

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GARY EDWARDS AND TANA WOOD, Petitioners
v. JERRY B. BALISOK
CASE NO: 95-1352
PLACE: Washington, D.C.
DATE: Wednesday, November 13, 1996
PAGES: 1-51

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY EDWARDS AND TANA WOOD, :

4 Petitioners :

5 v. : No. 95-1352

6 JERRY B. BALISOK :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, November 13, 1996

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:08 a.m.

13 APPEARANCES:

14 KATHLEEN D. MIX, ESQ., Chief Deputy Attorney General of
15 Washington, Olympia, Washington; on behalf of the
16 Petitioners.

17 THOMAS H. SPEEDY RICE, ESQ., Spokane, Washington; on
18 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 95-1352, Gary Edwards and Tana Wood v. Jerry
5 Balisok.

6 Ms. Mix, you may proceed.

7 ORAL ARGUMENT OF KATHLEEN D. MIX

8 ON BEHALF OF THE PETITIONERS

9 MS. MIX: Mr. Chief Justice, and may it please
10 the Court:

11 This case presents issues at the intersection of
12 the Civil Rights Act and the habeas corpus statute.

13 In his civil rights complaint, Mr. Balisok seeks
14 relief from harm stemming from allegedly unconstitutional
15 procedures at a prison disciplinary hearing. Although the
16 liberty interest that has given rise to these procedural
17 protections is the loss of good-time credits, Mr. Balisok
18 does not seek restoration of those good-time credits in
19 this action and reserves that claim for a later time.

20 QUESTION: He has not finally waived it or
21 surrendered it, though, has he?

22 MS. MIX: Mr. Balisok has specifically reserved
23 his right to contest and litigate over the loss of good-
24 time credits at a later time.

25 QUESTION: One minor point. He alleges at some

1 point that he's a pretrial detainee, that his conviction
2 was overturned. Do these good-time credits apply to some
3 other conviction or --

4 MS. MIX: No. They would still apply to that
5 conviction.

6 QUESTION: He says that the conviction was
7 overturned, although he's still in custody. I just didn't
8 know how that plays out.

9 MS. MIX: Yes. I think he was still in custody
10 pending recharging on the same situation. So, he was
11 still subject to a good-time credit application and denial
12 process while incarcerated. So, it made no difference in
13 his --

14 QUESTION: So, the good-time credits apply in
15 case he's convicted again? Is that it?

16 MS. MIX: Yes, they would still be applying to
17 his total term of confinement. That is correct.

18 QUESTION: This is a retrial on the same charge
19 that was earlier overturned?

20 MS. MIX: I believe so, Mr. Chief Justice.

21 QUESTION: Has he been retried?

22 MS. MIX: I believe so, yes.

23 QUESTION: Well, then why -- wouldn't the whole
24 good-time calculus begin anew if he were convicted?

25 MS. MIX: I think the good-time calculus would

1 be made on his total time of confinement, if I understand
2 the system right. So, he's receiving credit for time
3 served while he's in a pretrial detention status and the
4 good time is going to be calculated on the whole of his
5 sentence.

6 As a result of the allegations of this
7 complaint, the question presented by this case is whether
8 certain prisoner cases which purport to be about due
9 process procedures but which may inevitably or logically
10 entail a shorter duration of confinement should proceed as
11 habeas corpus actions with the attendant exhaustion of --
12

13 QUESTION: May I just add one point to it? You
14 said inevitably be shorter. Do you disagree with his
15 argument that there is a State law doctrine that he may or
16 may not lose his good-time credits?

17 MS. MIX: I'm not sure precisely which doctrine
18 you're referring to.

19 QUESTION: Well, the same or other evidence. I
20 forget the --

21 MS. MIX: The some evidence standard?

22 QUESTION: Some, yes.

23 MS. MIX: It is correct that if there was a lack
24 of some evidence in the hearing, that our position would
25 be that his good time could not stand, that the hearing

1 should be reversed. But we do not agree with Mr. Balisok
2 that that is the only basis upon which the hearing
3 sanction could be reversed. If you take his position as
4 expressed, that the some evidence standard is the only
5 basis to reverse a hearing sanction, then it renders the
6 rest of the rule protections meaningless. You could have
7 serious due process violations and under the theory
8 advanced by Mr. Balisok, those serious due process
9 violations could not result in a reversal of the sanction
10 imposed in the disciplinary hearing.

11 QUESTION: I'm not sure I totally understand
12 your answer. Let me rephrase my question, if I may.

13 Is it correct that at least in theory he could
14 win this lawsuit and say there were Federal violations of
15 his procedural rights, rights of -- violations of his
16 Federal procedural rights and nevertheless end up still
17 losing his good-time credits? Is that a possibility?

18 MS. MIX: That he could win this particular suit

19 --

20 QUESTION: And not get his good-time credits
21 restored.

22 MS. MIX: Our position is that that is not what
23 would occur, that if he were to --

24 QUESTION: Well, is it possible or just unlikely
25 in your view? I mean, you're saying you don't think it

1 will happen, but your whole argument is based on if this
2 could result, that's enough, but I'm just wondering if you
3 agree that it will not necessarily result.

4 MS. MIX: We believe that the allegations that
5 Mr. Balisok has made necessarily invalidate the sanction
6 of his -- imposed in his hearing, that they are so
7 serious. They go to the fundamental --

8 QUESTION: And they necessarily would require
9 the restoration of his good-time credits?

10 MS. MIX: Yes, under the Heck test.

11 QUESTION: Then in order for you to prevail, you
12 would not have to advocate the rule that you do advocate
13 in your brief.

14 MS. MIX: That is correct.

15 QUESTION: I see.

16 QUESTION: And are you taking the position now
17 that if he succeeds here and then ultimately does
18 challenge his confinement on habe that you're not going to
19 claim harmless error? Are you taking that position right
20 now? There's no harmless error doctrine?

21 MS. MIX: With respect to the claims that he is
22 asserting in this complaint that they are serious enough
23 that a harmless error doctrine would not be brought to
24 bear on these claims, but I --

25 QUESTION: Some due process claims would be

1 subject to harmless error, but this would not.

2 MS. MIX: That is correct. That is --

3 QUESTION: What is peculiar about this that
4 disentitles it to a harmless error analysis?

5 MS. MIX: The nature of the allegations made by
6 Mr. Balisok are the arbitrary denial of witness statements
7 that go to his fundamental ability to prove his innocence
8 and put forth a case and prove his innocence before the
9 disciplinary hearing.

10 QUESTION: But what if those witness statements
11 are brought in and it turns out they're really not very
12 relevant at all? You'd still say no harmless error?

13 MS. MIX: No. At that point I think a district
14 court looking at that or a State court in habeas corpus,
15 could conclude that there was harmless error.

