ORIGINAL

No. 23-429

FILED
OCT 23 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

BRETT C. KIMBERLIN,
Petitioner,

v.

DEPARTMENT OF JUSTICE, et al,
Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court held that in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a Section 1983 plaintiff must first prove that the conviction or sentence has been vacated. But what happens when law enforcement officials and other conspirators corruptly and intentionally conceal evidence that would invalidate a conviction until the time has run out for appellate or post-conviction relief? The courts below held that under *Heck*, Petitioner cannot recover damages or get declaratory relief against officials and conspirators who destroyed DNA evidence, withheld exculpatory evidence, used false evidence, secretly planted a relative of the hypnotist on the jury, lied to all three levels of the federal court, and laughed that they "got away with" wrongfully convicting Petitioner. The lower court also held that the statute of limitations ran out on the Fourth Amendment and Section 1986 claims while the litigation was pending.

Last term, Neal Katyal petitioned the Court in *Kimberlin v. DOJ*, No 22-124, to allow a writ of error coram nobis to vacate his conviction in light of these grave constitutional errors discovered 40 years after Petitioner's conviction, but the Court denied certiorari on January 9, 2023 thereby ensuring that Petitioner could not vacate his conviction and leaving only the civil rights suit to recover damages for the official corruption.

On April 19, 2023, the day after the Seventh Circuit affirmed the instant case, this Court decided *Reed v. Goertz*, ___U.S.___ (2023), holding that the statute of limitations begins at the end of litigation not during it, thereby allowing Reed to file a1983 action challenging the state's application of a DNA statute without first vacating Reed's conviction.

The questions presented are:

I. Whether this case should be remanded for consideration in light of *Reed v. Goertz*, ___U.S.___ (April 19, 2023) to consider 1) Petitioner's 1983 action challenging the Government's misapplication of DNA statutes and microscopic hair policies, and 2) the lower court's dismissal of Petitioner's Fourth Amendment and Section 1985(2)/1986 claims on statute of limitations grounds.

II. Whether *Heck v. Humphrey*, 512 U.S. 477 (1994) can bar Petitioner's civil suit (1) against actors who corruptly and intentionally concealed evidence that undermined the validity of Petitioner's conviction until the time had passed for appellate and post-conviction relief, and (2) where Petitioner's claims did not implicate the invalidity of his conviction and occurred before and after his trial.

PARTIES TO THE PROCEEDINGS

Petitioner is Brett Kimberlin proceeding pro se.

Respondents are the United States Department of Justice, Attorney General Merrick Garland, Alcohol, Tobacco and Firearms, Indiana State Police Superintendent Douglas Carter, Assistant United States Attorneys Kennard Foster and Brian Reitz, Indiana State Police Officials Brooke Appleby and Michael Oliver, Juror Shirley Henderson and her husband Donald Henderson.

RELATED PROCEEDINGS

The District Court dismissed 42 U.S.C. 1983 et al case. *Kimberlin v. DOJ*, et al, No. 1:21-cv-02506-TWP-MPB, March 3, 2022. Appx A.

The Seventh Circuit Court of Appeals affirmed. *Kimberlin v. DOJ*, No. 22-1622, April 18, 2023. Appx. B.

The Seventh Circuit Court of Appeals denied rehearing. June 23, 2023. Appx C.

Petition for a Writ of Certiorari of denial of a writ of error coram nobis filed by Neal Katyal, *Kimberlin v. United States*, 22-124, certiorari denied, January 9, 2023.

Petition for a writ of coram nobis to test biological evidence and enforce microscopic hair policies of the Department of Justice. *United States v. Kimberlin*, IP. 79-7-CR

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brett Kimberlin respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in order (1) to resolve the inconsistencies that judgment creates with *Reed v. Goertz, ___U.S. ___ (2023), Skinner v. Switzer,* 562 U.S. 521 (2011), *and Heck v. Humphrey,* 512 U.S. 477 (1994), (2) to ensure that those who corrupt the criminal justice process are held accountable, and (3) to ensure that those wrongfully convicted are compensated for the injuries committed against them.

