

No. 18-73

In the Supreme Court of the United States

SCOTT CARPENTER,

Petitioner,

v.

DOUGLAS JORDAN,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the unanimous Sixth Circuit panel below properly determined under this Court’s decisions in *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Wallace v. Kato*, 549 U.S. 384 (2007) that Mr. Jordan’s claim of prosecutorial misconduct that led to Mr. Jordan’s wrongful conviction, specifically that police withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), was most analogous to a malicious prosecution claim and that the statute of limitations consequently began to run upon Mr. Jordan’s acquittal.

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INTRODUCTION

Douglas Jordan spent more than eight years in prison for a crime he did not commit. The defendant put him there by withholding favorable and material evidence. Pet. App. 2-3. Mr. Jordan did not get a full and fair hearing at his criminal trial. He deserves to get one in his civil case. A unanimous panel of the Sixth Circuit agreed and rejected the defendant's argument that the case was untimely. Pet. App. 3-5. The defendant filed a petition for rehearing en banc but failed to get even a single vote. Pet. App. 15.

The timeliness issue does not warrant review because the courts of appeals are in agreement on the applicable standard and its application to these circumstances, and because the decision below followed this Court's instructions for discerning when the statute of limitations begins to run. Petitioner's suggestion that the circuits are divided relies on an incomplete account of the case law, elevates dicta over holdings, and mischaracterizes cases as having resolved disputes they never considered, much less addressed.

As this court's decision in *Wallace* makes clear, when a plaintiff may file suit under *Heck* is a distinct issue from when the statute of limitations on a claim begins to run. The petitioner attempts to conflate the issues before this Court as he did before the Sixth Circuit. However, the fact remains that the issue was decided in *Wallace* and the circuits have consistently ruled on it.

As the Sixth Circuit unanimously concluded, a claim for damages for wrongful imprisonment on the basis of

withheld evidence is a claim for wrongful imprisonment pursuant to legal process and therefore, most analogous to a claim for malicious prosecution. Pet. App. 3. Applying this Court’s directive in *Wallace* to determine the commencement of the statute of limitations based upon the most analogous common law tort, the Sixth Circuit determined that the statute of limitations did not begin to run until the criminal proceedings had concluded. *Id.* at 3-5. No circuit court of appeals has reached a different conclusion.

STATEMENT OF THE CASE

Having spent over eight years in prison for a crime he did not commit, Douglas Jordan sued former detective Scott Carpenter under 42 U.S.C. § 1983 for withholding exculpatory and impeachment evidence from his defense. Pet. App. 2-3. The district court dismissed the suit as untimely, holding that the one year limitations period for Mr. Jordan’s claim commenced when the Tennessee Court of Criminal Appeals granted him a new trial in January 2011, not when the jury acquitted him at his retrial on March 28, 2015. Pet. App. 7-14. A unanimous panel of the Sixth Circuit reversed and held that the suit was timely. Pet. App. 2-6. The Defendant filed a request for en banc review, which the court unanimously denied. Pet. App. 15. The Defendant then appealed to this Court.

1. On September 11, 1998, Mr. Jordan was indicted for Second Degree Murder. E.g., D. Ct. Doc. 76-1, at 1041-1042. On the same day, a writ of habeas corpus was issued setting Mr. Jordan’s bond at \$100,000. D. Ct. Doc. 76-9, at 1074. On September 14, 1998, Mr. Jordan posted the bond and was released. D. Ct. Doc. 76-10, at 1075. In October 2002, a Blount County, Tennessee jury

found Mr. Jordan guilty of second degree murder. D. Ct. Doc. 69, at 765 ¶ 25. Mr. Jordan's bond was revoked. D. Ct. Doc. 76-11, at 1077. Mr. Jordan was convicted and prosecuted under Blount County Circuit Court docket number C-11261 and pursuant to the original indictment. D. Ct. Doc. 76-1, at 1041-1042; D. Ct. Doc. 54-2, at 551-3. Following the denial of his direct appeal, Mr. Jordan filed a petition for post conviction relief, which the post conviction court denied. Mr. Jordan appealed to the Tennessee Court of Criminal Appeals and the Court of Criminal Appeals reversed the judgment of the post conviction court and held that Mr. Jordan was entitled to a new trial, because the State had violated his right to due process by withholding favorable, material evidence. See *Jordan v. State*, 343 S.W.3d 84 (Tenn. Crim. App. 2011). Specifically, the Court ruled, "we reverse the judgment of the post-conviction court and remand the case for a new trial" and concluded its opinion by holding "[b]ased on the foregoing reasons, we reverse the judgment below and remand this case to the Blount County Circuit Court for further proceedings consistent with this opinion." *Id.* at 87, 101. On January 25, 2011, the Court of Criminal Appeals entered a judgment stating:

Came the petitioner, Douglas Jordan, by counsel, and the State, by the Attorney General, and this case was heard on the record on appeal from the Circuit Court of Blount County; and upon consideration thereof, this court is of the opinion that there is error in the judgment of the post conviction court. It is, therefore, ordered and adjudged by this court that the order of the post-conviction court is reversed, and the case is

remanded to the Circuit Court of Blount County for any further proceedings consistent with this opinion.

D. Ct. Doc. 76-2, at 1043.

Significantly, the Tennessee Court of Criminal Appeals did not state that it was vacating or setting aside Mr. Jordan's conviction. Instead, the Court sent the case back to the Blount County Circuit Court for "proceedings consistent with this opinion," which based upon the language of the opinion were to be a new trial.

After the Court of Criminal Appeals issued its opinion, Mr. Jordan remained in the penitentiary for several months. D. Ct. Doc. 76-3, at 1044-5; D. Ct. Doc. 76-4, at 1046. Eventually, Mr. Jordan was transported back to the Blount County jail. *Id.* After Mr. Jordan arrived in the Blount County jail, the Blount County Circuit Court held a hearing under the docket number from the first trial, C-11261, at which the State asked the court to set bond at \$250,000 based upon the fact that Mr. Jordan was convicted unanimously before. D. Ct. Doc. 76-3, at 1044-5. Through his counsel, Mr. Jordan asked for a bond of \$20,000 based in part upon Mr. Jordan's record in the first trial of appearing in court, while on bond. *Id.* The trial court set bond at \$75,000. D. Ct. Doc. 76-3, at 1044-5; D. Ct. Doc. 76-5, at 1047. Mr. Jordan was able to make the bond. D. Ct. Doc. 76-3, at 1044-5. See also e.g., D. Ct. Doc. 69, at 792 ¶177.

The case proceeded in the Blount County Circuit Court under the original indictment from the first trial and with the original docket number from the first trial, C-11261. D. Ct. Doc. 76-3, at 1044-5; D. Ct. Doc.

76-6, at 1048-1070. Mr. Jordan's bond for the second trial was under docket number C-11261 and pursuant to the original indictment. *Id.* See also D. Ct. Doc. 76-1, at 1041-1042; D. Ct. Doc. 76-5, at 1047. The State never obtained a new indictment or even a superseding indictment. D. Ct. Doc. 76-3, at 1044-5; D. Ct. Doc. 76-6, at 1048-1070. After the Court of Criminal Appeals's decision, Mr. Jordan was not re-arrested or released from custody, but remained in the penitentiary and later in the Blount County jail, until the trial court granted him bond. D. Ct. Doc. 76-3, at 1044-5; D. Ct. Doc. 76-4, at 1046; D. Ct. Doc. 76-5, at 1047; D. Ct. Doc. 76-6, at 1048-1070. As the case proceeded, the Blount County Circuit court repeatedly stated that it would not revisit issues previously litigated and ruled upon in the first trial, because those decisions from the first trial were the "law of the case." D. Ct. Doc. 76-3, at 1044-5. The trial court stated that its only task was to hold a new trial with the withheld evidence. *Id.* Mr. Jordan's second trial ended in an acquittal on March 28, 2015. Pet. App. 3; D. Ct. Doc. 76-7, at 1071-2; D. Ct. Doc. 69, 793 ¶181.

2. On March 14, 2016, Mr. Jordan filed a 42 U.S.C. § 1983 civil rights action alleging constitutional violations of the First Amendment and the Due Process Clause of the Fourteenth Amendment along with a common law negligence claim, based on the State's withholding of favorable and material evidence that resulted in his wrongful conviction and imprisonment. D. Ct. Doc. 1, at 1-112. Before a responsive pleading was filed, Mr. Jordan amended his complaint on March 27, 2016, adding Defendant Brooks. D. Ct. Doc. 7, at 156-310. Mr. Jordan subsequently amended his complaint to clarify that he was raising a destruction

of evidence claim against Defendant Brooks. D. Ct. Doc. 69, at 807.

