UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 20-3590

TRENTON JOHN TOMPKINS, Plaintiff—Appellant, v. LAUREN LEIGH HACKETT, Defendant—Appellee.	)	Appeal from the U.S. District Court for the Western District of Pennsylvania Civil Action No. 20-1141 The Hon. Maureen P. Kelly, U.S. Magistrate Judge

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APPELLANT'S BRIEF

(20 Pages)

Trenton Tompkins

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Subject Matter and Appellate Jurisdiction

The District Court has subject matter jurisdiction under 42 U.S.C. § 1331(a) because the complaint raises a question whether the defendant violated the plaintiff's rights under the United States Constitution (42 U.S.C § 1983). This court has appellate jurisdiction under 28 U.S.C. 1291 because the grant of dismissal for the defendant is a final judgment (Appx. 52). Judgment was entered on December 3, 2020 (Appx. 52), and plaintiff's notice of appeal was filed on December 21, 2020 (*Document #26*, Appx. 3).

Statement of Issues Presented for Review

1. ***Whether the District Court's incorrect reading of the pro se complaint supported a flawed argument for dismissal?*** (*see point 1* at pg. 4, *see also* "III. Complaint is sufficient to Begin Discovery" Appx. 38-40; objected to on pgs. 2-3; Appx. 44, 52)

2. ***If poor draftsmanship causes a pro se complaint to be dismissed pursuant to Heck v. Humphrey should amendment be permitted where mistakes are correctable?*** (Appx. 47-50, no chance to object to the court's new argument or facts, *but see* "I. This Case is not Barred under *Heck*, Appx. 35-36; "leave to amend would be futile" Appx. 49, 52)

3. ***If criminal attorney Lauren Hackett knows to avoid questioning in this case, why does she trick her own clients into taking the District Attorney's polygraphed interrogations?*** ("The fact is, Lauren Hackett, a trained criminal defense lawyer, sent the plaintiff, her client, who she knew was not fully innocent, without counsel and under false pretenses to be interrogated, [then] instead of explaining ... why, as the bar and ethics would dictate, she stonewalled" Appx. 39-40; *see defense brief* Appx. 28-32; "his current suit is not cognizable under § 1983. Heck"; Appx. 47-48 "fails to allege that his civil rights were violated by a person acting under color of state law" Appx. 48; "plaintiff does not allege the necessary factual basis to for a plausible inference of an agreement between Hackett and the prosecutor" Appx. 49, 52)

Statement of Related Cases and Proceedings

This is the first time this case has been presented to the United States Court of Appeals for the Third Circuit. Civil action #19-1089, relating to physical abuse and improper care, has been stayed and administratively closed since June 9, 2020, while council is appointed pursuant to 28 U.S.C § 1951(e)(1) and the order of the court dated March 24, 1999 (Miscellaneous No. 99-95) (*see* U.S. District Court for the Western District of Pennsylvania Docket for Case #2:19-cv-01089-NR-MPK, Document #127).

Statement of the Case

A. Statement of the Proceedings

Plaintiff filed his complaint and full filing fee with the U.S. District Court on 7/31/20. On 9/4/20 he submitted a typed copy of his complaint which corrected two typos and was marked by the clerk as "amended" (Appx. 6). It was this version that was mailed to the defendant along with waivers of service. On 10/15/20, defendant filed a motion to dismiss (Appx 19), on 11/5/20 plaintiff filed a brief in opposition to dismissal (Appx. 33), and on 12/3/20 the court entered an order (Appx 52) which granted full dismissal with prejudice, ruling inter alia, plaintiff's case was barred by the Supreme Court's decision in *Heck v. Humphrey* (see *Opinion*, Appx. 42). No leave for amendment was given nor timeframe for objections prescribed (Appx. 52).

B. Statement of Facts

1. This is a civil rights action brought under 42 U.S.C. 1983 which alleges a conspiracy between the plaintiff's former public defender and county level actors to deprive the plaintiff of rights federally protected by the Constitution of the United States of America. (Appx. 7, 43).

