No. 03-287

In the Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, *et al.*,

Petitioners,

v.

WILLIAM DWIGHT DOTSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT WILLIAM DOTSON

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QUESTIONS PRESENTED

In *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994), the Court held that a state prisoner cannot advance a claim under 42 U.S.C. § 1983 that would "necessarily imply the invalidity of his conviction or sentence," unless and until he has first invalidated the underlying "conviction or sentence." The questions presented in this case with respect to respondent Dotson are:

1. Does *Heck* bar a prisoner's Section 1983 claims that challenge, on *ex post facto* grounds, the procedures and parole-eligibility standards that will be applied to him in future parole proceedings, and that seek only permanent injunctive and associated declaratory relief against state parole officials relating to the conduct of those future proceedings?

2. Does *Heck* bar a prisoner's Section 1983 claim that calls into question a non-binding recommendation of a parole officer, made to the Parole Board, concerning the future scheduling of a discretionary parole hearing, especially where subsequent events have deprived the recommendation of any continuing effect and thus mooted any challenge to the recommendation that might have been brought under 28 U.S.C. § 2254?

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STATEMENT

This case arises out of the efforts of two Ohio inmates to challenge, in civil rights actions under 42 U.S.C. § 1983, certain procedures used by the State in parole proceedings. Respondent William Dotson challenged, among other things, the Ohio Parole Board's anticipated use and retroactive application to him, in future parole proceedings, of certain new guidelines and procedures that would have the effect of rescinding his eligibility for parole and decreasing the frequency of parole hearings to which he would be entitled in the future. The district court dismissed Dotson's *ex post facto* claims for "prospective" relief (J.A. 10) as barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994), reasoning that success on those claims would "necessarily imply the invalidity" of his conviction or sentence. In reversing, all eleven members of the Sixth Circuit who sat on the three-judge and en banc panels agreed that *Heck* poses no barrier to Dotson's constitutional claims.

A. Factual Background To This Litigation

In 1981, Ohio convicted respondent Dotson of aggravated murder and sentenced him to life imprisonment.[1] Because Dotson's offense was committed before October 19, 1981, state law provided that he would "become[] eligible for parole after serving a term of fifteen full years." OHIO REV. CODE. ANN. § 2967.13(B) (Anderson 1994) (Pet. Br. S-2).[2] Thus, after 15 years had passed (including time spent in jail awaiting trial), Dotson's first parole hearing was held in April 1995. J.A. 16 (Cplt. ¶ 11). The purpose of such a so-called "release hearing" is to determine whether the prisoner is *suitable* for parole, that is, whether release "would further the interests of justice and be

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[1] The background facts are drawn largely from Dotson's *pro se* complaint, which was dismissed under 28 U.S.C. § 1915(e). Pet. App. 47a-51a.

[2] This provision was repealed in 1996 as part of an overhaul of Ohio's sentencing and parole system. Petitioners concede, however, that Dotson's sentence continues "to be controlled by pre-1996 law." Pet. Br. 5 n.1.

consistent with the welfare and security of society." OHIO REV. CODE ANN. § 2967.03 (Anderson 1994) (Pet. Br. S-1).

To give more specific content to this general standard, the administrative regulations governing the Ohio Parole Board in place at the time of Dotson's offense (and in 1995) provided that an inmate *may* be released, unless the Board finds release inappropriate for one or more of the following reasons:

> (1) There is substantial reason to believe that the inmate will engage in further criminal conduct, or * * * will not conform to * * * conditions of release * * * ;
>
> (2) There is substantial reason to believe that due to the serious nature of the crime, the release * * * would create undue risk to public safety, or * * * would not further the interest of justice nor be consistent with the welfare and security of society;
>
> (3) There is substantial reason to believe that due to serious infractions of Administrative Regulations, the release * * * would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules * * *;
>
> (4) There is a need for additional information upon which to make a release decision.

OHIO ADMIN. CODE § 5120:1-07(A) (1975) (J.A. 21); see Pet. Br. S-2 to S-3 (1997 version). Although the presence of one or more of these factors requires the denial of parole, their absence does not mean that parole must automatically be granted. In assessing a prisoner's suitability for parole, the Board retains significant discretion to refuse to release a prisoner based on considerations not enumerated in the regulations. See *Inmates of Orient Correctional Inst.* v. *Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-36 (6th Cir. 1991); *Layne* v. *Ohio Adult Parole Auth*., 780 N.E.2d 548, 555 (Ohio 2002).

At Dotson's initial release hearing in April 1995, the Parole Board decided against releasing him. J.A. 16 (Cplt. ¶ 11); Pet. App. 7a, 22a, 38a. The Board further found that, because of the

nature of Dotson's offense, a second release hearing would be deferred for ten years. J.A. 16 (Cplt. ¶ 12). Dotson's next release hearing was accordingly scheduled for June 2005. *Ibid.*[3]

Ohio's administrative regulations require that prisoners denied parole at a release hearing that occurred before April 1, 1998 (and whose next hearing is deferred for 20 months or more), are entitled to a "review" after half the length of the deferral period has expired. OHIO ADMIN. CODE § 5120:1-1-20(A) (1998) (Pet. Br. S-6). The sole purpose of this so-called "halfway review" is to determine whether the inmate should receive an earlier parole release hearing than the one originally scheduled. *Id.* § 5120:1-1-20(E) (Pet. Br. S-7). A favorable decision at the halfway review does *not* result in the prisoner's release from incarceration, or make it likelier that the inmate will succeed at his release hearing in obtaining parole.

Under the Ohio regulations, the halfway review proceeds in two steps. The first stage is conducted by a single "parole board hearing officer or other person designated by the chairman of the parole board." OHIO ADMIN. CODE § 5120:1-1-20(B) (Pet. Br. S-6). Based on a review of the inmate's file, any written submissions the inmate might make, and any further investigation the parole officer elects to undertake, the parole officer formulates a recommendation as to whether the next scheduled release hearing should be moved up and conveys that recommendation to the chairman of the Parole Board. *Id.*

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[3] At the time of the 1995 hearing, Ohio regulations provided that, when a prisoner was denied parole, the Parole Board must schedule another hearing no "later than five years beyond the minimum eligibility date for release consideration, unless for good cause shown." OHIO ADMIN. CODE § 5120:1-1-10 (1979); see J.A. 14, 24 (Cplt. ¶ 5 & Exh. B). Moreover, "[i]f release is denied at such second hearing, the inmate *shall be eligible for annual hearings thereafter*." OHIO ADMIN. CODE § 5120:1-1-10 (1979) (emphasis added); see J.A. 14, 24 (Cplt. ¶ 5 & Exh. B). This provision was amended on March 16, 1998, to eliminate the right to annual hearings following a second denial of parole. See J.A. 14-15, 25 (Cplt. ¶ 7 & Exh. C). Under the current version of the regulation, the inmate's second and later release hearings may be scheduled up to ten years after the date of the denial of parole.

§ 5120:1-1-20(B)-(H) (Pet. Br. S-6 to S-8). At the second stage of the halfway review, the Parole Board chairman decides whether or not to accept the recommendation. *Id*. § 5120:1-1-20(J) (Pet. Br. S-8). Even if the parole officer recommends an earlier release hearing, it remains the prerogative of the Board to accept or deny that recommendation and schedule such a hearing as it sees fit. *Ibid.*

In accordance with these procedures, Dotson received the first stage of his halfway review on March 10, 2000. J.A. 16-17 (Cplt. ¶ 13). On March 1, 1998, however, the Parole Board had adopted new guidelines for making parole decisions. *Id*. at 14, 17, 27-28 (Cplt. ¶¶ 6, 14 & Exh. D). Those guidelines take the form of a two-dimensional grid that assigns numerical scores to both the severity of the inmate's offense and the likelihood of recidivism ("criminal history/risk" score). J.A. 27 (Cplt. Exh. D). At the intersection of these two numbers lies a range of months that the prisoner is expected to serve before becoming a candidate for parole. Although "the Parole Board may depart from the guidelines (either upward or downward)" (*ibid*.), in practice it "usually follows them." Pet. Br. 7.

At the first stage of Dotson's halfway review in 2000, the parole officer – retroactively applying the newly promulgated guidelines – assigned Dotson a range of 390 months to life. J.A. 17, 37 (Cplt. ¶ 15 & Exh. G); Pet. App. 7a. At that time, Dotson had served only 230 months; by the time of his scheduled release hearing in 2005, he would have served only 293 months. J.A. 37 (Cplt. Exh. G). Accordingly, after finding that Dotson's "continuance date remains short of the Guideline Range," the parole officer recommended that no earlier release hearing be scheduled. *Ibid.*

The record is silent as to the outcome of the second stage of Dotson's halfway review. In their brief, petitioners, citing Dotson's complaint, say that the parole officer's recommendation "was apparently accepted." Pet. Br. 12.

Acceptance of the parole hearing officer's recommendation by the Parole Board would mean (in the absence of intervening action by the Board) that Dotson would not come before the Board for a release hearing until June 2005. At that time, however, Dotson will still be 97 months short of his guideline-assigned parole *eligibility* date; if the guidelines are followed, therefore, the 2005 release hearing will be essentially symbolic, as Dotson will have no meaningful opportunity to have his *suitability* for parole evaluated by the Board.

B. The Proceedings In The District Court

1. Shortly after it became clear during the halfway review that the parole hearing officer had based his recommendation on the retroactive application of the 1998 guidelines, Dotson filed a *pro se* complaint in federal district court. See J.A. 10-20. Dotson claimed, among other things, that the retroactive application of those guidelines to him in future parole proceedings – and the postponement of his eligibility for parole until he had served 390 months in prison – would contravene both the *Ex Post Facto* Clause of Article I, Section 10 of the U.S. Constitution, and the Due Process Clause of the Fourteenth Amendment. J.A. 17-18.

According to the complaint, the Board's retroactive change in the parole standards and procedures, if used to determine Dotson's eligibility for parole, would work to his disadvantage in at least two ways. *First*, it would eliminate the possibility that he would be a candidate for release at his 2005 hearing. J.A. 17-19 (Cplt. ¶¶ 1-3). That result, Dotson contended, was inconsistent with an Ohio statute, in force at the time of the commission of the crime, providing that he would "become[] eligible for parole after serving a term of fifteen full years." OHIO REV. CODE. ANN. § 2967.13(B) (Anderson 1994).

Second, Dotson claimed that retroactive application of the March 16, 1998, regulations (see note 3, *supra*) would disadvantage him by "alter[ing] and cancel[ing] the period between parole reconsideration hearings." J.A. 19 (Cplt. ¶ 4). Specifical-

ly, he noted that the old regulations "mandated" that, following the denial of parole at a second release hearing, the Board would provide an inmate with "annual hearings thereafter"; in contrast, the 1998 regulations "authoriz[e] initial hearing continuances for *up to ten (10) years* with no chance of any second reconsideration hearing prior to the expiration of that time." J.A. 19 (Cplt. ¶ 4) (emphasis added). Thus, Dotson objected to the possibility that the new regulations would be applied to him after his second release hearing in 2005, with the result that he could be denied a third release hearing *for ten years* (in contrast to his right to *annual* hearings under the old regulations).