16 QUESTION: Then there's nothing inevitable in
17 this case.

18 MS. MIX: But just looking at the allegations of
19 the complaint as stated, our position is that some due
20 process violation, some allegations that alleged serious
21 deviations from the rule of standards, will inevitably
22 lead to the restoration of good time.

23 QUESTION: Yes, but you've just said -- excuse
24 me. Have you not just said in answer to Justice Scalia
25 that we in fact cannot tell at this stage whether this is

1 one of those cases?

2 MS. MIX: We think this is one of those cases,
3 but the State of Washington --

4 QUESTION: You know what the witnesses are going
5 to say. You know, for example, that his hypothetical
6 cannot be true in this case?

7 MS. MIX: No. You don't know that. You have to
8 look at just the bare, naked allegations of the complaint
9 to make that determination.

10 QUESTION: But doesn't -- isn't it the case --
11 and I don't want to go on too much longer with this, but
12 isn't it the case that based on the allegations, you
13 simply cannot tell in this case whether the -- whether his
14 success at this stage will inevitably result in an
15 entitlement to reduced time. You cannot tell.

16 MS. MIX: Well, we have not wanted to concede
17 that point in this case because --

18 QUESTION: I realize.

19 MS. MIX: -- we think they are so serious.

20 But I think it is true in the prison
21 disciplinary context, unlike the criminal arena that the
22 Court analyzed in Heck, that it is more difficult to say
23 certain allegations inevitably will affect the outcome
24 because of the application of the harmless error doctrine
25 in prison disciplinary hearings and because --

1 QUESTION: One of the oddities in this area is
2 that we have the State arguing that the prisoner is
3 probably going to prevail in all of these procedural
4 matters, and in order to establish a 1983 suit, the
5 prisoner argues the contrary. We've got you switching
6 positions, which makes me wonder if the doctrine isn't
7 incongruous at its foundation.

8 MS. MIX: Yes. We realize that we were
9 elevating Mr. Balisok's claims to a certain degree by our
10 position.

11 But I think the problem is that, as I said, the
12 prison disciplinary context is a more fact-bound
13 determination and you do not have the same principles to
14 apply in that context that you have in the criminal arena.

15 QUESTION: The question you present in your
16 petition for certiorari is whether Heck bars the 1983
17 action brought by a prisoner challenging prisoner
18 disciplinary procedures, if the success of that action
19 would necessarily imply the invalidity of the prisoner's
20 loss of good time.

21 Now, that was the language used in Heck I
22 believe, necessarily imply, but that could mean -- is
23 there a probability, a possibility, or a certainty? That
24 really is what we have to decide here, what that language
25 in Heck meant?

1 MS. MIX: Yes, and that certainly is the
2 language in Heck, and I think, Mr. Chief Justice, the
3 problem you have in a prison disciplinary case, in a case
4 like Balisok, is that if we can't conclude that there is a
5 100 percent chance that the sanction is going to be
6 reversed, then the lower courts are saying that doesn't
7 meet that language in Heck that says necessarily
8 invalidate. And so, he can have his case one degree
9 removed. It can be very, very serious allegations. Yet,
10 the court can't say with 100 percent certainty that this
11 is a case that will necessarily invalidate the sanction
12 and that case will go forward in 1983.

13 QUESTION: Well, are you asking us to make some
14 clarification of Heck or change it in some way?

15 MS. MIX: We are proposing that the Court adopt
16 what we refer to as a bright line rule to address a
17 broader context of cases, particularly prison disciplinary
18 cases.

19 QUESTION: So, your answer is yes to my
20 question?

21 MS. MIX: Yes.

22 QUESTION: You do want a change or a
23 clarification in Heck.

24 MS. MIX: Yes. I don't think you have to change
25 the holding in Heck, and certainly, as Mr. Balisok has

1 suggested, we are not asking for a reversal of Heck. But
2 we do think that the Court needs to clarify language in
3 Heck and language in Wolff v. McDonnell.

4 QUESTION: Ms. Mix, this is bait and switch. We
5 just decided Heck a couple of years ago. We would not
6 have taken this case in order to decide whether we should
7 reconsider a case just decided.

8 The question you presented in your petition was,
9 does this Court's ruling in Heck bar a 1983 action that
10 would -- that would -- necessarily imply the invalidity of
11 the prisoner's loss of good time? That's how you put the
12 question, and I assumed we were going to have a case
13 before us where it would necessarily imply the invalidity
14 and that the Ninth Circuit ignored what Heck seemed to say
15 very clearly, that where it -- not seemed to say -- said
16 very clearly -- that where it would necessarily imply
17 invalidity or shortening of the sentence, you have to do
18 it by habeas.

19 Now you come before us with a totally different
20 proposition that Heck is inadequate to the real world and
21 we should adopt some new proposition. I mean, that may be
22 a nice argument, but I resent being forced to confront
23 that argument when it's not what I thought we were taking
24 the case for.

25 MS. MIX: Well, Justice Scalia, what we have

1 done is we have argued that Heck is applicable to a
2 category of cases in the prison disciplinary context and
3 that it does fit squarely into that context, that the
4 lower courts are doing that.

5 QUESTION: I thought the issue was whether good-
6 time credits comes within Heck. That is simply whether
7 eliminating a good-time credit is part of necessarily
8 shortening the sentence. That's what I thought the issue
9 we were going to grapple with was. But, gee, very little
10 of the debate -- in fact, I think none of the debate --
11 goes to that point.

12 MS. MIX: Justice Scalia, I think that whichever
13 route the Court goes with this case, it is very important
14 to say that Heck explicitly applies in the prison
15 disciplinary context and that good-time credits are, as
16 the courts have consistently found, within the definition
17 of fact and duration of confinement --

18 QUESTION: And it would do some good just to
19 decide that point, right, even if we don't reconsider Heck
20 and adopt a much more expansive rule?

21 MS. MIX: It would do some good to address that
22 point, but there will continue to be difficulties just
23 under that rule because the courts, such as the Ninth
24 Circuit, can take a very serious --

25 QUESTION: And maybe some day we'll agree to

1 consider those difficulties, but I didn't think we had
2 agreed to consider them here.

3 MS. MIX: What I'm saying, though, is even if
4 you make explicit that Heck applies to the prison
5 disciplinary context, if the lower courts are going to
6 say, but nothing fits within the necessary invalidation
7 rule of Heck, the rigors of the Heck test, then we haven't
8 achieved very much.

9 QUESTION: Ms. Mix, I'm confused and perhaps you
10 can help me. It seems like everything that you are
11 discussing is academic because in this case, as I
12 understand the prisoner's complaint, he's not saying that
13 the conduct, the bad conduct in which he engaged in, isn't
14 conduct that's subject to a good-time reduction.

15 What he's saying is I'm a jailhouse lawyer, and
16 I'm going to be brought up on these disciplinary charges,
17 and most of the time they've got me. But I want the
18 procedure to be fair. So, I'm talking about not giving me
19 witness statements or witness statements that aren't date-
20 stamped. So, I'm not arguing that I'm ever entitled in
21 any of these proceedings to keep that good time. I'm not
22 talking about whether I was a bad actor in prison. All
23 I'm saying is I want a procedure that isn't infected by
24 these witness statements.