2. Plaintiff is presently incarcerated at SCI Fayette with a maximum sentence date of September 20, 2021 (Appx. 6, 25)

3. Lauren Hackett conspired to deprive the plaintiff of his 5th, 6th and 14th amendment rights, and all facts set forth in the complaint (Appx. pgs. 8-12) are provided to support that claim and its necessary elements, and to provide background and context (Appx. 7).

4. In the court's "Factual and Procedural Background" (Appx. pgs. 44-45) it states, "With the retention of private counsel, Hackett no longer represented the plaintiff" (Appx. 44). This statement is objected to and false.

5. The statement, "Plaintiff alleges that at some point before the retention of private counsel, Hackett entered into a plea agreement with the prosecutors that was different from the final agreement accepted by private counsel" (Appx. 44) is objected to and false.

6. The statement, "Plaintiff contends the later agreement added at least a year to his sentence" (Appx. 44) is objected to and false.

7. The complaints facts section begins on page 7 of the appendix and the facts contained therein may be considered as if set forth in length.

Summary of Argument

The district court's decision to grant dismissal with prejudice is predicated upon factual and legal errors which begin with a flawed reading of the pro se complaint, and which can be traced through the opinion and reasoning. The court created its own arguments and its own facts, and allowed plaintiff no chance to address either. This led to incorrect legal conclusions and ultimately an incorrect outcome.

ARGUMENT

The District Court Errored in Granting Dismissal

Point 1 — The Court's Legal Conclusions were Determined Upon Factual Errors and a Flawed Reading of the Complaint

Point 2 — The Plaintiff's Claim is Not Properly Barred by *Heck v. Humphrey*

Point 3 — The Court's Departure from *Grier v. Klem* and *Tower v. Glover* Violated Stare Decisis

Conclusion

Standard of Review

Whether this court has jurisdiction and whether the complaint states a claim are questions of law to be reviewed de novo. *Boyle v. U.S.*, 200 F.3d 1369, 1371 (Fed Cir. 2000)

Point 1 — The Court's Legal Conclusions were Determined Upon Factual Errors and a Flawed Reading of the Complaint

When issuing its opinion (Appx. 42), the court did not provide parties an opportunity to propose objections. It is impossible to fairly decide the relevant legal issues without first correcting the underlying factual errors in the court's opinion.

On page 2, the opinion reads: "With the retention of private counsel, Hackett no longer represented the plaintiff" (Appx. 44). However, "counsel's obligation to represent the defendant whether as retained or appointed counsel, remains until leave to withdraw is granted by the court", *Pennsylvania Rules of the Court*, Vol. 1, 2016 Ed., pg. 723, *accord, Commonwealth* v.

Librizzi, 810 A.2d 692 (Pa.Super.Ct. 2002). Therefore, Lauren Hackett did represent the plaintiff during the time of his interrogation.

Page 2 continues: "Plaintiff alleges that at some point before the retention of private counsel, Hackett entered into a plea agreement with prosecutors that was different from the final agreement accepted by counsel" (Appx. 42).

This is false.

What the complaint actually says is: "5. To induce the plaintiff to take the polygraph, she[defendant Hackett] told him[plaintiff] the prosecution had agreed to drop the charges against him if he passed the test" (Appx. 8). This statement is factually true, declared under penalty of perjury and uncontroverted absent an answer. But it is also not equivalent to: "Plaintiff alleges that ... Hackett entered into a plea agreement with prosecutors".

The restated version is a bald assertion, and it wrongly describes the deal as a "plea agreement". The deal had nothing to do with a plea, nor did it promise or specify any length of sentence.

Lastly, page 2 states: "Plaintiff contends the later agreement added at least a year to his sentence" (Appx. 44). Again, this is factually untrue, and used to bolster the court's own later argument for dismissal based on *Heck v. Humphrey*.

