No. 12-16935, No. 13-15050

United States Court of Appeals
for the Ninth Circuit

Damous D. Nettles,

Petitioner-Appellant,

v.

Randy Grounds, Warden,

Respondent-Appellee.

PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court
Eastern District of California
Hon. Anthony W. Ishii
No. 1:11-CV-1201-AWI

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INTRODUCTION AND STATEMENT OF PURPOSE

This appeal involves an exceptionally important issue of federal jurisdiction dealing with the interplay of habeas corpus and civil rights actions. Relying on dicta contained in a footnote in *Skinner v. Switzer*, 562 U.S. 521 (2011), the panel majority held "that a claim challenging prison disciplinary proceedings is cognizable in habeas only if it will '*necessarily* spell speedier release' from custody, meaning that the relief sought will either terminate custody, accelerate the future date of release from custody or reduce the level of custody." *United States v. Nettles,* No. 12-16935, 2015 U.S. App. Lexis 8825 (9th Cir. May 28, 2015) (attached) (emphasis in original) (quoting *Skinner*, 562 U.S. at 535 n.13). In doing so, the panel explicitly overruled as inconsistent with *Skinner* this Court's decisions in *Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989), and *Docken v. Chase*, 393 F.3d 1024, 1031 (9th Cir. 2004), and effectively overruled others not named in the opinion. *See, e.g., Himes v. Thompson*, 336 F.3d 848, 863 (9th Cir. 2003); *Nulph v. Faatz*, 27 F.3d 451, 456 (9th Cir. 1994).

For the reasons stated in Judge Murguia's dissent, 2015 U.S. App. Lexis 8825, at ** 37-53, the majority erred in concluding that it was not

bound by *Bostic* and *Docken*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (a three-judge panel is bound by a prior panel decision unless its reasoning or theory is "clearly irreconcilable" with that of intervening higher authority).

Indeed, this Court had already rejected the majority's position that dicta in *Skinner* had overruled decades of jurisprudence permitting habeas actions where success on the merits could potentially, but would not necessarily, accelerate release from custody. *Thornton v. Brown*, 757 F.3d 834, 841 n.4 (9th Cir. 2014) (describing *Skinner* as "raising, *without deciding*, the question whether 'habeas [is] the sole remedy, or even an available one,' for certain types of claims") (emphasis added). In overruling well-established decisions of this Court, the panel majority circumvented the en banc process to profoundly limit federal court habeas review based on an ambiguous Supreme Court footnote on an important jurisdictional issue, which the Supreme Court has expressly left open since *Preiser v. Rodriguez,* 411 U.S. 475 (1973). Because the Court should not overrule *Bostic* and *Docken*, if at all,

except through en banc review, the Court should grant rehearing en banc to review the judgment in Nettles's case.[1]

PROCEDURAL BACKGROUND

Petitioner Damous Nettles is serving an indeterminate life sentence with the possibility of parole for a conviction of attempted murder with enhancements. In a petition for writ of habeas corpus, he challenged a prison disciplinary violation finding that he threatened to stab a correctional officer in 2008. Nettles claimed that his due process rights were violated because false evidence was presented against him, he was not given the opportunity to present favorable percipient witness testimony, and the hearing officer was biased. He also alleged that the California parole board used the 2008 disciplinary violation as a factor in denying him parole in 2009. He sought restoration of post-conviction credits[2] and expungement of the disciplinary violation record from his file.

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[1] The panel's opinion also decides a second consolidated appeal, *Santos v. Holland*, No. 13-15050, which is not at issue in this petition.

[2] Because Nettles is past his minimum parole eligibility date, his post-conviction credits would only affect his release date if the parole board deems him suitable for parole and determines a release date. 2015 U.S. App. Lexis 8825, at ** 29-30.

Nettles explained that before the alleged 2008 violation, he went ten years "without any disciplinary action for drugs or violence" and, "if he is able to expunge the [violation], he would take to the Board today fifteen years free of any actions relating to drugs or violence." 2015 U.S. App. Lexis 8825, at * 50. Because the parole board "shall normally set a parole release date" unless the board determines that "the inmate constitutes a current threat to public safety," *In re Lawrence*, 190 P.3d 535, 546, 553 (Cal. 2008), Nettles argued that expungement would make it much more likely he would be deemed suitable for parole. He also contended that expungement would enable him to accelerate his next parole consideration hearing due to a "change in circumstances." Cal. Pen. Code § 3041.5(d).

Applying *Docken v. Chase*, 393 F.3d 1024, 1028 (9th Cir. 2004), and *Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989), the district court held "that habeas corpus jurisdiction exists when a petitioner seeks expungement of a disciplinary violation from his record if the expungement is likely to accelerate the petitioner's release on parole." ER 7. The district court dismissed the petition, however, on the ground that Nettles had not met this showing in light of the underlying crime,

his criminal history, and his record of other violations in prison. ER 9. This Court granted a certificate of appealability on whether the district court had jurisdiction over Nettles's habeas petition. ER 1-2.

On appeal, the panel affirmed in a 2-1 opinion. Relying on footnote 13 in *Skinner v Switzer*, 562 U.S. 521, 535 n.13 (2011), the majority held the district court lacked jurisdiction with respect to Nettles's petition because the relief he sought would not necessarily accelerate his release on parole. 2015 U.S. App. Lexis 8825, at * 4. In dissent, Judge Murguia, "adhering to the [Court's] binding precedent," would find that the district court had jurisdiction over his habeas action because "Nettles' claim, if successful, *could* potentially affect the duration of . . . confinement." 2015 U.S. App. Lexis 8825, at * 51 (quoting *Docken*, 393 F.3d at 1031) (emphasis in original).

REASONS FOR GRANTING REHEARING EN BANC

I. Federal Habeas Corpus Jurisdiction Is Broad And Covers Nettles's Challenge Seeking Expungement Of A 2008 Disciplinary Violation Record Used To Deny Him Parole.

The "Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). The basic scope of federal habeas corpus is codified at 28 U.S.C. § 2241. The habeas statute is broad and extends to any prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); *see also Ex parte McCardle*, 73 U.S. 318, 325 (1868) (noting that the Act of 1867, a predecessor to § 2241, provided federal courts the "power to grant writs of habeas corpus in all cases where any person may be restrained of his liberty in violation of the Constitution"). "While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963); *see also Peyton v. Rowe*, 391 U.S. 54, 58 (1968) ("The writ of habeas corpus is a

procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny."). Indeed, with some exceptions, Congress has taken care "throughout our Nation's history to preserve the writ and its function," evidenced by the fact that "most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims." *Boumediene*, 553 U.S. at 773. "The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available." *Jones*, 371 U.S. at 238.

A. *Preiser v. Rodriguez* through *Wilkinson v. Dotson*

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court considered whether a prisoner may challenge the disallowance of good-time credits in an action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, or whether "habeas corpus is the exclusive federal remedy in these circumstances." 411 U.S. at 477. The Court emphasized that "over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law." *Id.* at 485. Although the broad language of § 1983 was found to cover plaintiffs' causes of action, the Court noted "the

question remains whether the specific habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available." *Id.* at 489.

Answering that question, the Court held "that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500. To rule otherwise would frustrate Congress's intent in requiring that prisoners first exhaust state remedies before resorting to the federal writ of habeas corpus by permitting inmates to evade that requirement through a civil rights action. *Id.* at 489-90. Because plaintiffs sought their immediate or speedier release from confinement, claims at the "core of habeas corpus," *id.* at 487, the Court concluded they could not pursue their claims in a § 1983 action.