On February 9, 2017, Defendant Carpenter filed a Motion for Summary Judgment and accompanying Memorandum of Law asking the court to dismiss the case, because the statute of limitations had run. D. Ct. Doc. 54, at 539-40; D. Ct. Doc. 55, at 555-60. Defendant Blount County joined Defendant Carpenter's Motion. D. Ct. Doc. 58, at 667-8. Mr. Jordan filed a response and accompanying exhibits on March 2, 2017. D. Ct. Doc. 62, at 680-699. On April 7, 2017, Defendant Brooks filed a Motion to Dismiss and accompanying Memorandum of Law, alleging in relevant part that Mr. Jordan had filed his Complaint outside the statute of limitations. D. Ct. Doc. 71, at 954-5; D. Ct. Doc. 72, at 956-66. On May 19, 2017, Mr. Jordan filed his Response to Defendant Brooks's Motion to Dismiss and attached the same exhibits he had filed in response to Defendant Carpenter's Motion for Summary Judgment. D. Ct. Doc. 76, at 1014-40.

3. The district court dismissed the suit as untimely, holding that the one year limitations period for Mr. Jordan's claim commenced when the Tennessee Court of Criminal Appeals granted him a new trial in January 2011, not when the jury acquitted him at his retrial on March 28, 2015. Pet. App. 7-14.

4. A unanimous panel of the Sixth Circuit reversed and held that the suit was timely. Pet. App. 2-6. The parties agreed that Tennessee's one year statute of limitations for personal injury actions governed, but they disagreed as to when the limitations period began to run. Pet. App. 3. The Sixth Circuit followed this Court's instruction in *Wallace* to apply the

commencement rules applicable to the common-law tort most analogous to the § 1983 claim at issue and to consider any “distinctive rule” particular to that type of claim in determining when the statute of limitations begins to run. Pet. App. 3. The court also followed this Court’s instruction in *Heck* that malicious prosecution is the tort most analogous to a claim for withholding evidence, “because that claim, unlike one for false arrest, ‘permits damages for confinement imposed pursuant to legal process.’” *Id.* The court followed *Heck* to conclude that “[o]ne element of a malicious-prosecution claim ‘is termination of the prior criminal proceeding in favor of the accused.’” *Id.* at 3-4. Accordingly, the court concluded that the statute of limitations commenced to run when Mr. Jordan’s criminal proceeding ended with his acquittal. *Id.* at 3-5.

5. Defendants petitioned for en banc review, but the court unanimously denied the petition. Pet. App. 15.

REASONS FOR DENYING REVIEW

I. THE TIMELINESS OF MR. JORDAN’S SUIT DOES NOT WARRANT REVIEW

Petitioner’s claims that the circuits are divided on when the statute of limitations for a *Brady* claim begins to run do not withstand scrutiny. No court of appeals to have considered the issue has held that the statute of limitations on a *Brady* claim begins to run while the plaintiff remains subject to pending criminal proceedings. Moreover, the decision below correctly applies this Court’s decision in *Wallace*.

A. Petitioner's argument that the circuits are divided is incorrect

Petitioner's attempt to demonstrate a circuit split fails. Each one of the circuits petitioner identifies as supposedly disagreeing with the decision below either has indicated that it would reach the same result as the decision below on similar facts, or has not addressed the distinction at issue in this case¹.

1. Petitioner relies chiefly on *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) and *Smith v. Gonzales*, 222 F.3d 1220 (10th Cir. 2000). However, those cases are completely inapposite. In *Poventud*, the plaintiff's attempted murder conviction was overturned for *Brady* violations and the plaintiff subsequently pled guilty to the lesser included offense of attempted robbery. *Poventud*, 750 F.3d at 124. The question before the court, therefore, was whether *Heck* barred the plaintiff from filing suit for the *Brady* violation, because the lawsuit would call into question the plaintiff's guilty plea. *Id.* at 124-5, 127. The court did not consider whether under *Wallace* a *Brady* claim has a distinctive commencement rule. Further the Second Circuit recognized that a *Brady* claim has two distinct types of damages: damages for the purely procedural injury of the withholding of evidence and damages for the wrongful incarceration pursuant to legal process resulting from the withheld evidence. *Id.* at 128-30,

¹ Petitioner also cites several federal district court cases, but these cases are simply irrelevant, because even if these decisions were in conflict with the Sixth Circuit's decision, any conflict with a district court decision would not warrant this court's review. Sup. Ct. Rule 10.