OPINIONS BELOW

The denial of the District Court to allow Petitioner to proceed with his civil rights claim under 42 U.S.C. 1983 is unpublished. Appx. A. The affirmance of the Seventh Circuit Court of Appeals is unpublished. Appx. B. The lower court's denial of rehearing is unpublished. Appx C. The District Court's denial of his coram nobis regarding DNA testing of hair is unpublished. Appx D.

JURISDICTION

The Seventh Circuit entered judgment on April 18, 2023. Pet. Petitioner timely sought rehearing, which was denied on June 23, 2023. Pursuant to this Court's order of September , 2023 the deadline for filing a petition for certiorari was extended to November 1, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3600A(a):

(a)In General.—

Notwithstanding any other provision of law, the Government shall preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is sentenced to imprisonment for such offense.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

...

42 U.S.C. 1985(2):

(2)OBSTRUCTING JUSTICE; INTIMIDATING PARTY, WITNESS, OR JUROR

If two or more persons in any State or Territory conspire to .... influence the verdict, presentment, or indictment of any grand or petit juror in any such court....

42 U.S.C. 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; ... But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

INTRODUCTION

Petitioner was wrongfully convicted in 1981 based largely on the testimony of six hypnotized witnesses and microscopic hair evidence. Since then, both of these types of evidence have been determined by the scientific community and the courts to be "junk science" that have no place in criminal prosecutions. In 1987, former Solicitor General and Harvard Law School Dean Erwin Griswold petitioned this Court to reverse Petitioner's conviction because of the use of hypnosis and asked Solicitor General Charles Fried to acquiesce in the granting of certiorari. The Court denied certiorari. *Kimberlin v. United States,* No. 86-6445.

In 2019, the hypnotist in Petitioner's case, Indiana State Police Detective Brooke Appleby, had a series of come-to-Jesus interviews with an award-winning reporter, Dan Luzadder, who covered Petitioner's original trial. Detective Appleby told Mr. Luzadder that he corrupted Petitioner's trial and lied to the trial court about his supposed "independence" which was required at the time in order to allow the use of hypnotically induced testimony. This lie was repeated by the Government on appeal to the Seventh Circuit and unknowingly by the Solicitor General in his opposition to certiorari. Detective Appleby also told Mr. Luzadder that he was not independent because he had been secretly stalking, surveilling, and conducting clandestine illegal searches of Petitioner for years before hypnotizing the witnesses in Petitioner's case. He amassed a huge six-inch file detailing his multi-year stalking campaign, and gave it to the case agents prosecuting Petitioner, but never disclosed it to defense counsel. Detective Appleby also said that he, with the knowledge of the case agents and federal prosecutors, conspired to secretly seat a relative of his on Petitioner's jury. The juror lied during voir dire to get on the jury, and she agreed not to have eye contact when Detective Appleby testified to ensure that no one would suspect anything. Detective Appleby secretly met with the juror's husband during trial, and then with the juror, case agents, and prosecutors after the verdict to coordinate their stories and ensure a coverup.

In 2015, the Department of Justice issued a groundbreaking report which admitted that in 95% of the criminal cases that included evidence and testimony involving microscopic testimony, the

testimony and the analysis were false. Therefore, it issued a directive requiring federal prosecutors to admit error in those cases and waive all procedural defenses so the convictions could be vacated. False microscopic hair evidence and testimony was used by the Government in Petitioner's trial.

In light of these extraordinary developments, Petitioner's original trial lawyer, in 2019, filed a writ of error coram nobis to vacate his conviction. He also asked the district court to issue an order for DNA testing of the hair that was subject to the microscopic testing used at trial to prove that it was not Petitioner's. The court issued that order but the Government responded that it either "lost or destroyed" the evidence, despite statutes, regulations and directives requiring the retention of biological evidence. Petitioner also requested discovery and interrogatories from Detective Appleby in order to learn more about his violations of the Petitioner's Fourth Amendment rights and other misconduct. The court denied the discovery motions and coram nobis on the grounds that Petitioner could not show any civil disability and that the court could not enforce the DOJ microscopic hair policies because Petitioner was not in custody. The Seventh Circuit, which has the most restrictive standards for coram nobis relief among the circuit courts, affirmed.

