SUPREME COURT OF THE UNITED STATES

No. 03–287

REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL., PETITIONERS *v.* WILLIAM DWIGHT DOTSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 7, 2005]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion, which in my view reads *Heck* v. *Humphrey,* 512 U. S. 477 (1994), and *Edwards* v. *Balisok,* 520 U. S. 641 (1997), correctly. And I am in full agreement with the Court's holding that "[b]ecause neither prisoner's claim would necessarily spell speedier release, neither lies at 'the core of habeas corpus'" and both may be brought under Rev. Stat. §1979, 42 U. S. C. §1983. *Ante,* at 8. I write separately to note that a contrary holding would require us to broaden the scope of habeas relief beyond recognition.

Preiser v. *Rodriguez,* 411 U. S. 475 (1973), and the cases that follow it hold that Congress, in enacting §1983, preserved the habeas corpus statute as the sole authorization for challenges to allegedly unlawful confinement. *Id.*, at 489–490. At the time of §1983's adoption, the federal habeas statute mirrored the common-law writ of habeas corpus, in that it authorized a single form of relief: the prisoner's immediate release from custody. See Act of Feb. 5, 1867, §1, 14 Stat. 386. Congress shortly thereafter amended the statute, authorizing federal habeas courts to "dispose of the party as law and justice require," Rev. Stat.

§761. The statute reads virtually the same today, 28 U. S. C. §2243 ("dispose of the matter as law and justice require"). We have interpreted this broader remedial language to permit relief short of release. For example, when a habeas petitioner challenges only one of several consecutive sentences, the court may invalidate the challenged sentence even though the prisoner remains in custody to serve the others. See *Peyton* v. *Rowe,* 391 U. S. 54, 67 (1968); *Walker* v. *Wainwright,* 390 U. S. 335, 336–337 (1968) *(per curiam).* Thus, in *Preiser* we held the prisoners' §1983 action barred because the relief it sought—restoration of good-time credits, which would shorten the prisoners' incarceration and hasten the date on which they would be transferred to supervised release—was available in habeas. See 411 U. S., at 487–488.

It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a "quantum change in the level of custody," *Graham* v. *Broglin*, 922 F. 2d 379, 381 (CA7 1991) (Posner, J.), such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody. That is what is sought here: the mandating of a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed. A holding that this sort of judicial immersion in the administration of discretionary parole lies at the "core of habeas" would utterly sever the writ from its common-law roots. Cf. *Bell* v. *Wolfish,* 441 U. S. 520, 526, n. 6 (1979) (treating as open the question whether prison-conditions claims are cognizable in habeas). The dissent suggests that because a habeas court may issue a conditional writ ordering a prisoner released unless the State conducts a new *sentencing* proceeding, the court may also issue a conditional writ

ordering release absent a new *parole* proceeding. See *post,* at 2–3, 4 (opinion of KENNEDY, J.). But the prisoner who shows that his sentencing was unconstitutional is actually entitled to release, because the judgment pursuant to which he is confined has been invalidated; the conditional writ serves only to "delay the release . . . in order to provide the State an opportunity to correct the constitutional violation." *Hilton* v. *Braunskill,* 481 U. S. 770, 775 (1987); see *In re Bonner,* 151 U. S. 242, 259, 262 (1894) (conditional writ for proper resentencing). By contrast, the validly sentenced prisoner who shows only that the State made a procedural error in denying discretionary parole has *not* established a right to release, and so cannot obtain habeas relief—conditional or otherwise. Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release. Conditional writs are not an all-purpose weapon with which federal habeas courts can extort from the respondent custodian forms of relief short of release, whether a new parole hearing or a new mattress in the applicant's cell.

Petitioners counter that we need not be concerned about this expansion of habeas relief because prisoners will naturally prefer §1983 to habeas corpus, in light of the burdensome prerequisites attached to habeas relief by 28 U. S. C. §2254. But those prerequisites, such as exhaustion of state remedies, reliance on "clearly established Federal law," and deference to previous findings of fact, apply only to "a person in custody pursuant to the judgment of a State court," §§2254(b)(1), (d)(1), (e)(1). By contrast, §2243's delineation of the scope of permissible relief applies to *all* federal habeas proceedings, whether the petitioner is in federal or state custody, see §2241(c). Thus, while §2254 may shield petitioners and their fellow state wardens from the impact of the broadened writ they urge us to create, not every warden responding to a ha-

beas petition can claim the same protection. And federal prisoners, whose custodians are not acting under color of state law and hence cannot be sued under §1983, have greater incentives to shoehorn their claims into habeas.

Finally, I note that the Court's opinion focuses correctly on whether the claims respondents pleaded were claims that may be pursued in habeas—not on whether respondents can be successful in obtaining habeas relief on those claims. See, *e.g., ante*, at 6. Thus, for example, a prisoner who wishes to challenge the length of his confinement, but who cannot obtain federal habeas relief because of the statute of limitations or the restrictions on successive petitions, §§2244(a), (b), (d), cannot use the unavailability of federal habeas relief in his individual case as grounds for proceeding under §1983. Cf. *Preiser, supra*, at 489–490 ("It would wholly frustrate explicit congressional intent to hold that [state prisoners] could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings").

With these observations, I join the Court's opinion.