135-6. The court expressly limited its holding to the procedural injury and left open whether *Heck* would bar any damages for the plaintiff's incarceration prior to his guilty plea. *Id.* at 135 -36 and n. 18. The court did state, however, that *Heck* would bar any *Brady* based claim that the plaintiff was innocent. *Id.* at 135, 137 n. 20. There is, therefore, nothing even remotely similar between this case and *Poventud*. The cases deal with entirely separate legal issues: whether a claim is barred by *Heck* as opposed to when the statute of limitations on a *Brady* claim begins to run. The cases are also factually distinct. In *Poventud*, the plaintiff pled guilty and the court held that the plaintiff could sue for damages for the purely procedural injury of withheld evidence. In this case, although Mr. Jordan certainly suffered a procedural injury from the withheld evidence, Mr. Jordan was acquitted and seeks damages for the eight years that as an innocent man he was incarcerated pursuant to legal process due to the withheld evidence. Pet. App. 2, 3. In *Poventud*, the court stated that *Heck* would bar that type of *Brady* claim until it was favorably terminated. There is, therefore, nothing even remotely inconsistent between *Poventud* and the Sixth Circuit's opinion in this case. If anything, *Poventud* suggests an alternate ground for affirmance.

In discussing the purported disagreement among the federal circuits, petitioner also discusses at length the Tenth Circuit's opinion in *Smith*. But *Smith*, decided before this Court's decision in *Wallace*, does not address whether the statute of limitations for a *Brady* claim has a distinctive commencement rule. *Smith*, 222 F.3d at 1222-1223. The case focuses on when a plaintiff can file suit under *Heck* and runs the statute of

limitations from that date without considering whether the statute of limitations on a *Brady* claim has a distinctive rule for commencement. *Id.*

Similarly, the Eighth Circuit's decision in *Buckley v. Ray*, 848 F.3d 855 (8th Cir. 2017), also fails to address whether the statute of limitations for a *Brady* claim has a distinctive commencement rule. *Id.* In *Buckley*, the plaintiff argued that the statute of limitations did not begin to run on his *Brady* claim until the charges against him were dismissed, because his *Brady* claim would imply the invalidity of his conviction under *Heck*. *Id.* at 866. The Court, therefore, addressed when a claim accrues under *Heck*. *Id.* at 866-7. The plaintiff apparently not having raised the issue, the court did not address whether a *Brady* claim has a distinctive commencement rule. *Id.*

Even if it was error for the Eighth Circuit to have failed to apply *Wallace*'s directive to identify the most analogous common law tort to determine whether a *Brady* claim has a distinctive commencement rule, an erroneous decision omitting part of the analysis would not be reason to grant certiorari. A reason to grant certiorari would be if the Eighth Circuit had considered the issue under *Wallace* and determined that a *Brady* claim does not have a distinctive commencement rule. In that case, two circuits would have analyzed the same issue and applied the same case but reached different results. Sup. Ct. Rule 10(a). That, however, is not the case here.

2. Just as there is no inter-circuit split, so too is there no intra circuit split. The petitioner seeks principally to rely upon the Sixth Circuit's decision in *D'Ambrosio v. Marino*, 747 F.3d 378 (6th Cir. 2014).

Notably, Judge Kethledge, who authored the opinion in this case, was a member of the unanimous panel in *D'Ambrosio*. As Judge Kethledge correctly states, both cases involve a criminal court proceeding which had been terminated and therefore, any contrary language in *D'Ambrosio* was merely dicta. Pet. App. 4-5. The issue of a distinctive commencement rule having been raised in this case, although not at issue in *D'Ambrosio*², Judge Kethledge writing on behalf of a unanimous panel correctly applied *Wallace* to conclude that because Mr. Jordan through his *Brady* claim seeks damages for his wrongful incarceration based upon legal process, the claim is most analogous to a claim for malicious prosecution. Pet. App. 3-5. Accordingly, the statute does not begin to run until the criminal proceedings have been terminated. *Id.*

Petitioner's arguments that there is an internal split of authority in other circuits fare no better. Petitioner relies upon two pre-*Wallace* Fifth Circuit cases, but neither of these cases address whether the statute of limitations for a *Brady* claim has a distinctive commencement rule. *Clay v. Allen*, 242 F.3d 679 (5th Cir. 2001) does not involve a *Brady* claim at all, but rather a claim for excessive bail and as the petitioner acknowledges, *Davis v. Zain*, 79 F.3d 18 (5th Cir. 1996) involves a claim for prosecutorial misconduct and for perjury. Both cases address when a plaintiff may file suit under *Heck* and not whether the statute