Dotson's complaint sought "prospective Declaratory And Injunctive Relief." J.A. 10; *id.* at 20. More specifically, he asked the court to "issue a binding statement declaring and explaining" his "due process rights" under the Ohio statutes and regulations in effect before the 1998 changes. J.A. 20 (Cplt. ¶ 1). He also requested a declaration regarding the "legal rights" and "duties" of "all parties" under the *Ex Post Facto* Clause. J.A. 20 (Cplt. ¶ 2). Finally, he requested "a permanent injunction" directing the defendant Ohio officials (petitioners in this Court) "to comply with the court's declarations" concerning Dotson's constitutional rights "and to proceed toward a prompt and immediate parole hearing in accordance with the statutory and administrative rules in place when [Dotson] committed his crimes." J.A. 20 (Cplt. ¶ 3).[4]

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[4] Based on the complaint's request that a "permanent injunction" be issued against petitioners ordering them to "proceed toward" a parole hearing that is "prompt and immediate" (J.A. 20 (Cplt. ¶ 3)), petitioners suggest that Dotson was actually seeking an order *vacating* the parole officer's recommendation at the halfway review in 2000. But the complaint nowhere requests vacatur as a remedy and, as noted above, it expressly limits the relief sought to "*prospective* Declaratory And Injunctive Relief." J.A. 10 (emphasis added). Moreover, because the record is unclear whether, at the time the complaint was filed (May 12, 2000), the Parole Board had acted on the parole officer's March 10, 2000 recommendation (J.A. 37), it is possible to read Dotson's complaint as seeking merely to have the federal court enjoin the Parole Board *not to accept* the officer's negative recommendation. Petitioners, however, interpret Dotson's complaint as requesting that the

2. The district court dismissed Dotson's complaint *sua sponte* on the ground that his claims were barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). See Pet. App. 47a-51a.

C. The Proceedings In The Court Of Appeals

Dotson took a *pro se* appeal to the Sixth Circuit. Petitioners elected not to submit a brief. See Pet. App. 40a.

On February 7, 2002, the Sixth Circuit sent the parties a notice indicating that the case had been submitted to a panel consisting of Judges Ryan, Boggs, and Cole, which would be sitting on April 25, 2002. Also on April 25, 2002, the Ohio Parole Board conducted another review of Dotson's parole status and issued a decision continuing his next parole release hearing until June 2005 and declining to schedule it earlier.[5]

1. A panel of the Sixth Circuit unanimously reversed the district court's dismissal order. Pet. App. 36a-46a. Writing for the court, Judge Ryan concluded that the district court had "fail[ed] to appreciate the nature of Dotson's challenge." *Id*. at 43a. Because Dotson was "not challenging the denial or revocation of parole," the court reasoned, but instead merely whether "the Parole Board properly revoked his *eligibility* for parole, his claim was not barred by *Heck*." Pet. App. 43a-44a (emphasis in original). Under *Heck*, Judge Ryan explained, "only prisoner challenges that 'necessarily imply' the invalidity of the conviction or challenge the duration of the physical imprisonment are not cognizable." Pet. App. 42a. Since that did not include "a prisoner's § 1983 challenge to the procedures employed in *parole eligibility* determinations," the district court's order of dismissal was mistaken. *Id*. at 43a.

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hearing officer be required to redo the first stage of the halfway review and formulate a new recommendation. Although that interpretation is at best debatable, petitioners' entire argument rests upon it.

[5] A copy of the April 25, 2002, Parole Board decision, which came to counsel's attention during the preparation of this brief, is not in the record of this case. Because this document bears on the question of mootness, however, we have reproduced it in an appendix to this brief. See App., *infra*, 1a-4a.

Judge Cole concurred, emphasizing that Dotson was challenging "only the *scheduling* of his release hearing" and not any "release decision." Pet. App. 46a (emphasis added). Because neither potential outcome of the scheduling decision – "resecheduling the hearing or not rescheduling the hearing – necessarily implies the invalidity of [Dotson's] continued confinement," Judge Cole explained, Dotson's Section 1983 action should have been allowed to proceed. *Ibid.*

2. The court of appeals *sua sponte* reheard Dotson's appeal en banc, together with the appeals of respondent Rogerico Johnson and another prisoner whose case presented similar issues. J.A. 5-6; Pet. Br. 15. As to Dotson's claims, the en banc court unanimously reached the same conclusion as the panel and reversed the district court's judgment. Pet. App. 4a-35a.

Chief Judge Martin's majority opinion (for six judges) conducted an extensive review of this Court's decisions involving the intersection of habeas corpus and prisoner Section 1983 claims, as well as of the circuit decisions involving the application of *Heck* v. *Humphrey* to challenges to the procedures used in parole proceedings. Pet. App. 8a-16a. On the basis of that review, the court announced the following rule (*id*. at 19a-20a):

> where a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied in his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under section 1983.

Applying that principle, the court held that both Dotson's and Johnson's Section 1983 claims could proceed under *Heck*. The court of appeals first noted that Dotson's complaint did not challenge "the denial of parole" itself; instead, it challenged "the parole hearing" conducted in 2000, at which the parole officer "made a determination about Dotson's parole eligibility, not about his parole suitability." Pet. App. 7a. "Although

Dotson challenges a parole eligibility determination and Johnson a parole release determination," the court reasoned, "the success of either challenge would result" only in "a new hearing that would follow the appropriate procedures under Ohio law." Pet. App. 17a. Moreover, because parole is entirely discretionary in Ohio, "the impact the new hearings would have on Dotson and Johnson's parole or release is indeterminate." *Ibid.* Accordingly, the court concluded, "we cannot say that a successful section 1983 action that simply results in a new discretionary parole hearing 'necessarily implies' the invalidity of either plaintiff's conviction or sentence." *Ibid.*

Judge Gilman, joined by three judges, concurred in part and dissented in part. Pet. App. 20a-35a. Judge Gilman *agreed* with the majority that Dotson had stated a valid claim under Section 1983 that was not barred by *Heck*, making the resolution of Dotson's claim unanimous. Judge Gilman's disagreement with the majority was limited solely to the disposition of Johnson's case. According to Judge Gilman, the critical issue under *Heck* and later cases is not whether a Section 1983 claim, if successful, "will necessarily shorten a prisoner's time in jail" but rather whether it will "imply the invalidity of any state criminal judgments" – including the decisions of state administrative bodies such as parole boards – "relating to the length of a prisoner's incarceration." Pet. App. 21a, 23a.

Because Johnson was seeking to have "redone" a Parole Board hearing at which he was denied parole, Judge Gilman explained, his claim was barred by *Heck* under this rule. Pet. App. 33a. In contrast, "[t]he nature of Dotson's claim – an attack on the retroactive applicability of Ohio's statutory parole-eligibility scheme – does not necessarily imply the invalidity of any judgment by an administrative body that he is or is not entitled to parole." *Id.* at 28a. That is because in Dotson's case a "successful outcome would simply dictate that the 2005 hearing actually function as a real parole hearing, rather than as a rubberstamp denial rooted in the retroactive application of the current eligibility guidelines." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994), the Court held that a state prisoner cannot advance a claim under 42 U.S.C. § 1983 that would "necessarily imply the invalidity of his conviction or sentence," unless and until he has first invalidated the underlying "conviction or sentence." This case raises questions concerning the meaning of that standard as well as its applicability to certain challenges brought by respondents to procedures used in discretionary parole proceedings.

In addition to *Heck* itself, this Court has applied or discussed the *Heck* standard in four cases: *Edwards* v. *Balisok*, 520 U.S. 641 (1997); *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998); *Muhammad* v. *Close*, 124 S. Ct. 1303 (2004); and *Nelson* v. *Campbell*, 124 S. Ct. 2117 (2004). Taken together, these decisions establish four guideposts as to how the analysis under *Heck* must be conducted: (1) it is built upon a careful analysis of the precise claims asserted in a prisoner's Section 1983 lawsuit; (2) it requires an examination of whether the asserted claims, if successful, would "necessarily imply the invalidity" of the prisoner's conviction or sentence, which in turn requires an evaluation of the likely impact of success on the legality of the prisoner's conviction or term of confinement; (3) it requires courts to look beyond the labels used by the parties in assessing that impact; and (4) it does not lend itself to categorical rules.

In the decision below, the Sixth Circuit faithfully adhered to these principles in applying *Heck*'s standards to Dotson's claims. Although the eleven members of the en banc court and three-judge panel may have differed slightly in their interpretation of Dotson's complaint and in certain details of their analysis, they all agreed that *Heck* presents no impediment to the adjudication of Dotson's *ex post facto* claims under Section 1983. That holding was correct and should be affirmed.

Petitioners, in contrast, invite this Court to ignore all of the guideposts developed in this Court's previous cases involving

Heck. Thus, petitioners largely ignore the two primary *ex post facto* claims that are actually advanced in Dotson's complaint – both forward-looking challenges to the use of certain procedures and parole-eligibility standards in *future* parole proceedings – and instead largely base their argument on a questionable interpretation of what is at best a subsidiary claim in Dotson's complaint. Next, petitioners invite the Court to evaluate whether Dotson's claims "necessarily imply the invalidity of his conviction or sentence" (*Heck*, 512 U.S. at 487) by examining the likely impact that success on those claims will have *not* on the legality of Dotson's conviction or term of confinement *but rather* on the validity of a state administrative decision (here, a hearing officer's non-binding recommendation concerning the scheduling of a future parole hearing). Petitioners also offer up a new label of their own invention, urging the Court to hold that *Heck* bars Dotson's claims because the parole officer's scheduling recommendation amounts to a "sentencing decision." Finally, petitioners champion several new categorical rules that would preclude under *Heck* any prisoner claim that either can be said to cast doubt on a state administrative decision that might somehow, someday, "affect" a prisoner's sentence, or that might require a new hearing of some sort. These arguments are all mistaken.

I. Dotson's complaint advances two *ex post facto* claims targeting the anticipated use by Ohio officials of certain parole-eligibility standards and hearing procedures in *future* parole proceedings. On those claims, he seeks permanent injunctive and associated declaratory relief that would require Ohio parole officials to comply with the mandates of the *Ex Post Facto* Clause in the future. These claims plainly are not barred by *Heck* because they do not "necessarily imply the invalidity" of either Dotson's conviction or his term of confinement. Indeed, Dotson's claim that he will be entitled to annual parole release hearings following the second denial of parole by the Ohio parole officials – which petitioners conveniently ignore – carries no implication whatsoever for any past administrative decision or recommendation made by the State.

To the extent that Dotson's complaint also challenged a hearing officer's recommendation (made to the Parole Board during the 2000 halfway review) that Dotson's next parole release hearing *not* be rescheduled, that claim, if successful, would merely entitle Dotson to a new scheduling recommendation by the parole officer. The new recommendation might or might come out the same way, and it might or might not be accepted by the Parole Board. If a favorable recommendation were made by the hearing officer *and* accepted by the Board, the result would be a scheduling decision allowing Dotson an earlier parole release hearing. But since parole is entirely discretionary in Ohio, the outcome of that hearing might or might not result in Dotson's release. As this attenuated chain of causation suggests, Dotson's challenge to a preliminary stage of a scheduling decision concerning his next parole hearing, if successful, would not "necessarily imply" that his sentence or continuing incarceration was illegal. And, in any event, Dotson's challenge to the 2000 recommendation has now been effectively mooted by the Parole Board's intervening decision in April 2002 to conduct a new parole review – and make a superseding decision as to scheduling.

II. Petitioners' argument that Dotson's claims fall within the *exclusive* province of habeas, and therefore are absolutely barred under *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), should be rejected. The argument is outside the scope of the questions presented, which relate exclusively to the meaning and proper application of the *Heck* standard, and it was neither raised nor decided below. The argument is also wrong. Dotson is not challenging the legality of his conviction or his sentence; he is challenging the procedures and standards that will be applied to him in future parole proceedings. Because Dotson does not contend that his confinement or sentence is illegal – the situation habeas is designed to address – habeas is *not* the exclusive means to bring his claims before a federal court. Indeed, Dotson's claims may not be cognizable at all in habeas.

III. Petitioners fare no better in arguing (Br. 43) that "concerns of comity and federalism" justify expanding the *Heck* doctrine to cover Dotson's claims. Their argument overlooks the fact that Congress, by including an expanded exhaustion requirement applicable to prisoner claims in the Prison Litigation Reform Act of 1995, has already given the States a means to ensure that parole officials will have the first opportunity to correct federal constitutional violations relating to parole procedures. 42 U.S.C. § 1997e(a). To the extent petitioners want more, their arguments are properly directed at Congress. Petitioners' other arguments based on comity are all unavailing.

