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IN THE SUPREME COURT OF THE UNITED STATES

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SHAKUR MUHAMMAD, AKA :

JOHN E. MEASE, :

Petitioner :

v. : No. 02-9065

MARK CLOSE :

- - - - -X

Washington, D. C.

Monday, December 1, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m

APPEARANCES:

CORINNE BECKWITH, ESQ., Washington, D. C. ; on behalf of the Petitioner.

THOMAS L. CASEY, ESQ., Solicitor General, Lansing, Michigan; on behalf of the Respondent.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90 -- it's 02-9065, Shakur Muhammad, also known as John Mease v. Mark Close.

Ms. Beckwith.

ORAL ARGUMENT OF CORINNE BECKWITH

ON BEHALF OF THE PETITIONER

MS. BECKWITH: Thank you, Mr. Chief Justice, and may it please the Court:

The petitioner in this case, Shakur Muhammad, is a state prisoner who has brought a civil rights action alleging that a prison guard framed him on a false disciplinary charge in retaliation for his having exercised his constitutional right to seek redress in the courts for this same prison guard's previous misconduct. For three reasons, this Court should not engraft onto this type of Section 1983 claim a favorable termination requirement that would make this prisoner have to win his claim in another forum before he can seek his remedy in Federal court.

First, the favorable termination requirement is a habeas protecting advice - device - that was borne of this Court's recognition that Congress would not have wanted a general civil rights action to be the vehicle for

1 undoing a state criminal judgment, particularly given the
2 more specific habeas exhaustion requirement.

3 Second, extending the favorable termination
4 requirement beyond this original rationale lacks any basis
5 in the statute's terms or history, and it's devoid of the
6 kind of common law pedigree that might suggest Congress
7 envisioned a broader application to cases that do not look
8 like habeas cases in that they don't involve a direct or
9 an indirect challenge to the fact or duration of custody.

10 And finally, any remaining qualms about
11 Congress' intent are resolved by the Prison Litigation
12 Reform Act, where, after carefully weighing the interests
13 of overburdened courts and of prison officials, Congress
14 imposed an administrative exhaustion requirement, not a
15 favorable termination requirement.

16 QUESTION: But I don't understand this about this
17 case. I'm having an awfully hard time understanding this
18 case, and - and it seemed to me what had happened was that
19 the - your client, who's certainly well represented, he is
20 sitting there at lunch and he makes some faces or gestures
21 and the prison guard then has him up for a couple of
22 charges and he basically is acquitted of the more serious
23 one and they punish him for the more - less serious,
24 threatening behavior, no, it's insolence or something like
25 that.

1 He never says a word about retaliation, never
2 says a word about it. He never appeals, which he could
3 have done, his conviction. He never says to the prison
4 authorities, hey, throw this out. The whole thing was
5 based on the guard's desire to retaliate. And now
6 suddenly have his - not having done any of that, we're in
7 Federal court, and the Federal magistrate says, you know,
8 he has no evidence of retaliation, or at least not enough.

9 And now we're up here arguing about Heck v.
10 Humphrey, sort of like the Finnegans Wake of the habeas
11 corpus law, and I - I can't really understand how we even
12 got here. I - I don't understand why, if you're right,
13 this isn't an unexhausted claim, or at least the
14 magistrate said you don't - your client, unfortunately for
15 him, has not enough evidence. How do we get into this?

16 QUESTION: Well, I suppose one of the reasons you
17 got into it was that the Sixth Circuit said that you had -
18 had to comply with Heck against Humphrey, and you didn't
19 agree with it.

20 MS. BECKWITH: Well, that's right, and you know,
21 this is undoubtedly a valid First Amendment retaliation
22 claim. The idea here is our - our client is saying, you
23 know, he - he made perfectly appropriate allegations in
24 the courts against this prison - this prison guard in
25 prior lawsuits, and the guard set out to get him -

1 QUESTION: Can we reach this - I can't reach the
2 Sixth - the question that the circuit thought was here. I
3 don't see what we're supposed to say. What are we
4 supposed to say? That - that this unexhausted claim,
5 nonetheless, in 1983 states a claim?

6 MS. BECKWITH: It's not - I don't believe it's an
7 -

8 QUESTION: If I said what I said, is that correct
9 what I've said?

10 MS. BECKWITH: I don't think so, because it's not
11 an unexhausted claim, and I believe the whole point of
12 this case is the - is the misstatement of the law by the
13 Sixth Circuit that would deem this a non-civil rights
14 claim, basically a habeas claim completely contrary to
15 this Court's precedent in Preiser. We have, you know,
16 Preiser v. Rodriguez, which set up the way, you know,
17 followed up on by Heck v. Humphrey, the way that we decide
18 which way these cases should go. Is this a civil rights
19 claim? It should go through 1983. Or is it something
20 we're worried might swallow the habeas exhaustion
21 requirement?

22 QUESTION: Well, does the Heck Humphrey issue
23 that comes to us one that is affected by whether good-
24 time credits are lost?

25 MS. BECKWITH: The - whether good-time credits

1 are lost is a - is a consideration and whether this is a
2 fact or duration case.

3 QUESTION: Right.

4 MS. BECKWITH: And this case is nothing about -

5 QUESTION: So after all the briefing, the
6 additional briefing that's gone on, do we know now for
7 sure whether good-time credits are affected here?

8 MS. BECKWITH: I think we do. The most important
9 point on that question, Justice O'Connor, is something
10 that I - a point I unfortunately made in a footnote
11 instead of in the text, footnote 6 on page 5 of the yellow
12 brief, which I wish had been the first sentence of my
13 issue in bold, and that point is that it doesn't matter,
14 because we're not - no part of our constitutional claim
15 challenges the insolvency conviction.

16 QUESTION: But is - is that really the point?
17 It's not what you challenge, it's the implication of what
18 you want to be held.

19 MS. BECKWITH: It - that's right.

20 QUESTION: And those are quite different things.
21 I mean, if in fact good-time credits are lost, even though
22 you are not asking for any adjudication on good-time
23 credits, then it necessarily follows that the length of
24 the sentence can be affected, and it necessarily follows
25 that at some point there could be a habeas claim because

1 the individual was not being released.

2 MS. BECKWITH: That's right, but there's nothing
3 about this claim that would ever, you know, ever lead to
4 the result, under the test necessarily imply the
5 invalidity of the deprivation of good-time credits, which,
6 by the way, I don't believe we were deprived of good-time
7 credits, because of the reasons I state in my brief. Our
8 client is a habitual offender and this claim was not
9 raised in the lower court but -

10 QUESTION: Well, let - let's - could we just make
11 a short excursus there? Assuming that no good-time
12 credits are lost with respect to the minimum sentence, the
13 point of - determining the earliest point at which he
14 could be paroled, isn't it the case under state law that
15 good-time credits still would be applied to the maximum
16 sentence?

