

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may "recharacterize" a state prisoner's action under 42 U.S.C. § 1983 for money damages as a petition for habeas corpus and, on that basis, require the prisoner to exhaust state habeas corpus remedies before seeking to vindicate his constitutional rights under Section 1983.

2. Whether a federal court that requires exhaustion of a Section 1983 action for money damages on this basis should stay, rather than dismiss, the Section 1983 action pending exhaustion.

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Robert Ewbank, Attorney
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a-5a) is reported at 997 F.2d 355. The opinion of the United States District Court for the Southern District of Indiana (App., *infra*, 6a-8a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in full in the appendix. See Pet. App. 26a.

STATEMENT

This case arises out of a state prisoner's action for damages under the federal civil rights statutes, including 42 U.S.C. § 1983. The district court recharacterized petitioner's Section 1983 damages action as a petition for habeas corpus, and on that basis dismissed the action without prejudice so that petitioner could exhaust state remedies. The court of appeals affirmed, holding that such recharacterization was proper under Seventh Circuit law and that the district court was correct in dismissing, rather than merely staying, petitioner's Section 1983 action. In reaching the latter conclusion, the court of appeals declined to follow the decisions of four other circuits and expressly acknowledged that its decision "creates an intercircuit conflict" (Pet. App. 5a) on an important and "difficult" issue (*id.* at 3a).

1. Petitioner Roy Heck is presently confined at the Westville Correctional Center in Westville, Indiana. He is serving a fifteen-year sentence after a jury, on July 30, 1987, convicted him of voluntary manslaughter in connection with the death of his wife, Rickie Heck. The Indiana Supreme Court upheld petitioner's conviction over a dissent by Justice DeBruler. *Heck v. State*, 552 N.E.2d 446, 449 (Ind. 1990) (reprinted at Pet. App. 9a-17a).

The State's case against petitioner was based on circumstantial evidence. Mrs. Heck disappeared on or about January 6, 1986, at a time when she and petitioner had been living apart and were involved in proceedings to dissolve their marriage. Some nine months after her disappearance, Mrs. Heck's body was found buried on petitioner's farm. The pathologist's report initially reported that no cause of death could be determined; later, it was altered to state that Mrs. Heck's jaw was broken and to "theorize[] [that] the probability was that decedent had died as a result of a severe blow to the head." Pet. App. 11a.

At trial, the State presented testimony from Mrs. Heck's neighbors that, on the evening of January 6, 1986, she engaged in a heated argument with another person outside of her trailer home. At trial, a neighbor of Mrs. Heck was permitted to identify petitioner as the unknown participant in the January 6 argument on the basis of his voice. The neighbor's in-court voice identification was based on the police having played, at her request and only one week before trial, a recording of petitioner's voice, which she then identified as the voice she heard on January 6. Pet. App. 13a. The neighbor, who was "from the Philippines" and "had a very limited understanding and use of the English language," also gave conflicting accounts in her deposition and at trial of what she heard during the January 6 argument. Pet. App. 13a-14a. In dissenting from the Indiana Supreme Court's affirmance of petitioner's conviction, Justice DeBruler concluded that the voice identification procedure employed by the Indiana police was "unduly and

unnecessarily suggestive" and created "a very substantial likelihood of irreparable misidentification." Pet. App. 17a.

2. On December 27, 1988, petitioner, proceeding pro se, filed this lawsuit under 42 U.S.C. §§ 1983, 1985(2), 1986 and 1988. Petitioner's complaint named as defendants three persons who participated in the investigation and prosecution of his case: Dearborn County prosecutors James Humphrey and Robert Ewbank, and Michael Krinoph, an investigator with the Indiana State Police. See Pet. App. 20a. Petitioner claimed that defendants "conspired and/or acted in concert" to subject him to "an illegal investigation" of his wife's death, "in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution." Pet. App. 21a. More specifically, petitioner alleged that defendants (1) conducted an illegal search, (2) arbitrarily, unlawfully, and knowingly "destroyed clothing from [his] deceased wife's body which was exculpatory in nature and could have proved [his] innoc[]ence," and (3) "directed * * * an illegal and unlawful v[oi]ce identification procedure [three] times with a potential state witness." Pet. App. 23a. Petitioner's complaint sought compensatory and punitive damages, declaratory relief, interest, costs, and attorneys' fees. Pet. App. 25a. It did not seek invalidation of his conviction or release from prison. Along with his complaint, petitioner filed an application to proceed in forma pauperis. Pet. App. 18a-19a.

3. The district court denied petitioner's request to proceed in forma pauperis and ordered the dismissal of his Section 1983 action.

The gravamen of petitioner's Section 1983 claim, the court explained, was that defendants had "acted improperly in an investigation culminating in his being charged." Pet. App. 7a. Because "the issue he raises directly implicate[s] the legality of his confinement," reasoned the court, the "exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may be brought only after available state remedies have been exhausted." Pet. App. 7a-8a (emphasis added). See also id. at 8a (stating that "a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement"). Ibid.¹

4. The Seventh Circuit affirmed. Pet. App. 1a-5a. The court of appeals first agreed with the district court that, under Seventh Circuit precedent, petitioner's civil rights action for damages was properly recharacterized as a petition for habeas corpus. Id. at 3a.

¹ Petitioner also sought but was denied habeas relief in federal court. On June 19, 1990, he filed a petition for relief under 28 U.S.C. § 2254, raising five constitutional claims: (1) insufficient evidence to support a conviction for voluntary manslaughter; (2) use of suggestive voice identification procedure; (3) ineffective assistance of counsel; (4) use of illegally obtained wiretap evidence; and (5) deprivation of a fair trial due to use of hearsay testimony. On January 7, 1991, the district court dismissed the petition without prejudice because petitioner had failed to exhaust his claim that he received ineffective assistance of counsel. Heck v. Richards, No. S90-205 (N.D. Ind.). On January 22, 1991, petitioner filed a second federal habeas petition that was identical but for the omission of the ineffectiveness claim. The district court found that the remaining claims had been exhausted on petitioner's direct appeal, and went on to deny relief. Heck v. Richards, No. S91-40 (N.D. Ind. July 30, 1991). The Seventh Circuit affirmed in an unpublished order. Heck v. Richards, No. 91-3034 (Sept. 28, 1992). Petitioner has never sought post-conviction relief in the Indiana courts.