ARGUMENT

This case calls on the Court once again to clarify the relationship between 42 U.S.C. § 1983 and 28 U.S.C. § 2254. By its plain terms, Section 1983 broadly authorizes "any citizen of the United States or other person within the jurisdiction thereof" who has been "subjected * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws" to initiate a suit in federal court against any "person" who has caused the deprivation "under color of any statute, ordinance, custom, or usage, of any State or Territory of the District of Columbia." The narrower habeas corpus statute, 28 U.S.C. § 2254, authorizes "a person in custody pursuant to the judgment of a State court" to file an "application for a writ of habeas corpus" in the federal courts. Specifically, Section 2254 authorizes "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court" to "entertain" such an application, but "*only* on the ground that [the applicant] is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a) (emphasis added); see also 28 U.S.C. § 2241. Before a federal court will entertain such a habeas petition, however, the applicant ordinarily must "exhaust[] the remedies available in the courts of the State." *Id.* § 2254(b).

Over the years, Congress has made adjustments to both statutes in response to the special problems and issues that arise

in connection with state prisoners' use of the federal courts to challenge the legality of actions of state officials. In 1948, Congress amended Section 2254 to codify the exhaustion doctrine first recognized in *Ex parte Royall*, 117 U.S. 241 (1886). See *Preiser* v. *Rodriguez*, 411 U.S. 475, 488 n.8 (1973). More recently, Congress undertook an extensive revision of the habeas laws – including Section 2254 – by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. AEDPA imposes many new limitations on the availability of habeas corpus for state prisoners. See, *e.g.*, 28 U.S.C. §§ 2244(d)(1) (imposing one-year limitations period), 2244(b)(2) (limiting bases for relief in second or successive petitions), 2254(d) (limiting bases for relief where claim was adjudicated on the merits by state courts).

Congress has also repeatedly amended Section 1983 to take account of litigation by state prisoners. Thus, although exhaustion of state remedies is generally "not a prerequisite to an action under § 1983" (*Patsy* v. *Board of Regents*, 457 U.S. 496, 507 (1982)), Congress in 1980, as part of the Civil Rights for Institutionalized Persons Act, 94 Stat. 352, enacted a "limited exhaustion provision" (*McCarthy* v. *Madigan*, 503 U.S. 140, 150 (1992)) applicable to "any action brought pursuant to section 1983" by an adult prisoner. 42 U.S.C. § 1997e (1994 ed.); see *Porter* v. *Nussle*, 534 U.S. 516, 523-24 (2002). More recently, Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-73, which, among other things, "invigorated the exhaustion prescription" (*Porter*, 534 U.S. at 525) applicable to prisoner claims brought under Section 1983, see 42 U.S.C. § 1997e(a), and imposed many other special limitations and restrictions civil rights suits by prisoners. *Porter*, 534 U.S. at 532; see also *Booth* v. *Churner*, 532 U.S. 731, 739-41 (2001). See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627-33 (2003) (describing changes made by PLRA).

In addition to these many adjustments by Congress, this Court repeatedly has addressed the intersection of the habeas

corpus statute and Section 1983. *E.g.*, *Preiser*, *supra*; *Heck* v. *Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Court held that a prisoner cannot advance a damages claim under Section 1983 that would "necessarily imply the invalidity of his conviction or sentence," unless and until he has first invalidated the underlying "conviction or sentence." *Id*. at 487, 490; see also *Muhammad* v. *Close*, 124 S. Ct. 1303, 1306 (2004) (referring to *Heck*'s "favorable termination requirement"). The questions presented in this case involve the meaning and applicability of the "favorable termination" requirement announced in *Heck*. As we explain below, the Sixth Circuit was correct in concluding that *Heck* presents no bar to respondent Dotson's claims.

I. BECAUSE DOTSON'S CLAIMS, IF SUCCESSFUL, WOULD NOT "NECESSARILY IMPLY THE INVALIDITY" OF HIS CONVICTION OR SENTENCE, THEY ARE NOT BARRED BY *HECK*

The inquiry under *Heck* v. *Humphrey* properly focuses on the consequences that a state prisoner's Section 1983 claim holds, if successful, for the State's legal authority to incarcerate the prisoner. So much is clear not only from *Heck* itself, but also from the cases on which it built, and from the cases that have built on it. In all of these cases, this Court has consistently held that Section 1983 yields to habeas only if the prisoner seeks relief from a federal court that necessarily undermines the conviction or the sentence itself. Accordingly, the only state decisions that *Heck* shields from attack under Section 1983 are those that, if invalidated by a federal court, would render the fact or duration of the prisoner's confinement unlawful and therefore imply that the prisoner is entitled to immediate or speedier release. As we explain below, Dotson's *ex post facto* claims do not fall within that category.

A. This Court's Cases Clearly Establish The Scope Of *Heck*'s "Favorable Termination" Requirement

1. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), is *Heck*'s most important progenitor. *Preiser* involved suits by state

prisoners under Section 1983 challenging the constitutionality of prison disciplinary proceedings in which the prisoners were deprived of good-conduct-time credits they had previously earned. 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." *Id*. at 476-77. The Court held that equitable relief of this kind was not available under Section 1983, and that the prisoners' "exclusive remedy" was under the habeas corpus statute. *Id*. at 489.

This was the first time that the Court had directly confronted the intersection of Section 1983 and habeas corpus. In holding that certain claims brought by state prisoners (despite coming within the broad, literal language of Section 1983) were cognizable *exclusively* in habeas, the Court emphasized two features that together placed a prisoner's claim at the "core," *id*. at 489, or "heart," *id*. at 498, of the habeas statute: (1) the claim "goes *directly* to the constitutionality of his physical confinement *itself*," *id*. at 489 (emphasis added); and (2) it "seeks either immediate release from that confinement or the shortening of its duration," *ibid*. The Court thus specifically distinguished cases in which a prisoner was not "challenging the fact or duration of his physical confinement itself," and was not "seeking immediate release or a speedier release from that confinement." *Id*. at 498. As to those types of claims, the Court made clear, Section 1983 continues to provide prisoners with a remedy for constitutional wrongs. See *id*. at 499.[6]

One year later, in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court held that a class of Nebraska prisoners could invoke Section 1983, among other things, to challenge on due process grounds the "rules, practices, and procedures" used by the State to deprive prisoners of their good-time credits. *Id.* at 553-55.

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[6] *Preiser* also included *dicta* regarding the effect of its holding on a claim, which the prisoners there had not made, for compensatory damages based on alleged unconstitutional conduct. The Court suggested that, "[i]n the case of a damages claim, habeas corpus is *not* an *appropriate or available* federal remedy." 411 U.S. at 494 (emphasis added).

The prisoners in *Wolff* "sought three types of relief: (1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures." *Id*. at 553. The Court explained that, although the first form of relief was "foreclosed under *Preiser*," the prisoners could maintain their due process claims for declaratory relief and damages in a Section 1983 action. *Id*. at 554.

In reaching that result, the Court noted that in *Preiser* it had been "careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous * * * could be pressed under § 1983 along with suits challenging the conditions of confinement." 418 U.S. at 554. The prisoners' "damages claim," the Court held, "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." *Ibid*. "Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser*," the Court added, "because under that case *only* an injunction restoring good time improperly taken is foreclosed." *Id.* at 555 (emphasis added). Finally, the Court explained that nothing in *Preiser* would "preclude a litigant with standing from obtaining" under Section 1983 "by way of ancillary relief an otherwise proper *injunction* enjoining the *prospective enforcement* of invalid prison regulations." *Ibid*. (emphasis added).[7]

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[7] In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court upheld the use of Section 1983 by pretrial detainees who challenged, on Fourth Amendment grounds, state procedures that allowed extended pre-trial detention, without a prior judicial determination of probable cause, of persons who had been arrested without a warrant and charged by information. In the lower courts, the detainees had obtained declaratory and injunctive relief, including an order directing various officials of Dade County, Florida, to provide them with judicial hearings at which probable cause for their detention could be determined (and, presumably, following which the detainees would be or-

2. After *Wolff* and *Gerstein*, the Court had no occasion to revisit the intersection of Section 1983 and habeas corpus until *Heck* v. *Humphrey*, 512 U.S. 477 (1994), nearly two decades later. Although *Heck* answered certain questions left unresolved by *Preiser*, it did not disturb the fundamental line the Court had previously drawn between those prisoner claims cognizable exclusively in habeas and those that may be brought under Section 1983. *Heck* did go beyond *Preiser*, however, in imposing a new "favorable termination" requirement on certain prisoner Section 1983 claims that were *not* precluded altogether under the rule of *Preiser*.

At issue in *Heck* was a claim brought by a prisoner seeking damages as compensation for an allegedly "unconstitutional conviction or imprisonment" (based on claims that state prosecutors and investigators had conducted an unlawful investigation leading up to his arrest, destroyed exculpatory evidence that would have exonerated him, and used an illegal voice identification procedure at his trial). 512 U.S. at 479-80 & n.2, 486. The prisoner, in other words, sought to recover damages for harm flowing directly from an allegedly illegal conviction and incarceration. See *id.* at 480 n.2 (emphasizing that prisoner's damages claims were "premised on an unlawful conviction"); *id*. at 487 n.6 (referring to "damages directly attributable to conviction or confinement"). Concluding that the prisoner's suit "challenged the legality of the conviction," the Court held that it could not proceed under Section 1983 unless and until the prisoner first "invalidated" the underlying conviction. *Id.* at 487, 490. In announcing this "favorable termination requirement" (*Muhammad* v. *Close*, 124 S. Ct. 1303, 1306 (2004)), the Court in *Heck* relied on an analogy to the "common-law cause of action for malicious prosecution." 512 U.S. at 484.

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dered released from custody if probable cause was found to be lacking). *Id*. at 106-07 & n.6. As in *Preiser*, the Court focused on release as the touchstone of whether the prisoners' Fourth Amendment claims could be pursued under Section 1983. "Because release was neither asked for nor ordered," the Court reasoned, "the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." *Id*. at 107 n.6.

The basic alteration that *Heck* performed on *Preiser* was to remove the latter's suggestion that the *relief* actually sought by the prisoner controls whether his claim can be brought under Section 1983. Whereas *Preiser* had suggested that prisoners who seek damages are not attacking the fact or length of their confinement, *Heck* pointed out that this was not necessarily true "when establishing the basis for the damages claim *necessarily* demonstrates the invalidity of the conviction." 512 U.S. at 481-82 (emphasis added). Thus, what matters for purposes of *Heck*'s "favorable termination" requirement is not what the prisoner asks for in his complaint, but instead what the necessary practical implications of a successful Section 1983 suit would be. If the plaintiff, in order to prevail, would have to "prove the unlawfulness of his conviction or sentence" – *i.e.* those criminal judgments that give the state the legal authority to deprive an individual of his liberty – the claim cannot be pursued under Section 1983 without first invalidating the conviction or sentence, regardless of what remedy the plaintiff actually requests. 512 U.S. at 486.[8]

To clarify the scope of the new "favorable termination" requirement, the Court in *Heck* gave two examples of claims that would (or would not) be covered. *Heck*'s "favorable termination" requirement, the Court first explained, applies to claims for damages not only "for allegedly unconstitutional conviction or imprisonment" itself but also "for other harm caused by actions whose unlawfulness would render a conviction or

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[8] *Heck* recognized, in distinguishing *Wolff*, that not *all* claims for damages are barred. Again, it was not the nature of the remedy, but instead the actual effect of the suit, that controlled. In *Wolff*, the prisoners had sought damages based on the "use of [] allegedly unconstitutional procedures" in taking away their good-time credits. 418 U.S. at 553. Because there was no reason to believe that using the wrong procedures "necessarily vitiated the denial of good-time credits," the claim "did not call into question the lawfulness of the plaintiff's continuing confinement." *Heck*, 512 U.S. at 483. This passage reaffirms that the *Heck* bar comes into play *only* if the prisoner's claim actually threatens the State's legal authority to incarcerate that prisoner, or to do so for a particular period of time.

sentence invalid." 512 U.S. at 486-87. The Court cited the example of a state prisoner "convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest," who later sued the arresting officer alleging that his Fourth Amendment rights had been violated. *Id*. at 487 n.6. Because such a prisoner would "have to negate an element of the offense of which he was convicted" – the lawfulness of the arrest – "[i]n order to prevail in this § 1983 action," the claim would be barred under *Heck*. *Ibid*. On the other hand, "a suit for damages attributable to an allegedly unreasonable search may lie," the Court explained, "even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." *Ibid*. "Because of doctrines like independent source and inevitable discovery," the Court reasoned, "such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Ibid*. (emphasis in original).[9]

3. In *Edwards* v. *Balisok*, 520 U.S. 641 (1997), the Court applied *Heck* to a prisoner's challenge to the validity of the procedures that were used at a disciplinary hearing to deprive him of good-time credits. Specifically, the prisoner alleged that prison officials violated his due process rights when they excluded exculpatory evidence, failed to provide written findings to support their decision, and committed other procedural violations, all at a hearing that had resulted in the deprivation of his accrued good-time credits. *Id.* at 644.

