holding that *Heck* did not bar an ex-prisoner's § 1983 claim challenging the "deprivation of good-time credits" because he could no longer bring that claim in a habeas petition after his release from custody); *see also Guerrero v. Gates*, 442 F.3d 697, 703-05 (9th Cir. 2006) (holding that, even though the plaintiff was out of custody, *Heck* barred wrongful arrest, malicious prosecution, and conspiracy claims because they attacked his conviction and "his failure timely to achieve habeas relief [was] self-imposed," *id.* at 705); *Galanti*, 65 F.4th at 1156 (explaining the distinction between a challenge to an underlying conviction or sentence and a challenge to the loss of prison credit deductions). Under

the reasoning of these cases, the narrow exception to the *Heck* bar is unavailable to Zuegel because he is challenging the validity of his conviction, not the loss of prison credits, revocation of parole, or similar matters.[2] *See Nonnette*, 316 F.3d at 878 n.7.

AFFIRMED.

2. Even if the narrow exception to *Heck* could apply here, Zuegel would not be entitled to such relief because he has not diligently pursued it. *See Galanti*, 65 F.4th at 1156 (discussing diligence requirement). Zuegel did not file a direct appeal and he did not commence state post-conviction proceedings until fifteen months after he pled no contest. California Rule of Court 8.853(a) (providing a thirty-day deadline to initiate direct review). His delay in pursuing state post-conviction proceedings allowed the statute of limitations for seeking federal habeas corpus relief to expire. *See* 28 U.S.C. § 2244(d); *Cunningham v. Gates*, 312 F.3d 1148, 1153 n.3 (9th Cir. 2002) (stating that "failure [to timely] pursue [federal] habeas remedies" does not protect against *Heck*).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED JULY 20, 2022

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SAN JOSE DIVISION

Case No. 21-cv-07538-BLF

JAMES R. ZUEGEL,

Plaintiff,

v.

MARCO GARCIA, *et al.*,

Defendants.

July 20, 2022, Decided
July 20, 2022, Filed

ORDER GRANTING MOUNTAIN VIEW DEFENDANTS' MOTION TO DISMISS WITHOUT LEAVE TO AMEND

[Re: ECF No. 16]

Déjà vu. In this case, Plaintiff James Zuegel alleges multiple violations of 42 U.S.C. § 1983 by Defendants City of Mountain View and Mountain View police officers Marco Garcia, Patrick Ward, and Britton Moore arising

out of Zuegel's warrantless arrest on June 7, 2015. Zuegel himself characterizes this case as a "follow-on" to a previous case before this Court in which the Court dismissed similar § 1983 claims as barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), and in which Zuegel eventually prevailed on other claims before a jury. *See Zuegel v. Mt. View Police Dep't (MVPD)*, No. 17-cv-3249, 2021 U.S. Dist. LEXIS 125418 (N.D. Cal., filed Jun. 6, 2017) ("*Zuegel I*").

Understandably, Defendants now move to dismiss the claims in this case, arguing that they are res judicata due to the judgment in *Zuegel I*. *See* ECF No. 16 ("MTD"); *see also* ECF No. 29 ("Reply"). Zuegel argues that the claims are not res judicata and that the *Heck* bar has been lifted because habeas relief is no longer available to him after his probation ended. *See* ECF No. 28 ("Opp."). The Court previously found this motion suitable for disposition without oral argument.[1] *See* ECF No. 24; Civ. L.R. 7-1(b). For the following reasons, the Court finds that the *Heck* bar remains because Zuegel's claims were not pursued diligently through other avenues of review. The motion to dismiss is thus GRANTED WITHOUT LEAVE TO AMEND, and the Clerk shall close the case.

1. Zuegel's request to restore this motion to the argument calendar is DENIED. ECF No. 30. The Court remains of the view that the issues are suitable for disposition without oral argument.

Appendix B

I. BACKGROUND

A. *Zuegel I*

On June 6, 2017, Zuegel filed his original lawsuit in this Court. *See Zuegel I*, ECF No. 1. The Court first evaluated Zuegel's claims in that lawsuit in April 2018 after he obtained counsel and filed an amended complaint. *See Zuegel I*, Order Granting Motion to Dismiss First Amended Complaint, ECF No. 40 ("Apr. '18 Ord."). As the Court summarized in that Order, in the amended complaint, Zuegel asserted claims arising out of incidents occurring between May and June 2015. Zuegel alleged that on May 23, 2015, he and his wife accompanied their severely autistic son JR (and his autism service dog) to the Mountain View El Camino YMCA for a swim lesson. *Id.* at 2 (citing the amended complaint). After the lesson, as Zuegel waited for his family on one of the couches at the YMCA, two young girls sat near him on the couch and talked to Zuegel about his son's service dog. *Id.* JR emerged making loud noises, sat between Zuegel and one of the girls, and tried to "dart" away. *Id.* Zuegel grabbed JR by the back of his shirt to try to prevent him from darting away, as he normally did, and said something to the effect of "sit your butt down." *Id.* Zuegel and his family left after briefly encountering a woman who appeared to be the mother of one of the girls. *Id.*

Zuegel alleged that days later and unknown to Zuegel, the girl's mother reported to the Mountain View Police Department that a man with a service dog at the YMCA had slapped her daughter on the butt and asked

her, "How old are these buns?" Apr. '18 Ord. at 2–3. The young girl corroborated these allegations in a follow-up interview, although also saying that the man did not "touch any private areas." *Id.* at 3. Based on these interviews, Officers Ward and Moore arrived at and entered Zuegel's home at 9:33 p.m. on June 7, 2015 without an arrest or search warrant and arrested Zuegel in the presence of his wife and JR after he refused to be interrogated without counsel or his wife present. *Id.* The arrest was extremely distressing to the family and caused JR to become highly agitated. *Id.* Officer Garcia led the interrogation of Zuegel at the police station. *Id.* Zuegel was confined overnight and for part of the following day until his wife posted bail. *Id.*

The Santa Clara District Attorney charged Zuegel with misdemeanor sexual battery and misdemeanor soliciting or engaging in lewd conduct in public in violation of California Penal Code §§ 242-243.4(3)(1), 647(a). Apr. '18 Ord. at 3–4. Zuegel alleged that to avoid having to register as a sex offender, on September 30, 2016, he pled no contest to misdemeanor disorderly conduct. *Id.* Zuegel was placed on probation for three years, ordered to perform 75 hours of community service, and barred from coming within 300 yards of the YMCA. *Id.*

In the amended complaint in *Zuegel I*, Zuegel asserted four state law claims against the Defendants here, one § 1983 claim against Officers Garcia, Ward, and Moore, and one § 1983 claim against the Mountain View Police Department and City of Mountain View. Apr. '18 Ord. at 4. As is relevant here, in April 2018, this Court dismissed the § 1983 claims asserted in the First Amended Complaint,

largely without leave to amend. *Id.* at 5–15. The Court found that the § 1983 claims for false arrest, lack of a warrant, coercion to consent to a search of his phone, violation of his right to remain silent, violation of his right to counsel, and violation of his due process right not to be interrogated were barred by *Heck* because establishing the basis for damages under § 1983 for those courses of conduct would necessarily demonstrate the invalidity of the underlying conviction. *Id.* at 6, 12 (citing *Heck*, 512 U.S. at 481–82). The Court held that those claims were "properly the subject of habeas corpus proceedings which [Zuegel] allege[d] he [wa]s simultaneously pursuing." *Id.* at 11, 12. The Court granted Zuegel leave to amend solely to attempt to allege a § 1983 claim based on "the circumstances surrounding the manner of the arrest"—the nighttime arrest or arrest without consent to enter absent exigent circumstances—because those courses of conduct would not demonstrate the invalidity of the plea. *Id.* at 15. Otherwise, his § 1983 claims were dismissed without leave to amend. *Id.* at 6, 11, 12, 15.