² In *D'Ambrosio*, the court determined that the *Heck* bar had been lifted prior to the running of the statute of limitations. *D'Ambrosio*, 747 F.3d at 384-6. The court, therefore, did not reach the issue of whether the statute of limitations for a *Brady* claim has a distinctive commencement rule.

of limitations for a *Brady* claim has a distinctive rule for commencement. *Clay*, 242 F.3d at 81-2; *Davis*, 79 F.3d at 19-20. Similarly, *National Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010) involved a dispute between an insurance company and its insured over whether the insurance company owed the insured coverage. *Id.* at 338-9. The court held that the insurance company did not owe the insured coverage on claims of false imprisonment, unconstitutional conviction, imprisonment, and denial of due process, because those claims did not accrue until the plaintiff was granted habeas corpus, which was after the policy had lapsed. *Id.* at 344. The court did not address, because it did not need to, whether any of those claims had a distinctive rule for the commencement of the statute of limitations. *Id.* Likewise, *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014), addressed whether a suit was barred by *Heck* and did not involve a *Brady* claim at all, but rather a claim for evidence obtained in violation of *Miranda* warnings. *Id.* at 758. The case was similar to *Poventud*, because the plaintiff was convicted in his retrial and sought damages essentially for a procedural injury. *Id.* at 758, 760-1.

3. When the issue is properly raised, the circuits have no difficulty applying *Wallace* to conclude that a *Brady* claim is most analogous to a claim for malicious prosecution and therefore, has a distinctive commencement rule. In those circumstances, the circuits have uniformly held consistently with the Sixth Circuit in this case that the statute of limitations for a *Brady* claim begins to run when the criminal proceedings end because the plaintiff seeks damages for wrongful incarceration pursuant to legal process. E.g., *Owens v. Balt. City State's Attys. Office*, 767 F.3d

379, 388-91 (4th Cir. 2014); *Bradford v. Scherschligt*, 803 F.3d 382, 387-9 (9th Cir. 2015). Far from a circuit split, the circuits are uniform in the correct application of this Court’s precedent.

B. The decision below was correct

1. In *Wallace v. Kato*, 549 U.S. 384 (2007), the Court explained that the date when the statute of limitations begins to run on a § 1983 action is determined by analogy to common-law tort principles. *Id.* at 388-92. The Court additionally instructed that the application of general common- law rules is subject to “refinement” based on the “common law’s distinctive treatment of the torts” that “provide the closest analogy” to the claims at issue. *Id.* at 388 (citation, internal quotation marks, and source’s alteration marks omitted). In order to determine what “refinement[s]” applied in *Wallace*, which involved a claim for an allegedly unconstitutional arrest, the court relied on common- law treatises for the rules governing the most analogous torts, false arrest and false imprisonment. *Id.* at 388-90. The Court distinguished between the accrual date and the date on which the statute of limitations begins to run: the cause of action for false imprisonment accrues as soon as the wrongful detention occurs, *id.* at 388, 390 n.3, but under the common law the statute of limitations does not begin to run until the false imprisonment ends, *id.* at 389. Thus, *Wallace* made clear that (contrary to petitioner’s argument) the accrual date does not dictate when the statute of limitations begins to run. Finally, the Court explained the role of *Heck v. Humphrey*, 512 U.S. 477 (1994), in determining timeliness: *Heck* “delays what would otherwise be the accrual date of a tort action

until the setting aside of an extant conviction which success in that tort action would impugn.” *Wallace*, 549 U.S. at 393 (emphasis removed). The Court did not, however, suggest that *Heck* determines when the statute of limitations begins to run, a question resolved by analogy to the common law.

Applying *Wallace*, the court of appeals followed the “common law’s distinctive treatment,” *id.* at 388, of the tort that this Court in *Heck* identified as the common law tort most analogous to a *Brady* claim: malicious prosecution. *Heck*, 512 U.S. at 484; Pet. App. 3. Relying on this Court’s instruction in *Heck*, the court of appeals concluded that the limitations period for malicious prosecution does not begin to run until the proceedings against the former-defendant-turned- plaintiff have been “favorably terminated,” and the court further found that the meaning of that standard was that the criminal proceedings had to have been concluded. Pet. App. 3-4. Like *Wallace*, the court recognized that *Heck* delays accrual of the cause of action but does not determine when the statute of limitations begins to run. See *id.* at 4-5. Thus, the court held that the removal of the *Heck* bar by the setting aside of Mr. Jordan’s original conviction did not affect the running of the statute of limitations, whose commencement is governed by the “favorable termination” standard of the common law. *Id.* The court followed *Wallace* to the letter.