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[9] Concurring in the judgment in *Heck*, Justice Souter's separate opinion reasoned that, rather than relying on an analogy to the common law of malicious prosecution, the Court should "follow the interpretive methodology employed in *Preiser*," according to which the "general" § 1983 statute must be read in light of the more "specific" habeas statute, so that where the latter is unavailable (because, for example, a prisoner is no longer in "custody"), no "favorable termination" requirement should apply. 512 U.S. at 497 (Souter, J., joined by Blackmun, Stevens, and O'Connor, JJ.).

In *Balisok*, the prisoner's Section 1983 claim did not purport to challenge the outcome of the disciplinary decision directly; instead, it rested on the assertion that the *procedures* used to reach the decision were deficient. 520 U.S. at 645. Thus, the question before the Court was whether *Heck* permitted Section 1983 claims styled as challenges to procedures rather than to results. In resolving that question, this Court rejected the Ninth Circuit's categorical view that "a claim challenging only procedures employed in a disciplinary hearing is *always* cognizable under § 1983." *Id.* at 645 (emphasis added). Consistent with the principal teaching of *Heck*, the Court reaffirmed that the label affixed to a claim is not dispositive. What mattered was the *actual effect* that the Section 1983 claim would have, if successful, on the legality of the prisoner's sentence or duration of confinement. See 520 U.S. at 645.

The Court focused carefully on the prisoner's specific claims. Among other things, the Court explained, the prisoner alleged that he was "*completely* denied the opportunity to put on a defense" when "all [exculpatory] witness testimony * * * was excluded" – an "obvious procedural defect" that, when established in other cases, had led many "state and federal courts [to] * * * reinstate[] good-time credits." 520 U.S. at 646-47 (emphasis added). Even more significant, the prisoner "asserted that the cause of the exclusion of the exculpatory evidence was the *deceit and bias* of the hearing officer himself." *Id*. at 647 (emphasis added). That claim, this Court took pains to point out, would, if successful, necessitate the invalidation of the decision to lengthen the prisoner's incarceration by depriving him of good-time credits (because such a claim is not subject to harmless error). *Ibid.* (citing *Tumey* v. *Ohio*, 273 U.S. 510 (1927)). The Court concluded that the prisoner's claim was barred under *Heck* insofar as "the principal procedural defect" that he complained of – a biased decisionmaker – would, if established, "necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 646.

That result, the Court observed, was "clearly envisioned by *Heck*." 520 U.S. at 645. Indeed, the holding in *Balisok* simply clarifies *Heck*'s rule – that Section 1983 cannot be used as a vehicle to undercut the validity of a conviction or sentence and secure speedier release – by applying it in the context of an attack that purports to be strictly procedural.[10] Cf. *Leamer* v. *Fauver*, 288 F.3d 532, 541 (3d Cir. 2002) (in *Balisok*, "the Court found that a plaintiff could not mask a claim that really required habeas relief as a § 1983 claim"). Like *Heck*, *Balisok* forecloses creatively pleaded claims that, in essence, seek to undo an "outstanding criminal judgment," *Heck*, 512 U.S. at 487, and thereby to expedite the prisoner's release by casting a shadow over the legal basis for his confinement.

Balisok also elucidated *Heck* in another important respect. The decision clarified that requests for prospective injunctive relief that do *not* implicate the validity of a conviction or sentence (and that therefore do nothing to shorten the lawful term of confinement) "may properly be brought under § 1983." 520 U.S. at 648. The Court addressed that issue in *Balisok* when discussing the prisoner's additional request for an injunction requiring prison officials to date-stamp witness statements when they are received. *Ibid.* In deciding that this request for relief could proceed immediately under Section 1983, the Court made clear that "[o]rdinarily, a prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Id.* at 648 (emphasis added).

In a concurring opinion, Justice Ginsburg, joined by Justices Souter and Breyer, underscored the limited nature of the Court's holding. They emphasized that the prisoner's allega-

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[10] *Balisok* does not, however, stand for the proposition that all procedural attacks are foreclosed; rather, like *Heck*, it holds that the issue is not the label, but the effect of the claim. Procedural claims that do not necessarily imply the invalidity of the sentence itself (such as the one made in *Wolff*, which both *Heck* and *Balisok* distinguished, but left undisturbed, see 520 U.S. at 645-46) are cognizable under Section 1983.

tions concerning "other procedural defects," such as the failure to make written findings, are *not* barred by *Heck* because they "would not necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 649-50.

4. Last Term, the Court revisited *Heck* in two cases.[11] The first arose, like *Balisok*, in the context of a challenge to an adverse prison disciplinary action. In *Muhammad* v. *Close*, 124 S. Ct. 1303 (2004), a prisoner who had been involved in an altercation with a prison guard was found guilty of insolent behavior (but acquitted of a more serious charge of "threatening behavior"). The prisoner sued for damages for six days of special detention he was forced to undergo because he was charged with the more serious infraction. He alleged that the prison guard had charged him with threatening behavior (and thus subjected him to the special detention) in retaliation for prior lawsuits and grievance procedures the prisoner had brought against the guard. *Id.* at 1305. The prisoner pointedly refrained from challenging his conviction for insolent behavior or the penalties he received for that infraction. *Ibid.*

After describing the *Heck* rule, the Court reiterated that it does not preclude a prisoner's Section 1983 claim that "threatens no consequence for his conviction or the duration of his sentence." 124 S. Ct. at 1304.[12] In contrast to *Balisok*, the

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[11] The Court had one intervening occasion to discuss the *Heck* rule. In *Spencer* v. *Kemna*, which involved a constitutional challenge to the procedures used in revoking parole, the Court reiterated that *Heck* would have "no application at all" to a Section 1983 suit by a prisoner seeking damages for "'using the wrong procedures, not reaching the wrong result,'" so long as the procedural defect did not "'necessarily imply the invalidity'" of the sentence under which he was confined. 523 U.S. 1, 17 (1998) (quoting *Heck*, 512 U.S. at 482-83, 487, and citing the several opinions in *Balisok*).

[12] "The assumption," the Court added, "is that the incarceration that matters under *Heck* is *the incarceration ordered by the original judgment of conviction*, not special disciplinary confinement for infraction of prison rules." 124 S. Ct. at 1304 n.1 (emphasis added). The Court also observed that it had "never followed the speculation in *Preiser* * * * that such a prisoner subject to 'additional and unconstitutional restraint' might have a

disciplinary decision challenged in *Muhammad* did not eliminate any good-time credits. This made all the difference, as the Court held that, in the "absence of any implication going to the fact or duration of [the] underlying sentence," *Heck* presents no obstacle to challenges to administrative decisions made by prison officials. 124 S. Ct. at 1306. *Muhammad* thus affirms that *only* those prison proceedings whose results actually "affect the duration of time to be served" are covered by *Heck*; where neither the "validity of the underlying conviction" nor the "duration of time to be served" is at stake, the prisoner may proceed under Section 1983. *Ibid.*[13]

Finally, in *Nelson* v. *Campbell*, 124 S. Ct. 2117 (2004), the Court upheld a death-row inmate's use of Section 1983 to challenge the "cut-down" procedure that a State proposed to use in carrying out a sentence of death by lethal injection. The Court acknowledged its holdings in *Preiser* that (1) a prisoner's claim for "injunctive relief challenging the fact of his conviction or the duration of his sentence" falls within the "core" of habeas corpus and thus is not cognizable under Section 1983; and (2) "constitutional claims that merely challenge the conditions of a prisoner's confinement * * * fall outside of that core and may be brought pursuant to § 1983 in the first instance." 124 S. Ct. at 2122. Observing that it had not "yet had occasion to consider

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habeas claim independent of § 1983, and the contention is not raised by the State here." *Ibid.* (quoting *Preiser*, 411 U.S. at 499).

[13] In *Muhammad*, the Court rejected the court of appeals' view "that *Heck* applies categorically to all suits challenging prison disciplinary proceedings." 124 S. Ct. at 1306. Although prison disciplinary proceedings "may affect the duration of time to be served (by bearing on the award or revocation of good time credits)," the Court explained, "that is not *necessarily* so." *Ibid.* (emphasis added). Because, in *Muhammad*, no good-time credits "were eliminated by the prehearing action Muhammad called in question," the prisoner's suit "could not be construed as seeking a judgment at odds with his conviction or the State's calculation of time to be served." *Ibid.* Because of these characteristics, the suit "raised no claim on which habeas relief could have been granted on any recognizable theory, with the consequence that *Heck*'s favorable termination requirement was inapplicable." *Ibid.*

whether civil rights suits seeking to enjoin the use of a particular method of execution * * * fall within the core of federal habeas corpus," the Court pointed out that "[n]either the 'conditions' nor the 'fact or duration' label is particularly apt" for such claims. *Id.* at 2122-23. But there was no need to reach the "difficult question of how to categorize method-of-execution claims generally" because the inmate's particular challenge was to a cut-down procedure that, he alleged, was wholly unnecessary to carry out the death sentence. *Id*. at 2123. That particular claim, the Court ruled, is cognizable under Section 1983.

The Court emphasized that its holding was "consistent with our approach to civil rights damages actions, which, like method-of-execution challenges, fall at the margins of habeas." 124 S. Ct. at 2124. In that connection, the Court took note of *Heck* and its preclusion of damages suits that "*necessarily imply*" the invalidity of the fact or duration of confinement. *Ibid*. (emphasis added). *Heck*'s "favorable termination requirement," the Court explained, "is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." *Ibid.* "Even so," the Court added, "we were careful" in *Heck* "to stress the importance of the term 'necessarily[]'" in *Heck*'s test. That term ensured that "potentially valid damages actions" are not "cut off" where "a plaintiff *might* never obtain favorable termination – suits that could otherwise have gone forward had the plaintiff not been convicted." *Ibid*. (emphasis added).[14]

5. As the foregoing review makes clear, this Court's cases shed substantial light not only on the meaning of the *Heck*

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[14] Notably, the Court rejected the State's argument that the cut-down procedure was "part of the execution procedure" and, accordingly, the inmate was challenging "the fact of his execution." 124 S. Ct. at 2123. "Merely labeling something as part of an execution procedure," the Court explained, "is insufficient to insulate it from a § 1983 attack." *Ibid*.

standard but also on how the analysis of *Heck* issues must be conducted. When read together, *Heck* and the cases that follow it present a consistent set of principles regarding when Section 1983 is unavailable to a prisoner.