17 MS. BECKWITH: That - that is true. I don't
18 believe that would ever -

19 QUESTION: Then - then isn't that the end of your
20 argument -

21 MS. BECKWITH: I don't think so.

22 QUESTION: - because doesn't it - I mean, let me
23 just finish -

24 MS. BECKWITH: Sure.

25 QUESTION: - my - my question so you know where

1 I'm going. If - if - if the good-time credits would apply
2 to the maximum sentence, then it seems to me that if he is
3 not released at the point at which he says he should be
4 entitled to good-time credits, he's got a habeas claim

5 MS. BECKWITH: I don't think that - I think that
6 that aspect of the claim, you know, aside from waiver and
7 aside from not challenging the conviction that led to the
8 good-time credits, if they exist, is still not true, I
9 don't think. It - it's too hypothetical. Most of these
10 cases are like Preiser, where there would be immediate
11 release. He has to serve his minimum sentence under
12 Michigan law, so he's not ever going to get out earlier
13 than his minimum. He - those will not be shortened by
14 good-time credits.

15 After that, he's going to see the parole board
16 several times. He's going to be 103 years old when he
17 hits his maximum sentence. The likelihood that he would
18 actually not be dismissed until his maximum sentence, you
19 know, be discharged as opposed to paroled earlier than
20 that and have his sentence terminated long before his
21 maximum, you know, just makes it impossible that this
22 would be anything but hypothetical -

23 QUESTION: Well, but for ease of judicial
24 administration, do we really want to have to look at how
25 old he's going to be and all of these things? Is it not

1 possible to say at the end of the day, good-time credits
2 still apply to the maximum, so you're out of here?

3 MS. BECKWITH: Well, that may be true in another
4 case, but it's not true in our case, because we're not
5 challenging, you know, nothing about our constitutional
6 claim would necessarily imply the invalidity of that
7 insolvency conviction.

8 QUESTION: Well, sticking with Justice O'Connor's
9 question, suppose good-time credits were involved here,
10 but insofar as the prisoner is concerned, it was wholly
11 peripheral, and assume that the good-time credits would
12 not click into operation for another 20 years. Would it
13 make sense for us to insist on Heck v. Humphrey in those
14 circumstances?

15 MS. BECKWITH: In - I mean, I think that - that
16 Preiser created a clean line, and this Court has decided
17 repeatedly that good-time - the loss of good-time credits
18 falls on the fact or duration side of that line, and I
19 think it makes sense to continue to maintain that clean
20 line, and it's the kind of thing where good-time credits
21 are the hard case. There's -

22 QUESTION: So you think it does - so you think
23 that if good-time credits were unequivocally involved
24 here, that the Heck rule would apply?

25 MS. BECKWITH: I don't - I - I think that's what

1 this Court's precedents would suggest. There might be
2 room for reconsideration of the good-time credits in the
3 future when it - when it starts to get real hypothetical
4 or when there - if there might be some abuses, such as
5 prison, you know, evidence that prisons were, you know,
6 had the perverse incentive of tacking on good-time credits
7 to -

8 QUESTION: Well, this is - this is very strange
9 when we - when the original idea, I thought, of Heck was
10 typing the kind of claim I think the Court said in that
11 case, this is not a prison condition case like my dietary
12 law is not observed, am I not getting medical treatment,
13 but it - it is like - there was an analogy to malicious
14 prosecution, and here this has the same flavor, that this
15 is - the complaint is that this guard had it in for me,
16 and there were trumped up charges.

17 And the way you get around - would you say
18 you're not really attacking the insolence, what he - he
19 was convicted, so you're only concerned with the six days
20 pre-hearing detention, but I don't see how you can, in all
21 candor, chop up your complaint that way, because if the
22 officer hadn't been retaliatory, the officer wouldn't have
23 confronted him in the first place, he wouldn't have been
24 insolent, and nothing would happen. So how you can say
25 is, well, we'll accept the insolence but really we don't

1 because this is a retaliation and there never would have
2 been any charge at all.

3 MS. BECKWITH: Well, I - that's - part - along
4 the lines of the argument the respondent makes in trying
5 to use a - sort of a but-for kind of take, or test, or a
6 relevance kind of test, but that is not the test. The
7 test is whether the claim, the constitutional claim, would
8 necessarily imply the invalidity of the conviction or
9 sentence -

10 QUESTION: I - I thought your response to that
11 was that provocation was no defense to the charge -

12 MS. BECKWITH: That's right.

13 QUESTION: - to the charge of insolence.

14 MS. BECKWITH: The respondent is - is arguing
15 that - that it goes to credibility. Credibility is not
16 enough. That's about relevance or admissibility.

17 QUESTION: But is not your position, and I don't
18 know that the other side has contested it, that
19 provocation would not have been a defense to the charge of
20 insolence?

21 MS. BECKWITH: That's right. There's no -

22 QUESTION: And therefore, your provocation claim
23 does not invalidate the insolence conviction.

24 MS. BECKWITH: There's - there's - that's
25 correct, Justice Scalia. There's no way of litigating -

1 QUESTION: How - how do I decide that, because
2 that, it seems to me, is why I kept thinking I'm having
3 trouble with this case?

4 MS. BECKWITH: Well -

5 QUESTION: It is inconceivable to me that under
6 any law of any place that if a guard has gone and brought
7 this whole thing about as a way of retaliating against a
8 First Amendment right, I can't imagine a tribunal that
9 wouldn't throw out the whole thing. I mean, I know you
10 say, oh no, that isn't what they would have done. If he
11 had gone to that disciplinary body and it said, look, I
12 have proof here that this is total fake by the guard in
13 retaliation for my First Amendment right, what that body
14 would have said is, we convict you still of insolence but
15 not of the greater charge.

16 That to me is inconceivable, but whether that's
17 so or not is a pure matter of state law, and - and it
18 seems to me that this case then turns on a pure matter of
19 state law, because I think if it is totally separate maybe
20 you're right. If it isn't totally separate, I don't see
21 how you could be right.

22 MS. BECKWITH: And it is. I have several answer
23 that. It is totally separate. You - you can't litigate
24 the retaliation claim in - in a - in a prison misconduct
25 hearing, just as Rodney King couldn't -

1 QUESTION: You couldn't - you couldn't say,
2 hearing examiner in the prison, I want to tell you
3 something. The guard's doing this because I filed some
4 earlier claims against him. What - what would be so hard
5 about doing that?

6 MS. BECKWITH: In fact, we actually - the hearing
7 officer himself, in his deposition, which is at joint
8 appendix 102 to 103, indicates he - he - retaliation was
9 not a defense. It might go to credibility, but he can't
10 consider that -

11 QUESTION: No, but that's a - that's an issue of
12 fact. And the thing that's bothering Justice Breyer is
13 the same thing that's bothering me, and that is it seems a
14 - it seems like a very strange statement of law to say
15 that there would be no retaliation defense, and if - and
16 yet it seems to me you've got to say that in order to
17 avoid Heck and Humphrey. So what's your basis for saying
18 it? Do you have -

19 MS. BECKWITH: It's -

20 QUESTION: - any state law authority for saying
21 that so that we could make that assumption that you are
22 correct in your statement when we decide this case?

23 MS. BECKWITH: To tell you the truth, I just
24 assumed it as - as a logical matter. It's like, as I was
25 saying before, Rodney -

1 QUESTION: You assumed that in - in the - in the
2 disciplinary proceeding for - that, let's say, in a
3 disciplinary proceeding for insolence, he would not be -
4 the prisoner would not have the opportunity of saying, he
5 got me into this situation in retaliation for filing these
6 actions? You just assumed that?