In August 2022, former Acting Solicitor General Neal Katyal filed a petition for a writ of certiorari arguing that there was a clear conflict in the circuits on the standards for granting coram nobis relief, and that it was grossly unfair for Petitioner to carry a wrongful conviction based on discredited "junk

science" and corruption that would invalidate Petitioner's conviction. *Kimberlin v. United States*, No. 22-124. This Court denied certiorari on January 9, 2023.

While the coram nobis was pending, Petitioner filed a civil rights complaint in federal district court against a number of parties including federal officials, Detective Appleby, the corrupt juror, and her husband. He alleged that the defendants conspired to conceal evidence and issues that would have overturned his conviction on appeal or post-conviction until the time had expired for raising those issues thereby depriving him of access to the court. He alleged a failure to intervene on the part of the defendants because most of them knew about the corruption but did not report it. He alleged that some of the defendants violated statutes, regulations and directives regarding the handling and retention of biological evidence that could have been used to exonerate him or identify the real perpetrator if that evidence was tested via DNA analysis. He alleged procedural due process violations for the failure of the DOJ to comply with its own microscopic hair policies. He alleged that some of the defendants violated 42 U.S.C. 1985(2) and 1986 by interfering with Petitioner's petit jury. He alleged that that some of the defendants committed fraud upon courts by concealing their misconduct and lying to the courts. He alleged a number of violations of the Administrative Procedures Act for the failure of federal officials to respond to his numerous complaints and petitions. And, he alleged that Detective Appleby violated Petitioner's Fourth

Amendment rights by stalking, surveilling, and searching his properties without a warrant or probable cause.

The district court pre-screened the suit and ordered Petitioner to show cause why it should not be dismissed without service under *Heck v Humphrey,* 512 U.S. 477 (1994). Petitioner responded with an Amended Complaint which specifically asserted that he was not suing to overturn his conviction but rather to hold those parties accountable who violated his established rights *after trial,* and for Detective Appleby's violation of Petitioner's Fourth Amendment rights *prior to trial.* Despite this, the district court, relying on *Heck,* dismissed all counts except the Fourth Amendment count which it dismissed without prejudice because Petitioner had not shown sufficient actual damages. The court dismissed the APA count because Petitioner did not show any specific statute that required a response from government officials.

Petitioner appealed arguing that *Heck* cannot bar a civil suit when the parties to the suit intentionally conceal their misconduct until the time to seek redress on appeal or through post-conviction procedures had expired. The Seventh Circuit affirmed holding that *Heck* barred the suit. On the Fourth Amendment claim, the court held that the lower court erred in dismissing the claim for lack of damages but nonetheless ordered that it be dismissed with prejudice because the statute of limitations ran out while Petitioner's civil suit was pending in the lower court. Specifically, the court found that since Petitioner first heard about Detective Appleby's illegal stalking in 2019 after reporter Luzadder

contacted Petitioner's lawyer, Petitioner should have filed the Fourth Amendment claim within two years of that disclosure.

The day after the Seventh Circuit affirmed, this Court held in *Reed v. Goertz*, that Reed could proceed with a civil rights claim under Section 1983 to challenge procedures involving DNA testing, and that the statute of limitations did not expire until the litigation ended. Implicit in the Court's holding is that *Heck* did not bar Reed's suit even though his conviction had not yet been vacated and, as he alleged, "DNA testing would help identify the true perpetrator."

This Court should grant certiorari for the following reasons: First, the lower court's opinion is contrary to *Reed v. Goertz* in three respects; (1) *Reed* held that the statute of limitations does not expire while a claim is pending in court. Instead, it begins to run after the claim is fully litigated. Petitioner's coram nobis was pending in the district court along with a discovery motion which was not denied certiorari until January 9, 2023, therefore making the Fourth Amendment claim and the 1985(2)/1986 claim timely; (2) a criminal defendant can file a 1983 procedural due process claim to challenge DNA policies; and (3) in such an instance, a criminal defendant can file a 1983 claim without first vacating his or her conviction.

