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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COUNTY OF PIMA; CITY OF TUCSON, Petitioners, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, TUCSON, Respondent, NINA ALLEY, as Guardian and Conservator for and on behalf of Louis Taylor, a single man, Real Party in Interest.	No. 24-869 D.C. No. 4:15-cv-00152-RM MEMORANDUM*

Petition for Writ of Mandamus

Argued and Submitted March 28, 2024
San Francisco, California

Before: PAEZ, NGUYEN, and BUMATAY, Circuit Judges.
Dissent by Judge BUMATAY.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The County of Pima and City of Tucson (collectively "the County") filed a petition for writ of mandamus against the United States District Court for the District of Arizona. Real Party in Interest, Nina Alley, as Guardian and Conservator for Louis Taylor ("Taylor"), filed a response. We have jurisdiction under 28 U.S.C. § 1651, and we deny the petition.[1]

To determine whether the extraordinary remedy of mandamus relief is appropriate, we weigh the five *Bauman* factors: (1) whether the party seeking relief has other adequate means, such as direct appeal, to attain relief; (2) whether the petitioner will be prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the error is one that is often repeated; and (5) whether the order raises a new and important issue, or one of first impression. *Bauman v. U.S. District Court*, 557 F.2d 650, 656-672 (9th Cir. 1977). Here, the majority of the *Bauman* factors weigh against granting the petition.

The issue raised by the County is whether the district court has the authority under *Shipp v. Todd* to grant Taylor declaratory relief expunging his 2013 state court convictions. 568 F.2d 133 (9th Cir. 1978). We previously held that although Taylor's 1972 convictions were vacated, he was nevertheless barred under *Heck v.*

[1] Because the parties are familiar with the extensive factual and procedural history of this case, we need not recount it here.

Humphrey, 512 U.S. 477 (1994), from seeking damages arising out of his 42 years of incarceration because his valid 2013 no-contest plea and sentence are now the "sole legal causes of his incarceration[.]" *Taylor v. Cnty. of Pima*, 913 F.3d 930, 936 (9th Cir. 2019). The district court then permitted Taylor to amend his complaint to add a request for a declaratory judgment expunging his 2013 convictions and found "as a matter of law, that *Shipp* expungement is appropriate" if the jury makes certain factual findings. The County argues the district court has improperly "devised a work-around" to the *Heck* bar by allowing Taylor to amend his complaint to seek an expungement remedy and seeks a writ of mandamus "directing the District Court to dismiss Taylor's expungement claim with prejudice."

We consider the *Bauman* factors in turn. The first two factors—whether alternative means of relief exist and whether the harm is correctable on direct appeal—weigh against the County. *See In re Mersho*, 6 F.4th 891, 902 (9th Cir. 2021) (explaining that the first two *Bauman* factors are closely related). The County concedes that direct appeal is technically available but argues that the damage it will suffer if Taylor's declaratory relief claim is allowed to proceed is not correctable on appeal. According to the County, it will suffer irreparable harm because (1) the County's trial counsel, Nicholas Acedo, may have to withdraw from representing the County based on the anticipation that he will be called as a

witness by Taylor; (2) if the district court is ultimately reversed, the age of the underlying case would make retrial difficult because many witnesses have died; and (3) if Taylor prevails on the expungement claim, his original 1972 convictions will likely be reinstated under the 2013 plea agreement, and he may at that point be out of custody and in possession of a damages award to which he would not, in the County's view, be entitled.

We recognize that the complicated facts and age of the underlying case pose numerous challenges, but the County has not shown that its rights would be so impaired that relief on direct appeal would be inadequate. Mandamus relief is an extraordinary remedy, and the record here does not support it. The arguments raised by the County rely on speculative assertions. First, it is not clear whether Mr. Acedo would need to or choose to withdraw from representing the County. Second, Taylor may or may not prevail at trial on his request for declaratory relief. And although the underlying case is old, even assuming that another trial before the district court is eventually needed—a speculative possibility—it is unclear how the County would be prejudiced in a way that is not correctable on appeal. Finally, the question of whether Taylor would be entitled to a potential damage award if his 1972 convictions were reinstated is correctable on appeal. The first two *Bauman* factors thus do not weigh in favor of mandamus relief.

The third *Bauman* factor—whether the district court committed clear error

as a matter of law—is more difficult. The County argues that the district court committed clear error by indicating it will consider expungement as a potential remedy. The question of whether *Shipp* allows a court to order expungement of a conviction—given the limits *Heck* places on § 1983 claims seeking damages for allegedly unconstitutional convictions—or whether it only allows for the expungement of criminal records, has not been addressed before. None of the authorities cited by the parties is dispositive on the legal question presented here. But, as the district court noted, this is an unusual case, and the jury would have to find that the County engaged in misconduct before the district court would consider granting expungement. The facts are hotly contested, and if the district court grants declaratory relief, its ruling and the jury's findings are matters that can be addressed on direct appeal. *See In re Van Dusen*, 654 F.3d 838, 845 (9th Cir. 2011) ("[W]e will not grant mandamus relief simply because a district court commits an error, even one that would ultimately require reversal on appeal.").

Finally, this appeal does not present an "oft-repeated error," though the "fourth and fifth factors are rarely present at the same time." *In re Kirkland,* 75 F.4th 1030, 1051 (9th Cir. 2023). As stated, whether *Shipp* permits a district court to expunge a conviction in extreme and unusual cases has not been decided, and we agree with the County that the case presents an important and novel issue. But this factor alone does not warrant the "drastic remedy" of mandamus relief. *See*

Calderon v. U.S. Dist. Ct. for E. Dist. of Cal., 107 F.3d 756, 761 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc* (Apr. 16, 1997) ("Mandamus is a drastic remedy that should be invoked only in extraordinary circumstances.").