But, as important to this appeal, the Court did not purport to determine or limit the scope of federal habeas corpus jurisdiction in any way. *Id.* at 500 ("we need not in this case explore the appropriate limits

of habeas corpus as an alternative remedy to a proper action under § 1983"). It presumed that federal habeas corpus and civil rights actions had overlapping jurisdiction, i.e., that outside the core of federal habeas corpus, prisoners may be able to pursue either form of relief. *Id.* at 499 (while courts have held that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, . . . [t]his is not to say that habeas corpus may not also be available to challenge such prison conditions"); *id.* at 499 n.15 (referring to "concurrent federal remedies in prison condition cases"); *id.* at 504 ("even under the Court's approach, there are undoubtedly some instances where a prisoner has the option of proceeding either by petition for habeas corpus or by suit under § 1983") (Brennan, J., dissenting); *see also Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief."); *Wilwording v. Swenson*, 404 U.S. 249, 249, 251 (1971) (holding that prisoners challenging "their living conditions and disciplinary measures" was "cognizable in federal habeas corpus").

Nor did *Wilkinson v. Dotson*, 544 U.S. 74 (2005), aim to restrict federal court jurisdiction in habeas corpus actions. There, plaintiffs challenged Ohio's state parole procedures seeking declaratory and injunctive relief in a § 1983 action. They requested "relief that will render invalid the state procedures used to deny parole eligibility . . . and parole suitability." *Id.* at 82. But because the two plaintiffs sought only a new parole hearing and a new eligibility review, "neither prisoner's claim would necessarily spell speedier release." *Id.* at 82. Thus, the Court held only that a § 1983 action was proper because their claims did not fall within *Preiser*'s "implied exception to § 1983's coverage" for those claims at the "core of habeas corpus" that must be raised in a habeas petition. *Id.* at 81-82. In his concurrence, Justice Scalia proposed restricting habeas corpus to those actions that if successful would terminate custody, accelerate future release, or reduce an inmate's level of custody. *Id.* at 86 (Scalia, J., concurring). But the majority rejected his position. *Id.* at 89 ("My concerns with the Court's holding are increased, not diminished, by the fact that the Court does not seem to deny the respondents' claims indeed could be cognizable in habeas corpus proceedings.") (Kennedy, J., dissenting); *see also Hill v.*

McDonough, 547 U.S. 573, 579 (2006) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus.") (quoting *Mohammad v. Close*, 540 U.S. 749, 750 (2004)).

Before reaching its decision in *Dotson*, the Supreme Court surveyed a number of cases that had determined whether a prisoner's claim could be raised in a § 1983 action, or whether it fell within the "core of habeas corpus," and thus was preempted by the more specific federal habeas statute. *See Wolff*, 418 U.S. at 553-55 (holding that although restoration of good-time credits was unavailable in a § 1983 action under *Preiser*, inmates could seek to enjoin unlawful prison disciplinary procedures because success would not necessarily lead to their immediate or speedier release); *Heck v. Humphrey*, 512 U.S. 477, 481-82, 487 (1994) (holding that in a suit for damages under § 1983, the complaint must be dismissed if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated"); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (holding inmate's claims challenging the constitutionality of

state's prison discipline procedures used to deny him good-time credits are not cognizable in § 1983 actions because the monetary and declaratory relief sought would "necessarily imply the invalidity of the punishment imposed"); *Muhammad*, 540 U.S. at 753-54 (*Heck*'s favorable termination rule did not apply to bar plaintiff's § 1983 action seeking only monetary damages for six days of detention for improperly charging a prison violation based on a retaliatory motive because the claim did not seek expungement or threaten the prisoner's conviction or duration of his sentence).

Conversely, the Court has never held that § 1983 could preempt federal habeas jurisdiction. Nor would that make sense under the preemption doctrine. Where Congress has enacted a specific remedial statute that sets forth specific procedures and limited remedies for vindicating a right that is otherwise cognizable under § 1983, courts are tasked with ensuring that litigants do not perform an end run around the more specific statute by bringing a § 1983 action. That is what the Supreme Court did in *Preiser* and what this Court has routinely done in other contexts. *See, e.g., Okwu v. McKim*, 682 F.3d 841, 844-45 (9th Cir. 2012) (Americans with Disabilities Act preempts § 1983); *Ahlmeyer v.*

Nev. Sys. of Higher Educ., 555 F.3d 1051, 1054 (9th Cir. 2009) (Age Discrimination in Employment Act preempts § 1983). The question presented in the preemption context is always whether the relief available under the specific remedial statute enacted by Congress is sufficiently comprehensive to foreclose a private right of action under § 1983—not the other way around. *See, e.g., Docken v. Chase*, 393 F.3d 1024, 1027 n.2 (9th Cir. 2004). Not surprisingly, the Supreme Court has never limited prisoner claims challenging unconstitutional confinement to § 1983 actions, exclusive of habeas corpus. As the Court explained in *Allen v. McCurry*, 449 U.S. 90, 104 (1980), "[i]t is difficult to believe that the drafters of [§ 1983] considered it a substitute for a federal writ of habeas corpus, the purpose of which is not to redress civil injury, but to release the applicant from unlawful physical confinement."

B. Ninth circuit case law

Consistent with the Supreme Court's habeas jurisprudence, this Court likewise has held a prisoner may raise claims that implicate the fact or duration of confinement through habeas corpus even if a successful claim would not always accelerate release. In *Bostic v. Carlson*, 884 F.2d 1267 (9th Cir. 1989), the Court explained that

"[h]abeas corpus jurisdiction also exists when a petitioner seeks expungement of a disciplinary finding from his record if expungement is likely to accelerate the prisoner's eligibility for parole." *Id.* at 1269. In *Docken*, the Court held "that when prison inmates seek only equitable relief in challenging aspects of their parole review that, so long as they prevail, *could* potentially affect the duration of their confinement, such relief is available under the federal habeas statute." 391 F.3d at 1031 (emphasis in original). In reaching its decision, the Court emphasized that habeas corpus and § 1983 are not mutually exclusive and explained that it is "reluctant to unnecessarily constrain our jurisdiction to entertain habeas petitions absent clear indicia of congressional intent to do so." *Id.* (citing *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2010)).

Other cases have also rejected the panel majority's view that habeas jurisdiction only exists where the petitioner, if successful, would necessarily obtain immediate or speedier relief. *See, e.g., Himes v. Thompson*, 336 F.3d 848, 863 (9th Cir. 2003) (granting habeas relief based on Ex Post Facto Clause violation where applying new parole regulations retroactively "greatly increased the *risk* that an inmate

would serve a longer sentence for his crime") (emphasis in original); *Nulph v. Faatz*, 27 F.3d 451, 456 (9th Cir. 1994) (in habeas action, holding that the state parole board violated the Ex Post Facto Clause when it retroactively applied a statute in calculating matrix ranges in determining petitioner's parole release eligibility date); *but see Blair v. Martel*, 645 F.3d 1151, 1157 (9th Cir. 2011) (after dismissing claim to speed up state appeal as moot once the California Supreme Court decided the appeal, the Court in dicta cites *Skinner* for the proposition that the claim would be appropriate in a § 1983 complaint, not a habeas petition);[3] *Ramirez v. Galaza*, 334 F.3d 850, 858-59 (9th Cir. 2003) (although confirming that *Bostic* held habeas jurisdiction is proper where a prisoner seeks "expungement of a disciplinary finding from the record if expungement is likely to accelerate the prisoner's eligibility for parole," quoting *Bostic*, 884 F.2d at 1269, stating in dicta that "habeas jurisdiction is absent, and a § 1983 action proper, where a successful

[3] Notably, the same judge who authored *Blair*, subsequently authored *Thornton v. Brown*, 757 F.3d 834 (9th Cir. 2014), which characterized *Skinner* as "raising, *without deciding*, the question whether 'habeas [is] the sole remedy, or even an available one,' for certain types of claims." *Id.* at 841 n.4 (emphasis added).

challenge to a prison condition will not necessarily shorten the prisoner's sentence").