Second, the lower court erroneously held that *Heck* barred Petitioner's 1983, and 1985(2)/1986 civil rights claims even though the parties he sued engaged in a multi-decade conspiracy to conceal the very grounds that would have overturned his conviction if raised on

appeal or during timely post-conviction proceedings, conspired to corruptly "influence" the jury in Petitioner's case, denied him meaningful access to the courts, and failed to intervene to stop such conspiracies. Because Petitioner did not discover the misconduct during the appellate and post-conviction process due to the fraudulent concealment by the defendants, the "fraud-based discovery rule" also precludes reliance on *Heck.* Indeed, *Heck* was never intended to grant immunity to corrupt parties who deliberately engage in gross misconduct and fraud upon the courts, and then conceal that misconduct so it cannot be raised on appeal or in post-conviction proceedings. Moreover, none of the claims raised by Petitioner necessarily implicated the invalidity of his conviction because they involved events that occurred before or after his trial.

STATEMENT

Petitioner was charged in a multi-count indictment with possession, manufacture, and detonation of small explosive devices. There were no witnesses to identify a suspect so federal officials resorted to hypnotizing six people, and the chief hypnotist was Indiana State Police Detective Brooke Appleby who learned hypnosis while attending weekend hypnosis seminars and talking with the famous television hypnotist, Kreskin. During the decade prior to Petitioner's trial, courts were bamboozled by police and hypnotists who asserted that hypnotized witnesses could remember details that they might otherwise not. However, by the late 1970s, courts became concerned that hypnosis could undermine the truth-finding process, and result in misidentification

and wrongful convictions. Therefore, some courts banned testimony from hypnotized witnesses altogether while others insisted on safeguards before such testimony could be allowed in court. The case relied on most for requiring safeguards was issued by the New Jersey Supreme Court just three months prior to Petitioner's federal trial. *State v. Hurd*, 432 A.2d 86 (1981). One of the key *Hurd* safeguards was that the hypnotist be unbiased and totally "independent" of the prosecution.

Before and during trial, Petitioner vigorously challenged the use of hypnosis and the testimony of the six hypnotized witnesses. Detective Appleby testified during both the pretrial hearing and trial that he was "independent," thereby leading the judge and jury to believe that he had no bias or prior knowledge of Petitioner. The judge relied on this sworn testimony to allow the hypnosis, and the Seventh Circuit, albeit very reluctantly and relying on *Hurd*, affirmed with Judge Cudahy penning a prophetic concurrence. He said: "I write separately on the admissibility of the testimony of the hypnotized witnesses to emphasize why reliance on this evidence presents such difficult problems in this case..." *United States v. Kimberlin*, 805 F.2d 210, 255 (7th Cir. 1986).

When Dean Griswold asked this Court to review Petitioner's conviction in 1987, he argued that the use of hypnosis undermined the truth finding process and that even the standards suggested by *Hurd* were not enough to ensure a fair trial. However, the Solicitor General opposed certiorari on the ground that some standards were employed including that Detective Appleby was

"independent." Now we know that the federal prosecutors intentionally misled the Solicitor General about Detective Appleby's independence, and that false information likely shaped his opposition to certiorari.

Dean Griswold was right. Petitioner's case appears to be the final federal criminal case that allowed the use of hypnotized testimony, and, 25 years later, the New Jersey Supreme Court, in *State v.. Moore*, 902 A.2d 1212 (2006), totally repudiated its prior holding in *Hurd*. It held:

> Based on the record developed below, and the substantial body of case law that has considered the question since *Hurd* was decided, we have determined that a change in course is now warranted. We are no longer of the view that the *Hurd* guidelines can serve as an effective control for the harmful effects of hypnosis on the truth-seeking function that lies at the heart of our system of justice. Most important, we are not convinced that it is possible to know whether post-hypnotic testimony can ever be as reliable as testimony that is based on ordinary recall, even recognizing the myriad of problems associated with ordinary recall. We therefore conclude that the hypnotically refreshed testimony of a witness in a criminal trial is generally inadmissible and that *Hurd* should no longer be followed in New Jersey. [*Id.*]