25 And so, I read his complaint and I say, well,

1 he's not talking about the possibility of good time at
2 all. He's saying whenever there's discipline in this
3 prison, I want to make sure that I have a fair procedure.
4 And I may, if I did the bad act, sure, they can take away
5 my good time.

6 So, how do we even get to your question?

7 MS. MIX: That is how Mr. Balisok has presented
8 his complaint certainly and how he would like his
9 complaint to be read, but we have to remember a couple of
10 things. One is that he has specifically reserved his
11 right to go challenge his good time later, and by allowing
12 him to proceed with just a procedures challenge, to
13 rectify the procedures that you have described, what we do
14 in that case is we put the procedural interest ahead of
15 the substantive interest. We allow --

16 QUESTION: Well, what's wrong with that? What's
17 wrong with saying if a prison going to have a disciplinary
18 proceeding, it's got to be fair? And that's very basic.

19 MS. MIX: Because this Court has said on a
20 number of occasions that procedural due process exists in
21 the first instance to protect against the mistaken and
22 unjustified deprivation of liberty. And the vindication
23 of those procedural rights should not be at the expense of
24 the substantive interest that they are there to protect.

25 And in this situation what will happen is he

1 will get his procedural victory in his 1983 action, and
2 then he will take that procedural victory back to the
3 Washington State courts and use it to bolster or demand
4 relief on his loss of good time on his substantive claims.

5 QUESTION: But is that necessarily true? Isn't
6 it at least possible if he won this case, you could have
7 another prison disciplinary action and follow all the
8 procedures he requests and come to the same conclusion?

9 MS. MIX: That is correct, but I would
10 characterize that, Justice Stevens, as comparable to a new
11 trial, a new hearing, where the relief --

12 QUESTION: A new trial that ended up with
13 exactly the same period of incarceration as he got with
14 the unfair trial. That happens a lot in the criminal
15 area.

16 MS. MIX: But the remedy that is given, the
17 rehearing or the retrial, should be given by a court
18 sitting in habeas corpus, not by a 1983 court.

19 QUESTION: The Ninth Circuit in this case, Ms.
20 Mix, as I understand it, relied on its earlier opinion in
21 Gotcher against Wood. And am I right in thinking in that
22 case they said that an inmate's challenge to the procedure
23 by which he was denied good-time credits does not call
24 into question the continuing -- the lawfulness of his
25 continuing confinement, in effect, saying that good-time

1 credits, one way or the other, do not require any resort
2 to habeas?

3 MS. MIX: Their conclusion is that simply
4 challenging the procedures doesn't call into question the
5 good time. I don't think they're saying that the good
6 time isn't -- or that Heck isn't -- doesn't apply to a
7 situation where good time is at issue.

8 QUESTION: Their position is that just
9 challenging the procedures never calls into question the
10 good time. Isn't that right? Even if they gave him no
11 hearing at all and the most -- even in a case where it's
12 clear --

13 MS. MIX: I think --

14 QUESTION: -- that there is -- that there was
15 harmful error, the Ninth Circuit would say good-time
16 credits just don't count for purposes of Heck. Isn't that
17 right?

18 MS. MIX: I think that is correct. I think --

19 QUESTION: And you take the other extreme. You
20 say even when there -- even when the error is harmless,
21 good-time credits do count for purposes of Heck. And
22 maybe you're both wrong.

23 MS. MIX: I suppose that's possible. This is a
24 question that has many answers to it.

25 But I think that the problem with what the Ninth

1 Circuit has done and what we have seen other circuit
2 courts doing is they're relying on the language in Wolff
3 and they're relying on the language in Heck that says a
4 procedures-only challenge that does not necessarily
5 vitiate the good time can go forward. Yet, there are a
6 large category of cases where the good time is called into
7 question and where, although it might not necessarily be
8 taken away, when the court looks at the issue, it may not
9 reach a harmless error conclusion, but it still may reach
10 a conclusion that that good time should be restored.

11 QUESTION: I'll look at Heck. Was that a direct
12 quote when you said necessarily? Does Heck use the word
13 necessarily?

14 MS. MIX: Heck uses the term I think in relation
15 to the Wolff --

16 QUESTION: Yes.

17 MS. MIX: -- passage, necessarily vitiate.

18 QUESTION: Necessarily vitiate.

19 MS. MIX: Yes, that is correct.

20 QUESTION: Suppose Mr. Balisok had gotten his
21 disciplinary sanction, hadn't attacked it, and then
22 brought a suit --

23 MS. MIX: I'm sorry. I didn't --

24 QUESTION: Suppose instead of this emerging in a
25 particular disciplinary action, Mr. Balisok had brought a

1 separate action in which he said I've been disciplined
2 before, I'm likely to be disciplined again. The procedure
3 is unfair, and I want -- I'm bringing this 1983 suit to
4 get the procedure fixed so that if and when I'm
5 disciplined again, I'll get a fair procedure. Would that
6 be a permissible suit to bring under 1983?

7 MS. MIX: Yes, I believe it would be because he
8 would not be under -- suffering from any sanction that
9 affected the fact and duration of confinement sufficient
10 to put it into habeas. It is an anticipatory action.
11 Now, whether he would have standing would be another
12 question.

13 But we think there are two types of suits that
14 could go forward as you have described, Justice Ginsburg.
15 One would be that purely anticipatory suit, assuming he
16 can establish standing, and the other way the inmate can
17 get around this issue is he can concede that the result is
18 right. If it is the procedural interest that the inmate
19 wants to vindicate, if he wants the procedures corrected
20 and not done in a certain way in the future, let him make
21 good on that and enter into some sort of binding
22 concession that says I am not challenging the result of
23 this hearing.

24 Right now these rules out of Wolff and out of
25 Heck don't provide for that. So, we can have a situation

1 like Balisok's where he has specifically reserved that
2 right and he may go forward on that claim for the good
3 time later armed with a victory in 1983.

4 And what that does in a case like this is it
5 deprives the State court of the first opportunity to look
6 at claims and issues that affect the fact and duration of
7 confinement. And this Court has specifically said that
8 should not occur under principles of comity. So, we are
9 very concerned that that will be the result unless some
10 boundaries are drawn around the language in Wolff and in
11 Heck.

12 What we will end up with in that situation, if
13 he is allowed to go forward in 83 and then goes back to
14 State court, is the potential -- flat-out potential -- for
15 conflicting results between these two courts. And the
16 public good should -- and the discretion of the court
17 should be exercised in recognition that the public good
18 does not --

19 QUESTION: We don't have any discretion under
20 section 1983. I mean, some of us think we have discretion
21 under habeas corpus, but we certainly don't have any under
22 1983. I understood Heck to say that only by reason of a
23 clear congressional policy that there should be exhaustion
24 of State remedies before habeas corpus occurs.