Granting dismissal pursuant to Rule 12(b)(6) is a question of law over which this court exercises plenary review (*see generally Kaucher v. County of Bucks*, 455 F.3d 418, 422 (3rd Cir. 2006)). Due to the aforementioned factual errors in the in the court's opinion, this review must begin with a fresh reading of the complaint's facts (Appx. pgs. 7-12).

Point 2 — The Plaintiff's Claim is Not Properly Barred by *Heck v. Humphrey*

The defendant's brief argues the court lacks jurisdiction to hear this case based on cases like *Heck v. Humphrey* (Appx. 28). The court rejects this argument (Appx. 47), but then proceeds to make its own argument for dismissal (Appx. 47), which it accepts without providing for further rebuttal (Appx. 52).

The key mistake made by the court culminates with this sentence which appears on page 5 of the opinion: "Plaintiff's claims regarding the polygraph examination and the length of his sentence are predicated on allegations of misconduct by defense counsel that would necessarily imply the invalidity of his conviction and sentence" (Appx. 47).

However, the complaint is intended to contain a single claim, which is conspiracy to deprive 5th, 6th and 14th amendment rights (*see item* C., Appx. 7). All other facts in the complaint are given to support that lone claim, provide background, and help to tell the story, but they are not separate legal claims.

The provided instructions say to "state facts" and give no legal arguments. This can create ambiguity as to what is, or is not, intended to be a legal claim. This ambiguity should be construed in the way most favorable to the complainant ("Under our liberal pleading rules, a district court should construe all allegations in a complaint in favor of the complainant", *Gibbs v. Roman*, 116 F.3d 83 (3rd Cir. 1997)(*overruled on other grounds*); *see additionally Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) "if the court can reasonably interpret pro se pleadings to state a cognizable claim ... it should do so, despite ... litigants' unfamiliarity

of pleading requirements"), but in this case it seems to have confused the court and helped to create grounds for dismissal pursuant to *Heck v. Humphrey*.

Interestingly, defendant's attorney, Michael R. Lettrich, correctly reads the complaint, and the "Statement of the Case" provided in the defendant's "Brief in Support of Motion to Dismiss" (Appx. 25) correctly identifies the legal claim and lacks the mistakes in the court's opinion. His argument still makes a straw man of the complaint, but that sophistry doesn't bleed into his findings of fact. Local Rule LCvR 10.C prohibits motions for counsel, absent special circumstances, until after resolution of dispositive motions. Plaintiff has no legal assistance or training, and to the extent mistakes are attributable to his poor skill, he could have rectified them by amending his complaint.

Lauren Hackett's representation ended November 2nd, 2017 (*see footer*, Appx. 44). Plaintiff signed a guilty plea while represented by Ross Smith on February 11th, 2019 (*see footer*, Appx. 43). As stated in plaintiff's brief in opposition: "Plaintiff was convicted following a plea of guilty while represented by a replacement attorney. Nothing in the complaint, accepted as true, would invalidate his criminal sentence" (Appx. 25).

The court goes on to consider the fact that plaintiff filed a motion for post conviction collateral relief (Appx. 47) but never obtains or requests a copy of it. Had it of, it would have found the motion does not raise any IAC claims against Ms. Hackett, because, as already noted, doing so would not invalidate his criminal conviction or sentence. The motion also raises issues such as replacement counsel's failure to object to allocution (Pa.R.Crim.P. 740(C)(1)) being skipped before sentencing; issues with no relevance at all to this case, and for that reason at least, the court should not have considered the fact that a PCRA motion was filed without also considering its content. If anything, the filing of a post conviction motion demonstrates that the

plaintiff did identify and separate issues actionable under 42 U.S.C. 1983 from those only currently addressable under the Post Conviction Relief Act (42 Pa.C.S. §§ 9541 et seq.).