Detective Appleby's friend and colleague at the Indiana State Police, Michael Oliver, was called by federal prosecutors to testify in Petitioner's case about hair found on a hat, and he testified that by using

microscopic hair analysis, he determined that the hair matched Petitioner's hair. This testimony was false. In 2015, the Department of Justice issued a comprehensive report which found that testimony and evidence derived from microscopic hair analysis in over 90% of cases were false and that the resultant convictions should be vacated. See *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review,* FBI Press Release, April 20, 2015.

In light of this report, the district court in the instant case ordered the Government to produce the hair in order to have it tested using the latest DNA analysis. The Government, without any sworn affidavit, responded in a pleading that it could not find the biological evidence so it must be "lost or destroyed."

There are over a million registered voters residing in the Southern District of Indiana. Despite this large number of prospective jurors, a relative of Detective Appleby just happened to be called for jury duty in Petitioner's case. Appleby's best friend was the juror's husband. The juror lied during voir dire when asked if she knew anyone involved in the case or anyone who worked in law enforcement; she agreed with Detective Appleby prior to his testimony not to make eye contact with him out of fear that someone would be able to notice a relationship; her husband was used as a conduit during the trial to pass messages between her and Detective Appleby; and she, her husband, Detective Appleby, the case agents, and the federal prosecutors met shortly after the guilty verdict to coordinate their stories and derail any possible jury

misconduct allegations. Sometime after the trial, the juror's husband hired Detective Appleby to work at his company. Yet all of this was kept from defense counsel and the judge, and Petitioner did not learn about this corruption of the jury until 2019 when Detective Appleby admitted it to reporter Dan Luzadder. Indeed, after carrying the secret of his corrupt conduct for four decades, he spilled it out in several interviews with the reporter. In addition to the jury misconduct, he admitted that he was not an "independent" hypnotist because he had been secretly stalking, searching, and surveilling Petitioner for years prior to his arrest and that he had amassed a six-inch file that he never disclosed during discovery.

REASONS FOR GRANTING THE WRIT

Petitioner is proceeding *pro se* in this case so he asks this Court to construe his petition liberally and consider recruiting counsel to assist him.

I

This Case Should Be Reversed Or Remanded For Reconsideration In Light Of This Court's Decision in *Reed v. Goertz*, ___U.S.___(2023)

One day after the Seventh Circuit affirmed, the Court decided *Reed*, and that ruling affects Petitioner's case in several distinct ways.

1. In *Reed*, the defendant, relying on *Skinner v. Switzer*, 562 U.S. 521 (2011), alleged that the application of Texas' DNA policies was unconstitutional because it denied him procedural

2. due process. Petitioner, like Reed, alleged denials of procedural due process with regard to the constitutionality of the federal government's DNA processes both under the DNA statutes and the government's 2015 microscopic hair evidence directives. The District Court ruled in Petitioner's coram nobis case, that the federal DNA statute, 18 U.S.C. 3600A(a), regarding DNA testing and retention of biological evidence, only applies to persons incarcerated or on parole and that the DOJ's directives to vacate convictions based on microscopic hair evidence cannot override this custody requirement. The District Court when denying the coram nobis made this extraordinary holding:

> But a federal district court only has jurisdiction to review a federal conviction in post-conviction proceedings if Kimberlin is in custody. *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (holding that the custody requirement is jurisdictional). This jurisdictional requirement is not a waivable defense. 18 U.S.C. 3600(a) is not applicable to convicted felons who are no longer imprisoned and the Kadzik letter cannot extend the reach of the statute to include them. For these reasons, Kimberlin's verified Motion for DNA Testing, (Dkt.3) is **denied.** [Appx. D]

The Kadzik letter referred to by the District Judge was written on September 15, 2015 by Assistant Attorney General Peter Kadzik to Senator Richard Blumenthal outlining the directives issued by the DOJ in federal cases that involved the use of microscopic hair evidence. He specifically states that the DOJ