25 We could read the other Federal statute, that

1 Federal statute, to impose a statutory limitation upon
2 1983 that where the 1983 action necessarily boils down to
3 habeas corpus, to the same thing, you should require
4 exhaustion.

5 But you're asking us to go much further in order
6 to pursue a policy that may well be a desirable policy,
7 but I don't know how we have the discretion to read 1983
8 which is categorical on its face.

9 What statute do you appeal to that modifies 1983
10 to such a degree that even where it does not boil down
11 necessarily to the same thing as habeas corpus, we may
12 require exhaustion?

13 MS. MIX: Justice Scalia, I think the answer to
14 that is when a prisoner is challenging procedures where
15 the challenge to that procedure logically will affect and
16 call into question, the very language the Court used into
17 -- in Heck, the confinement, then that is a case that
18 involves the fact and duration of confinement, and it
19 should proceed first in Federal habeas corpus. It's not
20 imposing an exhaustion request.

21 QUESTION: But you've acknowledged that it does
22 not necessarily call into question --

23 MS. MIX: We --

24 QUESTION: -- the confinement.

25 MS. MIX: Granted that can be the case in many

1 prisoner cases, but I think what we need to do is look at
2 what is the next natural step after Heck in dealing with
3 claims that call into question confinement, effect of
4 duration, confinement --

5 QUESTION: The next natural step is another
6 Federal statute, going beyond the statute that enabled us
7 to go as far as we did in Heck.

8 MS. MIX: Justice Scalia, I disagree. I think
9 that the Court has struggled for years in trying to deal
10 with the intersection between the Civil Rights Act and the
11 habeas corpus statute, and the lower courts continue to
12 express confusion on how to apply these two statutes. And
13 it doesn't take a congressional action to address this
14 issue. It takes this Court to give some more rules in
15 this area as to how these two statutes --

16 QUESTION: But you say that Mr. Balisok could do
17 exactly what on the surface he seems to want to do which
18 is to get a fair procedure, disciplinary procedure,
19 installed, and he could do that under 1983, but he has to
20 pay a price. That is, he has to say even if the good time
21 was taken away from me in an unfair procedure, I am giving
22 up my right to the equivalent of a new trial so that I can
23 bring the 1983 action. That's what you're saying in
24 essence, that this is not a case where he must exhaust.
25 He could bring it as a 1983 action, but he must say, I

1 will never seek restoration of those credits.

2 MS. MIX: He has an alternative. He can either
3 concede that --

4 QUESTION: Well, that's what you are saying. He
5 can -- he's got a 1983 suit, but he has to say, I won't
6 try to get back those good-time credits even though, if I
7 win the 1983 action, it will be clear that the procedure
8 that was used to discipline people in this prison was
9 unconstitutional.

10 MS. MIX: His alternative to conceding that
11 result is go -- to go first into State court and attempt
12 to have the State court look at the substantive liberty
13 interest that is at issue. Those are expedited
14 proceedings. Those are excellent proceedings by which he
15 can quickly --

16 QUESTION: But if he prefers the Federal forum,
17 he can have it. There's nothing disabling about his
18 claim. He can have it in a Federal forum, but he has to
19 give up the good time.

20 MS. MIX: That is correct, but I think he still
21 has other avenues back into the Federal forum should he
22 choose the exhaustion route first, and even if he should
23 not prevail in that and be subject to a harmless error
24 situation under the rule that we have proposed, the
25 broader rule that we have proposed, he could then go

1 forward with a nominal damages claim, another -- other
2 Carey-type claims because he would not be foreclosed on
3 that.

4 I will reserve the rest of my time for rebuttal.

5 QUESTION: Very well, Ms. Mix.

6 Mr. Rice, we'll hear from you.

7 ORAL ARGUMENT OF THOMAS H. SPEEDY RICE

8 ON BEHALF OF THE RESPONDENT

9 MR. RICE: Mr. Chief Justice, and may it please
10 the Court:

11 There are four important points raised by this
12 case.

13 The first one is, is Wolff v. McDonnell and Heck
14 v. Humphrey good law? And yes, it is.

15 Second, do the Heck principles apply to prison
16 disciplinary hearings? Yes, they do.

17 Third, is it important for our system of justice
18 that prisoners be permitted to file 1983 claims to protect
19 violations of procedural due process at prison hearings?
20 Yes, it is.

21 And finally, does Mr. Balisok's amended
22 complaint state a valid claim for a violation of procedure
23 as set out in Wolff and Heck? And it does.

24 QUESTION: Number two was not agreed to by the
25 decision below, though, was it? I mean, the unreported

1 decision of the Ninth Circuit seemed to indicate that all
2 challenges to prison procedures are exempt from Heck.

3 MR. RICE: No, Your Honor. The Ninth Circuit
4 decision applied Heck. What it said was if you're simply
5 attacking procedure, then the Heck principle of does it
6 necessarily imply invalidity doesn't apply.

7 QUESTION: Let me take the opposite side of the
8 side I was taking with Ms. Mix. Is it possible just to
9 attack procedure? Isn't any -- in at least any attack
10 looking retrospectively to a procedure that has already
11 occurred, as opposed to a suit enjoining future use of
12 that procedure, doesn't any such suit necessarily involve
13 a challenge to the elimination of good-time credits?

14 Otherwise, you have no standing. You can't come
15 in and just complain that somebody in the past committed a
16 procedure that was wrong but that didn't hurt you in any
17 respect.

18 Isn't -- at least as far as the allegations of
19 the complaint is concerned, doesn't a challenge to the
20 denial of past good-time credits because of invalid
21 procedure always necessarily involve a claim that you
22 should get good-time credits restored?

23 MR. RICE: No, it does not. If you look at this
24 Court's decisions under like Carey v. Piphus or Memphis
25 School District or Wolff v. McDonnell, this Court has

1 clearly said that a deprivation of a constitutional
2 procedure is in itself a violation and you have to have -
3 - you have standing --

4 QUESTION: We've never said that. Even where
5 you acknowledge that the procedure made no difference to
6 you?

7 MR. RICE: Well, the procedure made a
8 difference, Your Honor, because he wasn't allowed to call
9 a witness at a hearing.

10 QUESTION: That's the procedure.

11 MR. RICE: That's the procedure.

12 QUESTION: What's the difference? The
13 difference is he was denied good-time credits that he
14 should have been allowed.

15 MR. RICE: The difference is that he wasn't
16 allowed to have a witness at a hearing and whether or not
17 that --

18 QUESTION: He does not have to go ahead and say,
19 in order to have standing, and that made a difference in
20 the outcome. He doesn't have to say that?

