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P R O C E E D I N G S

(10:04 a.m.)

JUSTICE STEVENS: We'll now hear argument in
Wilkinson against Dotson.
Solicitor Cole.

ORAL ARGUMENT OF DOUGLAS R. COLE
ON BEHALF OF THE PETITIONERS

MR. COLE: Justice Stevens, and may it please
the Court:

Prisoners typically want two things: first, to
improve their conditions while in prison; and second, to
get out of prison as quickly as possible. Respondents'
claims here are not conditions claims. They do not seek a
larger cell or better food while in prison. Rather, their
claims are about getting out of prison.

Traditional understandings of habeas would
suggest that these release-driven claims lie there, not in
section 1983, and this Court's decision in Heck confirms
that this common sense answer is also the correct answer.
In fact, Heck establishes two bars, each of which
independently prevent respondents from using section 1983
to pursue their claims here.

First, Heck establishes that civil actions under
section 1983 cannot be used to collaterally attack State
criminal judgments. Before a prisoner can advance a claim

1 under section 1983 that would necessarily imply the
2 invalidity of such a judgment, he must first show that it
3 has been favorably terminated. And Edwards v. Balisok
4 confirms that quasi-judicial administrative decisions
5 regarding the duration of confinement count as criminal
6 judgments for this purpose.

7 JUSTICE SOUTER: Well, it isn't just duration of
8 -- of confinement. I mean, in -- in Balisok, what you had
9 was a determination that the confinement would be
10 definitely less as a result of the -- the good time
11 scheme. The -- the gut notion behind Balisok was that
12 what you were attacking would imply that the sentence
13 itself was invalid because the conviction was and so on.

14 We don't have that here. What we have here is a
15 scheme that makes a -- a sentence that is imposed a more
16 definite sentence. We know where in the range it's going
17 to be reconsidered. And however that may be classified,
18 it's not simply a Balisok situation.

19 MR. COLE: It's arguably different than the
20 good-time credits at issue in Balisok, as -- as Your Honor
21 notes. However, I -- I would suggest that even with
22 respect to good-time credits, often under many State
23 systems, good-time credits have the dual effect of moving
24 up the parole eligibility date, as well as potentially --
25 and in some States, it doesn't even have an effect on

1 the --

2 JUSTICE SOUTER: Right, but that had --

3 MR. COLE: -- of the sentence.

4 JUSTICE SOUTER: -- that had nothing to do with
5 the rationale in Balisok, as I recall it. Isn't that
6 correct?

7 MR. COLE: Your Honor, the -- the Court --
8 that's -- that's correct, yes. And I guess what I'd --
9 I'd say is that what seemed to be driving the Court,
10 though, was still the durational aspect of the sentence;
11 that is, as the Court said in Muhammad, if a claim
12 threatens no consequence for the duration of confinement,
13 then that isn't a -- or that isn't a claim that should be
14 brought in 1983.

15 JUSTICE SOUTER: No -- no question. But the
16 durational consequence in those cases was a definite
17 consequence of longer duration, i.e., a sentence in the
18 first place, a sentence not reduced by good time in -- in
19 the second example. Here, there -- there is no such clear
20 consequence. Here, the consequence is that there will
21 simply be a period of time before a sentence already
22 imposed will be reviewed to determine whether, in fact, it
23 will be shortened or allowed to run. And that's
24 different.

25 MR. COLE: I'm not sure it is, Your Honor. Both

1 of them are going to have definite durational consequences
2 for confinement.

3 JUSTICE SOUTER: No -- no question about that.
4 At -- at the level of whether there is a durational
5 consequence, they -- they both have it. I -- I grant you
6 that.

7 MR. COLE: And, Your Honor, as far back as
8 Preiser, this Court has noted that challenges to duration
9 go to the very heart of habeas corpus. That's --

10 JUSTICE GINSBURG: The duration of -- of the
11 sentence. And here, there's no implication at all that
12 this sentence is in any way invalid, that the sentence
13 itself or any portion of it is invalid because the parole
14 would be a matter of administrative grace, but it doesn't
15 -- the determination of parole eligibility or parole
16 suitability does not go to the validity of the sentence in
17 any way, shape, or manner. Does it?

18 MR. COLE: Well, a decision from a Federal court
19 -- and I guess -- I think the answer to Your -- Your
20 Honor's question is yes, it does. And the reason I say
21 that is I think we need to look to the consequences of the
22 Federal court decision that would follow from the claims
23 that -- that the plaintiffs -- or I'm sorry -- the
24 prisoners here are advancing.

25 The State of Ohio has made individualized

1 decisions with respect to each of these respondents that
2 they should not again be considered for release from
3 prison until 2005. The request -- the relief that they're
4 requesting and the claims that they're bringing, if
5 successful, would result in the Federal court undermining
6 that State decision with regard to the length that they
7 should be incarcerated. It goes directly to the -- the --

8 JUSTICE SCALIA: It doesn't -- it doesn't
9 shorten the length that they're going to be incarcerated.
10 There -- there is no certainty that -- that if they win
11 this action, they will be incarcerated for a lesser
12 period, is there?

13 MR. COLE: Absolutely no certainty of that, Your
14 Honor. But there is certainty --

15 JUSTICE SCALIA: And -- and there was in the
16 other cases, wasn't there? In Balisok.

17 MR. COLE: Well, Your Honor, I don't think so.
18 I mean, prisoners could be released in the State of
19 Washington before the terminus of their sentence. They
20 might not -- it isn't as though they had to serve all the
21 way till the end, less whatever good-time credits they
22 had. They could easily be --

23 JUSTICE SCALIA: Well, but --

24 MR. COLE: -- released prior to that time.

25 JUSTICE SCALIA: Oh, indeed, but the -- but --

1 but getting the good-time credits entitled them to be --
2 be released earlier. They might have been released even
3 earlier still, but their entitlement to be released
4 earlier was a consequence, wasn't it?

5 MR. COLE: It was, Your Honor.

6 JUSTICE SCALIA: And there is no entitlement to
7 be released earlier as a consequence of this.

8 MR. COLE: We --

9 JUSTICE SCALIA: You just get another hearing
10 and maybe you will, maybe you won't.

11 MR. COLE: That's correct. You'll -- you'll
12 just get another hearing. But an important note on that:
13 you'll get another hearing, and you'll get another hearing
14 sooner than the State has decided that you should get a
15 hearing.

16 JUSTICE SCALIA: Well, that's true. So it makes
17 it possible that you'll get released earlier, but -- but
18 there's no assurance you'll -- really, the crucial
19 question for me, I think, is whether -- whether this could
20 have been brought as a habeas action. Could this have
21 been brought as a habeas action?

22 MR. COLE: Yes, Your Honor, it could have been
23 brought as a habeas action. If you look at the nature of
24 their complaints, they're -- they're clearly in custody.
25 Habeas would require custody and violation of the

1 Constitution of the United States.

2 JUSTICE SCALIA: But they're just asking for a
3 new hearing. They're not asking for an earlier release.
4 What's your closest case that -- that would allow a habeas
5 action which does not seek an earlier release but just --
6 just a hearing?