"is waiving reliance on the statute of

> limitations for collateral attack on the convictions and any procedural-default defenses in order to permit a resolution on the merits of any legal claims arising from erroneous statements in laboratory reports or testimony." [Appx. E]

The letter also states that the DOJ will admit to the falsity of the microscopic hair evidence, impute that falsity to the government, and will consent to the exoneration of affected defendants. *Id.*

Petitioner alleged in his Complaint that he was unconstitutionally deprived of due process by the refusal of the DOJ to comply with its own directives which gave Petitioner, as a defendant in a case where the Government used false microscopic evidence, certain enumerated rights. The DOJ granted these rights to other defendants, both in and out of custody, but unconstitutionally denied them to Petitioner.

Petitioner also alleged that the DOJ directives, as set forth in the Kadzik letter, gave Petitioner a right to exoneration "in the interest of justice" because the DOJ used false microscopic hair evidence and testimony to convict Petitioner. Petitioner noted that at least four other defendants in Indiana have been exonerated after false microscopic hair evidence was used in their cases—William Barnhouse, Richard Alexander, and Roosevelt Glenn and Darryl Pinkins—and the same Indiana State Police laboratory used in Petitioner's case was used in those cases.

Petitioner also alleged that the DOJ and ATF failed to follow established DNA retention statutes, policies and directives which resulted in the loss or

destruction of the biological hair evidence thereby depriving Petitioner of his right to DNA testing to prove his innocence or identify the real perpetrator. The DOJ, without any affidavit or sworn testimony, asserted that it must have lost or destroyed the hair evidence but that the certificate of destruction is also missing so the DOJ could not with absolute certainty confirm that it was destroyed. Yet, without the discovery that comes from a civil suit, Petitioner has no way of even verifying the DOJ's bald statement. Indeed, based on the history of concealment and corruption in this case, the officials named in Petitioner's lawsuit could be concealing the hair evidence because they do not want it tested for obvious reasons.

Petitioner specifically cited *Skinner v. Switzer* in the body of his Complaint and in his brief to the Seventh Circuit. *Skinner* allowed a Section 1983 suit to proceed because it would not necessarily implicate the invalidity of Skinner's conviction. Despite Petitioner's reliance on *Skinner*, the Court of Appeals did not even mention *Skinner* in its affirmance. But then, the next day, this Court decided *Reed*, which upheld *Skinner*, and reaffirmed that that a defendant can file a 1983 suit to challenge a denial of procedural due process, which is precisely what Petitioner did. Therefore, this Court must either remand this case for reconsideration in light of *Reed* or reverse in light of *Skinner* and *Reed*.

3. The specific holding in *Reed* is that the statute of limitations for filing a civil rights complaint does not begin until the underlying litigation has ended. The lower courts in *Reed*

dismissed Reed's 1983 action finding that the two-year statute of limitations ended when the trial court issued its decision. This Court, however, reversed holding that the statute of limitations ended when rehearing was denied by the state court of appeals.

The lower courts dismissed Petitioner's Fourth Amendment claim and his Section 1985/1986 claim on statute of limitations grounds because he first learned of them when reporter Luzadder told Petitioner's lawyer about them in early 2019 after the interviews with Detective Appleby. Literally days after that disclosure, the lawyer filed a writ of error coram nobis along with a motion for discovery and for interrogatories of Detective Appleby to learn the details of those activities, all of which were eventually denied. Therefore, Petitioner never had the opportunity to flesh out the details surrounding the illegal searches and seizures or the interference with Petitioner's jury. The writ of error coram nobis was litigated in the courts until January 9, 2023 when this Court denied certiorari. Therefore, under *Reed*, the time for calculating the statute of limitations did not begin until that date.

Despite the denial of the coram nobis and the discovery motions, Petitioner filed his civil rights Complaint using the limited information conveyed by Mr. Luzadder and additional information that was revealed during the coram nobis litigation. Therefore, the Fourth Amendment and the Section 1985/1986 claims, filed after the district court denied his motions but before this Court denied certiorari, were, according to the holding in *Reed*, not barred by the statute of limitations.