21 MR. RICE: He has to say for standing purposes
22 that he had a right to call that and that it may have
23 affected the outcome of the hearing, not that it would
24 have affected, that he had a right to have those witnesses
25 there. Those witnesses are a basic constitutional right

1 --

2 QUESTION: He does not have to assert that it
3 affected the outcome of the hearing.

4 MR. RICE: He has to assert that it may have
5 affected the outcome of the hearing.

6 QUESTION: Just that it may have?

7 MR. RICE: Well, because he can't, under 1983
8 and the habeas dichotomy, Your Honor, because the decision
9 as to whether it would have affected the outcome belongs
10 in State court. That's purely a State court decision
11 under habeas.

12 QUESTION: No.

13 QUESTION: What -- you're equating the outcome
14 of the hearing with an eventual order of release, aren't
15 you? He may very well say not only that it may have, but
16 it did affect the outcome of the hearing. But for that
17 error, I would not have been -- I would not have had my
18 good time subtracted, but it doesn't follow from that that
19 he is necessarily entitled to have the good time restored
20 and the period of his incarceration shortened. Isn't that
21 the distinction that you want to make?

22 MR. RICE: That's correct, Your Honor, because
23 in the State of Washington and in most States, when a
24 prisoner goes in to attack habeas, he is going in under a
25 standard of, one, some or any evidence that upholds the

1 hearing.

2 And in the State of Washington, in particular,
3 they have held that where you allege a constitutional
4 violation such as in the case of In re Burton where they
5 were denied notice of the hearing, which is one of the
6 fundamental rights this Court guaranteed, the State of
7 Washington didn't automatically reverse that, but said
8 they had to show an actual and substantial prejudice for
9 that constitutional violation. That's different than the
10 standard under 1983.

11 QUESTION: One is never denied due process. One
12 is denied something without due process.

13 MR. RICE: Yes.

14 QUESTION: The process itself is worthless.
15 Something has been taken away from you without the process
16 that either the Constitution or a statute requires, and
17 that is your grievance.

18 But it seems to me the grievance in every one of
19 these prisoner actions is I have wrongly been denied good-
20 time credit, and that is necessarily an assertion that I
21 should get out earlier than they're going to let me out.

22 MR. RICE: The grievance is that he was denied
23 the right to present witnesses. In fact, he was lied to
24 by the prison officials, and that, yes, had he presented
25 those witnesses, it may have made a difference in the

1 outcome of the hearing. We don't know that and we don't
2 know that in 1983. That's a decision for State court to
3 decide.

4 QUESTION: Are you saying it's -- he's saying,
5 it's not inevitable that I will get my good time, but at
6 least I'll have a shot at it? I'll have a fairer shot.
7 What I'd like to do is to get those good-time credits, and
8 if I get my fair procedure, maybe I'll have a better
9 chance, but it's not inevitable that if I win my
10 procedural argument, I'm going to get the credits. Is
11 that --

12 MR. RICE: If the Court held that he was denied
13 constitutional procedure under 1983 and awarded him the
14 injunction he seeks and nominal damages, he would -- it
15 would not necessarily imply any change in the outcome of
16 his hearing at all.

17 QUESTION: But wouldn't he have to have
18 something in the -- I thought his situation is, I've had
19 an unfair trial, so at least I ought to get my good-time
20 credits restored, and then we can have a fair disciplinary
21 proceeding and maybe they'll be taken away again. Isn't
22 that really what you're saying is going on here?

23 MR. RICE: No, Your Honor, I'm not. I'm
24 ultimately saying that this Court needs to determine under
25 1983 whether or not proper prison procedures were

1 followed. In Wolff v. McDonnell, in Superintendent v.
2 Hill, this Court said that there are four basic, bottom
3 line rights to a fair hearing in prison.

4 QUESTION: Yes, but procedural rights don't
5 exist in the air. They have to be, as Justice Scalia just
6 pointed out, for the purpose of protecting something. And
7 here it seems to me what they're protecting is the man's
8 liberty. Right?

9 MR. RICE: Yes, the liberty interest and good-
10 time credits and the right to a fair hearing. That's what
11 it's protecting.

12 QUESTION: You say, Mr. Rice, that he would get
13 a declaration of some sort in the Federal court that he
14 had been denied procedural rights in the disciplinary
15 proceeding. And then you envision him going to State
16 court and taking that declaration then. What does he do
17 in State court?

18 MR. RICE: Well, he would go to State court, if
19 he had the opportunity to, to go to State court. He could
20 present that declaration from the Federal court. But the
21 State court doesn't have to honor it, and the State court
22 under 2254 and habeas has the first right of review to
23 determine whether or not the facts presented make any
24 difference in the hearing result or the outcome of the
25 hearing.

1 QUESTION: That seems like a very strange
2 bifurcation. You know, we like -- we think of things
3 ordinarily if you can do something in one procedure, you
4 -- and you contemplate I gather this totally divided
5 procedure. Half of it takes place in Federal court and
6 half in State court?

7 MR. RICE: They're separate and distinct
8 procedures, Mr. Chief Justice. They --

9 QUESTION: But surely we had that same objection
10 that the Chief Justice is questioning when you're
11 attacking the conviction itself. We said this is very
12 intrusive on State judicial mechanisms for us to second
13 guess their judgment of convictions.

14 MR. RICE: Well, absolutely.

15 QUESTION: And yet, that seems to be the very
16 process that you're holding out here as the solution to
17 some of the questions we've been raising in the context of
18 good time.

19 MR. RICE: Well, an attack to the conviction or
20 the sentence imposed at the conviction by Federal statute
21 under habeas must be done in habeas corpus and must
22 exhaust State remedies. But an attack to an illegal --

23 QUESTION: That's because we've said so, and
24 we've said so in order to preserve the State from Federal
25 interference. And I think what we're asking here in

1 exploring how we best interpret Heck is whether or not
2 those same State/Federal interests don't control.

3 MR. RICE: Well, Your Honor, they don't because,
4 one, 1983 is a different statute which doesn't require
5 exhaustion. This Court in Patsy, in the case --

6 QUESTION: But we were talking about 1983 in the
7 context of the collateral attack on a conviction as well.

8 MR. RICE: That's true, but in there -- in Heck
9 you also affirmed Wolff and said an attack to the
10 procedure that doesn't necessarily imply the invalidity of
11 the conviction or the sentence is valid and can go
12 forward.

13 QUESTION: Why doesn't this necessarily imply
14 the invalidity of the sentence if you consider as the
15 sentence the increase by reason of the denial of his good-
16 time credits?

17 MR. RICE: It doesn't imply it, Your Honor,
18 because when he goes to State court, when he goes into --
19 to the attack of habeas --

20 QUESTION: That denial of good-time credits is
21 invalid. If you want to deny good-time credits, you have
22 to go through the whole thing again with a new procedure,
23 but the past denial is automatically invalid once you
24 decide the procedure was wrong. Isn't it --

25 MR. RICE: It's not automatic. No, sir, it's

1 not because when he goes into habeas corpus, there's an
2 entirely different standard the court is looking at.