Conceding that petitioner was not "explicitly requesting that his conviction be vacated," the court nevertheless explained that "regardless of the relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * * ." Ibid. "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." Ibid. "Indeed," the court of appeals added, "if his conviction were proper, this suit would in all likelihood be barred by res judicata." Ibid.

Next, the Seventh Circuit addressed a question that it described as "difficult," namely whether "the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refileing it after he exhausts his state remedies." Pet. App. 3a. The court first acknowledged that under this Court's decision in Owens v. Okure, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action is that set forth in Ind. Code §§ 34-1-2-2, 34-1-67-1(6), which provide for a two-year limitations period; that the defendants' alleged misconduct occurred in 1987; that the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment"; and that, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute

of limitations." Pet. App. 3a. "In these circumstances," the court acknowledged, "several decisions of other circuits hold that the district court should stay rather than dismiss the suit." Ibid. (citing Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); and Richardson v. Fleming, 651 F.2d 366 (5th Cir. 1981)). The court below specifically declined to follow these decisions, however, because staying rather than dismissing the prisoner's action would "give[] inadequate weight to the policy of the statute of limitations, which is to bar stale suits." Pet. App. 3a.

The court of appeals went on to suggest that if petitioner were to exhaust his state habeas remedies, refile his Section 1983 action, and then encounter a statute-of-limitations defense, he might be able to avoid the time bar by invoking the doctrine of equitable tolling. Pet. App. 3a. The panel acknowledged that under Hardin v. Straub, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits," and it acknowledged that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." Pet. App. 3a-4a.² Nevertheless, the court of appeals suggested that if a state-law doctrine of equitable tolling were

² The court did, however, identify one case in which an Indiana court applied what the Seventh Circuit described as "a form of equitable tolling." Pet. App. 3a-4a (citing Torres v. Parkview Foods, 468 N.E.2d 580 (Ind. Ct. App. 1984)).

unavailable, a federal court would be obliged to fashion a federal doctrine of equitable tolling to effectuate "section 1983's `chief goals of compensation and deterrence.'" Pet. App. 4a (quoting Hardin, 490 U.S. at 538-39). The court acknowledged that the Second Circuit had come to precisely the opposite conclusion, holding that a federal doctrine of equitable tolling was not available in such circumstances. Pet. App. 4a (citing Jewell v. County of Nassau, supra).

Finally, the Seventh Circuit proceeded to suggest the content of a federal doctrine of equitable tolling applicable in cases such as this:

The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably untrained in law. If both questions are answered in the affirmative, a third question becomes relevant -- whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies.

Pet. App. 4a. The court "express[ed] no view on the proper answers to these questions in this case," explaining that "that would be premature." Id. at 5a.

Recognizing that its opinion "creates an intercircuit conflict" on the issue of dismissal versus stay, the panel, on its own

initiative, circulated its decision to the entire court pursuant to Seventh Circuit Rule 40(f).

Pet. App. 5a. Over the dissenting votes of Judges Cudahy, Ripple and Rovner, the full court decided not to rehear the case en banc. Ibid.

REASONS FOR GRANTING THE PETITION

This case presents two recurring issues of great practical significance: first, whether a federal court may require a state prisoner to exhaust state habeas corpus remedies before litigating his 42 U.S.C. § 1983 claim for money damages; and second, assuming that the answer to the first question is yes, whether the court should dismiss, rather than stay, the prisoner's Section 1983 claim pending exhaustion. Given the enormous volume of prisoner civil rights litigation,³ it is vitally important that the rules governing cases such as this be clearly established and uniformly applied. In the almost 20 years since the Court has last addressed this area of the law, however, the courts of appeals have "struggled mightily" -- and with a singular lack of

³ See 1991 Annual Report of the Director of the Administrative Office of the United States Courts at 179 (Table C-2) (29,645 civil rights actions filed by state prisoners in federal court in year ending September 30, 1992).

success -- to reach consistent results.⁴ There are now clear conflicts among the courts of appeals on both issues presented here.

By holding that a Section 1983 action for money damages may be recharacterized as a petition for habeas corpus, the court below would force litigants to exhaust state habeas remedies that are wholly incapable of providing the monetary relief they are seeking; not surprisingly, its holding requiring exhaustion cannot be reconciled either with decisions of this Court or with a recent holding of the Second Circuit. And in deciding to dismiss rather than stay petitioner's Section 1983 action -- which will subject the suit to a statute-of-limitations defense upon refiling, will lead to substantial additional litigation, and will prevent the litigation of some meritorious claims -- the Seventh Circuit expressly rejected the conclusions of four other courts of appeals and "create[d] an intercircuit conflict." Pet. App. 5a. Review of the decision below accordingly is warranted.

I. A State Prisoner May Not Be Required To Exhaust State Remedies Before Bringing A Section 1983 Action That Seeks Only Money Damages

In this case, the Seventh Circuit held that petitioner's civil rights action for damages was properly recharacterized as a petition

⁴ Paul Bator, Daniel Meltzer, Paul Mishkin & David Shapiro, Hart & Wechsler's the Federal Courts and the Federal System 1650 (3d ed. 1988). See generally Martin A. Schwartz, The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 85, 87-88 (1988) ("The lower federal court decisions are not surprisingly in disarray, with jurists frequently bemoaning the difficulties and frustrations they encounter in attempting to solve Preiser puzzles.").

for habeas corpus and, on that basis, subject to the requirement of exhaustion of state remedies set forth in 28 U.S.C. § 2254(b). Pet. App. 3a.⁵ Although the decision below recognized that petitioner was not "explicitly requesting that his conviction be vacated," it nevertheless explained that "regardless of the relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * * ." Ibid. "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." Ibid. In reaching this conclusion, the panel applied settled Seventh Circuit doctrine.