7 MS. BECKWITH: Right. It's just like assault on
8 a police officer. If you're arrested because you're black
9 and then you assault that police officer, you - you know,
10 your - your 1983 claim on the illegal arrest is not, you
11 know, it's - it's separate and apart from -

12 QUESTION: But we're talking here about
13 insolence. I mean, he gave him a dirty look or something
14 or other.

15 MS. BECKWITH: The - the hearing officer himself
16 said that -

17 QUESTION: Well, is there any state law authority
18 that we could look to?

19 MS. BECKWITH: I'm not aware of any and I'm sorry
20 that I -

21 QUESTION: Well, it doesn't seem unreasonable to
22 me. A police officer who's charged with a civil rights
23 violation for - for whacking a demonstrator cannot please
24 - plead as a defense, I was provoked. Doesn't matter if
25 you're provoked, you're not supposed to do - do the act,

1 and I don't know why it would be any different with - with
2 a prison inmate if - if he was provoked -

3 QUESTION: But he doesn't admit that.

4 QUESTION: - to resist the provocation.

5 MS. BECKWITH: And in any event -

6 QUESTION: What's so unreasonable about that?

7 MS. BECKWITH: - I think that what - whether we
8 challenge the - the misconduct - the result of the
9 misconduct proceeding in this case is really not relevant
10 because -

11 QUESTION: Well, his - his complaint doesn't say
12 the kind of thing you just said. I think his complaint
13 says, I'm sitting there, the officer made some faces,
14 lured me into this whole thing, and then what he charged
15 me with was false. So I - I didn't see - it's what
16 Justice Ginsburg, I think, was talking about at the
17 beginning. I'm just - maybe you have nothing else to say
18 on it, but I saw this being chopped up. I saw one
19 incident, it being chopped up as if there were several
20 things, one insolence, one threatening behavior, and then
21 separating that out, and I got totally confused about the
22 Heck v. Humphrey part, the exhaustion part -

23 MS. BECKWITH: The - the complaint is very clear.
24 I mean, the gist - the most tangible part of - of the
25 complaint is that I was overcharged, you know, and I had

1 to do pre-hearing detention, six days in pre-hearing
2 detention that I would not otherwise have had to do
3 because this guard was retaliating against me for suing
4 him, for exercising -

5 QUESTION: This is the amended complaint. It was
6 not his original complaint, and one of the many puzzling
7 features in this case is the Sixth Circuit is addressing
8 the original complaint, where this man says, I want the
9 whole thing expunged, not that, yes, I was insolent, but I
10 wasn't engaged in threatening behavior. The initial
11 complaint said, this officer retaliated against me, the
12 whole thing is no good, court, expunge the discipline.
13 And it was only in the amended complaint that they came up
14 with this theory, oh, insolence was all right, and the
15 only thing that we're attacking is the threatening
16 behavior.

17 MS. BECKWITH: Well, the two complaints are
18 actually very similar, maybe identical, except for the -
19 removing the request for expungement. And, of course, the
20 Sixth Circuit's -

21 QUESTION: Well, isn't that a rather significant
22 difference, because that says the whole thing is no good,
23 the insolence is no better than the threatening, the whole
24 thing is no good?

25 MS. BECKWITH: Mr. Muhammad was - was not

1 represented by counsel. He was - he was working pro se,
2 and he amended his complaint. The amended complaint was
3 accepted and that's - that's the complaint that's - that's
4 before -

5 QUESTION: But that's not what - that isn't the
6 complaint that was before the Sixth Circuit, so at a
7 minimum, shouldn't we send it back to the Sixth Circuit -

8

9 MS. BECKWITH: No.

10 QUESTION: - and say, look, you looked at the
11 wrong complaint?

12 MS. BECKWITH: Well, it was the complaint that
13 was before the Sixth Circuit. They just made a factual
14 error, and I think both parties agree it was a factual
15 error, but it's one that didn't matter.

16 QUESTION: Nonetheless, they ruled on a complaint
17 that is not the one he was complaining about.

18 MS. BECKWITH: But - but it doesn't matter,
19 because they relied on Huey v. Stine and the case law in
20 the Sixth Circuit. It wouldn't matter whether you asked
21 for expungement or not if you are challenging the result,
22 which the Sixth Circuit thought -

23 QUESTION: Excuse me. All of this is relevant
24 why? Because of the issue of whether he's lost any good-
25 time credit, isn't that right?

1 MS. BECKWITH: I don't -

2 QUESTION: Wasn't that issue waived by the other
3 side and wasn't - wasn't there a finding? As I understand
4 it, there was a finding by a - by the magistrate that
5 plaintiff is no longer in the more restrictive custody of
6 toplock or administrative segregation, nor in the more
7 extended custody that would still faced him had he lost
8 any good-time credit, and an issue was never made by the
9 other side as I understand it, nor before the Sixth
10 Circuit, that he had lost any - any good-time credit. Am
11 I wrong in that?

12 MS. BECKWITH: That's absolutely right. The
13 issue wasn't presented -

14 QUESTION: So it's waived. Why should we get
15 into that here?

16 MS. BECKWITH: Right. And if - but if -

17 QUESTION: Especially having granted cert on a -
18 on - on a significant question, to which that - that is -
19 is preliminary.

20 MS. BECKWITH: That's correct, Justice Scalia,
21 and if good-time credits are not at issue, it doesn't
22 matter if we're challenging the insolvency conviction,
23 because nothing about this claim is going to affect the
24 fact or duration of - of confinement, so that, you know -
25

1 QUESTION: Though the state does dispute you on
2 the good-time credit, does it not?

3 MS. BECKWITH: The state does dispute. You know,
4 I think they're wrong for four reasons.

5 QUESTION: But too late, but too late. Isn't
6 that your point? They dispute you, but too late.

7 MS. BECKWITH: That is my point. I mean, that is
8 my best point. My second best point -

9 QUESTION: Okay. If you're right on that point,
10 then it's the easiest case ever, you're obviously right.
11 If it has nothing to do with good-time credit -

12 MS. BECKWITH: Well -

13 QUESTION: - if you can chop up the - the action
14 in that way, if all you're complaining about is six days
15 that he spent in pre-trial detention and your winning on
16 that would have nothing to do with anything else, would
17 not set aside the rest of the - of the loss of good time
18 or anything else, then you're obviously right.

19 MS. BECKWITH: That's right.

20 QUESTION: That's what she says.

21 (Laughter.)

22 QUESTION: Why is it an issue for us?

23 MS. BECKWITH: I agree. It's an issue because
24 the respondent is trying to push the test of, you know, of
25 Heck v. Humphrey into the context of misconduct

1 proceedings, regardless of the punishment imposed. They
2 say even -

3 QUESTION: You don't - you don't say that Heck
4 against Humphrey should never apply to misconduct
5 proceedings, do you?

6 MS. BECKWITH: No.

7 QUESTION: You just say it shouldn't have -

8 MS. BECKWITH: As in Edwards, it should
9 definitely apply when good-time credits are lost or
10 something else happens, you know, in the proceeding. I
11 can't imagine what besides good-time credits, but if fact
12 or duration is affected - in this case, fact or duration
13 was not affected. This is a classic civil rights claim
14 We're talking about the First Amendment. It could have
15 been about religion. It could have been about race.