The opinion concludes: "because plaintiff's claims for damages relate to a conviction and sentence that have not been invalidated, his current suit is not cognizable under 42 § 1983. *Heck*, 512 U.S. at 486-87" (Appx. 47-8). This appears to be a condensed version of: "A claim for damages for an allegedly unconstitutional conviction or imprisonment, or for other actions whose unlawfulness would render a conviction or sentence invalid, is not cognizable under 42 U.S.C. § 1983 unless the plaintiff proves the conviction or sentence has been reversed" (*Heck v. Humphrey*, 512 U.S. 477 (1994)).

And under the complete criteria, plaintiff's claim for damages does not "relate" to his sentence, in that it neither provides the basis for damages, nor can it render his conviction or sentence invalid.

The current enforceability of any uncovered, past-made agreement would be an issue to be determined separately by subsequent post-conviction proceedings. With IAC claims against Ms. Hackett waived by virtue of her replacement and plaintiff's later-made guilty plea, this is a critical point to consider when assessing what would "imply the invalidity of" (*Heck v. Humphrey*, *supra*) his sentence.

Heck v. Humphrey relied upon common-law standards for malicious prosecution and applied them in a 42 U.S.C. 1983 context. Lauren Hackett engaged in a tactic which could better be described as advancing the county's interests at the expense of her client's constitutional rights, for-which she is sued for a count of conspiracy that accrues from the first overt act taken in it's furtherance.

As noted in plaintiff's brief (Appx. 39), plaintiff has the right to counsel and due process, which extends to the right to fairly plea bargain, even if guilty ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process.", *Lafler v. Cooper*, 566 U.S. 156 (2012)). ("In the United States, we have plea bargaining aplenty... It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty" (Justice *Scalia*), *Lafler v. Cooper*, *supra*). This right was not established in the time of *Heck v. Humphrey* ("until today [2012] it has been regarded as a necessary evil.", (Justice *Scalia*), *Lafler v. Cooper*, *supra*). Plaintiff can also plead guilty, whether or not he is innocent (*North Carolina v. Alford*, 400 U.S. 25 (1970)). So perhaps the question to consider is: "*Are a witch hunter's tactics excused once someone confesses to witchery?*" ("Of those who were wrongfully convicted of murder and later cleared by DNA, 62% had confessed, reports the Innocence Project.", *The Junk Science Cops Use to Decide You're Lying*, *Criminal Legal News*, October 2020, VOL. 3, No. 10 pgs. 1-6 at 5).

Lauren Hackett is sued for punitive damages (Appx. 13), which are intended to punish and dissuade future conduct (*Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)). It is easy to see how securing convictions without the expense of investigation or trial financially benefits her employer (and apparent indemnitor), Mercer County, and how shipping "undesirable" mentally-ill or indigent arrestees "up state" cheaply could benefit local agendas. This basis for damages is unrelated to any particular criminal sentence (*see Powers v. Hamilton County Public Defender Com'n*, 501 F.3d 592 (6th Cir. 2007), where conduct is systemic and in state's interest, conduct is under color of state law and not entitled to immunity).

The "ruse" alleged in the complaint is a tactic commonly employed by the county's public defenders. Attorney Jack Cline describes one account of the practice from 2009:

> "Mr. Zimburger [*publication alias*, *see Commonwealth v S.J.Z.*, (No. 458 Crim. 2009 Mercer County)] was represented by the Public Defender and waived his Preliminary Hearing (first mistake) with the understanding he would take a polygraph (second mistake). An additional felony one charge was added. After I became convinced of Mr. Zimburger's innocence, I discussed a polygraph with the District Attorney. Although I totally distrust the polygraph procedure, it can be a win-win for the accused. If he passes the polygraph the charges are dismissed. If he fails, the fact that a polygraph was even administered is not admissible in court, so no member of the jury would even know about it. One condition I requested pursuant to the polygraph was that no statements made by Mr. Zimburger could be used in evidence at trial. I required this condition because Mr. Zimburger had already given a statement to the police denying the charges. But there is no way for him to duplicate this denial word for word and thus his statements in the polygraph examination would be 'inconsistent' or 'contradictory'. The District Attorney would not agree to this, so I refused the polygraph offer. This made it clear that the government's motive was not to exonerate a potentially innocent man but to **gather evidence** against him**.**" —Jack W. Cline, esq., "*Yardbird USA*", pgs. 98-99 (2012)