The decision below, however, is flatly inconsistent both with decisions of this Court and with the Second Circuit's decision in Mack v. Varelas, 835 F.2d 995 (1987). What is more, while a number of the other courts of appeals have adopted an exhaustion rule generally similar to that of the Seventh Circuit, most have done so only over vigorous dissents or over the majority's own strong misgivings. Those courts, moreover, have also applied different versions of the exhaustion rule, thereby subjecting state prisoners across the country

⁵ The fact that petitioner has included, along with his damages claim, a request for declaratory relief in no way alters the analysis of the recharacterization and exhaustion issue. See Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974).

to different preconditions to having their federal rights determined under Section 1983. And the Seventh Circuit's holding is inconsistent with Congress's intent not to require state prisoners to exhaust state remedies in circumstances such as these. To resolve the conflict with the Second Circuit, and to bring clarity to an extraordinarily muddled area of federal law, further review by this Court is warranted.

A. The Seventh Circuit's Decision To Recharacterize And Require Exhaustion Conflicts With The Decisions Of This Court.

This Court has examined the boundary between habeas corpus and § 1983 in the context of state-prisoner litigation in three cases, all decided in the mid-1970s. See Preiser v. Rodriguez, 411 U.S. 475 (1973); Wolff v. McDonnell, 418 U.S. 539 (1974); Gerstein v. Pugh, 420 U.S. 103 (1975). In discussing the characterization of prisoner claims in those cases, the Court stressed the importance of the type of relief being sought, and it concluded that a state prisoner's Section 1983 claim for damages is immediately cognizable in federal court (and may be pursued simultaneously with a habeas corpus action premised on the same allegations).

Preiser involved a Section 1983 action by state prisoners challenging the calculation of good-time credits by prison authorities. The prisoners "sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in prison." 411 U.S. at 476-77. Explaining that the very essence of habeas corpus is an attack on the "fact or duration" of confinement, the Court ruled that the prisoners' exclusive federal remedy was an action for habeas corpus. Id. at 500. The prisoners'

claim, the Court reasoned, "goes directly to the constitutionality of [their] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." *Id.* at 489 (emphasis added). See also *id.* at 498, 500 (same). Thus, the Court's holding turned on both the nature of the prisoners' claim (a direct attack on the "fact or duration" of their confinement) and the nature of the relief sought in the lawsuit. In holding that habeas was the sole federal remedy available, the Court stressed the federalism concerns underlying the exhaustion requirement of the federal habeas corpus statute and explained that the more specific provisions of 28 U.S.C. § 2254(b) overrode the broader terms of Section 1983. 411 U.S. at 488-90, 493 n.10.

In *Preiser*, the prisoners argued that requiring exhaustion of state habeas remedies might extinguish a damages remedy under Section 1983, because a prisoner who lost in the state courts would be barred by res judicata from relitigating the issue in a subsequent Section 1983 suit, and this would be true even if "a federal habeas court had later granted him relief on habeas corpus." 411 U.S. at 493-94. In rejecting that argument, this Court explained:

The answer to this contention is that the respondents here sought no damages, but only equitable relief -- restoration of their good-time credits -- and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release -- the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal

court without any requirement of prior exhaustion of state remedies.

Id. at 494 (emphasis added in part). Preiser thus made unequivocally clear that a claim for damages is, by its very nature, not an attack on the "fact or length" of confinement and is maintainable in a Section 1983 suit "without any requirement of prior exhaustion of state remedies." Ibid.

This teaching was reaffirmed in Wolff. There, a class of inmates brought suit under Section 1983 for both injunctive relief and damages, contending that (1) prisoner disciplinary proceedings violated due process, (2) regulations concerning inmate mail were unduly restrictive, and (3) the inmate legal assistance program was constitutionally defective. The Court considered each claim separately.

In discussing the plaintiffs' claim that "the rules, practices, and procedures at the [prison] which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment" (418 U.S. at 553), the Court took pains to distinguish, at the outset, the various kinds of relief being sought by the plaintiffs: (a) restoration of good time, (b) submission of a plan by the prison authorities for a constitutionally adequate hearing procedure, and (c) damages. "At the threshold," the Court explained, "is the issue whether under Preiser * * * the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C. § 1983." 418 U.S. at 554. Preiser, the Court continued, had held "that because the state prisoners were challenging the very fact

or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, with the concomitant requirement of exhausting state remedies." Ibid. (emphasis added) (citation omitted). But Preiser, the Court continued,

was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.

The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under Preiser. But the complaint also sought damages; and Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by Preiser; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

Id. at 554-55 (footnote and citations omitted; emphasis added).

Finally, in Gerstein v. Pugh, 420 U.S. 103 (1975), the Court reaffirmed the critical importance of the type of relief being sought in a prisoner lawsuit in determining whether the suit was properly characterized under Section 1983, habeas corpus, or both. Gerstein was a class action brought under Section 1983 by pretrial detainees who were being held on the strength of prosecutors' informations without a judicial hearing on probable cause. The plaintiffs sought both a declaration that their detention on these terms violated the Fourth

Amendment, and an injunction directing the State of Florida to provide them with a probable-cause determination. The Court observed:

Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. Preiser v. Rodriguez, 411 U.S. 475 (1973); see Wolff v. McDonnell, 418 U.S. 539, 554-555 (1974).

Id. at 107 n.6 (citation omitted; emphasis added). Having thus indicated, yet again, that the remedy requested in a prisoner lawsuit is dispositive on the question of characterization, the Court proceeded to decide the Fourth Amendment issue on the merits.

In Preiser, Wolff, and Gerstein, then, the Court plainly instructed that the nature of relief sought in a federal lawsuit filed by a state prisoner is the critical factor in determining whether the lawsuit was properly characterized as a Section 1983 action, a habeas petition, or both. This Court also explained that a damages claim was not an attack on the "fact or length" of confinement and thus could be maintained under Section 1983 "without any requirement of prior exhaustion of state remedies." Preiser, 411 U.S. at 494. The general rule that state remedies need not be exhausted in a Section 1983 action, moreover, was subsequently reaffirmed by this Court in Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982). By holding that a prisoner who is seeking damages must nevertheless pursue a remedy in habeas corpus, and must exhaust state habeas remedies before proceeding in federal court under Section 1983, the Seventh Circuit has simply

ignored the clear import of this Court's decisions. To correct that error, this Court should grant further review.