16 QUESTION: Know what is very strange about this
17 case is you've got these two threshold requirements. If
18 it's a habeas line, then you can't skirt exhausting state
19 judicial remedies. If it's a prison condition case, then
20 you have the PLRA, you have to exhaust the internal
21 remedies. Here, you didn't do either. I mean, if you
22 take it on your case, this is really in the prison
23 conditions line. You didn't even appeal internally.

24 MS. BECKWITH: But that's - that's not at issue
25 in this case. The - the respondent complained in the

1 courts below about exhaustion. It was considered by the
2 lower court. The respondent said, you didn't seek
3 rehearing, and the magistrate judge said, I disagree with
4 you, he didn't have to seek rehearing because he's not
5 complaining about the insolence -

6 QUESTION: But, nonetheless, you are saying that
7 this is a case that can go into court under 1983 even
8 though there was - it's not on the habeas side so you
9 don't have to exhaust the judicial remedies. It's not on
10 the prison conditions side and you don't have to - you
11 don't have to exhaust internal administrative remedies.

12 MS. BECKWITH: Justice Ginsburg, I absolutely
13 disagree. He did exhaust. This was a question -

14 QUESTION: What did he exhaust?

15 MS. BECKWITH: He - he did everything he needed
16 to do. The magistrate judge held that and the district
17 judge affirmed that and it wasn't appealed -

18 QUESTION: Where? Because it seems to me that he
19 didn't. He didn't ask for anything.

20 MS. BECKWITH: In -

21 QUESTION: He said - and he said, indeed, I'm not
22 challenging, I'm not challenging the insolence conviction.

23 MS. BECKWITH: Record 68, the district court
24 record in 68, unfortunately it's not in the joint appendix
25 at - at 8 to 9 - pages 8 to 9, the magistrate held that

1 Mr. Muhammad exhausted, without seeking rehearing he
2 exhausted. And there was also a -

3 QUESTION: But can you tell me exactly what that
4 was, because I don't see how he - he had?

5 MS. BECKWITH: Well, the -

6 QUESTION: He might have said he didn't need to
7 exhaust.

8 MS. BECKWITH: No, the - the - the government
9 filed a brief, a motion to dismiss, saying, you know, many
10 things, but one of the things was he didn't exhaust his
11 administrative remedies and they said because he didn't
12 seek rehearing, respondent, or the - Mr. Muhammad
13 responded, I didn't have to seek rehearing because I'm not
14 complaining about the insolence. I agree I'm guilty of
15 insolence. And the magistrate agreed. That's the end of
16 exhaustion.

17 QUESTION: Exactly. But did he exhaust
18 administrative remedies for what he's complaining about
19 here, which is -

20 MS. BECKWITH: Right. There was no -

21 QUESTION: - which is not the insolence
22 conviction, but rather the sixth - the six day lockdown or
23 whatever he had pending the hearing on the higher charge.

24 MS. BECKWITH: As far as we know, he exhausted
25 everything that he needed to exhaust.

1 QUESTION: Well, how - how could that be,
2 because -

3 MS. BECKWITH: The government -

4 QUESTION: I know they said that, and that's one
5 of the reasons I'm having difficulty. You would have
6 thought that if he was retaliated against, he would have
7 said to the hearing examiner, I was retaliated against me,
8 the whole thing is no good, I had six days that I spent,
9 at least deduct the six days from the seven days
10 additional punishment you're giving me. He didn't say
11 that. Nobody knew a thing about it. He didn't ask for a
12 rehearing. He didn't ask a judge - I mean -

13 MS. BECKWITH: I -

14 QUESTION: - what I'm worried about is writing an
15 opinion in this that says you're completely right, and in
16 the course of doing that by every assumption I have to
17 make, so mixing up the law that nobody can understand what
18 it is.

19 MS. BECKWITH: I understand. There - there's no
20 doubt that the PLRA requires exhaustion of administrative
21 remedies. It's not at issue in this case. It's not
22 jurisdictional. Every circuit court to consider the issue
23 has said it's not jurisdictional. The government raised
24 the - the question. The lower court considered it. They
25 - they ruled in our favor. It's not a part of this case

1 anymore.

2 QUESTION: Was it raised on appeal?

3 MS. BECKWITH: It was not raised on appeal.

4 QUESTION: Was it raised in the brief in
5 opposition?

6 MS. BECKWITH: In - in cert?

7 QUESTION: To the petition for cert?

8 MS. BECKWITH: No.

9 QUESTION: Not the state, from the district court
10 or the court of appeals?

11 MS. BECKWITH: That's right, but it was not part
12 of - of the government's response, failure to exhaust. It
13 was decided in the lower court. It's - it's over.

14 QUESTION: Is - is it clear that the wrong of
15 which he's complain - complains - is one of the wrongs set
16 forth in the Prison Litigation Reform Act, or is this - is
17 this some -

18 MS. BECKWITH: Yes. And in fact, that - that's
19 one of our arguments that the Prison Litigation Reform Act
20 reaffirms the - the clean line that was created in
21 Preiser. You have fact or duration claims and you have
22 conditions claims, Prison Litigation Reform Act, in - in
23 creating an exhaust - an administrative exhaustion
24 requirement for conditions claims, you know, indicates
25 that this is the kind of claim that needs to exhaust.

1 QUESTION: If he had been charged initially just
2 with insolence instead of threatening behavior, that is
3 bondable, but that doesn't mean that he would have been
4 bonded, right? That's a discretionary determination.

5 MS. BECKWITH: That's right.

6 QUESTION: So it might have been the very same
7 thing. The officer might have said, this is a bad guy,
8 don't let him out until after the hearing. So, in one
9 case, he can't get out because it's mandatory pre-trial
10 detention. In the other - so this case is not about he
11 had a right to be free, or free in the prison population
12 those six days, but he could have argued that he should
13 have been not locked up. Is that's what the - that's the
14 whole thing that this case is about, right? .

15 MS. BECKWITH: I mean, his - his claim is a First
16 Amendment retaliation claim. The damages are this, you
17 know, the chilling effect, the six days of pre-hearing
18 detention, but that's just a remedial question. The claim
19 is a valid one.

20 QUESTION: I thought he's suing for damages and
21 that's the only thing he's suing for, not injunctive,
22 nothing else. All he wants is money.

23 MS. BECKWITH: That's right. That's right.

24 QUESTION: And what he wants money is for the six
25 days that he might have spent anyway.

1 MS. BECKWITH: He wouldn't have spent it anyway,
2 and you can see from the joint appendix at page 58, credit
3 was not given -

4 QUESTION: No, I'm not talking about - it's
5 bondable. There's nothing that shows that if the charge
6 had simply been insolence they wouldn't have held him for
7 the six days. He wasn't entitled not to be held.

8 MS. BECKWITH: That's purely speculative and a
9 matter of remedy, not - not the right. Mr. Chief Justice,
10 if I may reserve the balance of my time.