Zuegel proceeded to trial on two claims—one for warrantless entry and arrest against Officers Moore and Ward and one for *Monell* liability against the City on a failure to train theory related to the first claim. *See Zuegel I*, ECF No. 108 (denying summary judgment on those claims). On November 20, 2020, the jury returned a verdict finding that the officers did not enter Zuegel's residence in violation of the Fourth Amendment, but that they had remained inside after consent was withdrawn, thus violating the Fourth Amendment. *See Zuegel I*, ECF No. 178 at 1–2 (jury verdict). The jury found that the

Fourth Amendment violation was not a result of the City's deliberate indifference for failure to train. *Id.* at 2. The jury awarded Zuegel $3,000 in total damages, with fault apportioned equally between Officers Ward and Moore. *Id.* at 2–3. The Court entered judgment on November 23, 2020. *See Zuegel I*, ECF No. 179. The Court later denied the defendants' motion for judgment as a matter of law and granted in part Zuegel's request for attorneys' fees. *See Zuegel I*, ECF No. 223. Zuegel's appeal of the Court's orders on the motions to dismiss and motion for summary judgment is still pending at the Ninth Circuit.[2] *See* 9th Cir. No. 21-16277.

B. Zuegel's State Habeas Proceedings

Zuegel's plea to and conviction of the state misdemeanor charge occurred on September 30, 2016. *See Zuegel I*, ECF No. 19-4; *accord* Compl. ¶ 54 (stating the Zuegel's three years of probation were completed on September 30, 2019). Zuegel filed his petition for a writ of habeas corpus in the Santa Clara County Superior Court on December 19, 2017, fifteen months after his conviction. *See* Request for Judicial Notice ("RJN") Ex. H, ECF No. 16-10, at 67–113. The Superior Court denied the writ on February 2, 2018. *See id.* at 115–19. He filed a writ of habeas corpus in the Sixth District Court of Appeal on April 2, 2018, *id.* at 121–252, which was denied on November 1, 2018, *id.* at 254. He filed his habeas petition in the Supreme Court of California on December 31, 2018. *See generally id.* The Supreme Court denied the petition on July 10, 2019—

2. Defendants also filed an appeal that they later voluntarily dismissed. *See* 9th Cir. No. 21-16276.

approximately two-and-a-half months before Zuegel's probation was set to end—thus exhausting Zuegel's state habeas remedies. *See* RJN Ex. I. Zuegel did not file a federal habeas petition because he "could not realistically complete" those proceedings in the limited time before his probation would end and the habeas petition would become moot. *See* Opp. at 9.

C. *Zuegel II*

Zuegel filed this case on September 28, 2021, two days short of two years from the termination of his probation. *See* ECF No. 1 ("Compl."). Zuegel characterizes the case as a "follow-on" to *Zuegel I* that is based on the same conduct but which asserts claims that have supposedly newly "accrued" under § 1983 due to the unavailability of federal habeas relief after the termination of Zuegel's probation. *Id.* ¶¶ 1–2. The Complaint asserts four § 1983 claims: (1) against Officers Ward and Moore for arrest without probable cause, *id.* ¶¶ 55–57; (2) against Officers Ward and Moore for arrest in retaliation for assertion of constitutional rights, *id.* ¶¶ 58–60; (3) against Officer Ward and Detective Garcia for transportation to county jail for booking without probable cause, *id.* ¶¶ 61–64; and (4) against the City of Mountain View under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), Compl. ¶¶ 65–71.[3] Zuegel seeks compensatory and punitive damages and attorneys' fees. *Id.* at 26.

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3. The Complaint also separately asserted § 1983 claims against Gavin Newsom, Governor of California, and Rob Bonta, Attorney General of California. *See* Compl. ¶¶ 72–91. After those defendants moved to dismiss, Zuegel voluntarily dismissed his claims against them and the Court dismissed them from the case. ECF No. 27.

II. LEGAL STANDARD

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations omitted). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983).

III. DISCUSSION

A. Requests for Judicial Notice

Both Zuegel and Defendants request judicial notice of materials from *Zuegel I* and Zuegel's habeas proceedings. Zuegel requests judicial notice of the "docket sheet and filings" in *Zuegel I*. Opp. at 2 n.1. Because Zuegel does not identify specific entries or filings on the docket, the request is DENIED. *See Assurance Co. of Am. v. Nat'l Fire & Marine Ins. Co.*, 595 F. App'x 670, 672 (9th Cir. 2014) (noting that a blanket request for judicial notice "of entire case dockets" made it "impossible for the court to glean from [the] request the facts [the party] wanted [the court] to notice"). In contrast, Defendants request judicial notice of specific documents: the amended complaint, second amended complaint, two motion to dismiss orders, the summary judgment order, the judgment, and the notice of appeal/cross-appeal in *Zuegel I*. *See* RJN, ECF No. 16-2, at 2. Defendants also request judicial notice of Zuegel's habeas petition in the California Supreme Court (and the lower court documents attached to it) and the California Supreme Court's order denying the habeas petition. *See* RJN Exs. H, I. Zuegel does not object to the request and in fact cites several of these documents in his opposition. *See*, *e.g.*, Opp. at 2. The Court GRANTS Defendants' request for judicial notice of these court documents for their existence, not the truth of any disputed facts therein. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2004).

Appendix B

B. Res Judicata Does Not Bar These Claims

Defendants' first argument is that the claims in this lawsuit are res judicata. MTD at 4–6. Zuegel argues that they are not because the issue of whether the officers had probable cause to arrest Zuegel was not adjudicated in the prior lawsuit because it was dismissed as *Heck*-barred. Opp. at 4.

"Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980). Res judicata "bars 'all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action, if the prior suit concluded in a final judgment on the merits.'" *International Union of Operating Engineers-Employers Constr. Indus. Pension, etc. v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993) (quoting *Ross v. Int'l Bhd. of Elec. Workers*, 634 F.2d 453, 457 (9th Cir. 1980)). Application of res judicata requires "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). Although res judicata is a defense, it can be raised on a Rule 12(b)(6) motion where "the defense raises no disputed issues of fact." *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984).

There is no dispute between the parties that the first and third elements of res judicata are met. First, there

is an identity of claims between the two lawsuits because the "two suits arise from the same transactional nucleus of operative facts." *Tahoe-Sierra*, 322 F.3d at 1078. Both suits concern Zuegel's June 7, 2015 arrest by Defendants. Zuegel's assertion of some new causes of action in this lawsuit does not alter this conclusion because "[n]ewly articulated claims based on the same nucleus of facts" are still res judicata "if the claims could have been brought in the earlier action." *Id.* at 1078. Zuegel does not argue that he could not have pleaded these claims in the earlier action. Second, Zuegel and all of the Defendants here were parties to *Zuegel I*.

