RESOLVED, That the American Bar Association supports an interpretation that the relationship of federal habeas corpus and federal civil rights law permit an individual who is ineligible for federal habeas corpus relief to bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction; and

FURTHER RESOLVED, That the American Bar Association urges the United States Congress to amend 42 U.S.C. § 1983 to make explicit that an individual who is not eligible for federal habeas corpus relief may bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction.
The Supreme Court decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), held that Section 1983 claims are barred if they imply the invalidity of convictions that have not been reversed, expunged, vacated, or called into question by a federal writ of habeas corpus. But, four of the Justices who decided that case would not have applied its holding to plaintiffs who are ineligible for federal habeas relief. *Heck*, 512 U.S. at 491 (Souter, J., concurring); *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (Souter, J., concurring). And Justice Ginsburg, who had joined the majority in *Heck*, later wrote in a concurrence in *Spencer* [v. Kemna, 523 U.S. at 21-22, that she had come to agree with Justice Souter: *Heck*’s favorable-termination requirement does not extend to habeas-ineligible Section 1983 plaintiffs. After *Spencer*, five of the Justices who decided *Heck* thus seemingly would hold that it does not apply to Section 1983 plaintiffs who are ineligible for federal habeas relief.

But Justice Scalia’s majority opinion in *Heck* suggested in dicta that “the principle barring collateral attacks … is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.” Id. at 490 n.10. The division among the Justices has caused confusion in lower federal courts.

Three circuits—the Fourth, Sixth, and Tenth—have adopted and consistently applied *Spencer* to hold that *Heck*’s favorable termination requirement does not apply to habeas-ineligible Section 1983 plaintiffs. See *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008); *Griffin v. Baltimore Police Dep’t*, 804 F.3d 692 (4th Cir. 2015); *Powers v. Hamilton Cty. Pub. Defender Comm’n*, 501 F.3d 592 (6th Cir. 2007); *Harrison v. Michigan*, 722 F.3d 768 (6th Cir. 2013); *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010).

Four circuits—the First, Third, Fifth, and Eighth—have adopted and consistently applied Justice Scalia’s dicta from *Heck* to hold that the favorable-termination requirement applies even in the case of habeas-ineligible Section 1983 plaintiffs. See *Figuero v. Rivera*, 147 F.3d 77 (1st Cir. 1998); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Deember v. Beard*, 557 F. App’x 162 (3d Cir. 2014); *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam); *Black v. Hathaway*, 616 F. App’x 650 (5th Cir. 2015) (per curiam); *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007).

Four circuits—the Second, Seventh, Ninth, and Eleventh—are internally divided or have reversed course on *Heck*’s scope. The Second Circuit assumed, without deciding, that *Heck* would apply to habeas-ineligible plaintiffs in *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) (en banc), only 12 years after deciding it would not apply in *Huang v. Johnson*, 251 F.3d 65 (2d. Cir. 2001). The Seventh Circuit has granted rehearing en banc in *Savory v. Cannon*, 912 F.3d 103 (7th Cir. 2019) after that panel rejected a twenty-year-line of circuit precedent from *Carr v. O’Leary*, 167 F.3d 1124 (7th Cir. 1999), by holding that *Heck* bars claims by habeas-ineligible plaintiffs. The Ninth Circuit in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015) whittled down a seemingly once-broad exception for habeas-ineligible plaintiffs from *Nonnette v. Small*, 316 F.3d 872 (9th Cir.
2002), to cover only the narrowest cases. And though the Eleventh Circuit signaled in
*Harden v. Patak*, 320 F.3d 1289 (11th Cir. 2003), that it had adopted *Spencer*, it later
held in *Christy v. Sheriff of Palm Beach County*, 288 F. App’x 658, at 666 (11th Cir. 2008)
(per curiam), that it has “expressly declined to consider that issue [of whether a habeas-
ineligible plaintiff may bring claims] in an opinion where the § 1983 action is otherwise
barred under *Heck*."

This Resolution urges federal courts to interpret *Heck* consistently with Justice
Souter’s concurring opinion in *Heck* and urges Congress to amend 42 U.S.C. §1983 to
make explicit that the statute is consistent with the concurring opinion. The reality is that
thousands of people will never have access to federal habeas relief because their
sentences were non-custodial or expired before they could meet 28 U.S.C. §2254’s
exhaustion requirement. If the *Heck* bar applies to their Section 1983 claims, this habeas-
ineligible class will be denied access to a federal forum for the vindication of their federal
civil rights.

There is no reason to extend *Heck* to disqualify civil rights claims by convicted
individuals who are not eligible for habeas relief, and none of the reasons that undergird
*Heck* applies to such individuals. Habeas-ineligible plaintiffs cannot bring parallel
proceedings under Section 1983 and Section 2254 and are limited, instead, to their
remedies under Section 1983. Nor can they use those remedies to secure their release
or impose inconsistent obligations on state officials. Habeas-ineligible plaintiffs can at
most obtain redress for past violations.

Of the approximately 2,157,800 people incarcerated at the end of 2016, only
188,300 were held in federal facilities, with the remaining 1,969,500 being held in state
or local facilities. See DANIELLE KAEBLE & MARY COWHIG, U.S. DEP’T OF JUST.,
visited Jan. 5, 2020). People released from state prisons that same year served an
average of 2.6 years, but a median of only 1.3 years. See DANIELLE KAEBLE, U.S.
DEP’T OF JUST., BUREAU OF JUST. STAT., TIME SERVED IN STATE PRISON, 2016
prisoners had taken an appeal before their release, it likely would have taken nearly 300
days to resolve. See NICOLE L. WATERS, PH.D ET AL., U.S. DEP’T OF JUST.,
BUREAU OF JUST. STAT., CRIMINAL APPEALS IN STATE COURTS 7
state habeas proceedings undoubtedly took longer.