11 QUESTION: Very well, Ms. Beckwith.

12 Mr. Casey, we'll hear from you.

13 ORAL ARGUMENT OF THOMAS L. CASEY

14 ON BEHALF OF THE RESPONDENT

15 MR. CASEY: Mr. Chief Justice, and may it please
16 the Court:

17 I agree this is a very confusing case. We
18 believe there are several reasons why summary judgment
19 should be affirmed. The first is that because Mr.
20 Muhammad did lose good-time credits, and because the
21 nature of his challenge necessarily implies the invalidity
22 of his misconduct determination, we think this case is
23 controlled by Edwards v. Balisok.

24 QUESTION: Why didn't you waive the question of
25 good-time credits? I mean, why - you - you heard the

1 discussi on before.

2 MR. CASEY: Yes.

3 QUESTION: Why - why is this something we should
4 consider?

5 MR. CASEY: First of all, we believe it's - it's
6 a matter of straightforward statutory - not even
7 interpretation, just reading the text of the Michigan
8 statutes on good time, so it's not some fact issue that -
9 that can be waived. Secondly -

10 QUESTION: Excuse me? Only fact issues can be -
11 legal issues can't be waived?

12 MR. CASEY: No, it's not a legal argument. This
13 is a straightforward - a straightforward application of
14 the statutory language that says he did lose good time.

15 QUESTION: You did not - did you make the point
16 below that the other side has to lose because he lost
17 good-time credit?

18 MR. CASEY: In our first motion for summary
19 judgment, which was in 1998, we argued that Heck and
20 Edwards controlled the case, that he was in effect
21 challenging his good - or his misconduct hearing
22 determination. The magistrate of the district court
23 denied that motion, saying he is not challenging his
24 misconduct. They agreed with his theory that this was a
25 stand-alone retaliation case. So nobody - neither party

1 nor the district court nor the Sixth Circuit got into the
2 fine points of the argument about whether this was a
3 duration case or a conditions case.

4 QUESTION: Then why isn't it waived?

5 MR. CASEY: Well, we submit it's - it's a
6 straightforward matter. It appears that the magistrate,
7 in his opinion or his recommendation denying our motion
8 for summary judgment, was under the impression he did not
9 lose good time.

10 QUESTION: Okay. And let's assume the magistrate
11 was wrong. As I understand it, you did not go to the
12 district court and say, the magistrate is wrong on this
13 point and this point can be dispositive under Heck. Am I
14 correct?

15 MR. CASEY: We did not argue it in those terms.
16 We argued, as I say, the broader application of Heck and
17 Edwards to the effect that he was - the nature of his
18 challenge necessarily implied that his -

19 QUESTION: But your position - your position as I
20 understand was that even if he did not lose any good-time
21 credits, that you - nevertheless, Heck controls.

22 MR. CASEY: Yes.

23 QUESTION: And that's the question -

24 QUESTION: And that's what -

25 QUESTION: - on which we granted certiorari.

1 That's the question we - whether a plaintiff who wishes to
2 bring a 1983 suit challenging only the conditions rather
3 than the fact or duration of his confinement must satisfy
4 Heck v. Humphrey. Now, that question is not in the case,
5 if indeed the duration of his confinement is what is
6 affected. And did you respond in the brief in opposition
7 by saying, actually, this question is not even in the
8 case?

9 MR. CASEY: Yes. We -

10 QUESTION: But even if you did, it's not in the
11 case, none of it's in the case on the assumption your
12 colleague there was making, or your opponent. Imagine
13 that Mr. Muhammad wins his claim in the 1983 action, which
14 the fact that they thought didn't have enough evidence
15 suggests he wouldn't, but suppose he did. Then he says,
16 what I've showed was illegal under the Constitution or
17 whatever, was, by being put in confinement for six days
18 before my hearing, and my being charged with threatening
19 behavior, that's it, that's all. The rest of it is all
20 beside the point. I don't complain about my insolence. I
21 don't complain about the seven days. I don't complain
22 about the loss of good time. I don't complain about
23 anything except the six pre-hearing days and the later
24 dropped charge of threatening.

25 So, if he's right about that, if you can do

1 that, if in fact his winning on that in no way calls into
2 question the conviction or the loss of good time or the
3 seven later days for insolence, then under Heck, of course
4 he can bring it.

5 MR. CASEY: Yes, that - that's correct. Heck -
6 the favorable termination requirement of Heck only applies
7 when the nature of the challenge necessarily implies -

8 QUESTION: Fine. So now I've got to the point
9 that either she's obviously right or you're obviously
10 right, and what it depends upon is a matter of state law,
11 which is whether, as a matter of state law, should he win
12 this claim, it is true that his showing the retaliation in
13 respect to the six previous days and threatening in no way
14 calls into question the validity of the insolence
15 conviction, the seven days, and the loss of good time. So
16 I say, what is the answer to that question of state law?
17 Or a sister concluded - it's fairly obvious under the law
18 that they are separate. Now what do you conclude?

19 MR. CASEY: We argue that they are not separate,
20 that the nature of this challenge does in fact necessarily
21 imply the invalidity of his misconduct determination.
22 What he's challenging in this Federal lawsuit is
23 retaliatory disciplinary action. That - that's the
24 language that he used in his amended complaint. What he's
25 saying is that the guard acted with an improper motive and

1 that these adverse consequences flowed from that. The
2 only adverse consequences that he's alleging are involved
3 in the misconduct hearing. So we don't think that the
4 fact that he was found guilty of insolence and not
5 threatening behavior has any bearing at all on this
6 question. It was one incident, one charge that this
7 particular hearing officer felt should be reduced to a
8 lower charge, but the nature of his challenge, if - if Mr.
9 Muhammad is correct that this guard acted
10 unconstitutionally, there should not have been any
11 misconduct charges, should not have been a hearing, should
12 not have been any pre-hearing detention or post-hearing
13 punishment.

14 QUESTION: Is - is - is that so? You - you think
15 it, as a matter of constitutional law, you - you could not
16 - you could not say that a prisoner has no right to
17 threaten a guard even if he - even if he claims to have
18 been provoked or has no right to insolent behavior even if
19 he claims to have been provoked? As a matter of
20 constitutional law, the prison cannot have such rules?

21 MR. CASEY: The Heck v. Humphrey analysis says
22 that there were certain claims that are not cognizable on
23 a money damage action under 1983. Our argument is this is
24 such a claim. If a punishment imposed affects the
25 duration of confinement, the loss of good time, then under

1 Edwards v. Balisok, termination requires -

2 QUESTION: I'm saying it - it does not affect it
3 if he would have been convicted anyway, and the contention
4 of the other side is that he was guilty of the offense,
5 both the major offense, if he had been guilty of that, and
6 the minor offense, regardless of whether there was
7 provocation on the part of the guard.

8 MR. CASEY: Correct. That - that's his claim
9 Our argument is that -

10 QUESTION: Well, why - why do you - why do you
11 assert the opposite?

12 MR. CASEY: Well, that - that implicates the
13 elements of the common law tort of malicious prosecution,
14 as discussed in Heck and Edwards, and those elements
15 include favorable termination and probable cause.