The dispute is over the second element: whether there was "a final judgment on the merits" in *Zuegel I*. Defendants have not cited a case holding that Rule 12(b)(6) dismissals pursuant to *Heck* are unequivocally "judgment[s] on the merits" such that res judicata applies. Defendants are correct that a dismissal *with prejudice* under Rule 12(b)(6) is a "judgment on the merits" for purposes of res judicata. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002); *Beard v. Sheet Metal Workers Union Local 150*, 908 F.2d 474, 477 n.5 (9th Cir. 1990). But *Heck* dismissals are usually *without prejudice*. *See Heck*, 512 U.S. at 479 (noting that the district court dismissed the claims without prejudice); *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (*Heck* dismissals "must be without prejudice so that [plaintiff] may reassert his claims if he ever succeeds in invalidating his conviction"); *Wheeler v. Dayton Police Dep't*, 807 F.3d 764, 767 (6th Cir. 2015) ("When courts dismiss claims under *Heck*, they typically do so *without prejudice*. . . ."). Dismissals *without*

prejudice are not "judgment[s] on the merits" for res judicata purposes. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505–06, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001). The Court's April 2018 Order in *Zuegel I* stated that the *Heck*-barred claims were dismissed without leave to amend. Apr. '18 Ord. at 11, 16. The Order did not state that the claims were dismissed with prejudice. Although it may have been unclear from the Court's Order, given the clear statement regarding dismissal of *Heck* claims in *Trimble*, the dismissals should be without prejudice to reasserting the claims if the *Heck* bar is lifted. Because the dismissals were without prejudice, they were not "judgment[s] on the merits" such that res judicata would apply.

Res judicata accordingly does not categorically bar Zuegel's claims here.

C. The § 1983 Claims Remain *Heck*-Barred, Notwithstanding the Alleged Unavailability of Federal Habeas Relief

The parties' main dispute involves whether the *Heck* bar that was the basis for the Court's dismissal of most of Zuegel's § 1983 claims in *Zuegel I* remains a bar to asserting those claims today. The Court finds that the *Heck* bar remains.

Zuegel's argument goes like this. For purposes of this case, Zuegel does not contest the grounds on which the Court found that the § 1983 claims asserted in *Zuegel I* were barred at that time or that the claims needed to be

pursued through habeas proceedings. Zuegel, however, asserts that circumstances have changed since the Court's dismissal of those claims. Zuegel says he did pursue his claims through state habeas proceedings, which needed to be exhausted prior to asserting a federal habeas claim. He exhausted those remedies when the California Supreme Court denied his petition on July 10, 2019. But Zuegel says that he had no meaningful opportunity to pursue federal habeas relief because his probation ended less than three months later on September 30, 2019, supposedly mooting any federal habeas claims under the Supreme Court's decision in *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). Zuegel says that under *Spencer* and its progeny in the Ninth Circuit, because his federal habeas claims became moot at the moment his probation expired and he had no meaningful opportunity to assert them, he can now assert those claims as § 1983 claims in this direct proceeding. *See* Compl. ¶¶ 1–2; Opp. at 4–9.

Defendants maintain that the claims are still *Heck*-barred. MTD at 6–9; Reply at 3–4. They say that Zuegel waived any argument based on *Spencer* because he did not raise it immediately upon expiration of his probation, which occurred prior to the final judgment in *Zuegel I*. MTD at 9; Reply at 4. They also contend that the holding in *Spencer* is narrow and inapplicable to claims directly challenging the validity of an underlying conviction or plea, and that in any case Zuegel was not sufficiently diligent in prosecuting his habeas claims to invoke this rule. MTD at 6–8.

As an initial matter, Zuegel is incorrect that his federal habeas claims were mooted by the expiration of his

probation. When a habeas petition challenges a conviction, there is a presumption of collateral consequences that renders the habeas petition not moot even after the period of punishment expires. *See Spencer*, 523 U.S. at 12. The Supreme Court has said that it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences" even after punishment ends, such as "deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses." *Id.* at 8, 12 (quoting *Sibron v. New York*, 392 U.S. 40, 55, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968)). Zuegel had a presumption of collateral consequences from his guilty plea to and conviction of the state misdemeanor charge such that his habeas claims were not mooted when his probation expired.

But even if Zuegel is correct that his federal habeas claims were mooted by the expiration of his probation, his proper remedy was to seek reconsideration under Civil Local Rule 7-9 in *Zuegel I*. After all, he was aware of those facts a full 14 months before trial and he was no stranger to late amendments to his complaint. Zuegel amended his complaint on June 29, 2020 to add the only claim that proved successful at trial. *See Zuegel I*, Third Amended Complaint, ECF No. 87. Furthermore, he failed to raise this issue in post-judgment motions. Thus, there is a serious possibility that Zuegel waived this argument in *Zuegel I* such that issue preclusion applies in this case. *See Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) (under issue preclusion, losing party in prior case cannot avoid preclusion by "finding some argument it failed to raise in the previous litigation").

And, even if Zuegel's habeas claim is not moot and he is not precluded from making this argument in this new case, the Court concludes that the *Spencer* exception is not available to Zuegel and that his dismissed § 1983 claims remain *Heck*-barred because he was not diligent in pursuing this claim. To see why, the Court discusses *Spencer*, two important Ninth Circuit precedents interpreting *Spencer*, and the two lines of district court cases applying the Ninth Circuit's cases.

In *Spencer*, the Supreme Court held that the expiration of a petitioner's sentence moots a petitioner's federal habeas petition under Article III due to a lack of a case or controversy where there are no collateral consequences from the underlying action that is challenged. Randy Spencer was serving a three-year sentence for felony stealing and burglary that began in October 1990. *Id.* at 3. After he was released on parole in April 1992, he committed a parole violation and was returned to prison after his parole was revoked in September 1992. *Id.* at 3–5. Upon returning to prison, Spencer immediately began efforts to invalidate the revocation of his parole (not the underlying conviction). *Id.* at 5. His efforts at obtaining state court relief were unsuccessful at all levels of the Missouri courts, and he then filed a petition for a writ of habeas corpus with the United States District Court for the Western District of Missouri in April 1993. *Id.* After several extensions were granted by the court and six months passed, Spencer requested in July 1993 that the court expeditiously rule on his motion "to prevent his claim from becoming moot" due to the upcoming expiration of his term of imprisonment. *Id.* at 6. Spencer's imprisonment

expired on October 16, 1993 without a ruling from the district court. *Id.* The district court dismissed his habeas petition as moot almost two years later on August 23, 1995. *Id.* With Justice Scalia writing for the Court, the Supreme Court affirmed the district court's dismissal of the habeas petition, finding that there was lack of an Article III case or controversy because the petitioner's sentence had ended and there was no evidence he was suffering from (or was entitled to any presumption of) collateral consequences from his parole revocation. One of the arguments Spencer made was that dismissal of his habeas petition would prevent him from pursuing § 1983 claims at all because they would be *Heck*-barred. *Id.* at 17. Justice Scalia called this "a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available." *Id.* Justice Scalia said that Spencer retained the ability to bring damages claims for procedures that did not necessarily imply the invalidity of his parole revocation because *Heck* would not apply to those claims. *Id.*

As the Ninth Circuit has recognized, however, to the extent that statement "means that a § 1983 action is precluded even though a habeas petition would be dismissed as moot, five Justices disagreed with it." *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). It is instead Justice Souter's concurring opinion for four Justices in *Spencer* that controls on this point. Justice Souter wrote:

> *Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a

> § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any result. For all that appears here, then, Spencer is free to bring a § 1983 action, and his corresponding argument for continuing habeas standing falls accordingly.