Point 3 – The Court's Departure from *Grier v. Klem* and *Tower v. Glover* Violated Stare Decisis

Before starting his complaint, plaintiff obtained and read cases which included *Tower v. Glover*, 104 S.Ct. 2820, 81 L.Ed.2d. 758, 467 US 914 (1984), *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Grier v. Klem*, 591 F.3d 672 (3rd Cir. 2010). Plaintiff's complaint was pleaded specifically as to not be barred by *Heck v. Humphrey*. To accomplish this, he relied upon the advice provided in *Grier v. Klem*, which he later recited verbatim in his brief: "The proper inquiry to determine whether a prisoner's 42 U.S.C. § 1983 claim fell into the habeas exception was whether his or her success would necessarily require the prisoner's release or a reduction in a prisoner's sentence. Thus, it was irrelevant that a prisoner might, following success in a 42 U.S.C. § 1983 suit, find himself or herself in a better position to raise subsequent challenges to his [or her] conviction or sentence" (Appx. 35).

The doctrine of stare decisis, and precedent itself, should enable would-be litigants to know whether or not a case is actionable before filing it. In *Tower v. Glover*, Justice O'Conner opined: "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state and federal institutions and, if so, what remedial action is appropriate" (*Tower v. Glover*, *supra*).

The court's opinion reads: "The law is clear that a public defender acting within the scope of his/her professional duties is immune from civil liability under Section 1983.... Thus, to the extent that Plaintiff contends Hackett's conduct resulted in ineffective assistance of counsel during the time of his criminal proceedings, or the violation of his Fifth, Sixth and Fourteenth Amendment rights, such claims are not actionable under Section 1983" (Appx. 49).

As addressed previously, this is entirely based on a misreading of the complaint and the failure to correctly identify its only legal claim. Still, the opinion fails to even acknowledge *Tower v. Glover*, or *Dennis v. Sparks* (*Dennis v. Sparks*, 449 U.S. 24, 27-28, 66 L.Ed.2d 185, 101 S.Ct. 183 (1980)), upon which its decision was based (Appx. 37).

Besides the DA, and perhaps the warden to secure access to the plaintiff before his psychiatric commitment hearing (*see item* 15, Appx. 10), Lauren Hackett engaged with Scott A. Patterson, who was paid with county funds to, at the request of the District Attorney's Office, perform an investigative role typically performed by law enforcement (*see Flint v. Kennedy Department of Corrections*, 270 F.3d 340, 352-53 (6th Cir. 2001), an employee in charge of the print shop was a state actor because he "performed functions typically attributed to the state"; *see also* (*Monroe v. Pape*, 365 U.S. 167, 184, 81 S.Ct. 473 (1961), city police act under color of state law); *Bender v. General Services Admin*., 539 F.Supp.2d 702, 712 (S.D.N.Y. 2008), employer of

a private contractor under color of state law). He submitted a report directly to the District Attorney's Office within hours, that reads like a taken-confession, and says little about any actual polygraph testing ("Although my opinion based on the numeric evaluation of the charts is that the examinee was being truthful his lack of response in the EDA channel and the presence of the outside issue call into question the reliably of this exam.").

The report confirms he shared the results with "Assistant Public Defender Lauren Hackett" who was still functioning in her role as counsel. It also describes the plaintiff as "cognizant of his surroundings" (*see contra*, *items* 7, 9, 10, 15, Appx. pgs. 8-10), but makes no mention of plaintiff's back eyes (*see items* 6, 9, 12, Appx. pgs. 8-9), delusional and psychotic statements (*see items* 10,13, Appx. 9), or confused and battered condition (*see Temple v. Albert*, 719 F.Supp. 265, 267 (S.D.N.Y. 1989), doctor who conspired with police officers would act under color of state law).