16 QUESTION: But I think what you're not - it isn't
17 the issue of whether provocation is a defense to a charge
18 of insolence. I thought what you were saying is that this
19 whole string never would have happened, nothing would have
20 happened. If he - if he establishes the retaliation, then
21 none of this would have happened, and it's just one
22 episode.

23 MR. CASEY: Well, if - if he's correct that this
24 retaliation is independent of the hearing process, that's
25 - that's his argument. Our argument is that the only

1 thing he's complaining about is the retaliatory action,
2 and the retaliatory action was charging him with
3 misconduct. He -

4 QUESTION: Is not - not retaliation separate in
5 the hearing process. You're saying, is his point that
6 when the guard looked at him from outside the cafeteria
7 and made faces at him, and then he came in, and then the
8 prisoner stands up and gives him some very dirty looks,
9 according to the guard. Now, if you can separate out
10 there the retaliation, if you can separate out there what
11 the guard did by way of retaliation, making some very bad
12 faces through the window, and insolence under state law,
13 which would exist even if the guard were badly motivated
14 in making the bad faces, then you've got your two separate
15 things.

16 MR. CASEY: Under Sixth Circuit law, to establish
17 a claim for retaliation, there has to be protective
18 conduct that the inmate engaged in and there has to be
19 adverse action taken against that plaintiff that would
20 deter a person of ordinary firmness from continuing to
21 engage -

22 QUESTION: Fine. And the - and the conduct -

23 MR. CASEY: But that's -

24 QUESTION: - of the prisoner that's retaliation
25 is that - that - has to do with that -

1 MR. CASEY: No, conduct of the guard.

2 QUESTION: - would be his threatening look, but
3 not his insolent look.

4 MR. CASEY: If this situation had proceeded
5 exactly as petitioner alleges up to the point where they
6 were nose to nose for a few seconds and then they had both
7 walked away, there would be no retaliation claim, there
8 would be no constitutional violation at all. The only
9 thing that gives rise to a constitutional right is the
10 adverse action of charging him with misconduct. That's
11 why we say that this charge is necessarily implicated in
12 the hearing process. It necessary - necessarily
13 implicates that his misconduct determination is invalid.

14 If he's right that there should have been no
15 charge at all, if he's right on that, then the Heck v.
16 Humphrey analysis doesn't even come into play. We think
17 he's wrong on that. The - the district court felt he was
18 right on that and - and ruled against us on our Heck v.
19 Humphrey motion. The Sixth Circuit in effect said we were
20 right on that, that the nature of this challenge does
21 implicate the hearing process, and under Sixth Circuit
22 precedent, they said, therefore, it falls.

23 QUESTION: But the Sixth Circuit was addressing a
24 complaint that looked like it was attacking the whole
25 thing, because it asked for expungement of the

1 disciplinary - of the disciplinary action. Why didn't you
2 call to the - or whoever was representing Michigan at that
3 stage - call to the attention of the Sixth Circuit that it
4 had addressed the wrong complaint?

5 MR. CASEY: The Sixth Circuit issued its order.
6 The petitioner filed a motion for rehearing. Under the
7 court rules, we're not permitted to respond to that, but
8 our argument is that even though the Sixth Circuit -

9 QUESTION: You could have made a motion to remand
10 or something.

11 MR. CASEY: We could have, but we did not. In
12 retrospect, I wish many things had been done differently
13 in this case.

14 QUESTION: Well, do you aggrieve, looking at the
15 Sixth Circuit opinion, that it was examining the original
16 complaint, not the amended complaint?

17 MR. CASEY: It referred to the original
18 complaint, but the - the holding of the Sixth Circuit on
19 page 106 of the joint appendix, they say in an earlier
20 Sixth Circuit case, and they quote it, in order to grant
21 the plaintiff in this case the release he - relief he
22 seeks, we would have to unwind the judgment of the state
23 agency. That is the basis on which they affirmed the
24 judgment.

25 QUESTION: I thought you agreed that the Sixth

1 Circuit was looking at the initial, original complaint,
2 not the amended.

3 MR. CASEY: That they - they mentioned the
4 initial complaint and not the amended complaint. That's
5 correct.

6 QUESTION: Yeah.

7 MR. CASEY: But we believe that the rationale
8 that they used, that his challenge did implicate the
9 validity of his misconduct hearing, is correct on both his
10 original complaint and his amended complaint.

11 QUESTION: May I ask you a hypothetical question?
12 Assume we had the case with the same facts except the
13 remedy a different - if the, say the prison authorities
14 had said you can't use your television set for 30 days and
15 that was the only remedy and otherwise everything else was
16 the same, and he said it was - they did that in
17 retaliation because I exercised my First Amendment rights.
18 If that were the discipline, would Heck v. Humphrey
19 preclude relief in this case?

20 MR. CASEY: Yes, we believe - that's the question
21 the Court granted cert on. If a punishment affects only
22 conditions -

23 QUESTION: And that's the one we probably ought
24 to hear some argument about.

25 MR. CASEY: That's - that's correct. I - I

1 agree, Your Honor. We argue that -

2 QUESTION: And why would it preclude relief in
3 that case? That's what I'd be interested in hearing.

4 MR. CASEY: Because as in the Edwards v. Balisok
5 and - and Heck v. Humphrey, the proper method of analysis
6 is to look to the most closely analogous common law tort,
7 look to traditions of common law, public policy
8 considerations in light of the purposes of Section 1983.
9 In Heck v. Humphrey and Edwards v. Balisok, the Court
10 said, in the prison context - prison disciplinary context,
11 the favorable termination requirement applies. On the
12 facts of those cases, there was good time involved, so
13 duration -

14 QUESTION: More than the facts of the case, we -
15 the reason we - we - we adopted that common law rule was
16 to prevent a collision between 1983 and habeas corpus law
17 and prevent 1983 from being used as an end-run around
18 habeas corpus limitations.

19 MR. CASEY: Again, on - on the facts of the case,
20 that's - that was the situation presented, because in that
21 case there was a collision between the habeas statutes and
22 the 1983 -

23 QUESTION: And that collision was - was in the
24 reasoning of the Court. It isn't -

25 MR. CASEY: Yes, it was. But additional

1 reasoning was based on common law traditions and we argue
2 that that same rationale applies even if good time is not
3 involved, even if it's just conditions of confinement as
4 punishment.

5 QUESTION: So that even if setting a - a ruling
6 in favor of the plaintiff would not in any way call into
7 question the prison disciplinary proceeding, it still
8 should - Heck should still apply?

9 MR. CASEY: No. If - if the nature of the
10 challenge does not imply that the misconduct determination
11 is invalid, then the Heck v. Humphrey analysis doesn't
12 apply. It's not analogous to the common law tort of
13 malicious prosecution. We don't assert that the favorable
14 termination requirement applies to all conditions cases.
15 We say it only applies when a claim for money damages is
16 attempted which - the nature of which necessarily implies
17 that the misconduct hearing is invalid.

18 QUESTION: Well, it looked like the Sixth Circuit
19 is on the short side of a five-to-one split among the
20 courts of appeals on how Heck v. Humphrey is to be
21 applied, that the Sixth Circuit views it differently than
22 the other circuits that have addressed it.