B. The Courts Of Appeals Are In Disarray On Whether A State Prisoner Must Exhaust State Remedies Before Bringing A Section 1983 Action

1. In addition to being irreconcilable with this Court's decisions, the decision below is in clear conflict with the Second Circuit's holding, in Mack v. Varelas, 835 F.2d 995 (1987), that the nature of the relief sought by a state prisoner in a Section 1983 action determines whether the lawsuit may proceed under Section 1983 without prior exhaustion of state remedies. There, the Second Circuit held that a prisoner's Sixth Amendment claim for damages against law enforcement officials -- based on their alleged failure to comply with a court order and produce a witness at his trial -- could not be maintained in a habeas proceeding, but rather only in an action under Section 1983. Reasoning that any damages suffered by Mack were "dependent on a determination of the invalidity of his conviction," the trial court had recharacterized the complaint as a habeas petition and ordered dismissal for failure to exhaust state remedies. 835 F.2d at 997. In rejecting the trial court's recharacterization, the Second Circuit relied on the above-quoted language from Preiser, explaining that "a civil rights action for damages, insofar as it does not also seek to void or shorten the term of imprisonment, is not a challenge that should be made by means of a habeas petition." Id. at 998. See

also ibid. ("Mack's complaint is a civil rights complaint and is not properly characterized as a habeas petition.").⁶

The Second Circuit's approach makes eminent sense. As that court explained, a prisoner's claim for damages -- even if based on an allegation that purportedly "implicates" the legality of his conviction -- is legally and logically distinct from any claim for release:

Were the present claim essentially a habeas petition, it would be mooted if Mack prevailed on appeal from his conviction; but in fact if Mack were to prevail on that appeal and he were then retried and acquitted, his present claim would not be mooted. * * * Nor would an affirmance of Mack's conviction necessarily negate the basis for his claim for damages, for * * * it is likely that the state appellate court will not reach the question of the propriety of the action or inaction by the sheriffs.

835 F.2d at 998.⁷

⁶ Although the Second Circuit in Mack concluded that "[t]reatment of the complaint as a petition for habeas corpus was * * * not proper, and the case should not have been dismissed for lack of exhaustion" (835 F.2d at 998-99), it concluded that postponement of adjudication (and a stay of the action) was appropriate under the doctrine of abstention, because Mack's direct appeal was still pending at the time the court of appeals rendered its decision and because "one possible outcome of the state court proceedings could negate an essential element of Mack's claim." Id. at 997, 999.

⁷ Consistent with Mack, the Second Circuit has in several other cases narrowly construed the boundaries of habeas corpus vis-a-vis Section 1983. See Abdul-Hakeem v. Koehler, 910 F.2d 66, 69 (2d Cir. 1990) (prisoner seeking transfer could sue under Section 1983 because he was not seeking release from confinement itself); Williams v. Ward, 556 F.2d 1143, 1150 (2d Cir.) (Friendly, J.) (prisoner seeking new parole hearing but not requesting release could sue under Section 1983 even though "the relief sought may improve [the prisoner's] chances for parole"), cert. dismissed, 434 U.S. 944 (1977).

That reasoning is squarely applicable here. Petitioner's claim seeks damages for the infringement of his constitutional rights and for time spent wrongfully in jail; that claim will not be satisfied (much less mooted) if petitioner gains his release. Under Mack, then, had petitioner brought his Section 1983 lawsuit in the Second Circuit, his constitutional claims for damages would not have been subject to judicial "recharacterization" as a petition for habeas corpus. There is no reason why prisoners confined in Illinois, Indiana, and Wisconsin should be required to exhaust state habeas remedies whereas those in New York, Vermont, and Connecticut are exempt from that requirement.

2. On the other hand, a number of other courts of appeals, like the Seventh Circuit in this case, apply rules both permitting the judicial recharacterization of Section 1983 damages claims filed by state prisoners where those claims somehow "implicate" the legality of the underlying conviction, and requiring such claimants to exhaust state remedies. See, e.g., Hamlin v. Warren, 664 F.2d 29 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Meadows v. Evans, 550 F.2d 345, 349 (5th Cir.) (en banc) (aff'g per curiam, 529 F.2d 385 (1976)), cert. denied, 434 U.S. 969 (1977).⁸ A remarkable number of these

⁸ Those courts disagree among themselves, however, about the scope of the required exhaustion. In the Fifth Circuit, for example, a state prisoner whose Section 1983 action is recharacterized as a habeas petition is required to exhaust not only state, but also federal habeas remedies. See Richardson v. Fleming, 651 F.2d 366, 375 (5th Cir. 1981) (directing prisoner to exhaust not only state remedies but also "federal habeas corpus remedies"); Grundstrom v. Darnell, 531 F.2d 272, 273 (5th Cir. 1976) (per curiam) (Section 1983 damages claims could not proceed until prisoner completed "habeas corpus challenge of the conviction pursuant to 28 U.S.C.A. § 2254"). In the Seventh Circuit, as in many other circuits, exhaustion of state habeas remedies alone is

decisions, however, have been issued over sharp dissents. See Hamlin, 664 F.2d at 33-36 (Winter, C.J., dissenting); Meadows, 550 F.2d at 349 (Tjoflat, J., joined by Tuttle, Goldberg, and Godbold, JJ., concurring in part and dissenting in part) (stating that Wolff and Preiser "expressly" and "unambiguously" "laid to rest" the notion that exhaustion doctrine applies in Section 1983 damages suits). See also Fulford v. Klein, 529 F.2d 377, 383 (5th Cir. 1976) (Tuttle, J., concurring in part and dissenting in part) (criticizing majority's rule as "contrary to the language and reasoning of the Supreme Court in [Wolff and Preiser]"), aff'd en banc, 550 F.2d 342 (1977).⁹

Indeed, even those courts that have recharacterized Section 1983 damages claims as actions for habeas relief have expressed serious reservations about whether such a rule can be squared with this Court's decisions. The Eleventh Circuit, for example, has applied an exhaustion requirement, but only because it was bound to follow decisions of the former Fifth Circuit. Gwin v. Snow, 870 F.2d 616

required.