Spencer, 523 U.S. at 19 (Souter, J., concurring). Justice Stevens—the lone dissenter—agreed on this point, making it the position of five Justices. *See id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice SOUTER explains, that he may bring an action under 42 U.S.C. § 1983.").

The Ninth Circuit applied the rule from *Spencer* in *Nonnette*. In that case, plaintiff Narvis Nonnette brought a § 1983 action challenging the miscalculation of his prison sentence, revocation of 360 days of good-time credits, and imposition of 100 days of administrative segregation in a disciplinary proceeding after Nonnette was involved in an inmate fight. 316 F.3d at 874. The district court found those claims *Heck*-barred because they challenged the validity of intact decisions the caused Nonnette's continued confinement. *Id.* The Ninth Circuit reversed. Although at the time the district court made its decision Nonnette was still incarcerated, he was released during the pendency of the appeal. *Id.* at 877. Because Nonnette was no longer incarcerated, the Ninth Circuit concluded based on Justice Souter's concurring opinion that *Heck* did not preclude Nonnette's § 1983 action. *Id.* In a footnote later in the opinion, the Ninth Circuit noted:

> We do not share the State's concern that our holding will encourage prisoners to delay their challenges to loss of good-time credits until their release is imminent or accomplished. The possibility of release from incarceration is the strongest incentive for prisoners to act promptly to challenge such administrative action by habeas corpus after administrative remedies are exhausted. We also emphasize our holding affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus.

Id. at 878 n.7 (citing *Spencer*, 523 U.S. at 7–12).

The Ninth Circuit further clarified the scope of this rule in *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006). In that case, the plaintiff former state prisoner brought § 1983 claims alleging wrongful arrest, malicious conspiracy, conspiracy to bring false charges, and excessive force related to two separate arrests in 1995 and 1997. *Id.* at 702. Guerrero left custody in 1999 and filed his § 1983 suit a year later. *Id.* The Ninth Circuit found that *Heck* barred most of Guerrero's § 1983 claims. The court noted that although habeas corpus was not available to Guerrero because he was no longer in custody and "exceptions to *Heck*'s bar for plaintiffs no longer in custody may exist" based on *Spencer* and *Nonnette*, the exceptions did not

apply because Guerrero did not diligently seek relief through habeas procedures prior to filing his § 1983 lawsuit. *Id.* at 704–05. Guerrero in fact never did so. *Id.* "*Nonnette* was founded on the unfairness of barring a plaintiff's potentially legitimate constitutional claims when the individual immediately pursued relief after the incident giving rise to those claims and could not seek habeas relief only because of the shortness of his prison sentence." *Id.* at 705. The court also pointed to the footnote in *Nonnette*, saying that it "emphasized that *Nonnette*'s relief from *Heck* 'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters,' not challenges to an underlying conviction such as those Guerrero brought." *Id.* (quoting *Nonnette*, 316 F.3d at 878 n.7).

Based on these cases, the Court finds that the *Spencer* exception does not apply to Zuegel here. Under *Nonnette* and *Guerrero*, it is not even clear that Zuegel can use the *Spencer* exception because his claim was not moot upon conclusion of probation, as it might have been were he challenging "loss of good-time credits, revocation of parole or similar matters." *Nonnette*, 316 F.3d at 878 n.7. As the Court previously stated, when a habeas petition challenges a conviction, there is a presumption of collateral consequences that renders the habeas petition not moot even after the period of punishment expires. *See Spencer*, 523 U.S. at 12. The discussion of the presumption of collateral consequences in Justice Scalia's majority opinion in *Spencer* is not affected by Justice Souter's concurrence in that case, which only represented a majority as to the *Heck* issue. To be sure, some judges in this Circuit

have rejected a strict interpretation of the footnote in *Nonnette* that would restrict availability of the *Spencer* exception to those delineated matters. These courts hold that the footnote was merely "distinguishing claims that ex-prisoners can continue to assert on habeas once they are released [from custody] from claims that a prisoner's release renders moot." *Beckway v. DeShong*, 717 F. Supp. 2d 908, 917 (N.D. Cal. 2010) (allowing plaintiff who pleaded no contest to proceed with § 1983 claims under *Spencer* exception because he was "never incarcerated" and so "habeas is unavailable to him"); *Cole v. Doe 1 Thru 2 Officers of the City of Emeryville Police Dep't*, 387 F. Supp. 2d 1084, 1092–93 & n.2 (N.D. Cal. 2005) (rejecting narrow interpretation of the footnote because "the Ninth Circuit's focus in *Nonnette* was on the availability of the habeas remedy," not on the form of the underlying claims). Other courts in this Circuit have strictly interpreted the footnote and concluded that *Nonnette* and *Guerrero* do not allow the types of claims asserted by Zuegel here. *See Rouse v. Conner*, 2012 U.S. Dist. LEXIS 86446, 2012 WL 2368464, at *10 (N.D. Cal. Jun. 21, 2012) (*Nonnette* "provide[s] relief from *Heck* only for 'former prisoners challenging loss of good-time credits, revocation of parole[ ] or similar matters,' . . . not challenges to an underlying conviction"); *Wesbecher v. Landaker*, 2008 U.S. Dist. LEXIS 51883, 2008 WL 2682614, at *4 (E.D. Cal. Jul. 1, 2008) (interpreting exception as "narrow" based on *Nonnette* footnote) (citing *Ankhenaten Ra El v. Crain*, 560 F. Supp. 2d 932, 945 (C.D. Cal. Jun. 4, 2008)). Zuegel is not challenging the "loss of good-time credits, revocation of parole or similar matters" like the plaintiff

in *Nonnette*; instead, he is "collaterally challenging an underlying conviction" as was the plaintiff in *Guerrero*.[4]

But the Court need not decide whether *Nonnette* and *Guerrero* allow the type of claims Zuegel asserts here because even if they did, the Court finds that Zuegel did not diligently pursue "expeditious litigation" to challenge the conduct underlying his plea. *Guerrero*, 442 F.3d at 704–05. Here, Zuegel pled no contest to the misdemeanor charge on September 30, 2016. He filed no direct appeal in state court and he waited fifteen months until December 19, 2017 to initiate his state habeas proceedings. *Compare Zuegel I*, ECF No. 19-4 (plea), *with* RJN Ex. H at 67 (Superior Court habeas petition). This fifteen-month wait to begin pursuit of habeas claims does not represent diligent pursuit of "expeditious litigation" to challenge the conduct underlying his plea. Zuegel defends his diligence, saying that (1) his petition was filed two months after he located counsel and filed his amended complaint in *Zuegel I*, and (2) that the length of the state court proceedings foreclosed filing for federal habeas relief. Opp. at 8–9. While the Court does not fault Zuegel for the length of deliberations by the state courts, diligence is not measured from the date counsel is retained and Zuegel offers no impediment to hiring a lawyer over the preceding thirteen months. Zuegel cites no case that permitted a plaintiff to initiate claims pursuant to the exception articulated in *Spencer* after over a year's delay of the plaintiff's own making. The Court finds that this

4. Like in *Zuegel I*, Zuegel does not contend that a no contest plea is treated any differently for *Heck* purposes than a conviction. *See* Apr. '18 Ord. at 7 n.5.

long delay in beginning his pursuit of state habeas relief amounts to a lack of diligence that precludes availability of the *Spencer* exception to Zuegel, even if (as the Court doubts) he would otherwise qualify for it.