7 MR. COLE: I think probably the Garlotte case,
8 Your Honor, in which the Court allowed a habeas challenge
9 where the only result was going to be to advance the date
10 of eligibility for release from prison incarceration.

11 JUSTICE SCALIA: No. But it -- No, go on.

12 JUSTICE SOUTER: But it -- it doesn't advance the
13 date of eligibility. It advances the date at which the
14 parole board will take another look. The only eligibility
15 is an eligibility to take -- to have another look taken and
16 not an eligibility for release.

17 MR. COLE: That's true, Your Honor, but these --
18 under that understanding of eligibility, where eligibility
19 means the first possible release date. But these
20 prisoners are not eligible for release in the sense of
21 it's not going to happen for them unless and until the
22 next release hearing.

23 JUSTICE SOUTER: But if they are subject to
24 another look, they are not necessarily then eligible for
25 release. And I think that's the point that we're getting

1 -- let me -- let me ask a -- a sort of complementary
2 question.

3 Is there any reason that these --

4 JUSTICE SCALIA: Is this with an I or an E?

5 MR. COLE: I was hoping for an I, yes.

6 JUSTICE SCALIA: With an I or an E?

7 JUSTICE SOUTER: With an E. With an E. But if
8 -- if you take my questioning as a compliment with an I,
9 that's perfectly okay too.

10 (Laughter.)

11 MR. COLE: I'll -- I'll wait and see what the
12 question is --

13 JUSTICE SOUTER: Let's see what it is.

14 The -- the question is, could these claims not
15 have been brought in advance of any application to these
16 particular prisoners of the revised -- whatever they were
17 -- the 1998 guidelines? And if the answer is yes, then
18 they could be brought at a time when, I suppose, habeas
19 would -- would not have been a possible remedy. Is -- is
20 -- am I correct on those two points?

21 MR. COLE: The State concedes that if they had
22 brought this case before a parole hearing at which the
23 guidelines were applied, that it would be a different
24 case, and that 1983 would be a remedy in that -- in that
25 situation.

1 JUSTICE BREYER: Here's -- here's the difficulty
2 that I -- that I have. When I read your brief, I thought,
3 well, he must be right because this is really about
4 custody. It's really about custody. They want to get out
5 eventually.

6 But then when I -- I -- when I went back to
7 Balisok, I thought, oh, here's the problem. The problem
8 is that it's a damage remedy in Balisok. And normally you
9 want the person to go into 1983 to get damages. But he's
10 going to get mixed up. When do you send him to habeas?
11 Well, we don't want to send him to habeas unless it's
12 clear that habeas should have been brought. And so if
13 he's just challenging, for example, introduction of Fourth
14 Amendment violation evidence or something like that, don't
15 go to habeas. Don't go to habeas. You didn't have to go
16 to habeas unless you had to, unless you had -- unless it
17 was necessary to upset the conviction. You see? That's
18 why that language is there. Now, I got that far.

19 Then I said, oh, I see what you do. We should
20 have one rule for damages. Well, that makes sense. But
21 there's no reason not to have a different rule when you
22 have the injunctive action, and there maybe we could
23 follow your rule.

24 But the next thing I come across is a statement
25 that says, no, no, the rule is the same whether you bring

1 a damage action or whether you bring an injunctive or
2 declaratory relief action. And I said, well, why did we
3 write that? You know, we're the ones who caused all this
4 trouble. But the -- the -- well, because we didn't want
5 to make it too complicated and -- and not have all the
6 questions coming, well, what kind of an action is it
7 really, et cetera.

8 Okay. So once I got that far, I said, oh, well,
9 I'm going to have to change something for you to win.
10 Either I have to change the thing that says the damages
11 should be the same as the injunctive, or I have to change
12 something else somewhere along the line, the word
13 necessary. I don't want to change the word necessary.
14 Maybe I could change the other, but why bother really?
15 Because all that's important here is people know which way
16 they should go.

17 Now, that's where I am at the moment, thinking
18 give him his 1983 action. It's simpler. It follows from
19 Balisok. Why not?

20 MR. COLE: Well, Your Honor, there would be some
21 real consequences that would follow from that.

22 JUSTICE BREYER: That's what I thought.

23 MR. COLE: The reason that it's important that
24 these cases go to habeas rather than 1983 is because of
25 the State court exhaustion requirement that's attendant

1 with habeas. Parole claims like those advanced here are
2 often, if not always, intricately bound up with State law
3 issues, and the State law is often going to provide much
4 more meaningful relief than the Federal law claims that
5 the prisoners advance.

6 JUSTICE SCALIA: Doesn't the Prison Litigation
7 Reform Act require exhaustion even in a 1983 action?

8 MR. COLE: Yes, but as Your Honor is aware,
9 that's an administrative exhaustion requirement which this
10 Court referred to in Nelson, I believe, as a substantially
11 lower gate than the exhaustion requirement imposed by
12 habeas.

13 Moreover, it's telling --

14 JUSTICE SOUTER: Is -- may -- may I just follow
15 up on that question? At the administrative level, cannot
16 these State law policies perfectly well be taken into
17 consideration? In other words, your argument was these
18 things are bound up with State law issues and the best
19 place to have them resolved is -- is in a State forum.
20 They can be resolved in a State administrative forum,
21 can't they?

22 MR. COLE: They could, Your Honor, but I -- I
23 think the types of legal determinations with respect to
24 legal entitlements and also the court -- we would assume a
25 State court would also consider Federal claims that might

1 be made by the prisoners when they bring their State court
2 claim. Those types of legal claims are better resolved by
3 State courts. They have the expertise to make the -- the
4 determination. And in fact, in Ohio --

5 JUSTICE GINSBURG: Well, couldn't one say the
6 same thing of prison conditions that you can bring in as a
7 1983 action? The States know better about how their
8 prisons are operating and what changes would have to be
9 made. So I -- I think that you -- you may be right that
10 the State knows more about how its parole system operates,
11 but so does it know more about how its prison system
12 operates. And that doesn't -- that's not what determines
13 whether you have 1983 or habeas.

14 MR. COLE: Well, but Congress, with respect to
15 conditions claims -- and if you look at the language of
16 the administrative exhaustion requirement in the PLRA at
17 42 U.S.C. 1997(e)(a), it says no action shall be brought
18 with respect to prison conditions under 1983 without
19 administrative exhaustion. So even Congress, in thinking
20 about the PLRA and in thinking about requiring
21 administrative exhaustion, understood that 1983 is really
22 about conditions of confinement. 1983 isn't about -- it
23 never has been about -- release.

24 Habeas has traditionally been the relief that
25 people -- or the cause of action that people bring when

1 what they're interested in is relief -- or release from
2 prison. And these claims, no one can dispute, are
3 release-driven claims. They may not ultimately be
4 successful in securing release, but the prisoners here --

5 JUSTICE BREYER: Well, no, I've got that part.
6 But the -- and -- and you're right about that part. But
7 that -- you know, that doesn't get over the -- the hump
8 here I think because of the -- what we've written.