⁹ In a series of Eighth Circuit decisions involving challenges to the conditions of confinement or to the denial of good time credits, various judges likewise have argued that Preiser and Wolff mandate a relief-based distinction between Section 1983 and habeas corpus. See Bressman v. Farrier, 900 F.2d 1305, 1309 (8th Cir. 1990) (Heaney, J., concurring and dissenting) (requiring exhaustion of Section 1983 damages claims is "contrary to congressional intent" and "inconsistent with decisions of the United States Supreme Court"), cert. denied, 498 U.S. 1126 (1991); Jones v. Smith, 835 F.2d 175 (8th Cir. 1987) (McMillian, J., dissenting); Offet v. Solem, 823 F.2d 1256, 1261 (8th Cir. 1987) (Arnold, J., dissenting) (majority's holding is "based upon a completely untenable reading of Supreme Court opinions"); ibid. ("I see no other way to read [Preiser]").

(11th Cir. 1989).¹⁰ In Gwin, the Eleventh Circuit analyzed Preiser and Wolff and concluded that, under those decisions, "the requested relief is the dispositive criterion for determining whether an action can lie under section 1983." Id. at 622; id. at 626 (same). "To the extent that [the Fifth Circuit's] decisions do not allow claims under section 1983 for relief which would not reduce a prisoner's confinement," the Eleventh Circuit declared, "such decisions impermissibly conflict with the Supreme Court's decisions." Id. at 623 (emphasis added).

The Ninth Circuit expressed similar misgivings in Young v. Kenny, 907 F.2d 875 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991), which required exhaustion of a damages claim based on the denial of jail time credits.¹¹ Writing for the panel, Judge Kozinski there explained that

¹⁰ Gwin is itself inconsistent with a previous Eleventh Circuit decision. Wahl v. McIver, 773 F.2d 1169, 1171 n.1 (11th Cir. 1985) (per curiam) ("Although [the prisoner] complains of the manner in which his conviction was obtained, this suit was properly treated as coming solely under section 1983 * * * [because the] prisoner does not ask for reversal of his conviction * * * .").

¹¹ This Court denied petitions for certiorari in Young and in Bressman v. Farrier, supra, over the dissenting votes of Justices White and O'Connor. See Bressman, 498 U.S. 1126, 1127 (1991) (stating that "[b]ecause of the confusion and divergence of opinion these issues have generated in the Courts of Appeals, and the fact that this Court has not ruled definitively upon the issues presented," petitions should be granted). Significant differences in the cases, however, make this one a far stronger candidate for review. Young and Bressman involved a different characterization issue from that presented here -- namely whether a prisoner's claim for damages based on the denial of sentence credits (Young), or good-time credits (Bressman), is subject to the exhaustion requirement. Moreover, the petitioner in Young erroneously conceded that there was no division of authority on the characterization issue. See No. 90-5854 Petition for Certiorari, at 7-8 & n.2; 498 U.S. at 1127. As explained in text, however, that concession disregarded the Second Circuit's decision in Mack. Furthermore, the respondents in Young argued that the plaintiff had in fact sought not only damages but also injunctive relief. See No. 90-

the court was "acutely aware" that language in Wolff "appears to conflict with the rule we have just adopted." Id. at 877. See also ibid. ("we * * * are unable to come up with a principled way of distinguishing Wolff"). In fact, the panel in Young explained that it would "feel bound to follow Wolff" and thus to decline to require exhaustion of a state prisoner's damages claim "were it not for a brief excursion made by the Supreme Court at the end of its opinion" in Tower v. Glover, 467 U.S. 914 (1984). 907 F.2d at 877. The Tower dictum, however, has no relevance to the issue of exhaustion.¹²

In all, then, there is a pervasive confusion and uncertainty among the courts of appeals on the propriety of requiring exhaustion. Further review by this Court -- no matter what the ultimate outcome on the merits -- accordingly is necessary to bring clarification and uniformity to an important area of the law.

5854 Br. in Opp. at 9-10.

¹² In Tower, this Court held that "public defenders are not immune from liability in actions brought by a criminal defendant against state public defenders who are alleged to have conspired with state officials to deprive the § 1983 plaintiff of federal constitutional rights." 467 U.S. at 916. At the end of the opinion, the Court added this observation: "We * * * have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." Id. at 923 (emphasis added). This comment, which simply reserves judgment on a different issue (the court's duty to abstain rather than the litigant's obligation to exhaust) hardly can be said to impliedly overrule Wolff.

C. The Decision Below Is Erroneous

Finally, it of course also bears emphasis that the decision to recharacterize petitioner's Section 1983 action and to require exhaustion on that basis is, in several respects, incorrect. To begin with, it cannot be reconciled with the available evidence of Congress's intent on the issue of exhaustion.¹³ Section 2254(b) expressly excludes from the exhaustion mandate claims for which "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective," thus suggesting that Congress intended to excuse state prisoners from making futile efforts to obtain damages in state post-conviction proceedings. 28 U.S.C. § 2254(b).¹⁴ What is more, Section 1997e of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. § 1997e, permits states to require exhaustion of state remedies prior to initiation of a Section 1983 action by a state prisoner -- but only in specified circumstances that are not present here. See Pet. App. 26a.

¹³ As this Court has repeatedly recognized, "legislative purpose * * * is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts." Patsy v. Florida Bd. of Regents, 457 U.S. 496, 501 (1982); see also McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992).

¹⁴ Relying on this exception, federal courts have declined to order exhaustion of state remedies where the only remedy sought in the federal petition is unavailable under state law. See, e.g., Brown v. Estelle, 530 F.2d 1280, 1284 (5th Cir. 1976) (prisoner under indictments on other charges need not exhaust state remedies where Texas courts could provide only release, but not a speedy trial on pending charges); Mott v. Dail, 337 F. Supp. 731, 731-32 (E.D.N.C. 1972) (prisoner seeking credit on sentence for time served need not exhaust state remedies where North Carolina courts could not provide this form of relief), appeal dismissed, 473 F.2d 1973 (4th Cir. 1973).

As this Court has repeatedly recognized, CRIPA is strong evidence that Congress intended exhaustion to be required in Section 1983 actions brought by state prisoners only in circumstances covered by the statute -- and not otherwise.¹⁵ See also Bressman v. Farrier, 900 F.2d 1305, 1311-14 (8th Cir. 1990) (Heaney, J., concurring and dissenting), cert. denied, 498 U.S. 1126 (1991).