Additionally, although not directly at issue, Zuegel's federal habeas petition may have already been outside of the 1-year limitations period under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") after the conclusion of his state habeas proceedings. AEDPA provides that a 1-year limitations period begins running from "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A); *Gonzalez v. Thaler*, 565 U.S. 134, 148–54, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012). Zuegel's conviction occurred on September 30, 2016, so his time to initiate a direct review in state court ended on October 30, 2016. Cal. Rule of Court 8.853. His time to file a federal habeas petition thus appears to have expired one year later on October 30, 2017, before he filed his state habeas petition on December 19, 2017.[5] Recognizing that the statute of limitations is an affirmative defense, *Day v. McDonough*, 547 U.S. 198, 205, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006), the Court finds this issue relevant only as further context for the diligence inquiry.

The Court thus finds that the claims remain *Heck*-barred because Zuegel was not diligent in pursuing other

5. Because his state habeas action was filed after the 1-year AEDPA limitations period appears to have already run, his state habeas proceedings did not toll that limitations period. *See* 28 U.S.C. § 2244(d)(2).

avenues of review. Because the Court concludes that the *Heck* bar has not been lifted by the alleged unavailability of a federal habeas remedy, no claims accrued on September 30, 2019 such that the two-year statute of limitations applicable to the claims started to run on that date. *See* MTD at 9; Opp. at 9–10.

* * *

Because the claims remain *Heck*-barred, leave to amend would be futile. Defendants' motion to dismiss will thus be GRANTED WITHOUT LEAVE TO AMEND, but WITHOUT PREJUDICE to reasserting the claims if Zuegel satisfies the favorable termination requirement of *Heck*. 512 U.S. at 486–87.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Mountain View Defendants motion to dismiss is GRANTED WITHOUT LEAVE TO AMEND because the *Heck* bar remains in effect, but WITHOUT PREJUDICE to Zuegel reasserting the claims if he satisfies the favorable termination requirement of *Heck*. The Clerk shall close the case.

Dated: July 20, 2022

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION, FILED DECEMBER 2, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 21-cv-07538-BLF

JAMES R. ZUEGEL,

Plaintiff,

v.

MARCO GARCIA, *et al.*,

Defendants.

December 2, 2022, Decided
December 2, 2022, Filed

ORDER DENYING MOTION TO SET ASIDE JUDGMENT

[Re: ECF No. 35]

Plaintiff James Zuegel was arrested on June 7, 2015. On September 30, 2016, he entered a guilty plea to a state misdemeanor charge. On June 6, 2017, he filed a lawsuit under 42 U.S.C. § 1983 in this Court. That lawsuit proceeded to trial, and on November 20, 2020, the jury

returned a verdict for Zuegel. Zuegel appealed the Court's orders on the motions to dismiss and motion for summary judgment in that case, which appeal is still pending at the Ninth Circuit. On September 28, 2021, Zuegel filed this case, a "follow-on" to the previous case. On July 20, 2022, the Court dismissed this case and closed it, and on August 10, 2022, the Court entered Judgment.

Zuegel now seeks to set aside the Judgment. For the reasons discussed on the record at the hearing and explained below, the motion is DENIED.

I. BACKGROUND

A. *Zuegel I*

On June 6, 2017, Zuegel filed his original lawsuit in this Court. *See Zuegel v. Mountain View Police Dep't*, No. 17-cv-3249 (N.D. Cal., filed Jun. 6, 2017) ("*Zuegel I*") ECF No. 1. The Court first evaluated Zuegel's claims in that lawsuit in April 2018 after he obtained counsel and filed an amended complaint. *See Zuegel I*, Order Granting Motion to Dismiss First Amended Complaint, ECF No. 40 ("Apr. '18 Ord."). As the Court summarized in that Order, in the amended complaint, Zuegel asserted claims arising out of incidents occurring between May and June 2015. Zuegel alleged that on May 23, 2015, he and his wife accompanied their severely autistic son JR (and his autism service dog) to the Mountain View El Camino YMCA for a swim lesson. *Id.* at 2 (citing the amended complaint). After the lesson, as Zuegel waited for his family on one of the couches at the YMCA, two young girls sat near him on the couch

and talked to Zuegel about his son's service dog. *Id.* JR emerged making loud noises, sat between Zuegel and one of the girls, and tried to "dart" away. *Id.* Zuegel grabbed JR by the back of his shirt to try to prevent him from darting away, as he normally did, and said something to the effect of "sit your butt down." *Id.* Zuegel and his family left after briefly encountering a woman who appeared to be the mother of one of the girls. *Id.*

Zuegel alleged that days later and unknown to Zuegel, the girl's mother reported to the Mountain View Police Department that a man with a service dog at the YMCA had slapped her daughter on the butt and asked her, "How old are these buns?" Apr. '18 Ord. at 2-3. The young girl corroborated these allegations in a follow-up interview, although also saying that the man did not "touch any private areas." *Id.* at 3. Based on these interviews, Officers Ward and Moore arrived at and entered Zuegel's home at 9:33 p.m. on June 7, 2015 without an arrest or search warrant and arrested Zuegel in the presence of his wife and JR after he refused to be interrogated without counsel or his wife present. *Id.* The arrest was extremely distressing to the family and caused JR to become highly agitated. *Id.* Officer Garcia led the interrogation of Zuegel at the police station. *Id.* Zuegel was confined overnight and for part of the following day until his wife posted bail. *Id.*

The Santa Clara District Attorney charged Zuegel with misdemeanor sexual battery and misdemeanor soliciting or engaging in lewd conduct in public in violation of California Penal Code §§ 242-243.4(3)(1), 647(a). Apr. '18 Ord. at 3-4. Zuegel alleged that to avoid having to register

as a sex offender, on September 30, 2016, he pled no contest to misdemeanor disorderly conduct. *Id.* Zuegel was placed on probation for three years, ordered to perform 75 hours of community service, and barred from coming within 300 yards of the YMCA. *Id.*

In the amended complaint in *Zuegel I*, Zuegel asserted four state law claims against the Defendants here, one § 1983 claim against Officers Garcia, Ward, and Moore, and one § 1983 claim against the Mountain View Police Department and City of Mountain View. Apr. '18 Ord. at 4. As is relevant here, in April 2018, this Court dismissed the § 1983 claims asserted in the First Amended Complaint, largely without leave to amend. *Id.* at 5-15. The Court found that the § 1983 claims for false arrest, lack of a warrant, coercion to consent to a search of his phone, violation of his right to remain silent, violation of his right to counsel, and violation of his due process right not to be interrogated were barred by *Heck* because establishing the basis for damages under § 1983 for those courses of conduct would necessarily demonstrate the invalidity of the underlying conviction. *Id.* at 6, 12 (citing *Heck*, 512 U.S. at 481-82). The Court held that those claims were "properly the subject of habeas corpus proceedings which [Zuegel] allege[d] he [wa]s simultaneously pursuing." *Id.* at 11, 12. The Court granted Zuegel leave to amend solely to attempt to allege a § 1983 claim based on "the circumstances surrounding the manner of the arrest"—the nighttime arrest or arrest without consent to enter absent exigent circumstances—because those courses of conduct would not demonstrate the invalidity of the plea. *Id.* at 15. Otherwise, his § 1983 claims were dismissed without leave to amend. *Id.* at 6, 11, 12, 15.