Using these 2016-era prisoners as representative, and accounting further for the
thousands of people whose state convictions result in non-custodial sentences, there are
substantial numbers of people who will never have access to federal habeas relief
because they will not be under state control long enough to meet Section 2254’s
exhaustion requirement. 28 U.S.C § 2254(b). For those living in circuits that deny an
exception to the *Heck* bar for habeas-ineligible plaintiffs, the result is that they will never
have access to a federal forum for the vindication of their federal civil rights.
Justice Souter’s *Heck* concurrence explained the unfairness of denying a convicted defendant the right to bring a civil rights claim if a conviction was not set aside in a habeas proceeding. He considered the Reconstruction-era example of an African-American framed for raping a white woman by Ku-Klux-Klan-controlled state law enforcement and subsequently convicted by a Klan-controlled state court. 512 U.S. at 501. If the unjustly arrested and convicted African-American only discovered proof of unconstitutionality after his release from custody, he would lack recourse to the federal courts not only through federal habeas relief but also through Section 1983. *Id.* at 501-02.


It is ironic that Section 1983, which was adopted in 1871 to respond to Ku Klux Act violence and its efforts to prevent the civil rights amendments to the Constitution, the 13th, 14th and 15th amendments, from being effective has been read by federal courts as denying remedies to individuals who have genuine claims of constitutional violations but who have no ready mechanism for challenging and overturning their convictions. Thus, the Resolution seeks to keep open a federal forum for civil rights claims brought by individuals who cannot avail themselves of federal habeas relief under Section 2254.

Respectfully submitted,

Stuart Plunkett
President
Bar Association of San Francisco
February 2020
GENERAL INFORMATION FORM

Submitting Entity: Bar Association of San Francisco

Submitted By: Stuart Plunkett, President

1. Summary of Resolution(s).

This Resolution urges federal courts to interpret the relationship of federal habeas corpus and federal civil rights law to permit an individual who is ineligible for federal habeas corpus relief to bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction. The Resolution further urges the United States Congress to amend 42 U.S.C. § 1983 to make explicit that an individual who is not eligible for federal habeas corpus relief may bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction.

2. Approval by Submitting Entity.

Approved by the Board of the Bar Association of San Francisco on February 7, 2020.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The Resolution is consistent with Association policies involving access to justice and equal rights and justice for all such as Resolution 107 D at the 2012 annual meeting (urging Congress to amend 28 U.S.C. §2254(d) to require a federal district court to review de novo, based on the record made in the federal court, claims of ineffective assistance of counsel by petitioners under sentence of death); Resolution 103 at the 2003 Mid-Year meeting (urging that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status). This Resolution seeks to keep open a federal forum for civil rights claims brought by individuals who cannot avail themselves of federal habeas relief under Section 2254. It will end the denial of civil rights remedies to individuals who have genuine claims of constitutional violations but who have no ready mechanism for challenging and overturning their convictions. It is consistent with Association policies.

5. If this is a late report, what urgency exists which requires action at this meeting of
The House?

The matter is currently before the United States Supreme Court and the Association’s expression of policy will advance the rule of law consistent with the Association’s policies. It further will allow the Association to urge Congress to amend 42 U.S.C. § 1983 to make explicit that an individual who is not eligible for federal habeas corpus relief may bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction.


N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will provide authority for the preparation and filing of an additional ABA amicus curiae brief in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy. It will further provide a policy statement urging Congress to amend 42 U.S.C. § 1983 to make explicit that an individual who is not eligible for federal habeas corpus relief may bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction.

8. Cost to the Association. (Both direct and indirect costs)

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable)

There are no known conflicts of interest.

10. Referrals.

ABA Criminal Justice Section
ABA Section on Civil Rights and Social Justice
ABA Coalition on Racial & Ethnic Justice

11. Contact Name and Address Information. (Prior to the meeting)

Stuart Plunkett
President
12. **Contact Name and Address Information.** (Who will present the report to the House?)

Russell S. Roeca  
Delegate, Bar Association of San Francisco  
Roeca Haas Montes De Oca LLP  
San Francisco, CA 94133  
(415) 901-4201  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges federal courts to interpret the relationship of federal habeas corpus and federal civil rights law to permit an individual who is ineligible for federal habeas corpus relief to bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction.

It further urges the United States Congress to amend 42 U.S.C. § 1983 to make explicit that an individual who is not eligible for federal habeas corpus relief may bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction.

2. Summary of the Issue that the Resolution Addresses

It will eliminate the denial of federal civil rights remedies to individuals who have genuine claims of constitutional violations but who have no ready mechanism for challenging and overturning their convictions. Thus, the Resolution seeks to keep open a federal forum for civil rights claims brought by individuals who cannot avail themselves of federal habeas relief under Section 2254.

3. Please Explain How the Proposed Policy Position Will Address the Issue

It will urge the federal courts to interpret the relationship of federal habeas corpus and federal civil rights law to permit an individual who is ineligible for federal habeas corpus relief to bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction. It will further urge Congress to amend 42 U.S.C. §1983 to make explicit that an individual who is not eligible for federal habeas corpus relief may bring a civil rights claim pursuant to 42 U.S.C. § 1983 for civil rights violations associated with the criminal process leading to a criminal conviction.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA, Which Have Been Identified

None to date.