In Petitioner's case, the lower courts dismissed his (a) Section 1986 claim because the one-year statute of limitations had passed, and (b) Fourth Amendment claim because the two-year statute of limitations had passed. Specifically, the courts found that since Petitioner learned of these civil rights violations right before his coram nobis was filed, he should have filed the civil rights claims earlier. This is contrary to the letter and spirit of *Reed* which counsels that the statute of limitations begins to run when the litigation ends. Moreover, in *Reed,* the Court noted it makes sense to wait until the litigation ends because if "any due process flaws lurk in the DNA testing law, the state appellate process may cure those flaws, thereby rendering a federal § 1983 suit unnecessary." In Petitioner's case, had be prevailed on the coram nobis litigation, his civil rights suit may have been unnecessary or would have been streamlined because many of the civil rights issues would have already been litigated.

Moreover, there is a big difference between "discovering" a civil rights claim through hearsay from a reporter and from actual facts. The lower court found that the statute of limitations began when reporter Luzadder contacted Petitioner's trial lawyer in 2019 to tell him about Detective Appleby's admissions. However, such hearsay needed to be verified in order to provide a valid basis for a civil rights lawsuit because such a suit must be based on more than hearsay. The filing of the writ of error coram nobis and discovery motions were intended to discover the actual facts, and they did reveal more information that formed the basis for the civil rights suit. This is one of the reasons why *Reed* noted that

the statute of limitations begins at the end of the litigation.

Clearly, Petitioner's case is analogous to Reed's—Petitioner filed a civil rights complaint to challenge the application of DNA statutes and policies, his complaint was filed without first having his conviction vacated, and, several of his claims were dismissed on statute of limitations grounds while the issues were still pending in the courts. Therefore, this Court should either reverse this case in light of *Reed* or remand it for reconsideration in light of *Reed*.

II

***Heck v. Humphrey*, Does Not Bar Petitioner's Civil Rights Complaint Because It Raises Challenges To DNA Related Policies, Has Other Claims Protected By The "Fraud-Based Discovery" Rule, And Does Not Necessarily Implicate The Invalidity Of His Conviction**

As noted in Argument I, Petitioner's civil rights Complaint raised numerous challenges to DNA statutes and policies that would not "necessarily imply" the invalidity of his conviction. *Skinner* at 1298. Therefore, under both *Skinner* and *Reed*, those challenges are not barred by *Heck*.

Moreover, the other civil rights claims in the Complaint are not barred by *Heck*, not only because they do not implicate the invalidity of the conviction but because they are protected by the "fraud-based discovery" rule which states that "where a plaintiff has been injured by fraud and remains in ignorance of

it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (internal quotation marks omitted). See also *Bailey* v. *Glover*, 21 Wall. 342, 347 (1875) ("[W]hen the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it.").

In Petitioner's case, he could not discover the Respondents' misconduct during the time limits set forth for a direct appeal or post-conviction relief because the Respondents entered into a decades-long conspiracy to fraudulently conceal their misconduct. When Petitioner did discover it in 2019, he immediately filed a writ of error coram nobis which was denied because he could not show a civil disability and biological evidence was missing.

Under the "fraud-based discovery" exception, Petitioner cannot be barred relief under *Heck* and doing so would reward the Respondents for committing their misconduct and concealing it until the statute of limitations ran out for Petitioner to seek relief. *Heck* was never meant to grant immunity to parties or officials who engage in criminal or ethical misconduct. To do so in the instant case would incentivize other corrupt officials to simply conceal misconduct until the statute of limitations runs out, knowing that this would ensure that the wrongful conviction stands and that the wrongfully convicted defendant is deprived of his right to pursue a civil rights suit. Moreover, it would allow corrupt officials

to benefit from their own misconduct while depriving injured parties to of their right to redress.