Petitioner’s argument that the decision below is inconsistent with *Heck* is disproved by *Wallace*, which treated *Heck* just as the court of appeals did here: as a bar to a § 1983 suit when it would impugn the validity of an extant conviction or sentence but not as the

determinant of when the statute of limitations begins to run once such a suit is permitted. See *Wallace*, 549 U.S. 388- 89, 390 n.3, 393. For that, *Wallace* teaches, the common law governs. Thus, *Heck* and *Wallace* answer two different questions. Whereas *Heck* determines when a § 1983 suit is premature, *Wallace* shows courts how to determine when such a suit is dilatory. Accordingly, petitioner's reliance on *Heck* to try to answer the statute of limitations question is misplaced.

2. As a practical matter, it runs afoul of common sense for a § 1983 cause of action to commence before damages are known. An essential element of the tort claim is damages, and, without damages, there is no claim. For instance, in the present case, if, following his post conviction relief, Mr. Jordan were to have been convicted a second time upon retrial, then he would not have suffered damages from his wrongful incarceration as a result of the withheld evidence. In the event he was retried and convicted again, then the fact that exculpatory evidence was withheld would not have caused him any substantive harm, because he would be guilty regardless of the withheld exculpatory evidence and would be entitled to jail credit for the time he had already served. Therefore, he would not have any damages for wrongful incarceration because, with or without the exculpatory evidence, he would be guilty.

However, that is not the case here, as Mr. Jordan was retried and acquitted. He won post conviction relief on the basis that material evidence was withheld. He was then retried and acquitted. Therefore, upon acquittal, Mr. Jordan incurred damages for wrongful incarceration. His damages consist of the approximately

eight years of being wrongfully incarcerated and all the turmoil that assuredly uprooted his life during that time. These damages only exist because he was acquitted during his second trial. In other words, Mr. Jordan's constitutional tort claim only became ripe, when his incarceration was determined to be wrongful.³

Additionally, were Mr. Jordan forced to prosecute his civil case during an ongoing criminal matter, there would exist the very real possibility of rulings in the civil case affecting his criminal matter, or vice versa. Certainly, the civil case could be stayed until the resolution of the criminal prosecution, which would, in effect, be the same thing as staying the statute of limitations until his acquittal. Regardless, the filing of a civil suit for damages could certainly affect the prosecution's decision making in regard to the criminal matter.

Moreover, as a practical matter, following the District Court's ruling would mean that every potential plaintiff afforded post conviction relief on a withholding claim (or any other constitutional violation for that matter) would need to file a federal civil lawsuit, while the underlying criminal case was still pending. Indeed,

³ Petitioner argues that *Carey v. Piphus*, 435 U.S. 247 (1978) somehow stands for the proposition that a 1983 violation is actionable even without actual damages. In *Carey*, two high school students were suspended without a hearing, and the Court held that, while the students were not entitled to any actual damages (as they had not offered any proof of damages), they were "entitled to recover nominal damages not to exceed one dollar ..." for the deprivation of rights. *Id.* at 267. Mr. Jordan does not seek nominal damages for his procedural injury, but actual damages for his wrongful confinement pursuant to legal process.

the prudent constitutional tort plaintiff wishing to err on the side of caution would file suit on any violation to ensure that the case was timely, which would also greatly add to the courts' burden of deciding, which cases should go forward under *Heck* and which should not. This would encourage a great influx of these suits into the federal courts, where the ones that could proceed under *Heck* would either linger for years as stayed cases on the courts' dockets or the cases would proceed in tandem with the criminal prosecution, giving rise to the real possibility that a civil plaintiff could recover millions in damages for an incarceration that was later adjudicated in the criminal case not to have been wrongful.

II. THIS CASE IS NOT A PROPER VEHICLE TO RESOLVE WHEN A *BRADY* CLAIM ACCRUES UNDER *HECK*

Even if the Court were interested in deciding when a *Brady* claim accrues under *Heck*, this case is a poor vehicle for deciding it, because the Sixth Circuit did not decide the case on that issue or even consider it and therefore, the Sixth Circuit's actual basis for decision presents an alternative basis for affirmance. In other words, deciding the accrual issue in this case would simply amount to an advisory opinion as the basis for the Sixth Circuit's decision is correct and there is no conflict in regard to it: the statute of limitations on a *Brady* claim (at least for damages for wrongful incarceration) has a distinctive commencement rule based upon its closest common law analogue: malicious prosecution.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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