II. *Skinner v. Switzer* Is Not Clearly Irreconcilable With This Court's Decisions In *Bostic v. Carlson* And *Docken v. Chase*.

As set forth above, this Court has held in a number of cases, including *Bostic* and *Docken*, that habeas relief is available when a prisoner's claim, if successful, would likely accelerate parole eligibility (*Bostic*), or could potentially speed release from custody (*Docken*). A panel is bound by the Court's prior decisions unless "the reasoning or theory of [the Court's] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 892 (9th Cir. 2003) (en banc). In this case, the panel majority overruled *Bostic* and *Docken*, finding that both are clearly irreconcilable with *Skinner v. Switzer*, 562 U.S. 521 (2011). Judge Murguia's dissent persuasively explains why this is not so. 2015 U.S. App. Lexis 8825, at ** 37-53.

Skinner dealt only with the availability of § 1983 for a prisoner who sought post-conviction DNA testing. The Court framed the question presented as follows: "*May* a convicted state prisoner seeking DNA testing of crime-scene evidence assert that claim in a civil rights

action under 42 U.S.C. § 1983, *or is such a claim cognizable in federal court only when asserted in a petition for a writ of habeas corpus* under 28 U.S.C. § 2254?" 562 U.S. at 524 (emphasis added). Noting that *Dotson* reaffirmed the rule that "[h]abeas is the exclusive remedy" only where the prisoner "seeks 'immediate or speedier release' from confinement," *id.* at 525, the Court explained that "[w]here the prisoner's claim would not 'necessarily spell speedier release,' . . . the suit may be brought under § 1983." *Id.* Thus, the Court held "that a postconviction claim for DNA testing is properly pursued in a § 1983 action" because "[s]uccess in the suit gains for the prisoner only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive." *Id.*

The availability of habeas relief was simply not an issue in *Skinner*. Nowhere did the Court state that prisoner due process claims, such as Skinner's, were precluded in habeas corpus. Rather, the Court indicated that his claim could proceed in a habeas petition by framing the question in the permissive ("may") instead of the mandatory ("must"). The panel majority nonetheless relied on *Skinner* in holding "that a claim challenging prison disciplinary proceedings is cognizable

in habeas only if it will '*necessarily* spell speedier release' from custody, meaning that the relief sought will either terminate custody, accelerate the future date of release from custody or reduce the level of custody." 2015 U.S. App. Lexis 8825, at * 4 (emphasis in original).

The panel majority based its decision on dicta in footnote 13 in *Skinner,* which stated that "*Dotson* declared, however, in no uncertain terms, that when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at 'the core of habeas corpus,' and may be brought, if at all, under § 1983." 562 U.S. at 535 n.13 (quoting *Dotson*, 544 U.S. at 84, and citing *id.* at 85-86 (Scalia, J., concurring)). The majority claims that this single sentence of dicta "forecloses habeas jurisdiction for all non-core claims, including claims that closely relate to core proceedings—i.e., claims that, if successful, will not necessarily result in speedier release but could affect the duration of confinement." 2015 U.S. App. Lexis 8825, at ** 40-41 (Murguia, J., dissenting). As the dissent explained, this is not a fair reading of *Skinner*:

> *Skinner* addressed whether a prisoner's civil rights action could proceed under 42 U.S.C. § 1983, and did not involve a federal habeas petitioner, much less the scope of relief available under 28 U.S.C. § 2254. *See Skinner*, 131 S. Ct. at

> 1297 ("We take up here *only* the questions whether there is federal-court subject-matter jurisdiction over Skinner's complaint, and whether the claim he presses is cognizable under § 1983. (emphasis added)). To accept the majority's strained reading of *Skinner* we have to believe that the Supreme Court, after leaving the issue open for over forty years, conclusively determined the outer boundaries of habeas jurisdiction in a footnote of a case that did not involve a habeas petition. We likewise must ignore the Court's explicit limitation that its decision was not intended to forge new law, *see Skinner*, 131 S. Ct. at 1299 n.13 (stating that *Skinner* should not be interpreted to "mov[e] the line" drawn by the Court's earlier decisions) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 84 (2005)), and accept that the Supreme Court implemented this drastic change to habeas jurisdiction through an ambiguous statement rather than by clear direction.

2015 U.S. App. Lexis 8825, at ** 37-38.

The majority overruled this Court's long-standing case law without clear contradictory intervening Supreme Court authority to adopt a position limiting habeas jurisdiction advocated by Justice Scalia in *Dotson*, which only Justice Thomas joined. *See* 544 U.S. at 86-87 (suggesting habeas statute does not "authorize[] federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody") (Scalia, J., dissenting, joined by Thomas, J.). It is inconceivable that the addition of the ambiguous phrase, "if at all," to dicta in *Skinner's* footnote 13 was

intended to denote that the *Skinner* majority had limited federal courts' authority to grant habeas relief in the manner suggested in Justice Scalia's concurrence in *Dotson*. While this dicta may suggest a dispute over the boundaries of habeas jurisdiction that the Court might resolve in a future case, it is not "clearly irreconcilable" intervening authority required to overrule *Bostic*, *Docken*, and similar cases. *See United States v. Green,* 722 F.3d 1146, 1150 (9th Cir.) (explaining that it is not enough for intervening Supreme Court authority to "chip[] away" at the theory or send "strong[] signals" of a change in law for a panel to disregard its own Court's case law), *cert. denied*, 134 S. Ct. 658 (2013).

Finally, it is worth noting that the panel majority's decision may do more than simply move claims from habeas to § 1983 actions. Rather, the opinion may leave inmates, like Nettles, who seek to raise due process challenges to prison disciplinary violations no recourse (except for some claims seeking restoration of good-time credits) should § 1983 relief be found to be barred under the favorable termination rule set forth in *Heck v. Humphrey*, 512 U.S. 477 (1983). *See Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (concluding that prisoner's claim, "based on allegations of deceit and bias on the part of the [prison

discipline] decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983").

CONCLUSION

For these reasons, the Court should grant rehearing en banc.

Respectfully submitted,

Dated: July 27, 2015

/s/ John Balazs
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BRIEF FORMAT CERTIFICATE
PURSUANT TO CIRCUIT RULE 32(a)(7)(C)

Pursuant to Ninth Circuit Rule 32(a)(7)(C), the attached Petition for Rehearing En Banc uses Century Schoolbook 14-point font and contains 4,188 words.