The court's opinion concedes: "Given the recommended disposition of this action, the court need not to discuss at length Hackett's third basis for dismissal" (*footer*, Appx. 49). This makes it clear the court treated *Heck v. Humphrey* as a bell which could not be un-rung. But it still goes on to support dismissal under cases like *Twombly* (*Bell Atlantic v. Twombly*, 550 U.S. 544, 555 127 S.Ct. 1995 (2007)) without specifying whether such dismissal, standing alone, would allow for amendment or, more critically, some opportunity for discovery ("The peculiar perversity of imposing heightened pleading standards in prison cases ... is that it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again it is not because the prisoner does not know the law but because he is not able to investigate before filing suit", *Billman v. Indiana Dep't of Corr.*, 56 F.3d 785, 789-90 (7th Cir. 1995)(*Posner*, C.J.).

The opinion states: "Plaintiff does not allege the necessary factual basis to for a plausible inference of an agreement between Hackett and the prosecutor" (*footer*, Appx. 49). Even logically, one must infer *some* reason a trained criminal defense lawyer would subject their client to a videotaped polygraph examination. No one polygraphed the plaintiff's accuser, before or after her statements were refuted, so it wasn't done out of concern for the truth. The results, if exonerating, are not admissible in court. ADA Stephanie Lauderbaugh successfully objected to Ross Smith bringing up the polygraph results at sentencing (on December 16th, 2020, sentencing judge Daniel P. Wallace denied plaintiff's motion for transcripts, *see* Mercer County Docket No. CP-43-CR-0001578-2017). And according to Jack Cline's published account, a polygraph was offered by the District Attorney to him as part of a deal to drop charges against his client.

Although most important to "drawing a plausible inference" is simply that the complaint says: "**she told him** the prosecution had agreed to drop the charges" (*quoting #5 in apposite part*, Appx. 8). And "all allegations in the complaint are true", *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 127 S.Ct. 1995 (2007) for purposes of granting dismissal under Fed.R.Civ.P. 12(b)(6).

Ultimately, Lauren Hackett needs to give her account (*see additionally* Appx. pgs. 17-18, "The canons of professional ethics must be enforced by the Courts and must be respected by members of the Bar if we are to maintain confidence in the integrity and impartiality of the administration of justice.", *In re Meeker*, 76 N.M. 354, 357, 414 P.2d 862, 864 (1966)), and she is not entitled to be immune from discovery because she is working for Mercer County as a public defender ("The public interest is not served by insulating public defenders from claims of negligence. Thus our established caselaw precludes a grant of immunity to these defendants... Immunity would only permit less zealous representation and deny those who can not afford

counsel an equal remedy for injuries" (Justice Roberts, *concurring*), *Reese v. Danforth*, 486 Pa. 479; 406 A.2d 735; 1979 Pa LEXUS 696; 6 A.L.R. 4th 758 (1979).

Grier v. Klem provides a bright line test to know if a claim falls under the habeas exception (Appx. 35). This test applies equally to all cases, such as *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), where the government successfully argued to apply *Heck v. Humphrey* in a prison context because the outcome of a disciplinary hearing would affect sentence length. The District court should have applied this test agnostically to plaintiff's case. This court should do so now.

Conclusion

Dismissal should be reversed and this case should be remanded for discovery. Legal arguments can be further refined as facts become known, but as plaintiff's claim is not barred, at least one cognizable claim for relief is currently "plausible" ("A pleading is plausible if there are enough factual allegations to 'raise a reasonable expectation **that *discovery* will reveal evidence** of each necessary element'." (***emphasis added***), *Phillips v. City of Allegheny*, 515 F.3d 224, 234 (3rd Cir. 2008)) and that is sufficient to preclude dismissal ("Unless it appears beyond a doubt that plaintiff can prove no facts in support of his claim, which would entitle him to relief, a complaint should not be dismissed", *Haines v. Kerner*, *supra*).

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Trenton John Tompkins, *plaintiff-appellant pro se*