Nor can the rule of recharacterization and exhaustion be justified of the ground advanced by the court below. The Seventh Circuit's view that exhaustion is necessary because, if petitioner "won his [Section 1983] case[,] the state would be obliged to release him" (Pet. App. 3a), rests on a misunderstanding of the applicable rules of issue preclusion. Even if petitioner were to prevail on his Section 1983 damages claims against the three governmental officials sued in their individual capacities in his complaint, petitioner could not invoke the issue-preclusive effect of that ruling against the State of Indiana in later Indiana proceedings for post-conviction relief. See Young v. Kenny, 907 F.2d at 876; Rule 1, §§ 2, 4(a), 9(d), 12(c), 12(f), Indiana

¹⁵ See McCarthy v. Madigan, 112 S. Ct. at 1089 (in declining to require federal prisoners to exhaust administrative remedies prior to bringing Bivens actions, indicating that "[w]e find it significant that Congress, in enacting Section 1997e, stopped short of imposing a parallel requirement in the federal prison context"); Patsy v. Board of Regents, 457 U.S. at 509 (stating that "[i]mplicit" in Congress's decision "to adopt the limited exhaustion requirement of § 1997e" is "Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits."). In Patsy, moreover, this Court went further and explained that Section 1997e's "detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases." 457 U.S. at 511; id. at 508 ("A judicially imposed exhaustion requirement would be inconsistent with Congress's decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.").

Rules of Post-Conviction Remedies (Burns 1993). It is elementary that collateral estoppel, or issue preclusion, may only be asserted only against a party that "litigated and lost in an earlier action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979).¹⁶ Accordingly, there is no risk here that the habeas exhaustion rule of Section 2254(b) will be circumvented through the operation of res judicata.¹⁷

In sum, the reasoning employed by the Seventh Circuit in ordering recharacterization and exhaustion of petitioner's damages claims is fundamentally flawed. There is no good reason to force petitioner to initiate against a different defendant a time-consuming state procedure that is incapable of providing the only relief he is seeking -- damages. Review of the judgment below accordingly is in order.

¹⁶ See Restatement (Second) of Judgments § 36 (1982) (party to be precluded in the second action must have appeared in the same capacity in the first action); Kentucky v. Graham, 473 U.S. 159, 167-68 (1985) ("A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him.").

¹⁷ Nor is the exhaustion requirement justifiable on the ground that the prisoner suing for damages under Section 1983 "in fact" desires his release. See McCarthy v. Madigan, 112 S. Ct. 1081, 1091 (1992) (courts "cannot presume, as a general matter, that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, specifically requesting monetary compensation only, that he is likely interested in 'other things'"); Hamlin v. Warren, 664 F.2d 29, 33 (4th Cir. 1982) (Winter, C.J., dissenting) (pointing out that plaintiff "was never interrogated on his motives").

II. If A Section 1983 Plaintiff Must Exhaust State Remedies, The Section 1983 Action Should Be Stayed, Rather Than Dismissed, In The Interim

Wholly apart from the propriety of the court of appeals' decision to require exhaustion of state remedies, its decision to dismiss rather than stay petitioner's Section 1983 action pending exhaustion "creates an intercircuit conflict," as the court below itself expressly acknowledged. Pet. App. 5a. But the holding below does more than "disagree" with the published decisions of seven other courts of appeals (id. at 3a) on the "difficult question" presented here (ibid.): the Seventh Circuit's holding that a Section 1983 action should be dismissed pending exhaustion will preclude the assertion of meritorious constitutional claims and create an additional layer of litigation in an already over-litigated area. Because that holding also is inconsistent both with decisions of this Court and with the manifest congressional intent, further review is warranted. Indeed, this issue is of enormous practical importance and warrants the Court's consideration even if it believes that review of the precedent question -- whether exhaustion is required -- is unnecessary.

A. The Decision Below Conflicts With The Holdings Of Other Courts Of Appeals

1. At the outset, the existence of a conflict in the circuits on this issue is undeniable, as the court below frankly acknowledged. The court of appeals itself recognized that the Second, Fifth, Eighth, and Ninth Circuits have held that dismissal of a Section 1983 claim is inappropriate in the circumstances of this case because it exposes the claimant to the risk that his damages action, when later refiled, will

be deemed barred by the statute of limitations. Pet. App. 3a (citing Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); and Richardson v. Fleming, 651 F.2d 366 (5th Cir. 1981)). In addition, the Third, Fourth, Sixth, Tenth, and Eleventh Circuits have reached the same result. Prather v. Norman, 901 F.2d 915, 919 (11th Cir. 1990); Feaster v. Miksch, 846 F.2d 21, 24 (6th Cir.), cert. denied, 488 U.S. 857 (1988); Harper v. Jeffries, 808 F.2d 281, 285 (3d Cir. 1986); Hamlin v. Warren, 664 F.2d 29, 32 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Smith v. Macy, 1992 U.S. App. LEXIS 1930 (10th Cir. Feb. 5, 1992) (unpublished disposition).

The analysis used by the Ninth Circuit in Young is typical. There, the court of appeals vacated the district court's order dismissing a prisoner's Section 1983 action and remanded for entry of a stay. Writing for the court, Judge Kozinski explained that dismissal "could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement" because exhaustion "may take years to complete" and "it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." 907 F.2d at 878. "[I]t would hardly promote the goals of the Civil Rights Act of 1871," the Ninth Circuit added, "to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and

again for being too late." Ibid. Accord, e.g., Jewell, 917 F.2d at 740-41 (vacating order of dismissal and remanding for entry of stay, since dismissal "would work a time-bar to reassertion of the § 1983 claim"); Offet, 823 F.2d at 1261 (reversing dismissal and directing district court to enter stay).¹⁸

As the court below recognized, that is precisely the danger here. See Pet. App. 3a-5a. The misconduct alleged in petitioner's lawsuit occurred in 1987; this action was timely filed on December 27, 1988. Under Owens v. Okure, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action must be borrowed from Ind. Code § 34-1-2-2, which provides a two-year limitations period for personal injury actions. As the court of appeals further noted, the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment" and, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." Pet. App. 3a. In these circumstances, other circuits plainly would have stayed, rather than dismissed, petitioner's Section 1983 action.