Dated: July 27, 2015

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9th Circuit Case Number(s) 12-16935, 13-15050

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12-16935

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On Appeal from the United States District Court
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No. 1:11-cv-01201-AWI-JLT
The Honorable Anthony W. Ishii, Judge

ANSWER TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

The panel majority held that habeas corpus jurisdiction is available to challenge a prison disciplinary proceeding only if success would necessarily spell speedier release from custody. In so holding, the panel majority noted that any Ninth Circuit case law allowing challenges in habeas where success is "likely to, or has the mere potential to, affect the length of a petitioner's confinement," are overruled as irreconcilable with Supreme Court authority. The prison disciplinary proceeding Nettles challenges did not affect the length of his sentence, so the panel majority held that habeas corpus did not lie because success on his claim would not necessarily speed his release from custody.

Nettles now seeks rehearing en banc. This Court should deny the Petition for two reasons. First, rehearing en banc is not necessary to secure or maintain uniformity of this Circuit's decisions. Second, while jurisdictional issues can involve important questions, the issue presented to this Court was answered by the Supreme Court. Further review is unwarranted.

REHEARING EN BANC IS DISFAVORED AND IS NOT REQUIRED IN THIS CASE.

"En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685 (1960). "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. A "petition should not be filed unless the case meets those rigid standards." Fed. R. App. P. 35 (Advisory Committee Comments to the 1998 Amendment). Because those standards are not met here, this Court should deny the Petition for Rehearing En Banc.

A. Rehearing En Banc Is Not Required Because the Panel's Decision Does Not Conflict with Ninth Circuit Authority.

The panel was presented with a narrow issue: whether a claim, if successful, must necessarily speed the prisoner's release from confinement to be cognizable in habeas. Before answering this question, the panel majority surveyed existing circuit law discussing the scope of habeas corpus jurisdiction. It concluded that existing authority establishes "that habeas

jurisdiction is available only for claims that, if successful, would have some shortening effect on the length of a person's custody." *Nettles v. Grounds*, 788 F.3d 992, 999-1000 (9th Cir. 2015). But the panel majority also noted that existing circuit law did not clarify "whether a claim has to necessarily, likely, or merely potentially accelerate release from confinement to be cognizable in habeas." *Id*. at 1000.

To answer this question, the panel was obligated to "reexamine normally controlling circuit precedent" in light of intervening Supreme Court authority. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Where "prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Id*.

The panel majority turned to *Skinner v. Switzer*, 131 S. Ct. 1289 (2011), which held that a prisoner could assert a claim for DNA testing under § 1983 because obtaining DNA testing would not necessarily imply the invalidity of his custody or spell his speedier release. *Nettles*, 788 F.3d at 1000. *Skinner* relied on *Wilkinson v. Dotson*, which held that prisoners could proceed with their § 1983 suit because their challenge to the retroactive application of

parole guidelines did not lie at the "core of habeas corpus." 544 U.S. 74, 82 (2005). In footnote 13, the Court in *Skinner* unambiguously clarified its jurisprudence regarding the exclusivity of § 1983 and habeas corpus jurisdiction: "*Dotson* declared . . . in no uncertain terms, that when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at the 'core of habeas corpus,' and may be brought, if at all, under § 1983." *Skinner*, 131 S. Ct. at 1299 n.13.

Based on *Skinner's* plain language, the panel majority held that *Skinner* was clearly irreconcilable with prior circuit authority that allowed habeas jurisdiction for claims that likely or merely had the potential to speed a prisoner's release from confinement. *Nettles*, 788 F.3d at 1000-01. It therefore had an obligation to declare contrary authority overruled as superseded by *Skinner*.

The panel majority's holding that *Skinner* is binding superseding authority is not in conflict with any decision of this Court. To the contrary, the panel majority noted that since *Skinner*, two other panels from this circuit reached the same conclusion in *Blair v. Martel*, 645 F.3d 1151 (9th Cir. 2011) and *Griffin v. Gomez*, 741 F.3d 10 (9th Cir. 2014). In *Blair*, the Court dismissed a prisoner's habeas claim in which he alleged that the California Supreme Court's delay in hearing his direct appeal amounted to a

due process violation. The *Blair* panel cited to *Dotson* and *Skinner* when it held that § 1983 was the prisoner's only remedy because his claim did not imply the invalidity of his conviction nor would it necessarily spell speedier release. *Blair*, 645 F.3d at 1157. And in *Griffin,* the panel noted that while it had previously granted habeas relief when the prisoner challenged the conditions of his confinement, the Supreme Court has since held otherwise. *Griffin*, 741 F.3d at 17 & n.15 (citing *Skinner*).

A conflict in this circuit's law is not created merely because the panel majority determined that intervening Supreme Court authority was clearly irreconcilable with previous circuit authority. The panel had a duty to reexamine this circuit's authority, which it did, and, finding that the Supreme Court authority was clearly irreconcilable with this circuit's previous authority, was bound to follow the higher authority. *Miller,* 335 F.3d at 893.

Nettles argues that the panel majority's application of *Skinner* conflicts with *Thornton v. Brown*, 757 F.3d 834, 841 n.4 (9th Cir. 2014), in which that panel characterized *Skinner* as "raising, without deciding, the question of whether 'habeas [is] the sole remedy, or even an available one,' for certain types of claims." But the *Thornton* panel's decision does not conflict

with the panel majority's decision here because *Thornton* addressed a different issue.

The issue in *Thornton* was whether the plaintiff's parole conditions were part of his sentence such that any challenge to them under § 1983 would be barred under the *Heck* doctrine, which bars a suit for damages under § 1983 if the challenge would imply the invalidity of a sentence that was not previously nullified. The *Thornton* panel majority held that the plaintiff could proceed under § 1983 because a successful challenge to his parole conditions would not "necessarily imply the invalidity of either his conviction or sentence." *Id*. at 845. Thus, *Thorton* was limited to whether the *Heck* bar prevented plaintiff's § 1983 action. It did not address the issue here.

Unrelated to its holding, the *Thornton* decision stated in passing that certain claims might be cognizable under both § 1983 and the habeas statute. *Id*. at 841. But this dicta is inaccurate. The *Thornton* decision cites to pre-*Skinner* Supreme Court authority for this proposition—authority that did not squarely address the issue of whether the two remedies were mutually exclusive but merely acknowledged that it was an open question. As additional support, in footnote 4, the *Thornton* panel cited to *Skinner* and characterized *Skinner* as "raising, without deciding, the question whether

'habeas [is] the sole remedy, or even an available one," for certain types of claims." 757 F.3d 834. But this characterization of *Skinner* is mistaken.

The portion of *Skinner* that *Thornton* relies on actually demonstrates the high court's delineation of § 1983 and habeas jurisprudence. The *Skinner* Court, in rejecting the argument that the prisoner must pursue his claim in habeas, stated that respondent Switzer "has found no case, nor has the dissent, in which the Court has recognized habeas as the sole remedy, or even an available one, *where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody*.'" *Skinner*, 562 U.S. at 534 (quoting *Dotson*, 544 U.S. at 86 (Scalia, J., concurring)) (emphasis added). This portion of *Skinner* illustrated that claims that do not lie at the core of habeas corpus cannot be brought in habeas corpus, but must be brought under § 1983. If this portion of the Court's opinion is ambiguous, the Court clarified its meaning three sentences later in footnote 13, in which the Court unequivocally stated that claims that do not necessarily spell speedier release do not lie at "the core of habeas corpus" "and may be brought, if at all, under § 1983." *Id*. at 534 n.13.

The majority decision in this case does not conflict with Ninth Circuit case law. Instead, it appropriately recognized that it was bound by *Skinner*—intervening Supreme Court authority that is clearly irreconcilable

with prior Ninth Circuit case law. Nettles therefore fails to meet the standard required for en banc review.