At bottom, what ultimately matters under *Heck* is the substantive effect that a successful Section 1983 claim will *necessarily* have on the State's legal authority to impose its chosen punishment on the prisoner. To come within *Heck*'s ambit, a prisoner's claim must, if successful, "necessarily" suggest that the State would act unlawfully were it to carry out the full extent of its sentence (whether, as in *Nelson*, by executing the prisoner, or, as in *Balisok*, by keeping him confined for the additional time allowed by the State's decision to cancel his good-time credits). In contrast, a Section 1983 suit in which a victory by the prisoner would not necessarily imply the impermissibility of either the length or the fact of the sentence can proceed unimpeded.

This Court's cases involving *Heck* have established four guideposts concerning how the analysis under *Heck* should be conducted. First, the analysis is built upon a careful review of the precise claims that are asserted in a prisoner's Section 1983 lawsuit. See *Heck*, 512 U.S. at 479-80 & n.2, 487 & n. 6; accord *Nelson*, 124 S. Ct. at 2123-25; *Muhammad*, 124 S. Ct. at 1305-06; *Balisok*, 520 U.S. at 644-48; *id.* at 649-50 (Ginsburg, J., concurring). Second, as both *Heck* and *Balisok* make clear, a proper assessment of whether a prisoner's claims "necessarily imply the invalidity" of a conviction or sentence requires an evaluation of the likely impact that success on the claims will have on the legality of the prisoner's conviction or term of confinement. Third, in evaluating that impact, courts must look beyond labels used by the parties. See *Nelson*, 124 S. Ct. at 2123 ("Merely labeling something as part of the execution procedure is insufficient to insulate it from § 1983 attack."). And fourth, the *Heck* inquiry does not lend itself to categorical rules. See, *e.g.*, *Muhammad*, 124 S. Ct. at 1306 (rejecting court of appeals' view "that *Heck* applies categorically to all suits

challenging prison disciplinary proceedings"); *Balisok*, 520 U.S. at 645 (rejecting court of appeals' categorical view that "a claim challenging only procedures employed in a disciplinary hearing is always cognizable under § 1983"). With these basic principles in mind, we turn to an evaluation of Dotson's claims.

B. Dotson's Alleged Challenge To The 2000 Scheduling Recommendation Is Not Barred By *Heck*

As explained above (see pages 5-6 & note 4, *supra*), Dotson's complaint advanced two *ex post facto* claims for permanent injunctive (and associated declaratory) relief. These claims challenged the retroactive application to him in future parole proceedings of certain new parole-eligibility standards and procedural regulations. Largely ignoring these claims, and thus ignoring one of this Court's clear guideposts, petitioners focus most of their arguments on a *third* claim they say Dotson advances. According to petitioners, Dotson's complaint challenges the scheduling recommendation made by the hearing officer during Dotson's halfway review in 2000. Because that scheduling recommendation was *also* based on the retroactive application of the 1998 guidelines, and because the complaint asked that Ohio officials be "permanent[ly]" enjoined to "proceed toward" a parole hearing that is "prompt and immediate" (J.A. 20 (Cplt. ¶ 3)), petitioners contend that Dotson was actually seeking an order *vacating* the parole officer's recommendation and requiring him to conduct his review again.

Although petitioners' interpretation of the complaint is debatable (see note 4, *supra*), even if they are correct that Dotson's complaint included a claim challenging the 2000 recommendation itself, that claim would not be barred by *Heck*. There are several reasons why that is so.

1. The hearing officer's recommendation has been superseded by events – in particular, by the Parole Board's decision in April 2002, while the appeal of this case was pending in the Sixth Circuit, to conduct a review of Dotson's parole status and issue a new scheduling decision. As a

consequence of that development, the scheduling recommendation made by the hearing officer during the 2000 halfway review – as to which the record is silent concerning whether it was accepted or rejected by the Parole Board chairman – has now been superseded. Even if the hearing officer's non-binding recommendation was accepted by the chairman of the Parole Board, the Parole Board has now revisited the scheduling question and decided anew not to move up the June 2005 release hearing. Plainly, Dotson's complaint does not challenge the April 2002 decision. Because the hearing officer's recommendation in 2000 has no continuing effect, any challenge to it has become moot.[15]

2. Even if Dotson's claim challenging the 2000 recommendation were not moot, it would not be barred under *Heck*. Success on such a claim would have no impact at all on Dotson's conviction; petitioners do not suggest otherwise. Nor would success necessarily invalidate Dotson's sentence, undermine the State's custodial authority over him, or in any way suggest that the State is obliged to expedite his release. Indeed, the parole officer's recommendation is multiple steps and contingencies removed from having any discernible effect upon Dotson's sentence. Because Dotson's success in challenging the 2000 recommendation on *ex post facto* grounds would not "necessarily imply the invalidity" of Dotson's conviction or sentence, *Heck* presents no barrier to that claim.

Several features of the hearing officer's recommendation underscore this point. To begin with, the recommendation is just that – a recommendation. Although petitioners at one point suggest, incorrectly, that the hearing officer exercises

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[15] Even if the Parole Board had not conducted a review of Dotson's parole status and issued a new scheduling decision in April 2002, the parole officer's scheduling recommendation during the 2000 halfway review likely would have become irrelevant (and any claim challenging it moot) before this case is decided because of the pendency of the June 2005 release hearing. Put differently, the actual occurrence of that hearing will effectively moot any issue as to whether it should have been scheduled earlier.

"sentencing discretion" and has the authority to "move * * * up" the date of Dotson's parole hearing (Pet. Br. 22), in fact the decision as to scheduling ultimately rests with the Parole Board itself (or its chairman) – as petitioners acknowledge elsewhere in their brief. See Pet. Br. 10 ("The chair * * * decides whether to advance the hearing."). Thus, the hearing officer's recommendation is non-binding.

Petitioners' argument also overlooks the possibility that the 2000 halfway review might have come out the same way even if the 1998 parole guidelines had not been invoked by the hearing officer. Even without applying those guidelines, the hearing officer might well have elected, for independent reasons, to recommend against moving up the date of Dotson's next parole hearing. And even if he *had* made a different recommendation, it is uncertain whether that would have affected the ultimate scheduling decision of the Parole Board's chairman. Thus, petitioners are wrong to suggest that success on Dotson's *ex post facto* challenge to the use of the 1998 guidelines by the hearing officer in formulating his non-binding recommendation would "necessarily invalidate" or change the outcome of *even the scheduling decision* made during the halfway review.

In addition, it must be remembered that the administrative decision made at the halfway review did not involve the grant or denial of parole. Parole was not considered; the decision instead had to do solely with the *scheduling* of Dotson's next parole release hearing.[16] Thus, even if the hearing officer

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[16] Petitioners suggest that Dotson's claims *do* in fact implicate the validity of his conviction and sentence because parole scheduling decisions "affect the duration of confinement." Br. 22. This is true, according to petitioners, because a "prisoner cannot obtain parole release except through a parole release hearing." Br. 22. But the simple fact that a prisoner *can* obtain release through a parole hearing does not convert every parole scheduling decision into a state decision that goes to the validity of the sentence and allows for speedier release. Indeed, scheduling decisions, such as the one evidently made by the Board at Dotson's halfway review, are not the source of the State's power to continue to incarcerate a prisoner. The underlying sentence

changed his recommendation *and* the Parole Board elected to move up the date of Dotson's next parole release hearing, that would not necessarily change the *duration* of Dotson's term of incarceration. As the en banc majority correctly noted:

> Dotson's challenge to the procedures used to determine the date upon which he will be considered for parole, if successful, would not "necessarily imply" the invalidity of his continued confinement. Rather, success on this challenge would simply provide Dotson with a discretionary parole hearing at which the Parole Board would determine whether parole was appropriate in his case.

Pet. App. 18a. Moreover, as the Sixth Circuit emphasized, in Ohio "the ultimate parole determination is discretionary and based on a host of factors." *Id.* at 17a. For that reason, "it will be difficult to predict any highly likely or inevitable consequence of the parole determination hearing." *Ibid.*

Petitioners' *Heck* argument is thus triply contingent: it depends on the assumption that Dotson's (now-moot) *ex post facto* challenge would result in a new and different recommendation by the hearing officer, which in turn would prompt the Parole Board to move up the next parole release hearing, which in turn would result in Dotson being granted parole at the earlier parole release hearing. That is far too attenuated and speculative a link to the actual duration of Dotson's confinement to satisfy the *Heck* standard.

3. The result is the same even if one focuses not on the outcome of the 2000 halfway review – a scheduling decision – but instead on the substance of Dotson's *ex post facto* challenge and its impact on future parole determinations in his case. As Judge Gilman noted in his separate opinion below, "[t]he nature of Dotson's claim – an attack on the retroactive applicability of Ohio's statutory parole-*eligibility* scheme – does not necessarily imply the invalidity of any judgment by an administrative body

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is. See 67A CORPUS JURIS SECUNDUM: PARDON AND PAROLE § 61 (2004).

that he *is or is not entitled to parole*." Pet. App. 28a (Gilman, J., concurring in part and dissenting in part) (emphasis added). Put differently, Dotson's *ex post facto* challenge to the use of the 1998 parole guidelines, if it succeeds, will merely ensure that at future parole release hearings he will be considered *eligible* for parole (not that he will be entitled to it). That, too, shows that the *Heck* standard is not satisfied here.

C. Dotson's *Ex Post Facto* Claims Challenging Parole-Eligibility Standards And Procedures The State Will Apply To Him In The Future Are Not Barred By *Heck*

1. Although petitioners say virtually nothing about them, at the heart of Dotson's complaint are two *ex post facto* claims for permanent injunctive and declaratory relief. Both claims target procedures and standards that the Ohio Parole Board can be expected to use in the future in discretionary parole proceedings involving Dotson. *First*, Dotson challenges the Board's application of the 1998 guidelines at his future parole hearings. See J.A. 20 (Cplt. ¶¶ 1-2). The result of the Board's retroactive application of those guidelines to Dotson at the June 2005 hearing and beyond, Dotson alleges, will be effectively to rescind his eligibility for parole. Dotson seeks to enjoin the future use of the 1998 guidelines.

Dotson's second *ex post facto* claim challenges another aspect of the procedures that will be used in future parole proceedings. In essence, he contends that, under the regulations in place at the time of his crime, he was entitled to annual parole release hearings following the second denial of parole. See pages 5-6 & n.3, *supra*. Under regulations adopted in 1998, however, the Board is authorized to delay future parole hearings for up to ten years following a second denial of parole. That change, Dotson alleges, also violates the *Ex Post Facto* Clause. Thus, Dotson seeks a permanent injunction directing the Board to provide him with annual release hearings in the future and a declaration that it is required to do so.

2. Dotson's two *ex post facto* claims for a permanent injunction requiring the Board to apply certain procedures and standards in future parole proceedings are not barred by *Heck*. Here again, success on either of those claims obviously would have no impact at all on Dotson's conviction. Nor would success on either claim necessarily invalidate Dotson's sentence, undermine the State's custodial authority over him, or in any way suggest that the State is obliged to expedite his release. Thus, if Dotson prevails on his challenge to the future use of the 1998 guidelines, this will result only in the application of the pre-1998 standards to determine his eligibility for parole at future hearings. Using those standards would not guarantee that Dotson would be released any sooner than he otherwise would be. In fact, as explained above, because the ultimate parole decision lies totally within the discretion of the Parole Board, it is possible that the decision regarding which set of parole guidelines applies to Dotson's claim would make no difference in the amount of time he serves. Thus, as in *Muhammad*, Dotson's claim challenging the future use of the 1998 guidelines "could not be construed as seeking a judgment at odds with his conviction or the State's calculation of time to be served." 124 S. Ct. at 1306.