9 The -- I mean, where I'm coming out now, what
10 you've just said, is well, you know, there's going to be
11 exhaustion in both cases. And prison conditions, if we
12 say that habeas doesn't -- that 1983 applies here I think
13 probably -- I can't guarantee it -- but those where prison
14 conditions would then cover it, and then there would be
15 exhaustion, and there -- where it doesn't seem to make
16 difference there.

17 And now I'm back to asking the other half of
18 this, which is, well, all right, suppose I say I see your
19 point, I think you're right. Now, what -- what is your
20 recommendation? What do we change? Do we change the word
21 necessary in Balisok, which I'd be pretty reluctant to do?
22 Or do we drive a wedge between the damage cases and the
23 injunctive/declaratory relief cases?

24 MR. COLE: I don't think you need to do either,
25 Your Honor. I think if we go back to Heck and look at the

1 language there that talks about necessarily implying the
2 invalidity of a criminal judgment, which is something --

3 JUSTICE BREYER: Oh, well.

4 MR. COLE: -- respondents concede in their
5 brief, the only question then is does a parole decision
6 count as a, quote, criminal --

7 JUSTICE BREYER: All right. No, but then what
8 you're doing is taking the first half because what you're
9 reading is you're reading that word necessary, whatever
10 those words were in Balisok that we were just talking
11 about, as your case satisfying that condition. And if
12 your case satisfies that condition, then so does the case
13 where a person wants to bring a damage action because of
14 illegally seized evidence at his trial. Doesn't it? I
15 mean, because all -- I mean -- and then we've swept --
16 then we've done -- we've really moved Balisok from what it
17 was trying to do.

18 MR. COLE: I don't think that's necessarily
19 right, Your Honor, because the illegally seized evidence
20 at the trial -- I don't know that that would necessarily
21 imply the invalidity of the conviction that resulted from
22 that trial.

23 JUSTICE BREYER: Why is he bringing his damage
24 action? He thinks he's bringing it because what they did
25 at that trial hurt me. Now, how did it hurt me? It hurt

1 me because I went right to prison.

2 MR. COLE: Right, Your Honor, and that -- that's
3 absolutely correct, but I'm not arguing for, and I want to
4 make it very clear that I'm not arguing for any rule that
5 would turn on the subjective intent of the prisoner in
6 bringing their claim. It turns on the necessary
7 implication of success on that claim, and that's a -- a
8 distinction that the Court made both in Heck and in
9 Balisok. They looked to what's the necessary implication.

10 So we look to the claims here, not why they
11 brought them, but what are the claims. And the claims
12 here, and the particular ones that I would focus on, are
13 the ex post facto claims. If the -- if they have success
14 on their ex post facto claims -- and we don't believe
15 their claims are meritorious, but if they're successful on
16 those claims, there's no way the State's decision can
17 stand. They are entitled to a new hearing at which they
18 would again be considered for parole --

19 JUSTICE STEVENS: Yes, but does that mean the --
20 the judgment -- the order denying release on parole is
21 invalid? There are really two parts to it. One, you --
22 we're not going to release you. Secondly, your next
23 hearing will be at a later date than you want. Insofar as
24 you challenge the date of the hearing -- the date of the
25 next hearing, does that necessarily imply the invalidity

1 of the entire order denying parole?

2 MR. COLE: We -- we concede that if there's an
3 ex post facto violation here, these prisoners are entitled
4 to a new parole hearing. And I guess the --

5 JUSTICE STEVENS: But they're not entitled to
6 parole.

7 MR. COLE: Absolutely, Your Honor. Absolutely.

8 JUSTICE STEVENS: So that it doesn't totally
9 invalidate the order that is at issue.

10 MR. COLE: Well, the way that -- that I've been
11 thinking about it is if you put the State parole decision
12 up on the wall and you put the Federal decision up on the
13 wall, one of them has to come down. The Federal decision
14 trumps the State decision. It can --

15 JUSTICE STEVENS: Well, it doesn't entirely come
16 down. It just -- half of it comes down.

17 MR. COLE: No. The whole thing comes down, Your
18 Honor. They're entitled both to an immediate new release
19 hearing and --

20 JUSTICE STEVENS: But not for release.

21 MR. COLE: -- if they're successful on their
22 claims, they're entitled to more frequent release hearings
23 in the future. So the decision, the State's --

24 JUSTICE STEVENS: But -- but isn't it true that
25 one aspect of your order that's under attack is they had

1 refused to grant them parole?

2 MR. COLE: Absolutely.

3 JUSTICE STEVENS: And that remains.

4 MR. COLE: It doesn't, Your Honor. They have to
5 decide that again. That -- that order is void ab initio.
6 It's as though it were never entered. They have to make a
7 new decision about whether or not this person should --
8 should have parole and that they cannot in any way -- the
9 State cannot rely on the prior decision that they reached
10 on that issue.

11 JUSTICE STEVENS: I thought the only relief they
12 were seeking was a more prompt next hearing.

13 MR. COLE: No, they -- Dotson's complaint, I
14 believe at page 20 of the joint appendix -- he wants to,
15 quote, proceed toward a prompt and immediate parole
16 hearing in accordance with the statutory laws and
17 administrative rules in place when the plaintiff committed
18 his crimes. They want an --

19 JUSTICE GINSBURG: But aren't -- aren't those
20 claims moot or academic now? Because, as I understand it,
21 he has had another parole hearing. So he's -- with the
22 hearing that he was seeking, he's already had another. So
23 he's not complaining about the absence of a hearing or --
24 or flaws in the procedure at the hearing. I thought that
25 this case now reduces to a clean question about the

1 retroactive application of the new guidelines.

2 MR. COLE: Well, it isn't a clean question, Your
3 Honor, because exactly the same error that he alleges
4 infected his first hearing was present at his second
5 hearing. If -- if you look at the materials that they
6 added to their brief at lines 3, 7, and 8 where they have
7 the new parole decision, it's clear that Dotson's 2002
8 parole decision was predicated on exactly the same
9 guidelines, exactly the same 1998 guidelines that he says
10 violated his rights under the Ex Post Facto Clause.

11 So, in fact, if anything, it's made his
12 situation worse because a Federal decision on his claims
13 now would both necessarily imply the invalidity of his
14 previous hearing and the 2002 hearing, and the 2002
15 hearing was a release hearing. Unlike the halfway review
16 that occurred earlier, it was a full-fledged release
17 hearing in 2002, at which the parole board decided both
18 that he should not get parole then and that he should not
19 again be considered for parole until 2005.

20 JUSTICE GINSBURG: Was there -- maybe I'm wrong
21 about this, but I thought there no challenge being made to
22 the 2002 hearing.

23 MR. COLE: But what Heck makes clear is it
24 doesn't matter what you say you're challenging. What we
25 need to look to is what's the necessary implication of

1 securing success on your claims in Federal court for a
2 State decision. Here, the necessary implication, if
3 they're successful on their ex post facto claims, is going
4 to be that the 2002 decision can't stand, the 1999
5 decision --

6 JUSTICE GINSBURG: Why can't it simply be that
7 prospectively for this class of prisoner, the old
8 guidelines will apply, prospectively without undoing
9 anything that's happened in the past?