Heck made a clear statement that a defendant who challenges a conviction must do under direct appeal or habeas corpus. However, when, as here, the time limit for filing a habeas is long past and there is no possible way for a civil rights complaint to invalidate a conviction, then *Heck* cannot be used to deny redress for injury. In Petitioner's case, his civil rights complaint could not invalidate his conviction because the courts had already ruled that his time for direct appeal and post-conviction relief had expired and his coram nobis would not be allowed in the Seventh Circuit. In fact, in Petitioner's complaint, he specifically said that he was *not* seeking to overturn his conviction. Instead, he was seeking compensation and accountability for misconduct by law enforcement officials and conspirators that occurred *before* his trial (such as illegal searches and seizures), and *after* his trial (such as wrongful concealment of a number of constitutional violations, interference with access to the courts, failure to intervene, due process violations from improper destruction of DNA evidence, and failure to respond to formal complaints). Events that occur before or after a trial are not barred by *Heck* because they cannot, by their very nature, necessarily implicate the invalidity of a conviction. *Cf. Gilbert v. Cook*, 512 F.3d 899 (7th Cir. 2008) ("*Heck* and *Edwards* do not affect litigation about what happens after the crime is completed.")

The actions of the defendants in this case, including federal prosecutors and law enforcement agents, "shock[] the conscience" because they are so

egregious. These officials had an ethical duty to uphold the law yet they deliberately corrupted it, failed to intervene to stop the corruption, and then entered into a secret agreement to conceal the corruption so that Petitioner could not vacate his wrongful conviction on appeal or during post-conviction proceedings.

Without knowing about the corruption, Petitioner was denied his right to meaningful access to the courts during the appeal and post-conviction process. While the Constitution "entitles the individual to a fair opportunity to present his or her claim," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), that right is lost when officials conceal the circumstances relating to the deprivations of civil rights that Section 1983 is designed to remedy. Judicial access must be "adequate, effective, and meaningful." *Bounds v. Smith,* 430 U.S. 817, 822 (1977).

Here, Detective Appleby and his conspirators concealed everything about his misconduct—first, his pre-trial, secret, multi-year illegal surveillance and stalking of Petitioner, second, his lack of independence as a hypnotist and lies to the court about that, third, his pre-trial amassing of a six-inch illegal surveillance file which he gave to the federal case agents but not to defense counsel, fourth, his participation with his relative and others in the jury tampering, fifth, his recruitment of the microscopic hair analyst to conduct the microscopic hair analysis and testify falsely, and sixth, his decades-long coverup and conspiracy-of-silence. These conspirators, like members of the Cosa Nostra, agreed with the each other to maintain this criminal omerta for almost four

decades. And in doing so, they deprived Petitioner of access to the courts and are not entitled, in essence, to a grant of immunity under *Heck*. *Cf. Ryland v. Shapiro*, 708 F,2d, 967 (5th Cir. 1983) (holding that officials who covered up a murder by a prosecutor thereby depriving the parents of the information necessary to file a civil rights suit were not entitled to immunity).

Under these circumstances, the lower courts erred in holding that *Heck* barred Petitioner's civil rights suit. As noted above, these holdings directly conflict with *Skinner* and *Reed,* and are antithetical to *Heck,* which was never intended to grant immunity to those who engage in the wholesale corruption of the legal system.

CONCLUSION

According to the University of Michigan's *National Registry of Exonerations*, more than 3,391wrongfully convicted people have been exonerated since 1989 totalling more than 30,250 years lost in prison. Wrongful convictions are such an epidemic in the United States that many states have created innocence review boards to help speed the process of exoneration. The Department of Justice joined this movement with its 2015 report about the hundreds of wrongful convictions based on false microscopic hair evidence. However, despite good intentions and a laudatory start, it completely dropped the ball by failing to comply with its directives in Petitioner's case–and likely many other cases. As a result, Petitioner continues to carry the injury of a wrongful conviction based on junk science.

With the grant of certiorari and the reversal of the lower courts, Petitioner may finally receive compensation for his years lost in prison, and the Respondents may finally be held responsible for their constitutional violations. Petitioner's case raises issues that are important and affect many criminal defendants whose convictions were based on junk science and corrupt officials. This Court should grant certiorari for the all the reasons stated above and to ensure a consistent application of *Skinner, Reed, and Heck.*

Respectfully,

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