The same is true of Dotson's claim concerning the frequency of future parole hearings. If Dotson prevails on that claim, the result will be a declaration that it would violate the *Ex Post Facto* Clause not to provide him with annual hearings in the future, following any second denial of parole that might occur. Success on this claim would also mean that Dotson will be afforded annual parole release hearings in the future. Under the 1998 regulations, in contrast, the Board is permitted to delay future release hearings (following the denial of parole at a second release hearing) *for up to ten years*. Here again, nothing about Dotson's success on this claim would invalidate his sentence, undermine the State's custodial authority over him, or in any way suggest that the State is obliged to expedite his release. Because neither of Dotson's principal *ex post facto*

claims would "necessarily imply the invalidity" of his conviction or sentence, they are not barred by *Heck*.

3. Petitioners concede that Dotson's claims for "purely declaratory relief regarding how future hearings are conducted" are "a somewhat closer call" under *Heck* and its progeny. Pet. Br. 30. They nonetheless offer two arguments why those claims are barred. To begin with, petitioners suggest that the Court's statements in *Balisok* "seemed driven more by the nature of the claim being discussed than the prospective or retrospective nature of the relief sought." Pet. Br. 30. Petitioners concede that a claim for injunctive relief based on the ground that "the Warden's alleged refusal to time-stamp documents violated due process" would "not be *Heck*-barred," but they suggest this is so "because such an error simply would not undercut a resulting decision." *Ibid.* Petitioners' reading of *Balisok* is at best implausible. If the Court had relied on the rationale suggested by petitioners, there would have been no need to discuss the nature of the relief sought – or to instruct the lower courts that "a prayer for such prospective relief" will "ordinarily" be cognizable under Section 1983. In any event, the Court's statements in *Balisok* do not break new ground but merely reiterate what the Court has said in earlier cases, including *Wolff* and *Gerstein*.

Next, petitioners contend that Dotson's *ex post facto* challenge to the use of the 1998 guidelines at the June 2005 parole hearing and thereafter would "necessarily imply the invalidity" of "their use at the 2000 halfway review." Pet. Br. 31. That argument is flawed at every turn.

First, the argument rests on the assumption that *Heck* would bar any claim directly challenging the use, during the 2000 halfway review, of the 1998 parole guidelines as a basis for the parole officer's scheduling recommendation. For all of the reasons set forth above, however, that assumption is untrue. Because any claim by Dotson directly challenging the scheduling recommendation does not implicate *Heck*, neither can his future-oriented claim for permanent injunctive relief that

might be said to carry implications for the scheduling recommendation.

Second, this argument rests on the unwarranted assumption that the *ex post facto* issue with respect to the use of the 1998 guidelines *at a future parole release hearing* is *identical* to the *ex post facto* issue relating to the use of those guidelines during the halfway review to make a scheduling recommendation.[17]

Third, petitioners' broad interpretation of *Heck* should be rejected because it would create a new and unwarranted obstacle to the prosecution by state and local prisoners (in both individual and class actions) of claims for permanent injunctive relief that have traditionally been cognizable under Section 1983. In many cases where a prisoner criticizes the State for "'using the wrong procedures, not for reaching the wrong result,'" *Spencer*, 523 U.S. at 17 (quoting *Heck*, 512 U.S. at 482-83), and seeks to require state officials to adhere to federal constitutional standards in future proceedings, the prisoner has been subjected to the challenged procedure at some point in the past.[18] Under the logic of petitioners' position, however, such forward-looking claims would be regarded as "necessarily" calling into question the past use of the procedures against the prisoners. In *Balisok*, for example, the prisoner's claim for injunctive relief "requiring prison officials to date-stamp witness statements at the time they are received" would have

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[17] It is at least theoretically possible that parole officers, at halfway reviews, decline to recommend moving up the date of parole hearings 99% of the time even in cases where the inmate is eligible to be considered for parole. If that were true, the application of the 1998 guidelines at the halfway review would have almost certainly made no difference. But the effect at a parole release hearing might be far more significant. Because Dotson's complaint was dismissed on the pleadings, he had no opportunity to use the discovery process to develop, for example, "evidence drawn from the rule's practical implementation by the agency charged with exercising discretion" to support his *ex post facto* claims. *Garner* v. *Jones*, 529 U.S. 244, 255 (2000).

[18] Indeed, if the prisoner has not been subjected to the challenged procedure in the past, the State will likely argue that the prisoner lacks standing to seek injunctive relief.

necessarily called into question earlier administrative decisions that did not adhere to that procedure. 520 U.S. at 648.

Petitioners' argument also should be rejected because it would further complicate the complex inquiry that is now required by *Heck* and would lead to perverse results. In *Gerstein*, for example, the pretrial detainees contended that county officials had violated the Fourth Amendment by declining to provide them with a prior judicial determination of probable cause. Would that claim have implicated – and thus necessarily implied the invalidity of – past "decisions" by county officials? And, if not, why should Section 1983 be available in that setting but not where state or local officials make more formal administrative "decisions" (including non-binding recommendations) that are constitutionally defective? The distinction makes little sense.

Because Dotson's claims for injunctive and declaratory relief with respect to the conduct of future proceedings do not "necessarily imply" the invalidity of his sentence or conviction, they may properly be brought under Section 1983. Should Dotson prevail on his claims, it would cast no shadow over the State's legal authority to incarcerate him. Nor would the State have to take some further action to prevent Dotson's release on terms compelled by a federal court. This Court has never held, or even suggested, that a claim lacking those attributes cannot be pursued under Section 1983. It should not do so for the first time in this case.

D. Petitioners' Remaining Arguments Are All Unavailing

Petitioners seek to avoid the conclusion that *Heck* presents no bar to Dotson's claims by resort to a hodgepodge of other arguments, none of which is persuasive.

1. Petitioners insist that Dotson's Section 1983 claims are barred by *Heck* because they challenge what petitioners repeatedly call a "state sentencing decision" – a decision made by Ohio parole officials about when and on what terms to schedule a hearing to determine Dotson's eligibility for parole.

Br. 19-23, 24, 26, 20. According to petitioners, *Heck*'s limitation on Section 1983 claims extends to "all challenges that would, if successful, necessarily imply, the invalidity of a *sentencing decision*." Pet. Br. 23 (emphasis added); see also *id.* at 24 (arguing that application of the *Heck* bar turns only on the "implications for the state decision" and is not "contingent upon what would follow invalidation of the state decision").

There are several problems with this argument. To begin with, as respondent Johnson persuasively demonstrates (Br. 29-34), the denial of parole is *not* properly characterized as a "sentencing" decision. The premise of petitioners' argument is thus mistaken.[19]

Beyond that, "sentencing decision" is not a term that this Court has used in *Heck* or its progeny. Instead, it is a term invented by petitioners for this case. In *Nelson*, this Court rejected a State's similar attempt to avoid the careful analysis required under *Heck* by resorting to rhetorical sleight of hand. "Merely labeling something as part of an execution procedure," the Court explained, "is insufficient to insulate it from § 1983 attack." 124 S. Ct. at 2123. The careful inquiry on which this Court has repeatedly insisted under *Heck* does not turn on semantics or whether the prisoner's claim would invalidate a state administrative "decision"; instead, invalidation triggers the *Heck* bar only if it actually undermines the conviction or sentence itself and thus suggests the need for immediate or speedier release from confinement. See, *e.g.*, *Muhammad*, 124 S. Ct. at 1304 (*Heck*'s rule is not "implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his *sentence*") (emphasis added).

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[19] Although petitioners seek throughout their brief to portray a decision as to when the next parole hearing will be conducted as tantamount to a "sentencing decision" extending the sentence for the duration of the interval until the next hearing, that characterization finds no support in this Court's decisions. See, *e.g.*, *California Dept. of Corrections* v. *Morales*, 514 U.S. 499 (1995) (law decreasing frequency of parole hearings for certain prisoners from every year to every three years does not increase punishment).

"Sentence" – the word actually used in *Heck* – has a specific and definite meaning. It does not, as petitioners suggest, encompass every state decision that could conceivably affect a prisoner's jail time. "'Sentence' * * * is ordinarily meant in the context of criminal law to refer to the judgment or order 'by which a court or judge imposes punishment or penalty upon a person found guilty.'" *United States* v. *Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C.J., dissenting) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2068 (1971)); see also *id*. at 71 n.2 ("Federal sentencing law also consistently uses the word 'sentence' to refer to the punishment actually imposed on a defendant."); BLACK'S LAW DICTIONARY 1362 (6th ed. 1990) (defining "sentence" as "[t]he judgment * * * imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation"). Like a conviction, then, a sentence is a criminal judgment that justifies punishment, in this case incarceration. Without the imposition of a sentence, the State generally lacks the legal authority to deprive a person of liberty. Similarly, when a federal court invalidates a sentence, the State is stripped of its right to impose a particular quantum of punishment on the prisoner, unless and until it corrects the problem.

The two cases in which this Court has actually barred challenges to sentences under Section 1983 illustrate the meaning of "sentence" in this context. Both *Preiser* and *Balisok* involved attacks on decisions that took away good-time credits that the prisoner had previously accrued. The direct consequence of invalidating those decisions would have been the restoration of the prisoners' credits, which in turn would have necessarily reduced the time that the prisoners could lawfully be incarcerated. Similarly, *Heck* obliges courts to go beyond the potential impact of the federal judgment on that state decision and instead to focus on whether invalidating the state decision would "call into question the lawfulness of the plaintiff's continuing confinement." 512 U.S. at 483. Petitioners are thus simply wrong to say (at 24) that "*Heck*'s holding does not make

application of the favorable termination requirement contingent upon what would follow invalidation of the state decision."

2. Petitioners' incorrect insistence that *Heck* is concerned with protecting "state decisions" rather than with the validity of sentences and the legality of confinement leads them into other important mistakes. Relying on *Balisok*, petitioners argue that a Section 1983 claim results in the "invalidat[ion]" of a state judgment (and is therefore barred) when it could lead to a new hearing as opposed to outright reversal of the decision made in the challenged hearing. Pet. Br. 26-28. Here again, petitioners fail to focus on the crucial inquiry: the effect of the challenged hearing on the duration of lawful confinement. That issue, rather than the precise type of relief awarded, determines whether a claim is barred under *Heck*.

It is true that in some instances reversing a decision outright and vacating for a new hearing have the same result: they restore the prisoner to his status before the hearing. *Balisok* exemplifies this. In that case, had the plaintiff prevailed on his Section 1983 claim, the district court could have given the prison officials another chance to take away the inmate's good-time credits, this time using constitutionally acceptable procedures. But, even had that been the result, the prisoner's credits would have been restored unless the State took some further action. Thus, the immediate effect of the federal judgment would have been to undermine the legality of the prisoner's confinement and imply the invalidity of the sentence.

Thus, although it is true that under *Balisok* some federal decisions implying the need for a new hearing do fall within *Heck*'s bar, it is quite wrong for petitioners to suggest (at 28) that *any* claim implicating the right to a new hearing runs afoul of *Heck*.

II. DOTSON'S CLAIMS ARE NOT EXCLUSIVELY COGNIZABLE IN HABEAS CORPUS

Unable to show that *Heck*'s standard is satisfied, petitioners and their *amici* fall back on a different contention. They argue

that Dotson's claims are within the "traditional scope of habeas," and therefore, under *Preiser*, *must* be pursued under Section 2254 (without regard, that is, to whether "favorable termination" within the meaning of *Heck* is ever achieved). Pet. Br. 32; *Amicus* Br. of Alabama *et al.*, at 11 (arguing that this case is "governed by *Preiser*, not *Heck*"). That contention should be rejected because it is not fairly included in the questions presented in this case and because it lacks merit. In fact, most if not all of Dotson's *ex post facto* claims are not even cognizable under the habeas statute.