10 MR. COLE: I think for the same reason that in
11 Balisok I don't think there could have been a prospective
12 order that said -- said something like the method you have
13 for choosing decision-makers creates fraud, bias, and
14 deceit, on a going-forward basis you must change that
15 method for selecting decision-makers. Saying that you
16 have to change it on a going-forward basis would mean,
17 necessarily imply, that there had been fraud, bias, and
18 deceit by the decision-maker that would mean that --

19 JUSTICE GINSBURG: I think twice you started
20 something and our questions impeded you. But I think you
21 were equating the parole board's decision to a criminal
22 sentence, and so you -- you were saying just as the -- the
23 Federal authority can't come in and nullify the State
24 criminal sentence, neither can it nullify the parole board
25 determination. And -- and I thought that the comparison

1 between a -- a sentence -- a criminal conviction and
2 sentence and a parole board's discretionary determination
3 -- you seemed to be putting those on the same plane.

4 MR. COLE: Not exactly on the same plane, Your
5 Honor, but recognizing that this Court in Balisok said
6 that post-judgment administrative decisions regarding the
7 duration of confinement also count as criminal judgments
8 that are protected for purposes of -- of the Heck
9 doctrine. And in Greenholtz, this Court --

10 JUSTICE SOUTER: But -- but the -- the
11 generality at which you keep referring to it, with respect
12 to conditions of confinement, is a -- is a higher level of
13 generality than anything that Balisok decided. In
14 Balisok, the particular decision was a decision to revoke
15 an entitlement to be released at whatever the date the
16 good time would give, and -- and that is a much more
17 specific -- I mean, that literally affects an entitlement
18 to be released. It is not merely a decision with respect
19 to length of confinement.

20 MR. COLE: Well, Your Honor, if this turns on
21 whether or not it's an entitlement, I would agree with you
22 that it seems good-time credits might be different from an
23 entitlement sense than parole.

24 But -- but all the way back, in tracing the
25 cases from Preiser forward, the Court has talked about

1 duration of confinement, and certainly no one can argue
2 that the decision here is going to have dramatic
3 consequences for the duration of these prisoners'
4 confinement.

5 JUSTICE SOUTER: We -- we don't know what
6 consequence it will have for the duration of his
7 confinement. All we know is that it will have a
8 consequence in determining the date at which the next look
9 will be taken by the parole board to see whether he then
10 is in a condition to be released. That's all we can tell.

11 MR. COLE: That's correct, Your Honor, but
12 they're -- they're pressing ex post facto claims. And as
13 this point -- Court pointed out in Garner in 2000, they
14 can maybe bring those claims based on changes in frequency
15 of parole hearings, but they're going to have to show a
16 definite impact on the quantum of punishment that they
17 receive as a result of that change. So if they're going
18 to be successful on their ex post facto claims, they're
19 going to have to show an impact on the duration of their
20 confinement. Either they have no ex post facto claim
21 because there's no durational impact on their --

22 JUSTICE SOUTER: Okay. But you're -- you're
23 assuming -- your argument now is assuming that they are
24 going to be successful on this element, that you say
25 they've got to satisfy later.

1 MR. COLE: Right, but that's the Heck --

2 JUSTICE SOUTER: And -- and whether they are or
3 not has nothing to do with -- with Balisok and Heck.

4 MR. COLE: I -- I disagree, Your Honor, because
5 in Heck and Balisok, the Court said look to what happens
6 if they're successful on their claims. So I'm -- we're --
7 the State is supposed to hypothesize that somehow they're
8 going to be successful on these claims. We don't agree
9 it's going to happen, but once we hypothesize that they're
10 going to be successful on an ex post facto claim, it means
11 they're going to have to show, have to demonstrate a
12 durational impact on their sentence.

13 JUSTICE SOUTER: Sure. It also -- it also means
14 that if -- if -- assuming your argument is sound, if you
15 lose this case, you win the war.

16 (Laughter.)

17 MR. COLE: At -- at some level, I think there's
18 an -- an inherent and fundamental tension in their
19 position, and -- and the coin could flipped and conversely
20 there's that same tension in ours.

21 JUSTICE SCALIA: Are -- are you sure that that's
22 what they have to prove, that -- a durational impact?
23 Wouldn't it be enough to show that they were deprived of
24 an opportunity to have the sentence shorter? Wouldn't --
25 wouldn't it -- assuming there was an ex post facto

1 violation, wouldn't that be enough of an injury, that they
2 lost an opportunity to have their sentence shortened?

3 MR. COLE: But, Your Honor, I believe what makes
4 out the ex post facto claim is an increase in the quantum
5 of punishment after they've committed their crimes. So
6 they need to show that as an element.

7 I -- I see -- I'd like to reserve the remainder
8 of my time for rebuttal, if I could.

9 JUSTICE STEVENS: You may do so.

10 Mr. Lewis.

11 ORAL ARGUMENT OF JOHN Q. LEWIS

12 ON BEHALF OF RESPONDENT JOHNSON

13 MR. LEWIS: Justice Stevens, and may it please
14 the Court:

15 This case presents a straightforward opportunity
16 to apply the Heck rule. Respondent Johnson's section --

17 JUSTICE KENNEDY: Can you tell us why -- why is
18 it still live when they -- when they already received a
19 second hearing? Or why is not moot?

20 MR. LEWIS: Johnson still has remaining claims
21 for prospective injunctive relief in this case and, as
22 well, declaratory relief. What may be mooted is his claim
23 for retroactive injunctive relief, in other words, a new
24 parole hearing. I think in order for him to pursue that
25 type of a claim, he'd have to go back down to the district

1 court.

2 JUSTICE SCALIA: What -- what is --

3 JUSTICE O'CONNOR: Well, put in plain language
4 what it is Johnson is claiming he's entitled to. I don't
5 understand.

6 MR. LEWIS: Well, he -- really three different
7 things. He's requesting prospective injunctive relief,
8 fix the due process violations that are going on in Ohio
9 parole proceedings.

10 JUSTICE SCALIA: Which is a new -- a new parole
11 hearing. Isn't -- I mean, it -- I --

12 JUSTICE O'CONNOR: How could that be fixed?

13 JUSTICE SCALIA: Yes. How -- how can it be
14 fixed except by giving him a new parole hearing?

15 MR. LEWIS: Well, he does have a class action.
16 He filed a class action and he's trying to fix the
17 proceeding prospectively. It doesn't necessarily require
18 him to have a new parole hearing. He's still in
19 confinement and will very likely have a new parole
20 hearing, a new parole hearing that he wants the
21 proceedings to be different in. He's not necessarily
22 asking for a new parole hearing. He's saying --

23 JUSTICE SCALIA: Why isn't he? If -- if -- what
24 he's saying is the past proceedings were invalid, I want
25 you to do it right in the future.