3 QUESTION: No, no, no. I'm just talking about
4 he comes and challenges under 1983 the procedures. The
5 procedures are found to be improper. Okay? Does that not
6 mean that the thing has to be done again and that the
7 prior denial of good-time credits is invalidated?

8 MR. RICE: It does not.

9 QUESTION: It does not even imply that?

10 MR. RICE: It may -- it implies the procedures
11 were --

12 QUESTION: Careful, because what it says,
13 whether a judgment would necessarily imply the invalidity
14 of his conviction or sentence.

15 MR. RICE: That's correct.

16 QUESTION: And I don't see how it's possible to
17 say that when you prevail under 1983 on the ground that
18 the procedures were wrong, that does not imply that the
19 denial of good-time credits was in error.

20 MR. RICE: Well, Your Honor, this Court used
21 footnote 7 in Heck to explain what it meant by necessarily
22 imply, and in footnote 7 this Court said if the attack on
23 procedures had a different doctrine such as inevitable
24 discovery or harmless error, then our holding that the
25 procedure was invalid doesn't necessarily imply the

1 invalidity of the conviction or sentence because of other
2 doctrines which intersect on that issue.

3 QUESTION: Under your theory, Mr. Rice, could
4 you go into Federal court and say with respect to a trial
5 in which you had been found guilty of a criminal offense
6 that you had been denied the right of counsel and that the
7 Federal judge says, well, you know, that should be in
8 habeas? You say, well, no, I'm not trying to challenge my
9 conviction here. I just want nominal damages for being
10 denied the right to counsel. And then could you -- so,
11 then the Federal court says, okay, I find you were denied
12 the right. Can you then take that over to State court and
13 say, look, I've got a finding that I was denied counsel,
14 so set my conviction aside?

15 MR. RICE: Your Honor, you can reach certain
16 levels of constitutional depravation that no court would
17 hold a fair hearing. Now, in the denial of counsel, the
18 question becomes, did the person waive counsel? Did they
19 -- were they coming back later after an improper waiver?

20 QUESTION: Can a Federal court make that
21 determination without -- in a 1983 action?

22 MR. RICE: I think that immunities granted in
23 the judicial context would prohibit a Federal court from
24 making that --

25 QUESTION: Well, immunity is an affirmative

1 defense.

2 QUESTION: Mr. Rice, the difference in footnote
3 7 that you appeal to is this. The example given in
4 footnote 7 is an unconstitutional search and seizure. You
5 have standing to challenge an unconstitutional search and
6 seizure regardless of its effect upon your conviction. It
7 is a wrong in and of itself.

8 But you have no standing to challenge the
9 deprivation of procedures unless you allege that those
10 procedures have affected or may have affected the
11 reduction of your sentence.

12 The example given in footnote 7 has no
13 relationship to the present case. There was standing to
14 challenge a separate unconstitutional act, but the
15 unlawful act you're claiming here is an act that you have
16 the ability to challenge only by reason of your assertion
17 that it affected your sentence. That's a different
18 situation entirely.

19 MR. RICE: Well, Your Honor, I go back to this
20 Court's precedent in Carey v. Piphus and in Memphis School
21 District where there was a challenge to an
22 unconstitutional procedure which the Court said it
23 wouldn't have affected the outcome of the hearing. It
24 would not have mattered, and that the challenge to a
25 constitutional procedure on the right to a fair hearing -

1 - it doesn't entitle you to actual damages. It doesn't
2 entitle you to any other damages other than the injunction
3 on the hearing and nominal damages which you can get and
4 to vindicate that right.

5 QUESTION: It's significant that footnote 7 does
6 not refer to harmless error. It says that there are other
7 doctrines such as independent source and inevitable
8 discovery.

9 MR. RICE: And it also says, and of course,
10 harmless error under Arizona v. Fulmanente. So, it does
11 refer to all three, Your Honor.

12 QUESTION: Isn't it enough for your case, Mr.
13 Rice, to admit the possibility that there may be some
14 procedural deprivations that simply couldn't be cured? I
15 don't know whether that's so in this context, but let's
16 assume that it's a possibility.

17 MR. RICE: Well --

18 QUESTION: And then simply say, but that is not
19 the issue in this case and there is no claim that this is
20 one of them. And as long as there would have to be a
21 further step before any ultimate determination that the
22 sentence should be -- of any ultimate determination that
23 the sentence be shortened, so long as there would have to
24 be a further step, whether it be a harmless error step or
25 the application of this some evidence doctrine, whatever,

1 as long as there would have to be a further step, then you
2 don't have the inevitability that our prior case, that
3 Heck and Humphrey, spoke of. Isn't that enough for you to
4 prevail?

5 MR. RICE: Yes, it is enough for us to prevail.

6 QUESTION: Now, is that something different from
7 what I understood a moment ago you to be arguing which was
8 there's a further step simply because there would be no
9 collateral estoppel or no res judicata effect in a State
10 court?

11 MR. RICE: That's correct because of the State
12 having the some or any evidence standard, having a
13 substantial and actual injury for a constitutional --

14 QUESTION: Okay, but wouldn't your argument be
15 exactly the same if, let's say, suddenly tomorrow morning
16 you could show that a return to the State court would be
17 futile? You would still have to prove more than just a
18 procedural violation before you would be entitled to any
19 ultimate relief, let's say, on Federal habe. Isn't that
20 correct?

21 MR. RICE: On Federal habeas, that's correct.

22 QUESTION: Yes, and that's enough for you to win
23 -- I understood your argument to be that that's enough for
24 you to win this case.

25 MR. RICE: That's enough for us to win.

1 QUESTION: Can you explain -- for a minute I
2 would appreciate going back to the Chief Justice's
3 question. As I read Heck -- and I was coming new to it -
4 - and trying to work out how it would apply to the mine
5 run -- maybe yours is or isn't -- mine run kind of case
6 where a prisoner says there was some procedural violation
7 at my disciplinary hearing. A mine run case.

8 I thought the problem in Heck is that 1983
9 normally requires no exhaustion. Patsy. But habeas law
10 seems to require something that looks like exhaustion, and
11 therefore you have to reconcile it. In reconciling them,
12 I can imagine it would make sense to say, sorry, 1983
13 requires no exhaustion. That's the end of it. Or to say
14 it requires exhaustion for prison cases because of habeas.
15 Go exhaust.

16 But what I can't understand is how it could lead
17 to a hybrid system where you get the worst of both worlds.
18 You have to keep running between one -- or you can run
19 between one court and another, get half your case decided
20 in Federal court, then get the other half decided in State
21 court. Why does that make sense in terms of the effort to
22 reconcile 1983 with habeas law?

23 MR. RICE: While it seems convoluted, Your
24 Honor, it makes sense because there is very distinct and
25 separate remedies in 1983 and in habeas corpus.

1 In habeas corpus all you can get is a reversal
2 of the hearing or return of your good time. You cannot
3 get an injunction to attack an improper procedure or to
4 try and stop the conduct from occurring again and again
5 and again.