A. Petitioners' Argument That Dotson's Claims Are Absolutely Barred By *Preiser* Is Not Properly Before This Court

This Court's decisions in *Preiser* and *Heck*, though closely related, recognized distinct limitations on the ability of state prisoners to bring suit under Section 1983. In *Preiser*, the Court held that certain prisoner claims – those not only "challenging the fact or duration of * * * physical confinement itself" but also "seeking immediate release or a speedier release from that confinement" (411 U.S. at 498) – fall within the "core," *id*. at 489, or "heart," *id*. at 498, of habeas corpus, and therefore may not be brought in an action under 42 U.S.C. § 1983. *Preiser*'s bar on the litigation of "core" habeas corpus claims under Section 1983 is absolute; if a claim is barred by *Preiser*, then it is not – and never will be – cognizable under Section 1983.

The Court's decision in *Heck* v. *Humphrey* imposes a different limitation on prisoner claims. *Heck* applies only to claims that are not *Preiser*-barred. Under the rule adopted in *Heck*, certain claims brought by a prisoner under Section 1983 are barred unless and until the "underlying sentence or conviction has * * * been invalidated." 512 U.S. at 487. Thus, a claim that is *Heck*-barred may one day become cognizable if the prisoner achieves a "favorable termination."

The petition for certiorari in this case presented two issues concerning the meaning of *Heck*'s "favorable termination"

requirement. See Pet. i. First, petitioners asked this Court to determine whether "*Heck v. Humphrey*'s favorable termination requirement" applies to a prisoner's challenge to "parole proceedings," where "success by the prisoner on the claim would result in a new parole hearing and not necessarily guarantee earlier release from prison." *Ibid.* Second, petitioners asked the Court to decide whether a "federal court judgment ordering a new parole hearing 'necessarily implies the invalidity of' the decision at the previous parole hearing for purposes of *Heck*." *Ibid.* Petitioners did not raise any question about whether respondents' claims were barred by *Preiser*. Nor was the issue of a *Preiser* bar raised in or decided by the lower courts. Ordinarily, this Court does not address such questions. See S. Ct. Rule 14.1(a); R. STERN, ET AL., SUPREME COURT PRACTICE 419-21 (8th ed. 2002).[20]

Nor is the *Preiser* argument "fairly included" in the questions that were presented. S. Ct. Rule 14.1(a). If this Court were to accept petitioners' argument, there would be no need to reach the issues presented concerning the meaning of *Heck*'s "favorable termination" requirement. Moreover, a reversal on the basis of *Preiser* would give petitioners a *broader* victory than they achieved even in the district court. The district court, after all, dismissed respondents' claims under *Heck*, which means that respondents' claims may be refiled if and when they achieve "favorable termination." But, under petitioners' argument that *Preiser* forever bars respondents' claims,

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[20] At the petition stage, sixteen States urged this Court to grant review of the questions presented because there was a compelling need to clarify "the 'necessarily implies' language of *Heck*." *Amicus* Br. of Alabama *et al.*, at 4; see also *id.* at 5-9 (citing three additional areas in which the circuits are divided because of disagreements over the meaning of *Heck*). Once review was secured, the *amici* States changed course entirely. They now tell this Court that this case is "governed by *Preiser*, not *Heck*," and they suggest that *Heck* should be understood as limited to *damages* claims. *Amicus* Br. of Alabama *et al.*, at 9, 11 (merits-stage brief). We note that, if the Court were to accept the *amici* States' proposed limitation on *Heck*, that would only provide another ground for affirming the court of appeals' judgment in Dotson's favor (since he is not seeking to recover damages).

respondents will never be able to state cognizable claims under Section 1983. For all of these reasons, the Court should decline to consider petitioners' argument that respondents' claims fall within the "core" of habeas and are thus barred by *Preiser*.

B. Dotson's Claims Do Not Fall Within The "Core," Or Even The Periphery, Of Habeas Corpus

In any event, petitioners are wrong in suggesting that Dotson's claims are exclusively cognizable in habeas. Contrary to petitioners' submission, habeas corpus is not the appropriate mechanism through which to seek relief that does not undermine the legal validity of a prisoner's confinement. *Preiser* sets forth a comprehensive description of what places a claim within the exclusive ambit of habeas; and that discussion makes clear that Dotson's request for a prospective declaration of his rights under the *Ex Post Facto* Clause (and an injunction relating to the conduct of future parole proceedings) does not fall solely within the habeas statute.[21] This is confirmed, moreover, by a wide range of lower court cases after *Preiser*.

Although habeas corpus is the proper mechanism for challenging the constitutionality of a criminal sentence, Pet. Br. 36, that truism is simply not implicated by the claims that Dotson has advanced in this case. Dotson asks merely to have the pre-1998 Ohio parole guidelines apply in his future parole hearings. He also seeks the benefit of the pre-1998 regulations that offer annual parole hearings after a prisoner's parole is denied for the second time. Such claims are not within the traditional scope of habeas, but are instead the proper subject for litigation under Section 1983.

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[21] Petitioners overreach insofar as their argument is premised on the assumption that a claim cognizable under habeas is therefore *not* cognizable under Section 1983. This Court has certainly never said as much. To the contrary, both *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971) (per curiam), and *Preiser* itself, 411 U.S. at 499, suggest that certain claims can properly be pursued either through habeas or Section 1983.

1. In *Preiser*, this Court described the elements that cause a sentencing-related challenge to sound in habeas. The Court explained that the "essence of habeas corpus is an attack by a person in custody upon the legality of that custody." 411 U.S. at 484; see 28 U.S.C. § 2254 (application for habeas relief may be entertained "*only* on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States") (emphasis added). The "traditional scope of habeas corpus" is to provide a "a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law." *Preiser*, 411 U.S. at 485. "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power." *Fay* v. *Noia*, 372 U.S. 391, 430-31 (1963); cf. *In re Medley*, 134 U.S. 160, 173 (1889) ("[U]nder the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement * * * .").

The purpose of habeas, in other words, is to provide a mechanism for those "in custody" to challenge the legal basis of their confinement. See *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention."); *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969) ("the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom"); *Allen* v. *McCurry*, 449 U.S. 90, 98 n.12 (1980) (the "unique purpose" of habeas corpus is "to release the applicant for the writ from unlawful confinement"); *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963) ("State prisoners are entitled to relief on federal habeas corpus *only* upon proving that their *detention* violates the fundamental liberties of the person.") (emphases added). The writ allows prisoners – or others subject to analogous restraints – to demonstrate that their confinement, whether at present or at some point in the future, is (or will become) unlawful. See *Peyton* v. *Rowe*, 391 U.S. 54, 58 (1965) (where available, habeas corpus assures "that a prisoner may require his jailer to justify the detention under the law").

Although habeas has expanded beyond its original role of assuring that "the committing court had been possessed of jurisdiction," *Preiser*, 411 U.S. at 485, this Court has never held that the scope of habeas extends beyond challenges that seek, in some direct sense, to "effect release from illegal custody." *Id.* at 486 n.7; see also *id.* at 486 ("traditional meaning and purpose of habeas corpus" is to "obtain release" from unlawful physical restraint). The Court has certainly never suggested that a constitutional claim of the sort made by Dotson here is properly cognizable under habeas corpus. Dotson seeks only to alter the standards that will apply to him in future parole hearings. He does not claim – nor could he – that applying the old guidelines would ensure his expedited release or undermine any aspect of the State's legal authority to keep him in confinement. By the same token, if Dotson prevails on his *ex post facto* claims, his victory would in no way imply that the State has been, or eventually will be, incarcerating him unlawfully. Nor would the federal decree that Dotson seeks require Ohio to take some remedial action in order to avoid having to hasten his release. In short, all of the hallmarks that cause a claim to fall within the special province of habeas are missing from this case.

2. This Court's cases applying *Preiser* make clear that Dotson's request for forward-looking injunctive relief lies beyond the scope of habeas. In *Wolff*, the Court held that inmates pursuing claims for prospective injunctive relief relating to procedures under Section 1983 were not required to proceed in habeas. See 418 U.S. at 553, 555. As petitioners recognize, this aspect of *Wolff* "remains good law" and indeed was "expressly reaffirmed in *Balisok*." Br. 41-42; see *Balisok*, 520 U.S. at 648. Similarly, in *Gerstein*, the Court held that a request for declaratory and injunctive relief – *i.e.* for the use of constitutionally adequate procedures in the future – fell beyond the reach of habeas, at least where "release was neither asked for nor ordered." 420 U.S. at 107 n.6. Dotson seeks no more than did the prisoners in *Wolff* and *Gerstein*, and thus properly brought his claims under Section 1983 rather than habeas corpus.

3. Despite these gaps between Dotson's claim and a traditional habeas claim, petitioners devote much space to arguing that a claim can fall within the ambit of habeas even though it will not inevitably result in earlier release. They observe that "claims resulting in rehearing can be brought through habeas" and that rehearing rather than immediate release is the norm in modern habeas practice. Pet. Br. 37-39. Thus, they say, Dotson's efforts to obtain a new parole review support the conclusion that his is an ordinary habeas claim. *Id*. at 39.

Even if Dotson's alleged claim to have the 2000 halfway recommendation redone were not moot, this argument would fail. Petitioners are wrong to suggest that rehearing is a defining feature of habeas corpus. Habeas courts fully serve the writ's objective of preventing "illegal custody," *Brown* v. *Allen*, 344 U.S. 443, 465 (1953), by giving state officials an opportunity to remove the feature of the confinement that rendered it illegal. Thus, although a federal court may order "curative proceedings" in lieu of immediate release (Pet. Br. 38), it does so *only after* identifying some constitutional defect in the conviction or sentence itself – a defect that if not remedied would render the fact or quantum of punishment unlawful. In those circumstances, rehearing simply offers the State a less intrusive way of correcting the error highlighted by the federal court. *Phifer* v. *Warden, United States Penitentiary, Terra Haute, Ind.*, 53 F.3d 859, 864-65 (7th Cir. 1995) ("Conditional orders are essentially accommodations accorded to the state. They represent a district court's holding that a constitutional infirmity justifies petitioner's release. The conditional nature of the order provides the state with a window of time within which it might cure the constitutional error."). If the State does not avail itself of that opportunity, however, its authority to deprive the prisoner of his liberty will necessarily be vitiated. See 2 R. HERTZ & J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 33.3 (4th ed. 2001).

Accordingly, the fact that many habeas cases result in rehearing certainly does *not* mean that any case in which

rehearing is sought is therefore a habeas case. What makes a habeas claim unique is not the ultimate fate of the prisoner, but instead the effect that a successful claim has on the validity of the conviction or sentence. Such a claim need not result in the prisoner's ultimately being released; to fall within what *Preiser* identified as the traditional scope of habeas, however, it must seek to undermine some aspect of the State's legal authority to confine the prisoner.

Dotson's case presents a fundamentally different situation. Nothing about his claim implies that he has a right to earlier release. Indeed, the constitutional error that led the parole hearing officer in 2000 to decline to recommend an earlier parole hearing is simply not one on which the legality of Dotson's confinement rests. In other words, neither the time that Dotson may lawfully be imprisoned nor the quantum of punishment that the State is entitled to impose on him will change as a result of the federal judgment that he seeks. That judgment will not put the State to a choice between remedying that error or shortening his sentence. The same simply cannot be said of a claim that falls within the core of habeas. See *Preiser*, 411 U.S. at 489 (at the core of habeas is a claim that "goes directly to the constitutionality of [the prisoner's] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration"). In suggesting that bids for rehearing are at the heart of habeas, petitioners appear to have confused the cure with the disease.

4. Petitioners' reliance (Br. 38-39) on *Peyton* v. *Rowe*, 391 U.S. 54 (1965), and *Garlotte* v. *Fordice*, 515 U.S. 39 (1995), is similarly misplaced. In *Peyton*, the Court held that prisoners are "in custody" for purposes of the habeas statute when serving consecutive sentences, even if they have not yet begun to serve the sentence for the conviction they wish to challenge. *Garlotte* requires the same result when the prisoner serving consecutive sentences seeks to challenge the conviction underlying the sentence that ran *first* in the series and that has already expired.