B. Rehearing En Banc Is Not Required Because the Supreme Court Has Already Settled the Question This Case Raises.

Nettles argues, as he must, that this case presents a question of exceptional importance. But while issues raising jurisdictional questions under § 1983 and the habeas statute are important to those seeking relief from the Court, "if the legal standard is correct, then the full court should not occupy itself with whether the law has been correctly applied to the facts." *Watson v. Geren*, 587 F.3d 156, 160 (2nd Cir. 2009). "En banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice." *Id*. The panel majority's decision rests on the Supreme Court's plain language in *Skinner* that unequivocally reserves habeas corpus jurisdiction to those claims that lie at the core of habeas corpus. As this Court is bound by Supreme Court authority, en banc review of an issue that the Supreme Court has settled is unnecessary.

Nettles (citing to Judge Murguia's dissent) speculates that the Supreme Court would not have "conclusively determined the outer boundaries of habeas jurisdiction in a footnote of a case that did not involve a habeas

petition." (Pet. for Reh'g En Banc at 19.) But the language in *Skinner* is clear and the three dissenting Justices in *Skinner* also understood the majority's language in footnote 12 to mean what it says.

Justice Thomas, joined by Justices Kennedy and Alito, dissented in *Skinner*. In specifically discussing footnote 12 of the Court's decision, Justice Thomas criticized the majority's mechanical approach and its reliance on *Dotson*: "Contrary to the majority's contention, *Dotson* did not reduce the question whether a claim is cognizable under § 1983 to a single inquiry into whether the prisoner's claim would 'necessarily spell speedier release.'" *Skinner*, 562 U.S. at 543 (Thomas, J., dissenting) (citing the majority's decision at 1298-99, n.12). Justice Thomas asserts, instead of the approach the majority adopts, the Court should return to "first principles" as recognized in *Heck* to determine whether certain challenges are not cognizable in § 1983 and instead must be brought in habeas. That the three dissenting Justices in *Skinner* well understood that the principle set forth in the majority's decision limits habeas jurisdiction to only those claims that would "necessarily spell speedier release" demonstrates that the Court meant what it said. Because this Court is bound to follow it, en banc review of the majority panel's decision is unwarranted.

CONCLUSION

En banc review is the exception, not the rule. Here, en banc review is not warranted because the panel majority's decision does not conflict with Ninth Circuit law, the panel majority correctly determined that it was bound by *Skinner*, and the Supreme Court has definitively answered the question raised in this case. For these reasons, the Court should deny the Petition for Rehearing En Banc.

Dated: August 26, 2015

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 12-16935

I certify that: (check (x) appropriate option(s))

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August 26, 2015	/S/PHILLIP J. LINDSAY
Dated	Phillip J. Lindsay Supervising Deputy Attorney General

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Published Opinion Filed May 28, 2015
(Ikuta, Smith, Murguia)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Matta Juan Santos,

Petitioner - Appellant,

v.

K. Holland and Jeffrey Beard,

Respondents-Appellees.

Appeal From the United States District Court
for the Eastern District of California
Case No. 1:12-cv-01651 LJO GSA

PETITION FOR ISSUANCE OF THE MANDATE

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I. STATEMENT OF THE ISSUE

The three judge panel unanimously held that Matta Santos may use a writ of habeas corpus to effect discharge from confinement in violation of the Constitution. *Nettles v. Grounds*, 788 F.3d 992, 1006 (9th Cir. 2015); *id*. at 1010 (Murguia, J., concurring "in Section III.B. of the majority opinion, which reverses the district court's dismissal for lack of jurisdiction and remands for the district court to consider the merits of Santos's habeas petition").

In so holding, the panel relied on the explicit language of 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2254(a). *Id*. at 998. Section 2241 unequivocally extends the writ of habeas corpus to any prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), and Section 2254 mandates that a district court shall entertain a writ of habeas corpus "on the grounds that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). As the panel explained "[a]ccording to the Supreme Court, this language, as well as 'the common-law history of the writ' makes clear 'that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.'" *Nettles*, 788 F.3d at 998 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)).

The panel's decision is in accord with over a century of Supreme Court

jurisprudence, this Court's precedent, as well as decisions across other circuits. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (recognizing that habeas has historically been available to inmates seeking release from an unlawful level of custody); *Preiser v. Rodriguez*, 411 U.S. 475, 485-86 (1973) (noting that habeas is a remedy "to effect discharge from any confinement contrary to the constitution," including where a prisoner seeks release from an unlawful place of confinement to a lawful place of confinement); *Johnson v. Avery*, 393 U.S. 483, 484, 490 (1969) (the Court affirmed the district court's order on a writ of habeas corpus releasing the petitioner from his unconstitutional confinement in maximum security and restoring him "to the status of an ordinary prisoner"); *In re Bonner*, 151 U.S. 242, 259-60 (1894) (granting petitioner's writ of habeas corpus, explaining that the writ was available to a validly convicted inmate seeking release from a higher to a lower level of custody); *Bostic v. Carlson*, 884 F.2d 1267, 1269 (9th Cir. 1989) (explaining that "[h]abeas corpus jurisdiction is . . . available for a prisoner's claims that he has been subjected to greater restrictions of his liberty, such as disciplinary segregation, without due process of law"); *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873-74 (1st Cir. 2010) (noting that the writ of habeas corpus is available to an inmate seeking "'a quantum change in the level of custody'") (quoting *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991)); *McCollum v. Miller*, 695 F.2d 1044, 1046 (7th Cir. 1983) (explaining that because an inmate's due process can be violated in the proceedings that result in his placement in high security housing, "the prisoner ought to have a remedy that gets

him out of it, and habeas corpus is the normal remedy for one unlawfully confined"); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975) (federal habeas jurisdiction exists over a prisoner's complaint "challenging not the validity of his original conviction, but the imposition of segregated confinement").

The deadline for requesting a rehearing en banc passed several months ago. Fed. R. App. P. ("FRAP") 35, 40. As no extension for the filing of a petition was requested, let alone granted in Santos' case, the mandate in his case should have issued in June 2015. FRAP 41. It is Santos' position that his case should not be heard en banc, and he respectfully requests that the mandate in his case be issued immediately.

II. STATEMENT OF THE CASE

In 1996, Santos was sentenced to life in prison with the possibility of parole plus nine years. *Nettles*, 788 F.3d at 997. Fourteen years later, on October 9, 2010, Santos was placed in administrative segregation as a "threat to institutional safety and security" and sent to live in maximum security segregated housing (the "SHU"). ER 64. Santos has been in the SHU ever since; spending the first four plus years at California Correctional Institution in Tehachapi, and then, shortly after oral argument in this case, he was inexplicably transferred across the state to the infamous SHU at Pelican Bay State Prison.

Prison officials justify their indefinite detention of Santos in the SHU based

on their subsequent "validation" of him as an associate[1] of the Mexican Mafia in February 2011. ER 79. Santos has been challenging his indefinite custody in the SHU ever since. He contends that prison officials have confined him to maximum security housing without affording him his requisite due process rights. *Nettles*, 788 F.3d at 997. He exhausted his administrative appeals and then exhausted his state habeas rights. *Id*.

On October 9, 2012, Santos filed his petition for a writ of habeas corpus in federal court, again arguing that prison officials were confining him in violation of his due process rights. *Id*. Success on his habeas petition would result in his immediate release from the SHU. *Id*. at 997, 1004.