¹⁸ More recently, the Fifth Circuit has held that dismissal, rather than a stay, may be ordered in cases in which the plaintiff would be required to exhaust his remedies under Texas law. Jackson v. Johnson, 950 F.2d 263 (1992) (per curiam). As the court in Jackson explained, Texas adheres to a rule of "habeas abstention" under which state courts will not adjudicate state habeas claims while related federal claims are pending. Id. at 266. Thus, unless a federal court dismisses outright a Texas prisoner's § 1983 claim, the prisoner would never be able to satisfy the exhaustion requirement.

2. Recognizing this problem, the court below concluded that the prospect of a time-bar might be dealt with by invocation of the doctrine of equitable tolling -- in particular, by creation of a federal rule of equitable tolling.¹⁹ For several reasons, however, the court of appeals' suggestion that an equitable tolling doctrine might

¹⁹ The court recognized that, under Hardin v. Straub, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits." Pet. App. 4a. The court also observed that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." Pet. App. 3a. The State of Indiana agreed, in its supplemental brief filed below, that equitable tolling is unavailable under Indiana law in a case such as this one.

While the court of appeals identified Torres v. Parkview Foods, 468 N.E.2d 580 (Ind. App. 1984), as a case in which an Indiana court applied what the panel described as "a form of" equitable tolling (Pet. App. 4a), that decision almost certainly would not apply here. In Torres, the plaintiff mistakenly filed a lawsuit in federal court that was dismissed for lack of diversity. The court held that the statute of limitations was suspended at the time of the federal filing and that a subsequent state action could be initiated outside of the original limitations period. Id. at 583. Torres was based on the Indiana Journey's Account Statute, Ind. Code § 34-1-2-8, which provides that if a plaintiff's lawsuit "fails," a new action may be brought within five years. That statute, however, provides an extension only if the decision in the first action was not on the merits. Vesolowski v. Repay, 520 N.E.2d 433, 435 (Ind. 1988). In Torres, of course, the dismissal for lack of diversity jurisdiction was not on the merits, so the second suit could proceed. But neither Torres nor the Journey's Account Statute speaks to the situation here, where a plaintiff whose case is dismissed must then engage in a full round of collateral litigation in another forum before he can again present his claim. There is no provision in Indiana law for extending the statute of limitations if petitioner seeks post-conviction relief in the state courts and receives a determination on the merits. The court below, however, was not troubled by this point, explaining that "should it turn out that Indiana would not apply equitable tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal [tolling doctrine] would be applicable, and we think it would be." Pet. App. 4a.

be applied here detracts neither from the importance of this case nor from the necessity for review by this Court.

First, application of an equitable tolling rule by the Seventh Circuit means that identically situated litigants in different circuits will be treated dissimilarly. If petitioner's suit had been brought in the Second, Third, Fourth, Fifth, Eighth, Ninth, or Tenth Circuits, he would, upon exhaustion of his state remedies, proceed immediately to the litigation of the merits of his Section 1983 action. In the Seventh Circuit, in contrast, he will have to litigate questions related to the statute of limitations. At best, this means that he will be subjected to a uniquely time-consuming and burdensome round of procedural litigation that is not required by other circuits; at worst, the Seventh Circuit's approach means that petitioner's claim will be time-barred.

Second, the Seventh Circuit's invocation of a federal rule of equitable tolling is itself inconsistent with the Second Circuit's decision in Jewell v. County of Nassau, supra. In Jewell, a prisoner filed a Section 1983 suit one day before expiration of the applicable New York statute of limitations, seeking damages and contending that "he was unlawfully arrested and questioned, his home was illegally searched, and as a result of these actions, he was improperly convicted of manslaughter." 917 F.2d at 739. The district court dismissed the suit pending exhaustion of state remedies because motions collaterally attacking the prisoner's conviction were pending in state court. The Second Circuit reversed. Explaining that New York law did not permit

tolling under the circumstances presented in the case, the court of appeals, relying on this Court's decisions in Board of Regents v. Tomanio, 446 U.S. 478 (1980), and Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), held that it was bound to follow state-law tolling rules because their application "does not violate" the "policy underlying the federal cause of action." 917 F.2d at 740. On the basis of this analysis, the Second Circuit concluded that dismissal would lead to the prisoner's Section 1983 suit being time barred and, accordingly, that the dismissal was erroneous. The Seventh Circuit itself acknowledged that its holding cannot be reconciled with Jewell, which "reached a different conclusion in a similar case." Pet. App. 4a.

Indeed, as the Second Circuit explained, the creation of a federal equitable tolling rule for use in Section 1983 litigation is in significant tension with this Court's decisions. On at least three occasions the Court has specifically declined to substitute a federal for a state tolling rule in a Section 1983 action, cautioning against "unravel[ing] state limitations rules" that apply to federal causes of action. Hardin v. Straub, 490 U.S. 536, 539 (1989). See id. at 543-44; Chardon v. Fumero Soto, 462 U.S. 650, 655-62 (1983); Tomanio, 446 U.S. at 492.²⁰ See also Wilson v. Garcia, 471 U.S. 261, 269 (1985); Johnson, 421 U.S. at 463-64.

The court below nevertheless concluded that if Indiana law would not excuse petitioner from compliance with the statute of limitations,

²⁰ The Court also has declined to adopt a federal tolling rule in cases arising under 42 U.S.C. § 1981. See Johnson, 421 U.S. at 466.

a federal tolling doctrine would have to apply because it would be "essential to the vindication of federal rights." Pet. App. 4a. But while this Court has recognized the possibility that state statutes of limitations and related tolling doctrines might not be used in Section 1983 litigation when their use "would defeat the goals of the federal statute" (Hardin, 490 U.S. at 539), the Court declined to apply that exception in Hardin, Chardon, and Tomanio. The Seventh Circuit offered no persuasive reason why the outcome would be any different in this case. See also Tomanio, 446 U.S. at 488 (explaining that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation") (internal quotations omitted); Robertson v. Wegmann, 436 U.S. 584 (1978) (applying state survivorship statute even though it precluded continuation of Section 1983 action).