Both cases involve challenges to the constitutionality of criminal convictions. Although *Garlotte* incidentally concerns parole eligibility – in that the challenged conviction served to postpone the date on which the prisoner became eligible for parole – the substantive habeas claim that the prisoner made had nothing to do with parole procedures, but instead asserted that his conviction was unconstitutionally obtained. See 515 U.S. at 42 n.1. This kind of direct attack on the validity of a conviction is of course the very essence of habeas, see *Daniels* v. *United States*, 532 U.S. 274, 381 (2001); *Preiser*, 411 U.S. at 489, and – as *Heck* makes clear – one unsuited for adjudication under Section 1983, see 512 U.S. at 487.

In the present case, by contrast, the issue is not whether Dotson is "in custody" – he surely is – but instead whether the substance of his claim is one cognizable under Section 2254. See 1 HERTZ & LIEBMAN, *supra*, § 8.1 (distinguishing between the two separate jurisdictional requirements of habeas: the "status" requirement that the petitioner be "in custody" and the "substance" requirement that the "petition challenge the legality of that custody"). In *Peyton* and *Garlotte*, only the custody issue was in dispute. But the fact that a prisoner can be deemed "in custody" on, and therefore challenge, a criminal conviction because of that *conviction's* effect on his parole eligibility certainly does not imply that an attack *not* mounted against a conviction or sentence – but instead against parole procedures themselves – comes within the scope of habeas.

5. Finally, petitioners are wrong in asserting (Br. 35) that the "weight of precedent" demonstrates that claims like Dotson's are "typically brought in habeas." In fact, most courts that have considered the question have held that prisoners who seek nothing more than an opportunity to make their case for parole should proceed through Section 1983 rather than habeas.

As petitioners acknowledge, since *Preiser* this Court has decided at least three cases in which prisoners used Section 1983 (not habeas) to press claims relating to parole proceedings similar to those made here. See Pet. Br. 40 (citing *Garner* v.

Jones, 529 U.S. 244 (2000); *Board of Pardons* v. *Allen*, 482 U.S. 369 (1987); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979)). Moreover, in *Wolff* this Court squarely held that a challenge to procedures used in revoking good-time credits is cognizable under Section 1983.

Petitioners attempt to brush aside the three cases involving parole procedures on the ground that because "no one challenged whether § 1983 was an appropriate vehicle in those cases," they do not stand for the proposition that parole claims are *properly* pursued through Section 1983. In almost the same breath, however, petitioners attach significance to this Court's cases in which parole-related claims were litigated through habeas corpus without the propriety of that approach being raised. Pet. Br. 35-36. Petitioners cannot have it both ways.[22]

Finally, the weight of lower-court authority in cases in which the issue actually *was* litigated supports the Sixth Circuit's decision here that parole-related claims that do not imply the prisoner's right to speedier release are properly litigated through Section 1983, not in habeas. Applying the habeas standards described in *Preiser*, most courts that have considered the issue have held that, as Judge Friendly put it, a "request for a new parole hearing * * * was [a] remedy outside habeas corpus, since it concerned the manner of parole decision making, not its outcome." *Williams* v. *Ward*, 556 F.2d 1143, 1150-51 (2d Cir. 1977); see also *ibid*. (noting that "the question of [the prisoner's] release and of the length of his confinement still lies within the sound discretion of the board, unlike *Preiser* where the restoration of good-conduct-time credits would have

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[22] Petitioners also overlook a good reason why silence might mean something different in the two contexts. In the habeas cases, there was no reason for state defendants to argue that Section 1983 was the proper vehicle (because, presumably, state remedies had already been exhausted). In contrast, there would have been *every* reason for state defendants in the Section 1983 cases involving parole procedures to contend that habeas (with its exhaustion requirement) was in fact the proper vehicle.

resulted automatically in the shortening of the [prisoner's] confinement").[23] These decisions support the proposition that Dotson's claims – because they would give him nothing more than at most an opportunity to make his case for parole, and do not question the State's ongoing authority to keep him in confinement – fall outside of the traditional domain of habeas corpus.[24]

III. POLICY CONCERNS DO NOT JUSTIFY EXPANDING THE *HECK* DOCTRINE TO COVER DOTSON'S SECTION 1983 CLAIMS

Petitioners final argument for reversal is an appeal to "concerns of comity and federalism" (Pet. Br. 43), which they say justify this Court's creation of additional restrictions on the ability of prisoners to bring civil rights claims challenging the conduct of parole proceedings. According to petitioners, adopting an expansive reading of the *Preiser* and *Heck* rules would prevent interference with prison administration, minimize federal intrusion into a "core state function," and allow disputes to be resolved on state-law (rather than federal constitutional) grounds. Pet. Br. 43-48. These arguments are overstated and

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[23] See also *Clark* v. *State of Ga. Pardons and Paroles Bd.*, 915 F.2d 636, 638-39 (11th Cir. 1991); *Georgevich* v. *Strauss*, 772 F.2d 1078, 1087 (3d Cir. 1985) (en banc); *Walker* v. *Prisoner Review Bd.*, 694 F.2d 499, 501 (7th Cir. 1982); *Strader* v. *Troy*, 571 F.2d 1263, 1269 (4th Cir. 1978); *Haymes* v. *Regan*, 525 F.2d 540, 542 (2d Cir. 1975) *Bradford* v. *Weinstein*, 519 F.2d 728, 734-35 (4th Cir. 1975); cf. *Otey* v. *Hopkins*, 5 F.3d 1125, 1131 (8th Cir. 1993) (claim challenging process by which his clemency request was evaluated, but not asserting entitlement to clemency, is not cognizable through habeas because it does not attack the legality of the sentence).

[24] Although the three court of appeals cases discussed by petitioners (see Pet. Br. 26) did address whether parole claims could be brought under 28 U.S.C. § 2241 or § 2254, the issue of whether such claims were appropriately litigated in habeas in the first place (as opposed to Section 1983) was not presented. Moreover, the claims in those cases were directly focused – in a way that Dotson's plainly is not – on attacking decisions that actually went to the constitutionality of the prisoner's confinement and that, if successful, would imply the need for immediate or expedited release.

ignore the means that States already have at their disposal to ensure that parole officials have the opportunity to comply with the federal Constitution before being subjected to litigation under Section 1983.

As an initial matter, petitioners' argument overlooks that Congress has already provided the States with a means to ensure that parole officials will have the first opportunity to correct federal constitutional violations before being subjected to federal civil rights suits. As part of the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-73, Congress enacted an "invigorated * * * exhaustion prescription" (*Porter* v. *Nussle*, 534 U.S. 516, 524 (2002)) applicable to claims brought by state prisoners under Section 1983. See 42 U.S.C. § 1997e(a). Section 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This Court has held that this provision applies broadly to all "inmate suits about prison life" brought under Section 1983, "whether they involve general circumstances or particular episodes," and imposes a mandatory exhaustion requirement even where the remedy sought by a prisoner is unavailable in the prison administrative process. *Porter*, 534 U.S. at 532; see *Booth* v. *Churner*, 532 U.S. 731, 739-41 (2001).

Petitioners bemoan the fact that Congress did not go further in the PLRA and require exhaustion of state *court* remedies. Pet. Br. 46. But Congress's decision not to go further strongly suggests that it would be inappropriate for this Court to impose such a requirement on the strength of petitioners' policy arguments. See *Patsy* v. *Board of Regents*, 457 U.S. 496, 512 (1982) ("It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under 1983."). In any event, petitioners have offered no explanation of why such administrative tribunals would be less capable of vetting prisoner complaints than would state courts.

Congress has addressed the comity and efficiency concerns petitioners invoke, and it has given the States the first chance to correct their own errors.[25]

Next, petitioners suggest that the use of Section 1983 litigation to address problems of state prison administration represents a troubling intrusion into a core area of state sovereignty. But that argument proves too much. It overlooks the fact that prison conditions are frequently challenged under Section 1983. There is no reason to suppose that a Section 1983 suit challenging the State's parole procedures would represent a more serious intrusion on state sovereignty than would a suit challenging double-bunking and the training of prison guards. Yet the latter clearly *are* cognizable under Section 1983. Petitioners' argument about intrusions into core areas of state authority ignores this reality and is thus greatly exaggerated.

Finally, petitioners assert (Br. 45) that Section 1983 should yield when "there is a fair possibility that the underlying dispute can be resolved by state courts on state law grounds." But as this Court explained more than forty years ago, "[i]t is no answer that the State has a law which if enforced would give relief." *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). "The federal remedy" created by Congress in enacting Section 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[25] Notably, Congress has also addressed petitioners' comity concerns by placing limits on the scope of prospective relief available to prisoners under Section 1983. See 18 U.S.C. § 3626(a)(1) (requiring courts to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief").

Respectfully submitted.

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OCTOBER 2004

APPENDIX

OHIO PAROLE BOARD DECISION

Name:	**Inmate No.:**	**Date:**
William Dotson	163897	4/25/02

Hearing Type:	**Security Level:**	**Sentence:**	**Max/Eds/Est** (circle one)
Rel. Contin. RIV	MED 3 3/01	Life	Life

1. The (offense) (parole violation) behavior has been rated as Category 13 because the offense behavior involved (Circle appropriate behavior):

Aggravated murder by jury conviction whereon o/a 7-18-80 the victim was killed as a result of a shotgun blast

Section No.(s): 201(A)

2. The Criminal History/Risk Score is 8 .

3. The Guideline Range is 390-L months.

4. Time served 249 m 1d mos + JTC 5m 21d mos = Total Time Served 255 mos. TPV Arrest Date: _____

5. Check if non-applicable X . The inmate has committed new felony criminal conduct in a prison facility that is rated as
   Category __ because it involved: _____

   Section No.(s): _____

The Rescission Criminal History/Risk Score is _____.

This conduct requires __ months be added to the guideline range.

6. Check if non-applicable _____

   A. The inmate has committed _____ disciplinary infractions involving non-felonious threatening conduct against staff and/or non-felonious possession of a dangerous instrument (6-12 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   B. The inmate has committed _____ disciplinary infractions involving possession or use of alcohol and/or possession or use of a controlled substance other than possession of a controlled substance with intent to distribute (3-6 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   C. The inmate has committed _____ disciplinary infractions involving other misdemeanor conduct (0-6 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____

   D. The inmate has committed _____ other significant disciplinary infractions (0-2 months per infraction to be added to the guideline range) that occurred on the following dates:

   _____noted and not issued_____

   This conduct requires _____ months to be added to the guideline range.

* * [End of page one of original form] * *

Name:	**Inmate No.**:	**Date:**
William Dotson	163897	4/25/02

7. Check if non applicable __X__. The aggregate guideline range is _____ months.

8. After review of all relevant factors and information presented.

__X__ A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range.

____ B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

____ C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:

____ (1) The Inmate's offense behavior involved the following specific (aggravating) (mitigating) factors:

____ (2) The Inmate is a (poorer) (more serious) (better) risk than indicated by his/her criminal history score for the following specific reasons:

___ (3) Other specific reasons:

List number of guideline ranges departed:
Vertical _____ Horizontal ____
List selected guideline range: _____ months

The continuance being reviewed would result in inmate serving 292 months which is well below the guideline range. Good institutional conduct and programming should be addressed at the next hearing.

9. Total time to be served at least 292 months.

10. Optional Outstanding Program Achievement
    ___ granted __X__ not granted
    (Note: The granting or denying of such credit is discretionary.)

    The Board's decision includes a _____ month credit to outstanding program achievement as specified below:

11. Adjusted total time to be served _____ months.

12. Recommendation: No change: continue to 6-2005

13. Institutional conditions prior to PRD on next hearing: ___

14. Hearing Panel:

    Board Member: s/MS Hearing Officer: s/DWD

Release on PRD is contingent on good institution behavior and/or reduction from maximum security status.

A PRD may be extended for a Class II violation when the case is reviewed at the PRD Pre-Release Review.

* * [End of page two of original form] * *