The district court dismissed Santos' petition for lack of jurisdiction on the basis that Santos was not challenging the fact or duration of his unlawful confinement. *Id*. at 997. Santos timely appealed, and this Court reversed. *Id*. at 997, 1006. As the panel observed, the Supreme Court "has long indicated that a prisoner's claim for release from one form of custody to another, less restrictive form of custody, can be brought in a habeas petition." *Id*. at 1005. Accordingly, the panel held that Santos' "claim that he has been subjected to greater restrictions

---

[1] The panel's opinion incorrectly states that Santos was validated as a "member" of the Mexican Mafia. *Nettles*, 788 F.3d at 997. California's prison regulations draw a significant distinction between "associates" of a gang (now referred to as a "security threat group") and members of a gang. *See, e.g.*, 15 CCR § 3000 (noting that "affiliate" is the umbrella term that encompasses both members and associates of a security threat group); 15 CCR § 3341.3 (explaining the varying rights of members versus associates to participate in the prison's Step Down Program).

of his liberty without due process of law is . . . properly brought as a petition for a writ of habeas corpus." *Id*. at 1006 (citing *Skinner*, 131 S. Ct. at 1299 & n.13, and *Bostic*, 884 F.2d at 1269).

On May 28, 2015, the panel filed its opinion, remanding Santos' case to the district court for further proceedings on the merits of his habeas petition. Any petition requesting a rehearing en banc was due on June 11, 2015. FRAP 35, 40 (a petition for rehearing must be filed within 14 days after the entry of judgement). No petition for rehearing was filed by either party, and there was no request for a stay of the mandate. Accordingly, the mandate in Santos' case should have issued on June 18, 2015.[2] FRAP 41 (the "court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order" denying a petition for rehearing or a motion for a stay of the mandate).

III. THE MANDATE IN SANTOS' CASE SHOULD ISSUE IMMEDIATELY.

A. The Panel's Decision in Santos' Case Was Mandated by the Plain Language of 28 U.S.C. §§ 2241 and 2254, and the Precedent of the Supreme Court as well as this Court.

With both Supreme Court and Ninth Circuit precedent directly on point, the panel unanimously reversed the district court's dismissal of Santos' habeas petition for lack of jurisdiction. The panel's holding is not surprising given that Santos' petition sounds in what the Supreme Court has described as the "core" or the "heart" of federal habeas corpus. *See, e.g.*, *Preiser*, 411 U.S. at 498 (defining

[2] The Court did issue a mandate in Santos' case on July 23, 2015, but withdrew it that same day "as issued in error."

cases in which a petitioner, such as Santos, seeks the immediate or speedier release from his unlawful confinement as "the heart of habeas corpus").

By the plain language of 28 U.S.C. §§ 2241(c)(3) and 2254(a), Congress has made the federal writ of habeas corpus available to any state inmate challenging the constitutionality of his current confinement. The explicit grant of federal jurisdiction cannot be revoked "absent a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). There has been no such expression of congressional intent, clear or otherwise. As the Supreme Court explained,

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. . . . The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.

Preiser, 411 U.S. at 491-92 (explaining why state inmates who challenge their unconstitutional confinement by the state and seek immediate release from said confinement must bring their claim through a writ of habeas corpus).

Moreover, in addition to strong comity considerations, "at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention [which includes decisions by prison officials to subject an inmate to a heightened degree of custody], and it is in that context that its

protections have been strongest." *St. Cyr*, 533 U.S. at 301; *c.f.*, *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (noting that the writ of habeas corpus "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account").

Accordingly, the writ of habeas corpus has "evolved as a remedy available to effect discharge from any confinement contrary to the Constitution," regardless of whether the petitioner is challenging his custody on the basis that the statute under which he was convicted is unconstitutional or that the level of custody to which he is being subjected is unconstitutional; "in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement." *Preiser*, 411 U.S. at 485-86; *c.f.*, *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (observing that the congressional grant of federal habeas jurisdiction "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used").

In passing, the Supreme Court recently affirmed what it had previously affirmed 38 years ago in *Preiser v. Rodriguez* -- the federal writ of habeas corpus is available to a petitioner seeking to reduce the level of custody in which he is confined. *Skinner*, 562 U.S. at 534. *Skinner* is thus in accord with this Circuit's precedent that "[h]abeas corpus jurisdiction is . . . available for a prisoner's claims that he has been subjected to greater restrictions of his liberty, such as disciplinary

segregation, without due process of law." *Bostic*, 884 F.2d at 1269.

Because Santos is challenging his confinement in violation of his due process rights, and because success on his claim would result in release from his unconstitutional confinement, the panel's holding that his claim is cognizable through a writ of habeas corpus is unremarkable. The holding is mandated by the statutory grant of federal habeas jurisdiction that explicitly provides that the writ is available to inmates such as Santos who are challenging the constitutionality of their confinement, is in accord with over a century of Supreme Court jurisprudence, and is consistent with this Court's precedent and with decisions of other United States Courts of Appeals that have addressed this issue. There is, therefore, no basis under Fed. R. App. P. 35(b) for this Court to rehear Santos' case en banc, and there was no request by either party for such a hearing. The mandate in Santos' case should be issued immediately. FRAP 41.

B. Consolidation Under FRAP 3(b)(2) Does Not Merge Two Distinct Appeals Into One, and Should Not Be Effected to the Extent It Diminishes the Rights and Undermines the Interests of One of the Litigants.

The panel evoked its authority under Fed. R. App. P. 3(b)(2) to consolidate Santos' case with that of Damous Nettles for the purpose of issuing one opinion to dispose of their separate matters. *Nettles*, 788 F.3d at 995 n.1. When consolidating cases care must be taken such that the separate litigants' rights do not become undermined nor their interests diminished as a result of the Court's consolidation. Notably, in its notes to Rule 3, the Advisory Committee clarifies that in "consolidated appeals the separate appeals do not merge into one. The

parties do not proceed as a single appellant." FRAP 3, advisory committee's note (1998 amend.).

As the Supreme Court has explained, "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 496-97 (1933) (discussing the predecessor to Fed. R. Civ. Proc. 42); *see, e.g.*, *Simmonds v. Credit Suisse Sec. (USA) LLC*, 638 F.3d 1072, 1099 (9th Cir. 2010) (consistent with the general principle that consolidation does not effect a merger of the consolidated actions, the court cautioned that rulings in one case are not rulings in the other case)*; Cella v. Togum Constructeur Ensemlieir En Industrie Alimentaire*, 173 F.3d 909, 913 (3d Cir. 1999) (where the district court treated the consolidated actions as if they had been merged into one, it improperly diminished the rights of one of the litigants); *Chaara v. Intel Corp.*, 410 F. Supp. 2d 1080, 1094 (D. N.M. 2005) (aff'd without pub'd opinion, 245 Fed. Appx. 784 (10th Cir. 2007)) ("Consolidation is not like a marriage, producing one indissoluble union from two distinct cases. Instead, consolidation is an artificial link forged by a court for the administrative convenience of the parties; it fails to erase the fact that, underneath consolidation's facade, lie two individual cases.").