Third, the Seventh Circuit's invocation of equitable tolling cannot be dismissed as a harmless frolic and detour that simply takes an alternative route to the same result (preservation of otherwise time-barred Section 1983 claims) as that reached by the circuits that stay Section 1983 actions pending exhaustion. For one thing, the Seventh Circuit's approach creates an additional layer of wasteful and time-consuming litigation. Resolution of disputes about whether the statute of limitations should be tolled will require the expenditure of very substantial judicial resources: federal courts will first have to examine state tolling rules, which is far from a simple matter (see Chardon, 462 U.S. at 667 (Rehnquist, J., dissenting)), and then (if state law does not recognize tolling) will have to proceed to a fact-

specific inquiry into the plaintiff's good faith, the diligence with which the suit was pursued, and the possibility of prejudice to the defendant. See Pet. App. 4a.²¹ This inquiry often will be more complex than an examination of the merits.²²

By the same token, the course taken by the Seventh Circuit, in addition to being longer and rockier than the one charted by other courts of appeals, does not necessarily lead to the same destination. Under the equitable tolling doctrine recognized by the court below, a plaintiff may be time-barred through no fault of his own because delay has prejudiced the defense -- even though the plaintiff acted with due diligence and his failure to exhaust was "excusable." See Pet. App. 4a. If this rule is applied strictly, the Seventh Circuit will bar claims that other courts will permit; if it is applied loosely, the Seventh Circuit will have required a large volume of additional litigation that is to no one's advantage. In either case, the conflict in the circuits on this point warrants this Court's attention.

²¹ Insofar as the court of appeals was concerned that a plaintiff may be inexcusably dilatory in pursuing his claim (see Pet. App. 3a-4a), it failed to recognize that it is within a district court's inherent power, following the issuance of a stay, to take such actions as may become necessary to respond to occurrences in the state court proceedings. Harrison v. NAACP, 360 U.S. 167, 178 (1959); Romany v. Colegio de Abogados de Puerto Rico, 742 F.2d 32, 44 (1st Cir. 1984); New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Educ., 654 F.2d 868, 887-88 (3d Cir. 1981).

²² See Cleavinger v. Saxner, 474 U.S. 193, 207-08 (1985) ("the vast majority of prisoner cases are resolved on the complaint alone.")

B. Section 1983 Suits Should Be Stayed Pending Exhaustion

It should be added that the decision below merits review not only because the circuits are in conflict on the stay versus dismissal issue, but also because the Seventh Circuit's conclusion plainly is incorrect. In circumstances substantially identical to those here, this Court held in Deakins v. Monaghan, 484 U.S. 193 (1988), that staying the Section 1983 action is the proper course. In Deakins, the targets of a criminal investigation by state officials brought suit under Section 1983 seeking the return of records and documents seized during the investigation, compensatory and punitive damages for asserted violations of their constitutional rights, and attorneys' fees. In light of the pendency of a grand jury investigation, the district court abstained under Younger v. Harris, 401 U.S. 37 (1971), and ordered the complaint dismissed.

This Court assumed without deciding that Younger abstention applies to Section 1983 claims for monetary relief and then instructed, in language equally applicable here, that a "District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." Deakins, 484 U.S. at 202 (emphasis added). Endorsing as "sound" the Third Circuit's rule "requir[ing] a District Court to stay rather than dismiss" such claims, this Court explained that the requirement to stay "allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts to assume

jurisdiction where jurisdiction properly exists." Id. at 202-03 (internal quotations omitted). The Court specifically took note of the risk that, "unless [a district court] retain[s] jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations." Id. at 203 n.7.²³

As several courts of appeal have recognized, the rationale of Deakins applies with equal force where a prisoner's Section 1983 claim for money damages must be exhausted in the state courts. Prather, 901 F.2d at 919; Feaster, 846 F.2d at 24; Williams v. Hepting, 844 F.2d 138, 144-45 (3d Cir.), cert. denied, 488 U.S. 851 (1988). The risk of forfeiture of legal rights posed by the statute of limitations is the same in both contexts. Petitioner's claim for damages cannot be redressed in Indiana post-conviction proceedings. See Rule 1, § 6, Indiana Rules of Procedure for Post-Conviction Remedies (Burns 1993) (if petitioner is entitled to relief, court "shall enter an appropriate order with respect to the conviction or sentence"). The district court accordingly has the same "unflagging obligation" (Deakins, 484 U.S. at 203, quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)) to exercise jurisdiction over petitioner's

²³ A stay under the circumstances presented in Deakins is consistent with the settled rule that courts should stay the action and retain jurisdiction when Pullman-type abstention is appropriate. See American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973) (per curiam); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 512-13 (1972); Zwickler v. Koota, 389 U.S. 241, 244-45 (1967).

claims as did the court in Deakins. The panel's decision cannot be squared with the logic of Deakins.

In addition to disregarding the clear import of Deakins, the court below gave no weight to compelling evidence that a stay, rather than dismissal, is consistent with congressional intent. As explained above (see page 23, supra), in enacting CRIPA in 1980 Congress included a limited exhaustion provision that permits a federal court, under certain circumstances, to require a prisoner to exhaust state remedies. 42 U.S.C. § 1997e. Even if a court determines that exhaustion "would be appropriate and in the interests of justice," however, it is authorized by the statute only to "continue such case for a period of not to exceed ninety days in order to require exhaustion." Ibid. (emphasis added). Notably, Congress did not authorize dismissal of prisoner Section 1983 actions subject to CRIPA's limited exhaustion requirement, and indeed it limited the duration of any stay to a period of ninety days. McCarthy v. Madigan, 112 S. Ct. 1081, 1089 (1992). The panel's decision in this case cannot be reconciled with Congress's intent as reflected in Section 1997e. Cf. id. at 1086 (1992).²⁴

²⁴ In McCarthy, this Court held that a federal prisoner seeking only money damages in a Bivens action need not first exhaust administrative remedies in the federal Bureau of Prisons (BOP), because BOP remedies could not provide the only relief sought by the prisoner -- damages. In rejecting the exhaustion rule urged by the United States, this Court relied in part on the fact that the government's rule authorized dismissal for failure to exhaust, whereas Section 1997e of CRIPA -- the best evidence of Congress's intent -- permitted only a stay. 112 S. Ct. at 1089. Like the government's rule of exhaustion in McCarthy, the Seventh Circuit's rule of automatic dismissal is contrary to Congress's intent as expressed in CRIPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1993