Zuegel proceeded to trial on two claims—one for warrantless entry and arrest against Officers Moore and Ward and one for *Monell* liability against the City on a failure to train theory related to the first claim. *See Zuegel I*, ECF No. 108 (denying summary judgment on those claims). On November 20, 2020, the jury returned a verdict finding that the officers did not enter Zuegel's residence in violation of the Fourth Amendment, but that they had remained inside after consent was withdrawn, thus violating the Fourth Amendment. *See Zuegel I*, ECF No. 178 at 1-2 (jury verdict). The jury found that the Fourth Amendment violation was not a result of the City's deliberate indifference for failure to train. *Id.* at 2. The jury awarded Zuegel $3,000 in total damages, with fault apportioned equally between Officers Ward and Moore. *Id.* at 2-3. The Court entered judgment on November 23, 2020. *See Zuegel I*, ECF No. 179. The Court later denied the defendants' motion for judgment as a matter of law and granted in part Zuegel's request for attorneys' fees. *See Zuegel I*, ECF No. 223. Zuegel's appeal of the Court's orders on the motions to dismiss and motion for summary judgment is still pending at the Ninth Circuit.[1] *See* 9th Cir. No. 21-16277.

B. Zuegel's State Habeas Proceedings

Zuegel's plea to and conviction of the state misdemeanor charge occurred on September 30, 2016. *See Zuegel I*, ECF No. 19-4; *accord* Compl. ¶ 54 (stating that Zuegel's three years of probation were completed on September 30,

1. Defendants also filed an appeal that they later voluntarily dismissed. *See* 9th Cir. No. 21-16276.

2019). Zuegel filed his petition for a writ of habeas corpus in the Santa Clara County Superior Court on December 19, 2017, fifteen months after his conviction. *See* Request for Judicial Notice ("RJN") Ex. H, ECF No. 16-10, at 67-113. The Superior Court denied the writ on February 2, 2018. *See id.* at 115-19. He filed a writ of habeas corpus in the Sixth District Court of Appeal on April 2, 2018, *id.* at 121-252, which was denied on November 1, 2018, *id.* at 254. He filed his habeas petition in the Supreme Court of California on December 31, 2018. *See generally id.* The Supreme Court denied the petition on July 10, 2019—approximately two-and-a-half months before Zuegel's probation was set to end—thus exhausting Zuegel's state habeas remedies. *See* RJN Ex. I. Zuegel did not file a federal habeas petition because he "could not realistically complete" those proceedings in the limited time before his probation would end and the habeas petition would become moot. *See* Opp. at 9.

C. *Zuegel II*

Zuegel filed this case on September 28, 2021, two days short of two years from the termination of his probation. *See* ECF No. 1 ("Compl."). Zuegel characterizes the case as a "follow-on" to *Zuegel I* that is based on the same conduct but which asserts claims that have supposedly newly "accrued" under § 1983 due to the unavailability of federal habeas relief after the termination of Zuegel's probation. *Id.* ¶¶ 1-2. The Complaint asserted four § 1983 claims: (1) against Officers Ward and Moore for arrest without probable cause, *id.* ¶¶ 55-57; (2) against Officers Ward and Moore for arrest in retaliation for assertion

of constitutional rights, *id.* ¶¶ 58-60; (3) against Officer Ward and Detective Garcia for transportation to county jail for booking without probable cause, *id.* ¶¶ 61-64; and (4) against the City of Mountain View under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), Compl. ¶¶ 65-71.[2] Zuegel sought compensatory and punitive damages and attorneys' fees. *Id.* at 26.

Defendants filed a motion to dismiss this case. ECF No. 16-1 ("MTD"). The Court granted the motion to dismiss and closed the case on July 20, 2022. ECF No. 32 ("MTD Order"). The Court entered Judgment on August 10, 2022. ECF No. 34. On August 25, 2022, Plaintiff filed a motion to set aside judgment under Federal Rules of Civil Procedure 59 and 60. ECF No. 35 ("Notice of Motion"), 36 ("Motion"); *see also* ECF No. 45 ("Reply"). Zuegel also filed supporting declarations from himself, ECF Nos. 38-39, and his attorney, ECF No. 37. Defendants oppose the motion. ECF No. 44 ("Opp."). The Court held a hearing on December 1, 2022. *See* ECF No. 47.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 59(e), a party may file a motion to alter or amend a judgment within 28 days after the entry of the judgment. Fed. R. Civ. P.

2. The Complaint also separately asserted § 1983 claims against Gavin Newsom, Governor of California, and Rob Bonta, Attorney General of California. *See* Compl. ¶¶ 72-91. After those defendants moved to dismiss, Zuegel voluntarily dismissed his claims against them and the Court dismissed them from the case. ECF No. 27.

59(e). The Ninth Circuit has identified "four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

"Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quotation marks and citation omitted). Rule 59(e) relief "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). "A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *See Kona*, 229 F.3d at 890.

Under Federal Rule of Civil Procedure 60(b), a court may relieve a party from a final judgment for six reasons "upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief."

Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991); *see also* Fed. R. Civ. P. 60(b). Mere dissatisfaction with the Court's order, or belief that the Court is wrong in its decision, are not grounds for relief under Rule 60(b). *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981); *Beckway v. DeShong*, No. C07-5072 TEH, 2012 U.S. Dist. LEXIS 54589, 2012 WL 1355744, at *2 (N.D. Cal. Apr. 18, 2012).

III. DISCUSSION

In his opening brief, Zuegel asks the Court to "revisit the reasoning" of the MTD Order. Motion at 1. While Zuegel mentions Rules 59(e) and 60 in passing, see *id.*, as Defendants note, he does not explain why he entitled to relief under those rules, *see* Opp. at 2. Zuegel instead appears to be attempting to relitigate the issues decided on the motion to dismiss which, as stated above, is not permitted under Rules 59 and 60. In his Reply, Zuegel clarifies his theories as to why he is entitled to relief under the stringent standards in Rules 59(e) and 60(b). Zuegel argues that relief under Rule 59(e) is proper because the Court committed clear error and the circumstances of the Court's order were "highly unusual." Reply at 4-5. As to Rule 60, Zuegel states he is bringing the motion under Rule 60(b)(1) (surprise) and 60(b)(6) (extraordinary circumstances). *Id.* at 2-4.

A. The "In Custody" Requirement for Federal Habeas Relief

Zuegel argues that he is entitled to relief under Rule 59(e) because the Court committed clear error. Reply at

5. Zuegel states that the Court committed clear error "at least to the extent that, under controlling Ninth Circuit law, Zuegel's right to file a federal habeas petition ended along with his probation regardless of collateral consequences." *Id.*

But Zuegel is confusing two different habeas requirements. First, in order to *file* a habeas petition, an individual must be in custody. *See* 28 U.S.C. § 2254; *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) ("Spencer was incarcerated by reason of the parole revocation at the time the petition was filed, which is all the 'in custody' provision of 28 U.S.C. § 2254 requires."). Second, and separately, a habeas petition that has already been filed *may become moot* when that individual is released from custody. *Spencer*, 523 U.S. at 7 ("Once the convict's sentence has expired, however, some continuing injury other than the now-ended incarceration or parole—some 'collateral consequence' of the conviction—must exist if the suit is to be maintained."). It is thus not *always* the case that a habeas petition becomes moot when an individual is released from custody. *See generally id.* at 7-16.