One of the most significant procedural aspects that follows from the fact that two appellants do not become merged into one as a result of a consolidation effected under Fed. R. App. P. 3, is that each appellant remains individually

responsible for complying with deadlines pertaining to requests for rehearing in his separate case. *See United States v. Tippet*, 975 F.2d 713, 718-19 (10th Cir. 1992). In *Tippett*, only two of the four appellants in the consolidated case submitted petitions for rehearing, and only one filed a petition of certiorari; the other appellants in the consolidated case did not join in the cert petition nor file their own petitions. *Id*. at 718. The issue presented was whether the other appellants who failed to file petitions for rehearing or for cert could benefit from the appellant who did. *Id*. In holding that each appellant was separately responsible for complying with deadlines pertaining to requests for rehearing, the *Tippett* court explained, "there appears no good reason to hold that separate appeals, separately briefed, disposed of without oral argument in a single opinion by this court -- because they involved a common question of law -- become a single case," in which one appellant can benefit from another appellant's request for rehearing. *Id*. at 718-19.

Similarly, the Sixth Circuit addressed the impact of an appellant's right to seek review in the circuit court of the denial of a motion for a new trial in a case that had been consolidated by the district court where the appellant seeking review was not the litigant who had filed the motion for a new trial. *Stacey v. Charles J. Rodgers, Inc*., 756 F.2d 440, 441 (6th Cir. 1985). The *Rodgers* court held that the consolidation of separate actions for reasons of judicial efficiency, "does not merge the independent actions into one suit . . . . Each cause of action retained a separate identity, and each party was responsible for complying with procedural

requirements." *Id*. at 442. As the *Rodgers* court observed, "[b]y filing a separate action . . . a plaintiff in a consolidated case obviously wants to maintain independent control over his trial strategy and has not wanted to be bound by the actions of another plaintiff. Along with the benefit of retaining independence in decisionmaking from other plaintiffs comes the attendant responsibility of independently following procedural rules." *Id*. at 443.

Santos has never sought to be bound to Nettles' case, and did not identify Nettles' case as a related case pursuant to Circuit Rule 28-2.6. The two case are legally distinct; they present different issues that demand different legal analysis. To be sure, both are state inmates who filed habeas petitions alleging their due process rights were violated by a proceeding in a state prison, and both appealed the dismissal of their habeas petitions (by two different district court judges) for lack of jurisdiction. But that is where the similarities end. The harms suffered and the relief sought by the two petitioners are substantively different.

Santos was placed in administrative segregation to be housed indefinitely in maximum security housing based on an administrative proceeding in which prison officials decided that he was an associate of a prison gang. *See* 15 CCR §§ 3335, 3378.1 (discussing procedures for placing gang associates in administrative segregation and housing them in the SHU). Santos alleges that he was denied his due process rights during the gang validation proceedings, and seeks immediate release from his unlawful confinement in the SHU.

By contrast, Nettles is challenging a disciplinary proceeding in which he

was found guilty of threatening to stab a corrections officer and lost thirty days of post-conviction credit. *Nettles*, 788 F.3d at 995. Nettles seeks the restoration of his thirty days of post-conviction credit and the expungement of the disciplinary finding on the basis that it delays the date for his next parole hearing and constitutes a basis for the denial of parole at future parole hearings. *Id*. at 996-97.

While under this Court's clearly established precedents both inmates present claims cognizable through habeas corpus, they do so for very different reasons. Santos' claim seeking immediate release from unlawful custody falls squarely within the core of habeas corpus (using the writ to secure release from illegal custody). *See, e.g.*, *Preiser*, 411 U.S. at 489, 498. Indeed, his is the very type of case where the federal habeas statute preempts a petitioner from seeking relief under the more general remedial statute of 42 U.S.C. § 1983. *Id*. at 500.

By contrast, Nettles case addresses not the core of federal habeas corpus, but its contours -- the place where 28 U.S.C. § 2254 and 42 U.S.C. § 1983 have historically both existed as available remedial statutes to address issues relating to the fact or duration of an inmate's confinement. The outer contours of federal habeas corpus as an alternative remedy to § 1983 was left undefined by the *Preiser* Court, *id*., but has been addressed by this Court on multiple occasions. *See, e.g.*, *Docken v. Chase*, 393 F.3d 1024, 1027, 1031 (9th Cir. 2004) (explaining that the two remedial statues "are not always mutually exclusive so long as the 'core or 'heart' of habeas corpus is not implicated," and thus where success on the merits of an inmate's petition "could potentially affect the duration of [his] confinement"

his petition is cognizable under the federal habeas statute).

Because the issues Nettles raises in his petition for rehearing en banc concern the contours, not the core, of federal habeas jurisdiction, they have no bearing on Santos' case. Indeed, Nettles explicitly notes that Santos' case "is not at issue" in his petition. Nettles' Petition for Rehearing En Banc, p.3 n.1. Should this Court elect to hear Nettles' case en banc, and there are compelling reasons to do so as detailed in Nettles' Petition for Rehearing En Banc and Judge Murguia's dissent from the panel's decision pertaining to Nettles, 788 F.3d at 1006-11, it should not do so at the expense of Santos.

Should Santos prevail on his habeas petition, every day that he spends in the SHU he suffers irreparable harm. His habeas petition was erroneously dismissed by the district court in December 2012 notwithstanding the unambiguous statutory language granting federal jurisdiction and the clear direction from the Supreme Court as well as this Court that an individual challenging his unlawful custody may secure his release through a writ of habeas corpus. It is now over two and half years later and Santos has yet to have his petition for release heard in federal court.

Exacerbating the harm Santos experiences with each day his case is delayed is the fact that prison officials have transferred him to the SHU at Pelican Bay. The SHU at Pelican Bay "has gained a well-deserved reputation as a place which, by design, imposes conditions far harsher than those anywhere else in the California prison system." *Madrid v. Gomez*, 889 F. Supp. 1146, 1155 (N.D. Cal.

1995):

> Each cell is 80 square feet and comes equipped with two built-in bunks and a toilet-sink unit. Cell doors are made of heavy gauge perforated metal. . . . [C]ells are primarily lit with a fluorescent light that can be operated by the inmate. . . . [T]he SHU interior is designed to reduce visual stimulation. . . . The cellblocks are marked throughout by a dull sameness in design and color. The cells are windowless; the walls are white concrete. When inside the cell, all one can see through the perforated metal door is another white wall. A small exercise pen with cement floors and walls is attached to the end of each pod. Because the walls are 20 feet high, they preclude any view of the outside world. . . . The overall effect of the SHU is one of stark sterility and unremitting monotony. . . . Inmates in the SHU can go weeks, months or potentially years with little or no opportunity for normal social contact with other people. Regardless of the reason for their assignment to the SHU, all SHU inmates remain confined to their cells for 22 and ½ hours of each day. . . . Opportunities for social interaction with other prisoners or vocational staff are essentially precluded. Inmates are not allowed to participate in prison job opportunities or any other prison recreational or educational programs. Nor is group exercise allowed. . . . [T]here is little doubt that, by any measuring stick, the Pelican Bay SHU by design lies on the harsh end of the SHU spectrum.

Id. at 1228-30. Given the intense severity of the conditions to which prison officials subject inmates housed in the SHU at Pelican Bay, Judge Henderson found that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU." *Id*. at 1235. And for inmates, such as Santos, who prior to their transfer to the SHU at Pelican Bay were receiving ongoing medical care and appropriate pain management, the daily suffering is potentially that much more intense, and the physical and mental damage done becomes that much more difficult to repair with each passing day. *See id*. at 1205-13 (describing the medical care system at Pelican Bay as

"deplorably inadequate," with polices and procedures evincing "such disregard for inmates' pain and suffering that they shock the conscience").

IV. CONCLUSION

For the foregoing reasons, Mr. Santos respectfully requests that the mandate in his case be issued immediately.