1 MR. LEWIS: Sure. I think that was part of his
2 claim, which might be mooted, but he's also saying in any
3 future --

4 JUSTICE SCALIA: No. It -- it isn't mooted
5 because he still got it done wrong. The second hearing
6 was still wrong.

7 MR. LEWIS: Well, we don't --

8 JUSTICE SCALIA: His claims here -- if his claims
9 here are correct.

10 MR. LEWIS: We don't know that for sure, but
11 part of his claim as well is to say in future parole
12 hearings that I'm going to be subjected to, even if you
13 don't give me a new one, in future parole hearings that
14 I'm going to be subjected to, I want these processes fixed
15 to -- to come into compliance with due process. And I
16 think that's separate and apart from --

17 JUSTICE SCALIA: You -- you say we don't know
18 whether the -- the new parole hearing he got was still
19 invalid?

20 MR. LEWIS: I don't think there's enough in the
21 record to determine that.

22 JUSTICE SCALIA: Oh, so we can assume that that
23 was valid. You're -- you're willing to assume that for
24 purposes of this case?

25 MR. LEWIS: I am not willing to assume that. I

1 -- I don't think we can say one way or the other.

2 JUSTICE BREYER: Well,

3 MR. LEWIS: We can't yet.

4 JUSTICE BREYER: Okay, fine.

5 MR. LEWIS: We may intend to.

6 JUSTICE BREYER: Then we take it as valid. Then
7 we take it as valid. That's not a claim you're
8 challenging.

9 But I take it your claim is in the year 2009 he
10 will have another hearing.

11 MR. LEWIS: Actually 2005.

12 JUSTICE BREYER: 2005? Okay, 2005 he'll have
13 another hearing.

14 MR. LEWIS: Absolutely.

15 JUSTICE BREYER: And in the year 2005, I want
16 not to have the -- what are they called? The 1998
17 guidelines. I don't want my 1998 guidelines applied in
18 the 2005 hearing because you have some theory, maybe good,
19 maybe bad, but it's a theory that that would violate the
20 Constitution of the United States.

21 MR. LEWIS: That's correct.

22 JUSTICE BREYER: So you're saying he's going to
23 have this. I want an injunction or declaratory relief
24 they can't do it.

25 MR. LEWIS: That's right, and as well, he says I

1 want to be heard at this next parole hearing. Now, that
2 was -- part of his due process allegations in this case
3 were that he -- he wasn't even allowed to meaningfully
4 participate in --

5 JUSTICE BREYER: And he's saying it violates the
6 Constitution in two respects: one, they won't listen to
7 me; and two, they apply the 1998 guidelines.

8 MR. LEWIS: That's essentially it.

9 JUSTICE BREYER: That's it. Okay. We're
10 talking now about this 2005 hearing and he wants new
11 procedures, and the question is, is this 1983 or is it
12 habeas?

13 MR. LEWIS: That's -- that's correct.

14 JUSTICE BREYER: Okay.

15 MR. LEWIS: And -- and it is section 1983
16 because it doesn't violate the Heck rule. This --

17 JUSTICE O'CONNOR: And what -- what is your --
18 what is Johnson's mootness argument?

19 MR. LEWIS: Well, to the extent in his complaint
20 he was seeking a new parole hearing as a result of the
21 challenge to the '99 decision, that's probably mooted
22 because he has received this 2001 hearing and we just
23 don't know enough about it to know whether he's going to
24 challenge it or not. He'd have to amend his complaint in
25 the district court.

1 JUSTICE O'CONNOR: Could -- is it possible that
2 both Dotson and Johnson could get new hearings by -- filing
3 habeas --

4 MR. LEWIS: I don't think so.

5 JUSTICE O'CONNOR: -- petition?

6 MR. LEWIS: I don't think so. I don't think
7 that Johnson has a Federal habeas remedy here because the
8 Federal habeas statute is a challenge to the legality of
9 custody, the legality of confinement, and that's not
10 anything that he's challenging in this case.

11 JUSTICE KENNEDY: What would you do if there was
12 an allegation of a serious procedural flaw in a past
13 hearing? The parole commission was -- was drunk or they
14 read the wrong file or something, and it was just a
15 challenge to the invalidity of the past hearing. Would
16 that be 1983 or habeas?

17 MR. LEWIS: I think that's a closer call, but I
18 think it --

19 JUSTICE KENNEDY: That's why asked you. Why
20 isn't it --

21 (Laughter.)

22 MR. LEWIS: Right. And -- and I -- I think it
23 is still section 1983 if certain things are present. That
24 is, is he going to necessarily imply the invalidity of the
25 duration of his sentence by winning his case? And if

1 that's meets the Heck rule and if he isn't, then I think
2 he can proceed in section 1983.

3 JUSTICE SCALIA: Do we have any case in which
4 what was being -- what was sought to be challenged in a
5 habeas action was not the duration of the sentence, but
6 the procedure by which the duration of the sentence was
7 determined?

8 MR. LEWIS: I don't --

9 JUSTICE SCALIA: Is there any -- why -- why
10 shouldn't that be a habeas action? Why shouldn't 1983 be
11 limited to prison conditions, which is what we've always
12 -- and referred to it as -- as that in the past?

13 MR. LEWIS: Well, I think in the hypothetical
14 that you've presented, Justice Scalia, if the prisoner
15 wins the case in that particular case, then his sentence
16 is invalidated, and I think that's the important critical
17 factor here.

18 JUSTICE SCALIA: No, no, no, not necessarily.
19 He -- he's just saying the parole hearing I got lacked due
20 process safeguards. Had I had those safeguards, I might
21 -- I might -- have been given a shorter sentence. I can't
22 prove I would have. I'm not challenging the sentence
23 really, but I want a new hearing. I didn't get due
24 process. Give me a proper hearing because I might get out
25 earlier. Why shouldn't that come under habeas?

1 MR. LEWIS: Because it's not a challenge to the
2 legality of the confinement.

3 JUSTICE BREYER: My law clerk found two cases
4 which we've just looked at briefly. One is called
5 Wilwerding v. Swenson and the other Johnson v. Avery where
6 she says that in those two cases people were using habeas
7 to challenge prison conditions even. Now, so there are --
8 there are two cases that, if she's right -- and she's
9 usually right -- that -- that -- where habeas was used to
10 challenge prison conditions. So I've thought, well, if
11 they can use it, they certainly could use it here.

12 MR. LEWIS: Well, and I -- I think point with --
13 with both of those decisions is that the Heck rule did not
14 come into play because the prisoners must have gone
15 through and exhausted their State court remedies, and so
16 there wasn't an issue as to whether they must bring their
17 claim in habeas.

18 JUSTICE BREYER: No. It was a different issue,
19 but it said habeas could be brought.

20 MR. LEWIS: Sure. I think the Court in -- in
21 that particular case --

22 JUSTICE BREYER: So habeas could be brought
23 here?

24 MR. LEWIS: I don't think so.

25 JUSTICE BREYER: Why not?

1 MR. LEWIS: I don't think there's a remedy in
2 habeas for the respondent Johnson in this case because the
3 first thing that's going to be asked when he goes to the
4 Federal district court to seek habeas relief is, well, are
5 you challenging the legality of your custody?