6 1983 allows you to go in and get a declaration
7 and injunction to stop the conduct from occurring, and in
8 many ways, it's a more efficient remedy than habeas
9 corpus.

10 So, the two doctrines are separate and they
11 operate separately. And this Court said in Wolff and it
12 has said over and again in different cases like Heck that
13 you could actually have them both at the same time because
14 they're addressing such different standards and different
15 matters of proof, and they're statutorily created by
16 Congress.

17 Now, to further your answer your question why
18 you may not have this back and forth again and the trouble
19 you're concerned about is in April of 1980 -- 1996
20 Congress passed the Prisoner Litigation Reform Act. It
21 addressed virtually all of the questions that the State is
22 concerned about.

23 First, you have to exhaust -- when they looked
24 at exhaustion -- and Congress looked at exhaustion, they
25 said we're going to make prisoners exhaust State

1 administrative remedies, not judicial or court remedies.
2 On the administrative remedies, Mr. Balisok has done that.

3 Second, for how the petition to go, it said, if
4 you're attacking conditions in the prison or conduct of
5 the guards affecting confinement, you can proceed under
6 1983. Congress has said that. If you're attacking the
7 result of the hearing or a term of confinement, you have
8 to go to habeas corpus. Those are the two routes you have
9 a choice to do. They're separate.

10 As for these claims going forward, Congress has
11 said, you know, there have been too many of them, so we're
12 going to enact a three strikes and you're out provision.
13 Three frivolous or malicious claims, you're gone. We're
14 going to make prisoners do filing fees. We're going to
15 make them pay for that. So, we're going to have prisoners
16 pay their judgment for the attorney fee.

17 QUESTION: Actually three strikes and you're in.

18 (Laughter.)

19 MR. RICE: Well, three strikes and you're in.
20 You're right, Your Honor. Exactly.

21 But Congress has addressed all of the concerns
22 about the different claims.

23 QUESTION: Mr. Rice, what was the relief asked
24 for in this lawsuit?

25 MR. RICE: Mr. Balisok asked for a declaration

1 that the conduct of the guards was unconstitutional.

2 He asked for an injunction to have them stop
3 that conduct in the future, that if they have statements
4 in their hand -- and his allegations are that they had the
5 statements, and they told him they didn't exist.

6 His third is for damages and according to proof
7 to the court. Now, after the Prison Litigation Reform
8 Act, that's just nominal damages.

9 And his fourth is a general claim for any other
10 relief the Court deems just and equitable.

11 That's the only claims of relief in this case.

12 QUESTION: In his -- if he prevailed and had a
13 determination, a declaratory judgment, that his rights had
14 been violated by the guards, would that not have
15 preclusive effect as to that finding against the State in
16 a State court -- in a subsequent State court proceeding?
17 The State is a party.

18 MR. RICE: Not really, Your Honor, and here's
19 why. While it may have -- it may say, all right, that
20 fact is determined. 28 U.S.C. 2254 by Federal statute
21 grants to the States the right of independent review in
22 habeas corpus. So, if the State felt that its hands were
23 tied by that determination, it could discard it or even
24 come to a different interpretation because of what's
25 granted to it under 2254(b) which is a right of

1 independent determination.

2 Also, there's no requirement that a Federal
3 judgment be given preclusive effect in State court.

4 QUESTION: Is there in Washington law?

5 MR. RICE: No, there is not, not that I'm aware
6 of. The State can look at it, but the State is not
7 required to adopt it. So, in that respect, the State can
8 come in and look and say, all right, we've got this
9 finding in Federal court, and the first thing it looks at
10 under --

11 QUESTION: May I just -- that went by me very
12 quickly. I thought there was something about the
13 supremacy of Federal law that would require a Federal
14 court to honor -- a State court to honor a Federal
15 judgment.

16 MR. RICE: Your Honor, a Federal court -- a
17 State court is required to honor a sister court judgment
18 under full faith and credit of the Constitution, and a
19 Federal court must honor a State court judgment under the
20 full faith and credit statute. There is no Federal
21 statute which requires a State court --

22 QUESTION: But there is the Supremacy Clause.

23 MR. RICE: The Supremacy Clause would infer to
24 the State that it should give deference to the Federal
25 court judgment.

1 QUESTION: You're saying that a court decree
2 doesn't count as a Federal act.

3 MR. RICE: In terms of applying it to 2254 which
4 gives the State the right of independent review, that the
5 State court can look separate from the Federal judgment in
6 1983.

7 QUESTION: I thought -- and maybe I'm wrong
8 about this -- that it was well accepted that essentially
9 the Federal court judgment gets the same full faith and
10 credit in a State court that a sister State -- the notion
11 that a Federal court judgment is entitled to less respect
12 in State A than a judgment of a sister State, State B
13 judgment, that's very strange to me, and I frankly don't
14 think it's the law.

15 MR. RICE: Well, Your Honor, it's my
16 understanding that the full faith and credit of the
17 Constitution goes State to State and that the full faith
18 and credit statute governs both.

19 QUESTION: Yes, but the -- but there are other
20 doctrines and one of them is the supremacy of Federal law.

21 QUESTION: Your stronger argument I suppose is
22 that you can give full faith and credit to the judgment
23 and still not revoke his good time.

24 MR. RICE: It would not revoke his good time
25 because of the State court rights under some or any

1 evidence.

2 QUESTION: That's a much sounder argument.

3 MR. RICE: Pardon me?

4 QUESTION: That's a much sounder argument than
5 to say that a State court doesn't have to give, in effect,
6 full faith and credit to a Federal judgment.

7 QUESTION: Yes. That's quite a different point
8 as to whether or not it must accept as binding the fact
9 that, say, the officer mislabeled or destroyed or
10 concealed the documents.

11 MR. RICE: Well, Your Honor, when the decision
12 -- when the 1983 decision goes into State court, the State
13 court has several avenues to look at the facts of the case
14 independently. 2254 says you've got a right of first
15 review.

16 Washington's law under some or any evidence --
17 and I refer to the In re Burton where they said not -- any
18 meager evidence, even inferential evidence, is enough to
19 support the finding of the disciplinary board, and once
20 they find any evidence, the analysis stops. It's not a
21 weighing decision between the court -- between is this
22 good evidence and this bad evidence.

23 This Court affirmed that rule in Superintendent
24 v. Hill where it said for prison disciplinary hearing
25 review --

1 QUESTION: But 2254 applies to Federal court
2 proceedings, and you're saying there's also a provision in
3 2254 that says a State court --

4 MR. RICE: 2254(b) says that a State court has
5 the first -- gives the States the first right of review on
6 habeas grounds. You have to have that exhaustion. The
7 State has to have the independent right to make that
8 determination.

9 QUESTION: Yes, but the whole assumption of the
10 1983 action is that it is not functionally equivalent to
11 habeas. So, I don't see why that would apply.