23 MR. CASEY: I believe that's correct.

24 QUESTION: Do you agree?

25 MR. CASEY: I believe that's correct.

1 QUESTION: Yeah, based on -

2 QUESTION: How - how is -

3 QUESTION: - its own Huey decision, and I really
4 thought very likely that was why this Court granted cert
5 here, to see whether the Sixth Circuit rule is out of step
6 with what we said in Heck v. Humphrey.

7 MR. CASEY: The Sixth Circuit, and all of the
8 court of appeals' decisions that have attempted to apply
9 the Heck v. Humphrey analysis to conditions cases, are
10 necessarily involved in - in extension of the Heck
11 rationale to this other factual context, because Heck and
12 Edwards involved good-time losses. I agree that's - we
13 assume that's why the Court took the case. When we filed
14 our brief in opposition, we suggested that there are these
15 alternative reasons why the Court should not grant cert.
16 One of them was the loss - that he did in fact lose good
17 time, but -

18 QUESTION: But, of course, that conceivably was
19 waived, because you didn't get into it below. If we - if
20 we disregard that and think that you waived this issue of
21 good-time credits, and if we reach the merits on which I
22 assumed we granted the case, then what justifies the Sixth
23 Circuit rule? Do you say just because damages potentially
24 are at issue that the 1983 claim can't go forward?

25 MR. CASEY: A - a claim for damages cannot go

1 forward unless there's favorable termination. If his
2 claim was for an injunction changing the hearing
3 procedures somehow, as in Edwards, that type of claim
4 could go forward.

5 QUESTION: I don't see the difference in the
6 Sixth Circuit rule anymore. What - in what respect is it
7 in the minority? I thought you were reading now, as I
8 heard you, the last or the next to last sentence in the
9 opinion -

10 MR. CASEY: That's - that's correct.

11 QUESTION: - that the Sixth Circuit simply
12 thought that if this individual wins, if Mr. Muhammad
13 wins, they would have to unwind the entire judgment of the
14 hearing, which would include the judgment having to do
15 with insolvency.

16 MR. CASEY: That's correct.

17 QUESTION: And so if that's what they base it on
18 -

19 MR. CASEY: That's correct.

20 QUESTION: - is their rule different from that of
21 any other circuit?

22 MR. CASEY: The way the Sixth Circuit is
23 different from most of the other circuits is that they
24 apply the Heck v. Humphrey analysis to punishments of
25 conditions and not just to punishments affecting the

1 duration of confinement.

2 QUESTION: What is the condition -

3 QUESTION: They meaning the Sixth Circuit?

4 MR. CASEY: The Sixth Circuit applies it to
5 conditions, punishments, and duration punishments.

6 MR. CASEY: What do you mean by a conditions
7 punishment?

8 QUESTION: The - the punishments that Mr.
9 Muhammad received were the loss of good time, confinement
10 to administrative segregation, essentially remaining in
11 his cell, plus loss of privileges for 30 days. So only the
12 loss of good time affects the duration of his sentence -

13 QUESTION: Thus, only the loss of good time could
14 have been challenged in habeas?

15 MR. CASEY: Correct.

16 QUESTION: And the conditions couldn't have been
17 challenged in habeas?

18 MR. CASEY: Correct.

19 QUESTION: And that's the distinction -

20 MR. CASEY: The distinction in this case -

21 QUESTION: - that the other circuits think is
22 crucial?

23 MR. CASEY: Correct. In - in conditions
24 challenges, habeas corpus relief is not available, so
25 there will be no other Federal court remedy if a Federal

1 civil rights action is not available.

2 QUESTION: And it - it's your position that there
3 should be no remedy whatever for this person?

4 MR. CASEY: It's our position that if he is -

5 QUESTION: If - if - we're disregarding the good-
6 time credits. That's waived, that's out of here. Let's
7 just make that assumption. And you say that he's out of
8 luck on pursuing any remedy for anything else?

9 MR. CASEY: Prisoners who seek to challenge the
10 nature of their complaint seeks to challenge or call into
11 - whose challenges necessarily imply that a prison
12 misconduct is invalid, do not have a Federal Civil Rights
13 Act cause of action, whether it - whether the punishment -

14

15 QUESTION: And other circuits disagree. They say
16 that in this case it would relate to conditions, and
17 therefore, the 1983 suit could go forward.

18 MR. CASEY: Correct.

19 QUESTION: That's the difference?

20 MR. CASEY: Correct. And the difference was
21 created because the majority in Heck based much of its
22 decision on a rationale of the common law. A concurring
23 opinion in that case, signed by four justices, said, no,
24 we're not going to base it on that rationale because that
25 might mean that there would be no Civil Rights Act remedy

1 in any such case. Subsequently, in the *Spencer v. Kemna*,
2 one of the judges who - or justices - who had been in the
3 majority changed her mind and is now agreeing with the
4 rationale of the concurring opinion in *Heck*. So that's
5 why the Sixth Circuit, or that's why the courts of appeals
6 are split on this. On the facts of *Edwards* and *Heck* it
7 involved just duration claims, but depending on the
8 rationale for the rule, it may or may not apply to
9 conditions cases. We say it does apply to conditions cases
10 because -

11 QUESTION: And the condition here - and one thing
12 is the abstract level on which you're speaking, the other
13 is concretely what this case is about. This case is about
14 six days spent in pre-hearing detention. It's the only
15 thing that money is sought for. Now, we're told that
16 insolence is bondable, threatening behavior is not. Does
17 bondable mean it will be bond? What is the incidence?
18 What practically is the effect?

19 MR. CASEY: Some - some major misconducts are
20 mandatory non-bondable. Threatening behavior, the
21 original charge, was mandatory -

22 QUESTION: So insolence is not mandatory. What is
23 the practice in the prison? Is it common to let people -

24 MR. CASEY: On - on page 14 of the joint appendix
25 we've quoted from the policy directive, and the standard

1 is, if there is a reasonable showing that failure to do so
2 would constitute a threat to the security or good order of
3 the facility, so on a case-by-case basis, a prisoner
4 charged with a bondable major misconduct could be placed
5 in pre-hearing detention.

6 QUESTION: Well, when you say bondable, I mean,
7 you don't mean if a person posts a bond they're out on the
8 street?

9 MR. CASEY: No, no. That - that's the phrase
10 used in these prison directives.

11 QUESTION: But that's what this case is about,
12 those six days when he was in administrative detention.

13 MR. CASEY: Those are the six days for which he
14 is seeking damages.

15 QUESTION: And - and do you have, rather than
16 being in the general prison population, do you have any
17 statistical indication of - on charges of insolence, are
18 people more often than not, or is it rare that they would
19 be in administrative detention awaiting the hearing?

20 MR. CASEY: I - I don't have the statistics of -
21 the Department of Corrections probably could compile
22 that, but I don't know. I do know that there were last
23 year more than 72,000 major misconduct hearings of all
24 kinds, bondable and non-bondable. I do not know how many
25 of those 72,000 resulted in pre-hearing detention.

1 QUESTION: But was - was this argument raised
2 below that there's no cause of action because there's no
3 assurance that he wouldn't have been kept for six days
4 anyway, even if it was bondable? You - you didn't defend
5 on that ground, did you?