6 JUSTICE BREYER: Yes, and they say sure -- sure
7 I am. I'm saying I had terms. You know, I was going to
8 be here under conditions A, B, C, and A, B, C in my
9 opinion mean I will be released sooner, and instead, they
10 gave me D, E, F, and D, E, F means I'm likely to be
11 released later. I can't guarantee it. That's what he'll
12 say. He says I can't guarantee it, but I wouldn't be
13 bringing this case if I didn't think at least it was a
14 shot.

15 MR. LEWIS: Right. And -- and -- but he's not
16 necessarily challenging the legality of his custody.

17 JUSTICE KENNEDY: Well, but -- but that's part
18 of the conclusion that we're going to have to reach to --
19 to resolve the case. Why isn't he? How is that that much
20 different than if a judge -- let's assume, under a proper
21 sentencing guideline scheme, the judge just uses the wrong
22 guideline. The man is going to go to jail for either 5 or
23 10 years. We don't know which. But that's -- that's a
24 classic habeas case. Here, he's going to stay in a prison
25 for 5 or 10 years. We don't know which. Why isn't this a

1 classic habeas case?

2 MR. LEWIS: Because I think in -- in the first
3 hypothetical, Your Honor, that -- that you gave, the
4 challenge, if successful, would -- would completely
5 invalidate the sentence that he received. They'd have to
6 redo the -- the sentence.

7 And -- and I think that's the critical
8 distinction in this case, is that when Johnson files his
9 complaint, he has a 10- to 30-year sentence by the -- by
10 the State court. If he wins, he still has a 10- to 30-
11 year sentence.

12 JUSTICE KENNEDY: Well, it wouldn't completely
13 invalidate the sentence. We know that he's still going to
14 be held and he's going to be held in custody. It's a
15 question of how long, which is exactly what this case is.

16 MR. LEWIS: But in the hypothetical you propose,
17 Justice Kennedy, the -- the prisoner was actually -- would
18 be actually challenging the sentence he received, and by
19 winning the case, he's going to undo the State court
20 sentence.

21 JUSTICE SCALIA: Yes, well, those cases happen
22 to involve -- happen to involve sentences. This case
23 doesn't involve a sentence. It involves an opportunity to
24 have his sentence shortened. And if habeas can be brought
25 for that, we would phrase it differently. We wouldn't say

1 it would have to invalidate the sentence. We would say it
2 would have to invalidate the proceeding that could have
3 shortened his sentence. I grant you we can't use the same
4 language we did in the earlier cases, but if this is
5 properly a habeas action, then we -- we can get some
6 language to make it fit.

7 MR. LEWIS: Well, I don't -- I don't think it is
8 properly a habeas action. I think even in the decisions
9 where courts may have heard similar claims in habeas, I
10 think it was a matter of just saying, well, the prisoner
11 is already here. He's already exhausted all of his State
12 court remedies. It doesn't really matter whether it's
13 section 1983 or habeas.

14 JUSTICE BREYER: Suppose we wrote an opinion
15 that said, whatever the reasoning -- I don't know what it
16 would be right now -- that said in the future your client
17 should go ahead in 1983. I'm putting you in a slightly
18 awkward position, so don't answer if you don't want to.
19 But I mean, for the future all these cases will be brought
20 in habeas. Now, suppose that's what the opinion said.
21 We're absolutely making it clear just what the -- would
22 there be any harm done?

23 MR. LEWIS: I -- I think there would be.

24 JUSTICE BREYER: Now, what would that harm be?

25 MR. LEWIS: I think that by -- by having a rule

1 of that sort, that it would be expanding the jurisdiction
2 of habeas and it would start to swallow up otherwise
3 cognizable section 1983 claims.

4 JUSTICE BREYER: And why would that be bad?

5 JUSTICE SOUTER: And why --

6 MR. LEWIS: I'm sorry?

7 JUSTICE BREYER: Why would that be bad?

8 MR. LEWIS: Well, because the Congress has
9 enacted a statute --

10 JUSTICE BREYER: No, no. But I mean, is -- I'm
11 asking you a practical question as a practicing lawyer.
12 Would it be bad?

13 MR. LEWIS: Absolutely it would.

14 JUSTICE BREYER: Because?

15 MR. LEWIS: Because there's a statute that
16 allows --

17 JUSTICE BREYER: Well, I mean, leaving aside --
18 Congress changed the statute. It says absolutely it's
19 going to be habeas. Is there any bad consequence in the
20 law?

21 MR. LEWIS: It's going to give States a license
22 to violate civil rights that will otherwise not be
23 protected under the statute.

24 JUSTICE BREYER: We'll catch them in habeas.

25 MR. LEWIS: Yes, but the -- the State exhaustion

1 requirements in habeas are much tougher. Of course, the
2 State wants them to have to go through State exhaustion.

3 JUSTICE BREYER: Ah, so it comes down to that.

4 MR. LEWIS: That's really the critical --

5 JUSTICE SOUTER: You said -- you said a moment
6 ago that it would be expanding habeas, and I'd like you to
7 expand on that. It would be expanding habeas, I am
8 assuming, because in every successful habeas case, the
9 ultimate remedy that the court can order, if the State
10 does not snap to it, is the immediate release of the
11 prisoner. And I take it when you said it would expand
12 habeas, it would expand it because this would not be an
13 immediate release case no matter what. Is that correct?

14 MR. LEWIS: That's correct.

15 JUSTICE SOUTER: Okay.

16 MR. LEWIS: You would basically end up going to
17 a Federal district court seeking habeas relief asking for
18 processes to be changed prospectively.

19 JUSTICE SOUTER: And that's why they could not
20 bring habeas in this case because if they won, they still
21 would not have shown anything that entitled to them to get
22 out now or get out now unless the State within 30 days
23 does something. Is -- is that the nub of it?

24 MR. LEWIS: That's -- that's really it, Justice
25 Souter.

1 JUSTICE KENNEDY: Well, I'm -- I'm not sure. It
2 depends how you formulate the order. The -- the judge
3 says, I'm going to order this prisoner released unless,
4 within 6 months, he has a parole hearing under the
5 guidelines I set. That's the way the habeas statute
6 works.

7 MR. LEWIS: Well, if that's the relief that the
8 -- the prisoner was seeking, I think that is clearly a
9 habeas claim. But that's not what Johnson is claiming in
10 this case. He's not asking for entitlement to release at
11 all. He's asking for the processes to be changed
12 prospectively for future parole hearings, and he's asking
13 for declaratory relief.

14 JUSTICE SOUTER: Regardless of what he's asking
15 for, if he got what he wanted, he still would not be
16 entitled to any immediate release.