Zuegel was required to file his habeas petition when he was still "in custody." And Zuegel had the opportunity to file for federal habeas while he was still in custody, as his state habeas proceedings terminated before his probation was terminated. He chose not to do so. He argues that he did not do so because the petition would have become moot a few months later when his probation ended. *See* ECF No. 28 ("MTD Opp.") at 9. But he is also incorrect that

the petition would have necessarily become moot upon the termination of his probation, as his conviction could have had "continuing collateral consequences." *See Spencer*, 523 U.S. at 7-8. The Court's analysis in the MTD Order turned on the fact that Zuegel did not diligently seek habeas relief. MTD at 14-15. The Court did not state that Zuegel could have, or should have, filed for habeas relief when he was no longer "in custody"; the Court's determination was based on Zuegel's actions when he was still in custody. The Court did not commit clear error.

B. Zuegel's Opportunity to Be Heard

Zuegel's other arguments under Rules 59(e) and 60(b)(1) and (6) are all related. Zuegel argues that the Court improperly relied on reasoning that was not presented in the parties' briefs, and that Zuegel therefore did not have an opportunity to be heard. Reply at 2-5. Zuegel asserts that this action by the Court was "highly unusual" under Rule 59(e), and that the action constituted "surprise" under Rule 60(b)(1) and an "extraordinary circumstance" under Rule 60(b)(6). *Id.* at 3-5. Zuegel identifies the following legal issues from the Court's MTD Order which he suggests were not briefed: (1) whether the termination of probation affected Zuegel's ability to seek habeas relief; (2) whether these arguments were waived under issue preclusion; (3) whether the diligence requirement in *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006), required Zuegel to file for federal habeas relief; (4) whether Zuegel was diligent in seeking state court habeas; (5) whether Zuegel was diligent in failing to move for reconsideration of the *Heck* dismissal and/or leave to file a third amended

complaint in *Zuegel I* when probation expired; and (6) whether Zuegel's time to file a federal habeas petition expired in October 2017. *Id.* at 3.

However, most of these items were briefed on the motion to dismiss. As to the second and fifth items, Zuegel asserts that the issue of whether he should have moved for reconsideration and/or leave to file a third amended complaint, and therefore whether these arguments are waived under issue preclusion, was not argued on the motion to dismiss. Reply at 3. The Court initially stated at hearing that it was inclined to delete the issue preclusion analysis from its MTD Order on this basis. But Defendants noted that they argued on the motion to dismiss that "Zuegel never raised these arguments" in *Zuegel I*, and he could not now "try to make legal arguments that should have been raised in the First Action." MTD at 9. Zuegel makes much of the fact that Defendants did not state that Zuegel should have brought a motion for reconsideration or motion to file an amended complaint, Reply at 3, but Defendants were not required to identify the procedural mechanisms by which Zuegel could have raised these issues in *Zuegel I*. The above-quoted portion of the motion to dismiss sufficiently raised the waiver argument. The Court further notes that it did not rely on the issue preclusion analysis in deciding the motion to dismiss.

As to the third and fourth bases, Zuegel's diligence in pursuing habeas relief and the diligence requirement of *Guerrero*, Defendants did argue that *Guerrero* requires the "timely pursuit of available habeas relief [as] an important prerequisite for a section 1983 plaintiff seeking

to escape the *Heck* bar." MTD at 8. Defendants further argued that *Guerrero* "held that 'self-imposed' failure to seek habeas relief was not a ground for allowing Guerrero to escape the *Heck* bar." *Id.* And Defendants also argued that Zuegel did not "diligently pursue habeas relief," specifically highlighting the time it took him to first file for habeas. *Id.* Zuegel's attorney conceded at hearing that diligence had been briefed on the motion to dismiss. And the Court notes that Zuegel submitted a robust opposition to the diligence argument. MTD Opp. at 8.

The sixth issue identified by Zuegel is whether his ability to file for federal habeas expired in October 2017. Reply at 3. This is presumably referring to the Court's discussion of whether a federal habeas petition filed after exhausting state court habeas may have been outside the 1-year limitations period under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* MTD Order at 14-15. The Court did not determine whether a federal habeas petition would have been outside the limitations period, but rather only considered AEDPA as part of its diligence analysis. As discussed above, the diligence issue was briefed. Further, the Court notes that this analysis was not dispositive to its diligence determination.

Finally, the first issue identified by Zuegel is that the Court stated "that Zuegel's right to file a habeas petition did not expire upon termination of probation due to collateral consequences." Reply at 3. But again, as discussed in the previous section, Zuegel is conflating the in-custody requirement for *filing* a habeas petition

with the continuing case or controversy requirement for *maintaining* a habeas petition once out of custody. The Court did not state that Zuegel's right to *file* a habeas petition did not expire upon termination of probation, but instead that it would not necessarily have become moot upon termination of probation. *See* MTD Order at 9 ("Zuegel is incorrect that his federal habeas claims were mooted by the expiration of his probation."). Further, these issues were briefed on the motion to dismiss. *See, e.g.*, MTD at 8 (Defendants arguing that *Spencer* "reaffirmed that a habeas avenue is still available to attack an underlying conviction, even to a released prisoner").

Zuegel is incorrect that the Court's MTD Order "contained so many ideas not enunciated in the" motion to dismiss. Reply at 3. Zuegel also argues that some of the issues were "mentioned [in the MTD] fleetingly, only in passing, in skeletal form." *Id.* The fact that Defendants' motion to dismiss briefing is not to Plaintiff's liking is not grounds for setting aside a judgment. Further, Zuegel makes much of the fact that he "had no opportunity to respond to the Court's own reasoning because there was no oral argument," and that he therefore "had no opportunity to be heard with respect to the Court's originally formulated reasoning." *Id.* at 3-4. He similarly claims that he "was afforded no opportunity to address the arguments dispositive of his entire case." *Id.* at 4. However, as highlighted above, Zuegel did have the opportunity to be heard as to all of the arguments that the Court relied on in its analysis because those arguments were briefed. Plaintiffs are not entitled to oral argument on motions to dismiss. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7-1(b); *see,*

e.g., *Wilkins v. Rogers*, 581 F.2d 399, 405 (4th Cir. 1978) ("allow[ing] motions to be determined 'upon brief written statements' . . . is unquestionably constitutional" (citation omitted)).

Because there was no lack of notice on the dispositive arguments and no lack of an opportunity to be heard, the Order was not "highly unusual" for purposes of Rule 59(e), nor did it constitute "surprise" or an "extraordinary circumstance" for purposes of Rule 60(b).