12 MR. RICE: I don't --

13 QUESTION: I mean, the -- 2254 is applying
14 habeas versus habeas, State versus Federal.

15 MR. RICE: Right.

16 QUESTION: The whole premise of our argument is
17 that the 1983 action is not to be regarded as a covert
18 habeas action under certain circumstances.

19 MR. RICE: It's not a covert habeas action at
20 all.

21 QUESTION: So --

22 MR. RICE: But it depends upon --

23 QUESTION: So, therefore, 2254 doesn't have any
24 application one way or the other, does it?

25 MR. RICE: It has application with regard to

1 what the State standard is when it reviews a prisoner
2 habeas petition. That's where it has application, and the
3 State standard on review of a prisoner habeas petition is
4 the right of first and independent review.

5 QUESTION: Well, we could look at this later.

6 2254, as I -- including (b), applies to the
7 State -- what a State court must do, and it must first
8 defer to a -- pardon me -- what a Federal court must do.
9 It must first defer to the State court.

10 MR. RICE: That's right, and that has been
11 interpreted --

12 QUESTION: And it has been interpreted to say
13 that the State court need not be bound by any prior
14 Federal judgment.

15 MR. RICE: Well, look -- you can look at the
16 language in Heck v. Humphrey where the State there was
17 saying you have to in Heck -- you can't allow this ruling
18 to afford in Heck because it's going to be preclusion in
19 State court, and the opinion in Heck addresses that point
20 and says, no, it's not going to be preclusion. Preclusion
21 may not be -- may not apply and it may not even be
22 permissible.

23 And it sets out in footnote 11 I believe why
24 that's so because 2254 is Federal statute and the
25 preclusion is judge-made law, court-made law. So, 2254

1 governs over court-made law when you weigh the two, and
2 2254 will give the independent review to the State. So,
3 if you look at Heck in footnote 11, that's fully explained
4 by this Court why preclusion wouldn't apply.

5 Mr. Balisok is simply asking for a right to
6 review an unconstitutional procedure. Prisoners in the
7 United States have really just four when it comes to fair
8 hearings: a right to notice, a right to time to prepare,
9 a right to present witnesses so long as it doesn't
10 interfere with prison discipline or administration, and a
11 written finding of fact. There's only four things that
12 are given to prisoners.

13 He's simply asking in this case that these
14 guards who had witness statements that he had asked for,
15 who deliberately told them they didn't exist, that didn't
16 date-stamp them so that he couldn't prove they existed at
17 the time, but were later found in his file -- that he have
18 the right to have a ruling under 1983 that that conduct is
19 unfair and it's unconstitutional and it shouldn't be
20 permitted.

21 QUESTION: Mr. Rice, I've been looking for
22 footnote 11 in Heck v. Humphrey. I don't --

23 QUESTION: It ends with footnote 10.

24 QUESTION: Yes. Is that the footnote that we
25 thought better of and didn't issue?

1 (Laughter.)

2 MR. RICE: Footnote 9. I'm sorry, Your Honor.

3 QUESTION: I see.

4 MR. RICE: Look at footnote 9 where this Court
5 says, while we have no occasion to rule on the matter at
6 this time, it is at least plain preclusion will not
7 necessarily be an automatic or even permissible effect.

8 And then in the explanation of that it says, the
9 court-made preclusion rules may, as judicial application
10 of categorical mandate of section 1983 may not, take
11 account of the policy embodied in section 2254(b)'s
12 exhaustion requirement that State courts be given the
13 first opportunity to review constitutional claims bearing
14 upon State prisoner release from custody.

15 So, that's where you get the dichotomy on the
16 case where 1983 deals with procedure, an unconstitutional
17 procedure.

18 But we are not asking for return of his good
19 time. We're not asking for reversal of the hearing.
20 We're saying this was a hearing involving good time, which
21 is a liberty interest. This Court has said that good time
22 still remains that.

23 And second, when you've got a liberty interest
24 at stake, you're entitled to a minimum of due process for
25 a fair hearing. And that's all we're in court asking for

1 this -- for Mr. Balisok to have is his hearing -- is a
2 right to a fair hearing.

3 Thank you.

4 QUESTION: Thank you, Mr. Rice.

5 Ms. Mix, you have 3 minutes remaining.

6 REBUTTAL ARGUMENT OF KATHLEEN D. MIX
7 ON BEHALF OF THE PETITIONERS

8 MS. MIX: Thank you, Mr. Chief Justice.

9 Even if there is no preclusion with respect to
10 the successful 1983 action, I think the primary concern
11 that the State has is that the State interests and comity
12 interests are not served by the State having a second
13 independent opportunity to look at this claim.

14 And the problem that we have with what has been
15 described here is exactly the situation of running between
16 the courts where Mr. Balisok says, well, yes, indeed he
17 will go back to State court and present this declaration
18 to the State court, this declaration of a Federal court,
19 that there have been procedural violations of
20 constitutional magnitude at this hearing.

21 And the State court is in the position at that
22 point of either rendering an inconsistent result with a
23 Federal district court that has looked at the same issue
24 or the State courts and State officials are in the
25 position of being persuaded by that --

1 QUESTION: Of course, it is true that this
2 problem only arises if you lose in the Federal court.
3 Most of these cases you're going to win in the Federal
4 court.

5 MS. MIX: If he win -- if --

6 QUESTION: That's right.

7 MS. MIX: Yes, if he wins in a Federal court,
8 we'll have that problem, and that is the precise situation
9 that leads to conflict among the courts that this Court
10 has said should not be allowed to occur.

11 And the situation gets even worse because if Mr.
12 Balisok then wins in his State habeas corpus petition, he
13 has yet another avenue back into Federal court for the
14 actual harm from the confinement. So, we have multiple
15 times into the courts and multiple avenues into Federal
16 courts when we bifurcate these actions and allow a 1983
17 procedures-only claim to proceed as described by Mr.
18 Balisok.

19 The second point I'd like to address is just a
20 question of whether the procedures are part and parcel of
21 the liberty, and we think very much that they are. The
22 second part of the Heck holding is very critical with
23 respect to our rule. Heck not only barred damages for
24 unlawful confinement, but it also barred claims for harm
25 caused by unlawful actions that rendered confinement

1 invalid. And if the --

2 QUESTION: Do you have any comment on Carey
3 against Piphus?

4 MS. MIX: Under the rules we have proposed,
5 Carey could remain a good rule in that it would allow
6 nominal damages for the violation of procedural rights but
7 only after there had been exhaustion of remedies through
8 the habeas corpus procedures. So, if there is a finding
9 of error but it's harmless error, that procedural right
10 could still go forward for a nominal damages claim under
11 Carey.

12 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Mix.
13 The case is submitted.

14 (Whereupon, at 12:08 p.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

GARY EDWARDS AND TANA WOOD, Petitioners
v. JERRY B. BALISOK

Case No. 95-1352

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)