6 MR. CASEY: It was not argued in those terms, no.
7 As I said, the case was argued -

8 QUESTION: Why do we want to get into that? I -
9 I don't understand.

10 MR. CASEY: No. We did not argue the - the terms
11 of the bond versus non-bondable, because it simply didn't
12 come up.

13 QUESTION: So suppose now - I think Justice
14 O'Connor may be causing the light to dawn in my head -
15 suppose you're right, suppose that there is just one ball
16 of wax. Suppose the - this is all a waste of time trying
17 to separate those two things. There's just one thing.
18 There's a conviction, all right?

19 MR. CASEY: Correct.

20 QUESTION: Now, we look to see what happens if he
21 wins. If he wins, we set aside the whole conviction, but
22 good time is out of it. And since good time is out of it,
23 of course he can bring a 1983 action, because this wasn't
24 the kind of thing that habeas was designed for. Habeas
25 was about duration of - of staying in prison, and with

1 good time out of it, it doesn't matter whether it's one
2 ball of wax or two. He can go in on 1983 since there's no
3 conflict with the habeas statute. What's your response to
4 that?

5 MR. CASEY: Our response to that in - in - in
6 response to the question that the Court granted certiorari
7 on is that even if good time was not at issue in the case,
8 if the only punishment he received affected the conditions
9 of confinement, our argument is, it's still appropriate to
10 look to the traditions of the common law and public policy
11 considerations to determine whether a cause of action in
12 those circumstances is cognizable in 1983. We've argued
13 that it is not cognizable. If he is challenging the
14 validity of his misconduct determination, that's analogous
15 to the common law tort of malicious prosecution.

16 The elements of that tort require favorable
17 termination before it can succeed. We believe that - that
18 same element applies in a 1983 case. So if he does not
19 get favorable termination of his prison misconduct, he
20 cannot bring a suit for damages under 1983.

21 QUESTION: It is essential to your argument, is
22 it not, that provocation would be a defense?

23 MR. CASEY: No.

24 QUESTION: No?

25 MR. CASEY: Whatever - whatever charge -

1 QUESTION: If provocation would - would not be a
2 defense, then even if he establishes provocation, for
3 which he can get damages, he would not be impairing the
4 judgment against him

5 MR. CASEY: One of the elements of the
6 constitutional cause of action for retaliation is adverse
7 action against the prisoner because of his protected
8 conduct. The adverse action in this case is not the
9 staring down and the nose-to-nose confrontation. The
10 adverse action is charging misconduct, and we say, if he's
11 right in his complaint that there would not have been a
12 misconduct charge but for this action, that necessarily
13 implies that the misconduct proceeding is invalid, and
14 that triggers the analogy to malicious prosecution and its
15 element of favorable termination.

16 QUESTION: So that you say basically, the
17 importance of Heck and Humphrey here is the way it says
18 you ought to refer to common law analogies in analyzing
19 whether there ought to be a 1983 action, and that has
20 nothing to do in the final analysis with whether there's a
21 collision between habeas corpus and 1983. That is an -
22 that is an independent requirement of the way you go about
23 analyzing 1983 actions.

24 MR. CASEY: Yes, that's correct.

25 QUESTION: So that even though there isn't a

1 habeas corpus problem, you still go through the same
2 methodology?

3 MR. CASEY: Correct. You say the same
4 methodology applies whether it's just conditions or
5 duration of confinement. If it's a -

6 QUESTION: Are you essentially making an
7 exhaustion of - of state remedies then? It seems to me -
8 are you - you're not saying that this person would have
9 no complaint, no Federal complaint, not in habeas, not in
10 1983? Are you saying that -

11 MR. CASEY: Yes.

12 QUESTION: - or are you saying 1983 is premature?

13 MR. CASEY: If he gets favorable termination. We
14 say -

15 QUESTION: Where does he get the favorable
16 determination?

17 MR. CASEY: The - if he got favorable termination
18 by review of the misconduct - if he - if he had won at the
19 misconduct or if he had appealed and won on appeal, that
20 would be favorable termination.

21 QUESTION: So you're saying essentially he hasn't
22 exhausted his internal administrative remedies, and that's
23 why the 1983 is improper?

24 MR. CASEY: We say the - his failure to exhaust
25 is another independent reason why he does not have -

1 QUESTION: You're saying he has to both exhaust
2 and prevail?

3 MR. CASEY: That's correct. They're independent
4 requirements.

5 QUESTION: And that seems somewhat inconsistent
6 with at least the negative implication of the Federal
7 statute, which says all he has to do is exhaust.

8 MR. CASEY: Well, the - the Court addressed that
9 question in Heck v. Humphrey, and it said that even if a
10 person exhausts his remedies, if he has not favorably
11 terminated, he cannot bring the lawsuit unless and until
12 he gets favorable termination. They're - they're
13 independent. The exhaustion requirement -

14 QUESTION: Well, that's the Heck v. Humphrey's
15 gloss, but that's an additional requirement. Usually
16 exhaustion does not require prevailing.

17 MR. CASEY: Well, that's correct. That's
18 correct. The - the reason he has to get favorable
19 termination in this case is because of the analogy to -

20 QUESTION: Yes.

21 MR. CASEY: - malicious prosecution.

22 QUESTION: Right. It - it usually does not
23 require prevailing, but it does require prevailing when -
24 when your cause of action is that - that you have been
25 subjected to the law improperly.

1 MR. CASEY: That's correct. That's our argument.

2 QUESTION: Thank you, Mr. Casey.

3 MR. CASEY: Thank you very much.

4 QUESTION: Ms. Beckwith, you have 3 minutes
5 remaining.

6 REBUTTAL ARGUMENT OF CORINNE BECKWITH

7 ON BEHALF OF THE PETITIONER

8 MS. BECKWITH: Turning to the actual question
9 presented in this case, there is no justification for the
10 Sixth Circuit's rule extending the Heck favorable
11 termination requirement to prison hearings that don't
12 involve the fact or duration of custody. Congress could
13 have amended 1983 to say that, but we know from the PLRA
14 they looked at the same considerations, they did something
15 different. The Sixth Circuit is an outlier here, as
16 Justice O'Connor said, because there's no - there's no
17 conflict with habeas in a - in a matter like this.

18 As to all of the other questions that have come
19 up during this argument, this case came to this Court in
20 the posture where there were no good-time credits and
21 there was no exhaustion question. Now, we think we can
22 overcome those problems, but I don't think this Court
23 needs to.

24 And the - the government has never cited any law
25 that says the guard's retaliatory conduct violating Mr.

1 Muhammad's First Amendment rights would have been a
2 defense, and we know of none. They argued that it was -
3 it was relevant to credibility. They argued that that was
4 some kind of a but-for relationship, but victory in the
5 1983 suit does not affect the adjudication for insolvency
6 in this claim. All of this only matters if good-time
7 credits are at issue.

8 And putting all of that aside, we just agree
9 with Justice Breyer that then this is an easy case in our
10 favor. If there are no further questions from the Court,
11 we'd ask that you reverse the Sixth Circuit.

12 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
13 Beckwith. The case is -

14 (Whereupon, at 11:59 a.m., the case in the
15 above-entitled matter was submitted.)

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