PETITION DENIED.

County of Pima v. U.S. Dist. Ct., No. 24-869
BUMATAY, J., dissenting:

For the first time, a district court claims for itself the authority to expunge a state criminal conviction under 42 U.S.C. § 1983. This is clearly erroneous. The district court justifies this authority under *Shipp v. Todd*, 568 F.2d 133 (9th Cir. 1978). But the district court's reading of *Shipp* extends far beyond what *Shipp* authorized, and beyond the restrictions placed on *Shipp* in the years that followed. The district court's proclamation of its own authority was unprecedented, violated the principles expressed in *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016), and exceeded its statutory authority under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. So I would grant the writ of mandamus.

Our court weighs five factors when determining whether to grant a writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. . . . (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654–55 (9th Cir. 1977) (simplified).

While all five *Bauman* factors are considered by a court prior to issuing a writ of mandamus, it is important not to forget that one *Bauman* factor reigns supreme.

The third *Bauman* factor—whether the district court's order committed clear error—"is the most important" of the five factors. *In re Swift Transp. Co. Inc.*, 830 F.3d 913, 916 (9th Cir. 2016); *see also In re United States*, 791 F.3d 945, 955 (9th Cir. 2015) (simplified) (explaining that while "all the [*Bauman*] factors need not be present to issue the writ . . . the absence of factor three—clear error as a matter of law—will always defeat a petition for mandamus").

So even if none of the other four *Bauman* factors are present here, that does not mean we cannot grant mandamus relief. In fact, the opposite is true. Our court is "neither compelled to grant the writ when all five factors are present, nor prohibited from doing so when fewer than five, or only one, are present." *In re Kirkland*, 75 F.4th 1030, 1041 (9th Cir. 2023) (simplified). At base, we ask whether correcting the error now is the best use of our discretion. But as the Supreme Court has made clear, "[t]he writ is appropriately issued . . . when there is usurpation of judicial power or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (simplified); *see also Hartland v. Alaska Airlines*, 544 F.2d 992, 1003 (9th Cir. 1976) (Wallace, J., concurring) (same). That is the case here.

I would grant the writ of mandamus because the district court clearly erred and it makes little sense to allow this complex case to continue through trial only to be reversed on appeal. It is true that "[c]lear error is a highly deferential standard of review," *In re Swift*, 830 F.3d at 916 (simplified), and that our court should "not

grant mandamus relief simply because a district court commits an error, even one that would ultimately require reversal on appeal," *Wilson v. U.S. Dist. Ct.*, 103 F.3d 828, 830 (9th Cir. 1996) (simplified). But this is a case where "we . . . have a definite and firm conviction that the district court's interpretation [of *Shipp*] was incorrect." *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 936 (9th Cir. 2000).

Quite simply, a district court has no power to expunge a state criminal *conviction* in a civil tort action brought under § 1983. While our court may have left the door open to expunge criminal *records* in *Shipp*, a criminal *record* and a criminal *conviction* are not the same thing. And even then, *Shipp* made clear that when it comes to "[t]he power to order expungement of a state arrest record[,]" that power "is a narrow one and should be reserved for unusual or extreme cases." *Shipp*, 568 F.2d at 134 n.1. As examples, *Shipp* describes circumstances "where the arrest itself was an unlawful one, or where the arrest represented harassing action by the police, or where the statute under which the arrestee was prosecuted was itself unconstitutional." *Id.* (citing *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975)). Notice the similarities in these examples given by the *Shipp* court: They all deal with arrests, not convictions. And cases following *Shipp* only deal with the expungement of arrest records. *See, e.g.*, *Maurer v. Los Angeles Cnty. Sheriff's Dep't*, 691 F.2d 434, 437 (9th Cir. 1982) (simplified) (explaining that "federal courts have inherent equitable power to order the expungement of local arrest records as an

appropriate remedy in the wake of police action in violation of constitutional rights"); *United States v. Crowell*, 374 F.3d 790, 793 (9th Cir. 2004) (explaining that "federal courts have inherent authority to expunge criminal records in appropriate and extraordinary cases"). But never—not even once—has a district court in this circuit expunged a criminal *conviction* using the method that the district court order pronounced.

As we've explained, "expungement, without more, does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty." *Crowell*, 374 F.2d at 792 (simplified). So I disagree with the majority that this is an open question. Expunging an arrest record versus expunging a conviction are two very different things. *See id.* Courts have no authority to expunge a conviction under § 1983.

The Supreme Court has also clarified that whatever door *Shipp* might have opened for expungement has drastically closed. In *Heck*, the Supreme Court ruled that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgements." 512 U.S. at 486. It extended this principal's application "to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* So to attack his underlying state criminal conviction, Taylor would instead need to bring a habeas action,

whether through federal or state channels. This is because "habeas corpus is the exclusive remedy to attack the legality of [a] conviction." *Nettles*, 830 F.3d at 933.

Given the charged nature of this case and the vast complexities added by the district court's clearly erroneous ruling, we should have granted mandamus now, instead of waiting for a direct appeal by the County that it will unquestionably win. And even though the majority does not vote to grant mandamus, the district court should reconsider its bold assertion of authority when it comes to the ability to expunge criminal convictions in a civil tort action.

For these reasons, I respectfully dissent from the majority's denial of mandamus relief.