17 MR. LEWIS: That's absolutely correct.

18 JUSTICE SOUTER: He would still have a sentence
19 of X years, and the question is, how often are we going to
20 look at him to decide when, within X years, we may let him
21 out. Is that --

22 MR. LEWIS: That's -- that's absolutely it. He
23 cannot -- by winning his case, he's not going to shorten
24 his sentence in any way. And that's -- that's a big
25 distinction from the Balisok case where there was an

1 automatic entitlement to a shorter sentence --

2 JUSTICE KENNEDY: Well, he might --

3 MR. LEWIS: -- for Balisok in that case.

4 JUSTICE KENNEDY: -- he might shorten the term
5 of his confinement.

6 MR. LEWIS: Might but not necessarily. And this
7 Court made very clear most recently in the Nelson
8 decision --

9 JUSTICE KENNEDY: Well, you could say the same
10 thing when you're challenging the sentence. He might but
11 he might not. We're just -- we're just hearing the case.

12 MR. LEWIS: I think a challenge to the sentence
13 necessarily invalidates that sentence if you win. But a
14 challenge to parole is much different because you're not
15 affecting the sentence if you win your case. And the term
16 necessary is completely necessary to the Heck analysis, as
17 this Court made clear most recently in the Nelson case
18 from last term.

19 JUSTICE SOUTER: That's the nub of it I guess.
20 The fact that he may be granted parole has no implication
21 for the validity of the sentence.

22 MR. LEWIS: That's absolutely right.

23 JUSTICE SOUTER: In fact, it assumes the
24 sentence is valid, but that he will probably stay clean if
25 he gets out. That's all it means, isn't it?

1 MR. LEWIS: That's really all it means. And
2 this Court last term in Muhammad in -- in footnote 1 made
3 clear that the incarceration that matters for this
4 analysis is the -- in the incarceration of the sentence
5 from the State court. And I think that's -- that's what
6 the Court needs to look at, is what is Johnson's effect on
7 the State court judgment or sentence. What's the
8 necessary implications? Not in this case at all.

9 And really, this case I think has already been
10 decided by Wolff. It's something that the petitioners
11 sort of don't mention too much in their briefs. In Wolff,
12 the prisoners in -- in that case were trying to get their
13 good-time credits back. I think this is an easier case
14 than the Wolff decision. And what the Court did was parse
15 out, okay, you can't get your good-time credits back, but
16 you can seek prospective injunctive relief to fix the
17 processes that are used in connection with depriving
18 prisoners of good-time credits. And that's precisely what
19 Johnson is seeking here.

20 Your Honor, the other thing I wanted to mention
21 was the notion -- Your Honors, the other thing I want to
22 mention was the notion that there's no State review of
23 these decisions. The Prison Litigation Reform Act clearly
24 provides for State administrative review of even
25 challenges to the process. So the -- the State of Ohio

1 could easily set up an appeal process administratively to
2 -- to correct that problem.

3 JUSTICE STEVENS: Thank you, Mr. Lewis.

4 MR. LEWIS: Thank you.

5 JUSTICE STEVENS: Mr. Untereiner, is it?

6 ORAL ARGUMENT OF ALAN E. UNTEREINER

7 ON BEHALF OF RESPONDENT DOTSON

8 MR. UNTEREINER: Yes, Justice Stevens.

9 Justice Stevens, and may it please the Court:

10 I'd like to, first of all, go to the point that
11 Justice Ginsburg raised about the allegations in Mr.
12 Dotson's complaint. This case has -- has become much
13 simpler with respect to Dotson because any claim that he
14 might have had about this 2000 scheduling decision has
15 been mooted.

16 What's really left are claims for future
17 injunctive relief, for prospective relief. These are
18 classic 1983 type cases. Prisoners have been bringing
19 lawsuits since Wolff against McDonnell alleging that
20 parole procedures and other kinds of procedures,
21 disciplinary procedures ought to be reformed and seeking
22 future injunctive relief with respect to those kinds of --
23 of procedures.

24 In Edwards against Balisok, this Court indicated
25 that ordinarily claims for prospective injunctive relief

1 will not be barred by the Heck doctrine because ordinarily
2 they will not call into question or necessarily imply the
3 invalidity of any previous decision. So to Justice
4 Breyer's question, this would require a change in the law,
5 and it would, I think, fairly substantially cut back on
6 the kinds of suits that have been brought for 30 years
7 under Wolff because in all kinds of suits like this, the
8 State would argue, as the petitioners are arguing today,
9 that there's some prior administrative decision that's
10 called into question by a future claim for injunctive
11 relief with respect to some aspect of the procedures
12 relating to good-time credit revocation or parole or the
13 revocation of probation. So I think this would be a
14 fairly substantial change in the law. A lot of these
15 claims would be barred by Heck.

16 The -- Justice Scalia, you asked a question
17 about the habeas, the scope of habeas relief. And I think
18 it's important to understand that the lower courts have
19 generally held that habeas is not available for these
20 kinds of claims that are prospective only, seeking changes
21 in future procedures. There are some lower court cases
22 that say that where a prisoner seeks release on parole and
23 demands a right or claims a right to release on parole,
24 that might be cognizable in habeas, but the vast weight of
25 authority in the lower courts is that claims that only

1 seek an -- the right to a new parole hearing, the outcome
2 of which is completely discretionary --

3 JUSTICE KENNEDY: You want a 1983 hearing in
4 which a United States district judge tells the parole
5 commission, now, here are your marching orders for future
6 cases. You have to comply with this rule, that rule, this
7 rule. What is an analog that you can give us where United
8 States courts have done this under 1983? Using an
9 administrative case, if the -- if the agency does it the
10 wrong way, we reverse that decision. It would be like a
11 review of a conviction that's not final. Have we had
12 cases where under 1983 litigants come in and say, now,
13 these agencies are doing it the wrong way? You have to --
14 can you give me an analog?

15 MR. UNTEREINER: I think there -- there are a
16 fair number of cases in the lower court where -- lower
17 courts where these types of claims for injunctive relief
18 have been brought and the Federal courts have ordered, on
19 a prospective basis, that the States conform to all kinds
20 of -- I mean, Wolff is a case like that I think where the
21 -- the State was required to do certain things in the
22 future. So I think these are ordinary 1983 claims for
23 injunctive relief.

24 JUSTICE GINSBURG: Is there any significant
25 difference between this case and Wolff? I mean, Wolff was

1 a case of procedural fault supposedly, and if those faults
2 were cured, someone would have a better chance at getting
3 good-time credit. Wasn't that what --

4 MR. UNTEREINER: Yes.

5 JUSTICE GINSBURG: So it seems to me it's very
6 -- very close to your situation.

7 MR. UNTEREINER: It is very close, Justice
8 Ginsburg. Dotson is essentially making two claims for
9 prospective relief. He is saying that these 1998 parole
10 guidelines effectively rescind his eligibility for parole.
11 At the time of his conviction, he was entitled to parole
12 after serving 15 years. Under these guidelines, he'll
13 have to wait till -- until 32 and a half years have passed
14 before he's eligible for parole. And he's claiming that
15 in -- in his next parole release hearing, which is in June
16 2005 and beyond, the State is required to apply the old
17 rules to him so that he'll be eligible. So this is very
18 much like what was at issue in Wolff.