C. Additional Evidence

Zuegel submitted a declaration from himself and his attorney with this Motion. *See* ECF Nos. 37-39. Defendants argue that the Court should not consider these declarations, noting that Zuegel's declaration "could have, and should have, been submitted in opposition to the original Motion." Opp. at 3. Zuegel argues that the Court should consider these declarations because they are being submitted in light of the "new legal theories" in the Court's MTD Order. Reply at 5. The Court first notes that Zuegel is not basing his Rule 60 motion on Rule 60(b)(2)—newly discovered evidence. *See* Reply. Nor could he, as this evidence is not newly discovered. Because there is no basis to grant the Rule 59/60 motion, the Court need not consider this evidence.

D. Merits

Zuegel also makes many arguments as to the merits of the case, largely relitigating the issues decided on the

motion to dismiss. Because there is no basis to set aside the judgment under Rules 59 or 60, the Court need not get to these arguments. However, the Court will address them briefly. The Court also points the parties to its full legal analysis in the MTD Order.

First, Zuegel argues that his right to file a habeas petition ended when he was released from custody. MTD at 3-5. As discussed twice above, he is correct, and the Court did not state otherwise. However, this does not affect the Court's analysis, again for the reasons discussed above.

Second, Zuegel argues that issue preclusion does not apply. MTD at 5-9. As stated above, the Court did not rely on issue preclusion in reaching its decision on the motion to dismiss. Zuegel has not shown, or even argued, there was clear error in the Court's decision as to issue preclusion, and the Court relies on its earlier analysis. *See* MTD Order at 9-10.

Third, with regard to diligence, Zuegel argues that the diligence requirement in *Guerrero* exceeds the *Spencer* rule and, to the extent the Court requires diligence, he was diligent in his efforts to pursue habeas relief. MTD at 9-14. This issue was briefed on the motion to dismiss, and the Court gave an in-depth analysis of *Guerrero* and why Zuegel did not satisfy the diligence requirement. *See* MTD Order at 12-15. First, the Court notes that the diligence requirement in *Guerrero* does not exceed the *Spencer* rule, but was in fact derived from the *Spencer* rule, as the Ninth Circuit stated: "In following the reasoning of the concurrence in *Spencer*, we have emphasized the importance of timely pursuit of available remedies in two

cases." *Guerrero*, 442 F.3d at 704. And second, Zuegel was not diligent. He waited 15 months to file for state habeas relief. *Id.* at 4. And he chose not to file for federal habeas relief when he was still in custody. *Id.* That relief may or may not have become moot when he was released from custody. Regardless, Zuegel has not shown, or even argued, there was clear error in the Court's decision as to diligence, and the Court points to its earlier analysis. *See* MTD Order at 14-15.

Finally, Zuegel argues that the Court was incorrect in its reading of *Spencer* and *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2009). MTD at 14-19. As stated in the MTD Order, in *Spencer*, the Supreme Court held that the expiration of a petitioner's sentence moots a petitioner's federal habeas petition under Article III due to a lack of a case or controversy where there are no collateral consequences from the underlying action that is challenged. Five justices agreed that:

> *Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any result. For all that appears here, then, Spencer is free to bring a § 1983 action, and his corresponding argument for continuing habeas standing falls accordingly.

Spencer, 523 U.S. at 19 (Souter, J., concurring). The Ninth Circuit applied this rule in *Nonnette*. Again, as stated in the MTD Order, the plaintiff in that case brought a

§ 1983 action challenging the miscalculation of his prison sentence, revocation of 360 days of good-time credits, and imposition of 100 days of administrative segregation in a disciplinary proceeding after Nonnette was involved in an inmate fight. 316 F.3d at 874. The Ninth Circuit decided that because Nonnette was no longer incarcerated, based on Justice Souter's concurring opinion, *Heck* did not preclude Nonnette's § 1983 action. *Id.* In a footnote later in the opinion, the Ninth Circuit noted:

> We do not share the State's concern that our holding will encourage prisoners to delay their challenges to loss of good-time credits until their release is imminent or accomplished. The possibility of release from incarceration is the strongest incentive for prisoners to act promptly to challenge such administrative action by habeas corpus after administrative remedies are exhausted. We also emphasize our holding affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus.

Id. at 878 n.7 (citing *Spencer*, 523 U.S. at 7-12).

In the MTD Order, the Court discussed whether the Ninth Circuit limits the *Spencer* exception to instances involving "loss of good-time credits, revocation of parole

or similar matters." MTD Order at 12-13. The Court recognized that some judges in this Circuit have rejected a strict interpretation of the footnote in *Nonnette* that would restrict availability of the *Spencer* exception to those delineated matters, while other judges have interpreted the footnote more strictly. *Compare Beckway v. DeShong*, 717 F. Supp. 2d 908, 917 (N.D. Cal. 2010) (allowing plaintiff who pleaded no contest to proceed with § 1983 claims under *Spencer* exception because he was "never incarcerated" and so "habeas is unavailable to him") and *Cole v. Doe 1 Thru 2 Officers of the City of Emeryville Police Dep't*, 387 F. Supp. 2d 1084, 1092-93 & n.2 (N.D. Cal. 2005) (rejecting narrow interpretation of the footnote because "the Ninth Circuit's focus in *Nonnette* was on the availability of the habeas remedy," not on the form of the underlying claims) *with Rouse v. Conner*, 2012 U.S. Dist. LEXIS 86446, 2012 WL 2368464, at *10 (N.D. Cal. Jun. 21, 2012) (*Nonnette* "provide[s] relief from *Heck* only for 'former prisoners challenging loss of good-time credits, revocation of parole[] or similar matters,' . . . not challenges to an underlying conviction") and *Wesbecher v. Landaker*, 2008 U.S. Dist. LEXIS 51883, 2008 WL 2682614, at *4 (E.D. Cal. Jul. 1, 2008) (interpreting exception as "narrow" based on *Nonnette* footnote) (citing *Ankhenaten Ra El v. Crain*, 560 F. Supp. 2d 932, 945 (C.D. Cal. Jun. 4, 2008)).

Zuegel now "advocates that this Court follow the language of Justice Souter's *Spencer* opinion rather than the language of the *Nonnette* footnote seven." Motion at 18. The Court first notes that the word "rather" is not appropriate because this is not an either/or situation—the Ninth Circuit in *Nonnette* was following *Spencer*, and

even cited to *Spencer* in the identified footnote. *Nonnette*, 316 F.3d at 878 n.7. Regardless, this Court explicitly did not decide whether to adopt a strict interpretation of *Nonnette*, stating that it "need not decide whether *Nonnette* and *Guerrero* allow the type of claims Zuegel asserts here because even if they did, the Court finds that Zuegel did not diligently pursue 'expeditious litigation' to challenge the conduct underlying his plea." MTD Order at 14 (citing *Guerrero*, 442 F.3d at 704-05). Regardless of how the Court reads *Nonnette*, Zuegel is barred from filing for habeas relief under the diligence requirement in *Guerrero*. Again, Zuegel has not shown, or even argued, there was clear error in the Court's decision.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Zuegel's Motion to Set Aside Judgment under Rules 59/60 is DENIED.

Dated: December 2, 2022

/s/ Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 17, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-17021
D.C. No. 5:21-cv-07538-BLF
Northern District of California, San Jose.

JAMES R. ZUEGEL,

Plaintiff-Appellant,

v.

MARCO GARCIA, OFFICER; PATRICK WARD, OFFICER; BRITTON MOORE, OFFICER; CITY OF MOUNTAIN VIEW,

Defendants-Appellees.

April 17, 2024, Filed

Before: MILLER, BADE, and VANDYKE, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.