DATED: August 26, 2015

Respectfully submitted,

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Federal Defender

/s/ Peggy Sasso
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Assistant Federal Defender
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MATTA JUAN SANTOS

CERTIFICATION OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1 FOR CASE NO. 13-15050

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is proportionately spaced, has a typeface of 14 points or more and contains 4,065 words.

DATED: August 26, 2015

Respectfully submitted,

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9th Circuit Case Number(s) 13-15050

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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Signature (use "s/" format) /s/ Delia Rivera-Stark

13-15050

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTA JUAN SANTOS,

Petitioner-Appellant,

v.

K. HOLLAND and MATTHEW L. CATE,

Respondents-Appellees.

On Appeal from the United States District Court
for the Eastern District of California

No. 1:12-cv-01651-LJO-GSA
The Honorable Lawrence J. O'Neill, Judge

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INTRODUCTION

This appeal raises an issue regarding the proper scope of habeas corpus jurisdiction. It was consolidated with *Nettles v. Grounds*, Case no. 12-16935, which raised a similar habeas jurisdictional issue. In its decision, a unanimous panel determined that habeas jurisdiction existed in *Santos,* but a panel majority determined that jurisdiction was lacking in *Nettles*. A Petition for Rehearing En Banc has been filed in *Nettles* and this Court ordered a response. This Court also ordered the parties in this matter to provide simultaneous briefing on whether rehearing en banc should be ordered in this case.

En banc review does not appear warranted. This case does not meet the rigorous standards for rehearing en banc—the panel's decision does not conflict with this circuit's decisions, nor does it appear to present an issue warranting en banc review.

BACKGROUND

California state prisoner Matta Santos petitioned the district court for a writ of habeas corpus challenging prison officials' classification of Santos as an affiliate of the Mexican Mafia prison gang. This classification caused prison officials to house Santos in maximum security segregated housing. In his Petition, Santos alleged that prison officials violated his due process

rights because the classification decision was based on insufficient, unreliable, or false information.

The magistrate judge recommended dismissing the Petition for lack of jurisdiction reasoning that Santos's claims concerned the conditions of his confinement. The magistrate judge rejected Santos's argument that his claims were cognizable in habeas corpus on a theory that the gang classification and housing placement indirectly affected the length of his sentence. The district court adopted the magistrate judge's recommendation and summarily dismissed the Petition for lack of jurisdiction.

Santos appealed. Relying on intervening Supreme Court authority, the panel majority held that habeas corpus jurisdiction is available only if success would necessarily spell speedier release from custody. The panel majority noted that any Ninth Circuit case law allowing challenges in habeas where success is "likely to, or has the mere potential to, affect the length of a petitioner's confinement," are overruled as irreconcilable with this binding higher authority.

In applying this rule to Santos's claim, the panel noted that existing Ninth Circuit case law allows a prisoner to seek habeas corpus relief if success on the claim would result in the prisoner's release from disciplinary segregation to the general population. It then unanimously determined that

this Ninth Circuit authority was not clearly irreconcilable with intervening higher authority. As such, the panel overruled the district court and held that Santos could press his claim in habeas corpus.

THIS CASE DOES NOT APPEAR TO MEET THE STANDARDS FOR EN BANC REVIEW.

"An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. A "petition should not be filed unless the case meets those rigid standards." Fed. R. App. P. 35 (Advisory Committee Comments to the 1998 Amendment). Because it appears this case does not meet those standards, en banc review does not appear warranted.

A. The Panel's Decision Does Not Conflict with Ninth Circuit Authority.

The panel determined that it was bound to *Skinner v. Switzer*, 131 S. Ct. 1289 (2011), as intervening Supreme Court authority. As such, the panel was required to disregard as overruled any previous circuit authority that is "clearly irreconcilable" with *Skinner*. But the panel also determined that *Skinner* did not conflict with certain Ninth Circuit authority allowing Santos

to seek habeas corpus relief. Thus, the panel's decision is consistent with existing circuit authority.

Relying on *Skinner*, the panel determined that the Supreme Court clarified that habeas jurisdiction is available only where relief, if successful, would necessarily spell speedier release from custody. *Nettles v. Grounds*, 788 F.3d 992, 995 (9th Cir. 2015). In *Skinner,* the Supreme Court held that a prisoner could assert a claim for DNA testing under § 1983 because obtaining DNA testing would not necessarily imply the invalidity of his custody or spell his speedier release. *Skinner* relied on *Wilkinson v. Dotson*, which held that prisoners could proceed with their § 1983 suit because their challenge to the retroactive application of parole guidelines did not lie at the "core of habeas corpus." 544 U.S. 74, 82 (2005). In footnote 13, the Court in *Skinner* unambiguously clarified its jurisprudence regarding the exclusivity of § 1983 and habeas corpus jurisdiction: "*Dotson* declared . . . in no uncertain terms, that when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at the 'core of habeas corpus,' and may be brought, if at all, under § 1983." *Skinner*, 131 S. Ct. at 1299 n.13. Based on *Skinner's* plain language, the panel majority held that *Skinner* was clearly irreconcilable with prior circuit authority that allowed

habeas jurisdiction for claims that likely or merely had the potential to speed a prisoner's release from confinement. *Nettles*, 788 F.3d at 1000-01.

In applying these principles to Santos's claims, the panel noted that *Bostic v. Carlson*, 884 F.2d 1267 (9th Cir. 1989), allows prisoners to bring challenges in habeas corpus if success on their claim would result in a release from disciplinary segregation to the general population. *Nettles,* 788 F.3d at 1004. The panel then determined that *Bostic* was not clearly irreconcilable with *Skinner's* limitation of habeas corpus jurisdiction. *Id*. at 1004-05. As such, *Bostic* remains good law and is binding on the panel. *Id*.

In line with *Bostic*, the panel noted that the Seventh Circuit adopted a similar rule in concluding that "If the prisoner is seeking what can fairly be described as a quantum change in the level of custody . . . then habeas corpus is his remedy." *Nettles*, 788 F.3d at 1004 (quoting *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991)). The panel concluded that *Skinner's* requirement is satisfied so long as success on the claim would result in the necessary "quantum change in the level of custody." *Id*. at 1005.

The panel's decision does not appear to be in conflict with this Court's case law. To the contrary, the panel determined that this Court's existing case law was binding on the panel. Further, as the panel's decision illustrates, it does not appear that its decision is explicitly in conflict with

Supreme Court authority. *Id*. It appears this case does not satisfy the standards of en banc review.

B. En Banc Review Does Not Appear Warranted to Resolve a Question of Exceptional Importance.

Issues concerning this Court's jurisdiction, whether under § 1983 or the federal habeas corpus statute, can raise important questions. But as the panel decision notes, the law of this circuit has allowed a prisoner to seek habeas corpus relief in Santos's circumstances for over twenty-five years. As such, en banc review does not appear warranted.

CONCLUSION

En banc review does not appear warranted because it does not appear the rigorous standards allowing for such review are met. The panel's decision does not conflict with this Court's previous decisions. To the contrary, the panel specifically found that this Court's existing law controlled. Nor does it appear that this case presents issues warranting en banc review of circuit precedent in place for over a quarter century.

Dated: August 26, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 13-15050

I certify that: (check (x) appropriate option(s))

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August 26, 2015	/s/Phillip J. Lindsay
Dated	Phillip J. Lindsay Supervising Deputy Attorney General