19 The second claim he has is that he's entitled to
20 annual parole release hearings in the future. Again, it's
21 a future -- it's a prospective claim only. In the future,
22 he will be entitled to annual parole release hearings, and
23 the new rules say that the State can postpone those
24 hearings for up until 10 years.

25 So on both of those claims, he is seeking

1 changes in the future, and these are classic 1983 type
2 cases that have been brought, as I say, for the last 30
3 years in the lower courts.

4 Now, the Heck test requires a showing that if he
5 prevails on his section 1983 claims, he would -- that
6 would necessarily imply the invalidity of his underlying
7 conviction or sentence. And I think this case is very
8 different from the Balisok case. There -- there was a
9 colloquy about that earlier. I think that Balisok is
10 clearly distinguishable because the administrative
11 decision there would have had an immediate and direct
12 impact on the duration of the prisoner's sentence by -- by
13 revoking the good-time credits. Whereas, here, the impact
14 is very, very speculative.

15 Justice Souter, you referred earlier to a
16 durational consequence. The durational consequence here
17 is really quite hypothetical and remote. If he prevails
18 on his 1983 claims, all he will be entitled to are future
19 hearings, and since parole is entirely discretionary in
20 Ohio, we can't predict the outcome of those proceedings.
21 He'll also be entitled to -- merely to be considered
22 eligible for parole in the future. So I think that the --
23 the consequences -- any impact on -- on the duration of
24 his confinement is -- is really quite hypothetical here
25 and it would require an expansion not only of the Heck

1 rule but also of habeas jurisdiction to resolve this case
2 in the State's favor.

3 Unless there are any further questions, we would
4 ask that the Court affirm the Sixth Circuit's unanimous
5 decision in favor of Dotson. All 11 members of that court
6 found that Dotson's claims were not barred by Heck, and
7 this Court should affirm.

8 JUSTICE STEVENS: Thank you, counsel.

9 Mr. Cole, you have about 4 and a half minutes
10 left.

11 REBUTTAL ARGUMENT OF DOUGLAS R. COLE

12 ON BEHALF OF THE PETITIONERS

13 MR. COLE: Thank you, Your Honor.

14 A number of points. I wanted to start by
15 responding to Justice Souter's question, which was again
16 asking about this need for entitlement to early release
17 as part of habeas, and would ask the Court to consider the
18 In re Braden case where a prisoner in Alabama was seeking
19 to challenge a detainer that had been issued by Kentucky.
20 And the basis for the challenge to the detainer in habeas
21 was the fact that it was having implications for his
22 parole eligibility in Alabama. So there, there was not
23 going to be necessarily an entitlement to earlier release,
24 but simply a difference in the parole considerations.

25 Second, Justice O'Connor, with respect to your

1 questions about mootness, the only point that I would add
2 is that if this case is moot now, it was moot when the
3 Sixth Circuit decided it as well. So if mootness is the
4 direction we're going, I think there need to be a decision
5 vacating the judgment below --

6 JUSTICE KENNEDY: Well, what's your position as
7 to whether or not it's moot?

8 MR. COLE: Your Honor, we don't believe it's
9 moot either, and in -- in fact, for two reasons. First,
10 once again, it's threatening consequences for an existing
11 decision, albeit it not the one that was originally
12 threatened or where invalidity would be implied below, but
13 there is a new one where that would have that consequence.

14 In terms of bad consequences, I think the single
15 biggest bad consequence of directing these prisoners to
16 1983 rather than habeas is it's going to deprive them of
17 the opportunity for meaningful relief in Ohio's courts.
18 The Layne decision in the last -- decided just 2 years
19 ago, three prisoners brought a declaratory judgment action
20 about the way parole works in Ohio. They were successful
21 and their case resulted in 3,000 prisoners receiving --

22 JUSTICE GINSBURG: But -- but you raise
23 deprivation of the benefit they would get from the Ohio
24 courts. If they wanted that benefit, they could have
25 brought a 1983 action in State courts. State courts have

1 jurisdiction. So it's a little odd for you to say, oh,
2 they're being deprived of a benefit when they're telling
3 you by this very lawsuit they don't want it.

4 MR. COLE: That's true, Your Honor. At the same
5 time, this -- bringing this -- this case in 1983 in
6 Federal court means that they're not going to be able to
7 get injunctive relief on State grounds under the Pennhurst
8 doctrine. So they are depriving themselves of a chance to
9 get that type of meaningful relief that Ohio courts are
10 offering and that courts in other States are offering.

11 The other -- the other point I wanted to make is
12 that with respect to Petitioner Johnson's argument, his
13 understanding of sentence, that if it doesn't impact the
14 sentence, it can't be in habeas, would mean that parole
15 revocations can't be in habeas either. A parole -- parole
16 -- when you're on parole, you're still serving part of
17 your sentence, as he understands it, part of the initial
18 term that the court has imposed upon you. Granted, you're
19 not doing it in prison, but a parole revocation wouldn't
20 impact your sentence. It would merely bring you back into
21 prison to serve the remainder of your sentence rather than
22 having you serve it on the street. So I think that
23 understanding of sentence can't make sense for -- for
24 habeas purposes.

25 JUSTICE SCALIA: I think sentence means custody.

1 Don't you think it means custody?

2 MR. COLE: Well, but to the extent we're
3 talking --

4 JUSTICE SCALIA: The custody you've been
5 sentenced to?

6 MR. COLE: But to the extent we're talking about
7 duration of custody or duration of confinement, again, the
8 claims here do have a -- success on the claims here would
9 have a meaningful impact on the duration of confinement.
10 This Court in Muhammad said -- I think this is probably
11 the -- the closest quote on point -- challenges to
12 particulars affecting the duration of confinement are the
13 province of habeas corpus.

14 This is a challenge to a particular, the parole
15 procedures, that's affecting the duration of their
16 confinement. Or at least that's their allegations, and
17 that's what success on their claims is going to mean. And
18 because of those durational consequences, as well as
19 because of the consequences of success on the merits for
20 previous State parole decisions, we believe that those
21 claims are better routed to habeas than to 1983.

22 If there are no further questions.

23 JUSTICE STEVENS: I had one further question.
24 Are you asking us to change anything in Wolff against
25 McDonnell, or can we follow that case?

1 MR. COLE: I think we can follow that case as
2 it's been reinterpreted in Heck. Wolff said that -- well,
3 Heck said that Wolff was about challenges that would not
4 -- and I believe the language is -- necessarily vitiate
5 the underlying decision. So the way Heck understood Wolff
6 was that the procedural challenges there, with regard to
7 the prospective relief they were seeking, were not the
8 type of relief that would necessarily vitiate any decision
9 that had already been made.

10 Here, by contrast, the claims that they're
11 bringing, the ex post facto claims, if they're successful
12 on the merits, would necessarily vitiate the decisions
13 that have gone before.

14 Thank you, Your Honors.

15 JUSTICE STEVENS: Thank you, Mr. Cole.

16 The case is submitted.

17 (Whereupon, at 10:57 a.m., the case in the
18 above-entitled matter was submitted.)

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