APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-3543

[Filed January 7, 2020]

JOHNNIE LEE SAVORY, *Plaintiff-Appellant*,	)
v.	)
WILLIAM CANNON, SR., as special representative for CHARLES CANNON, *et al.*, *Defendants-Appellees.*	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-00204 — **Gary Feinerman**, *Judge.*

ARGUED SEPTEMBER 24, 2019 —
DECIDED JANUARY 7, 2020

Before WOOD, *Chief Judge,* and EASTERBROOK, KANNE, ROVNER, SYKES, HAMILTON, BARRETT, BRENNAN, SCUDDER and ST. EVE, *Circuit Judges*.[*]

ROVNER, *Circuit Judge.* Johnnie Lee Savory spent thirty years in prison for a 1977 double murder that he insists he did not commit. Even after his release from prison, he continued to assert his innocence. Thirty-eight years after his conviction, the governor of Illinois pardoned Savory. Within two years of the pardon, Savory filed a civil rights suit against the City of Peoria ("City") and a number of Peoria police officers alleging that they framed him. The district court found that the claims accrued more than five years before Savory filed suit, when he was released from custody and could no longer challenge his conviction in habeas corpus proceedings. Because the statute of limitations on his claims is two years, the district court dismissed the suit as untimely. Savory appealed to this court, and the panel reversed and remanded after concluding that the claim was timely under *Heck v. Humphrey*, 512 U.S. 477 (1994), because it accrued at the time of Savory's pardon, within the two-year limitations period. We granted the defendants' petition for rehearing *en banc* and vacated the panel's opinion and judgment. We again conclude that *Heck* controls the outcome here, and we reverse and remand for further proceedings.

---

[*] Judge Flaum took no part in the decision to consider this case en banc, nor in this court's subsequent en banc consideration and disposition.

I.

In reviewing a grant of a motion to dismiss, we are required to assume that the facts alleged in the complaint are true, but we offer no opinion on the ultimate merits because further development of the record may cast the facts in a light different from the complaint. *Dobbey v. Illinois Dep't of Corr.*, 574 F.3d 443, 444, 447 (7th Cir. 2009). *See also Tobey v. Chibucos*, 890 F.3d 634, 645 (7th Cir. 2018) (on a motion to dismiss, a court must accept as true the well-pleaded factual allegations in the complaint). In January 1977, Peoria police officers arrested fourteen-year-old Savory for the rape and murder of nineteen-year-old Connie Cooper and the murder of her fourteen-year-old brother, James Robinson. According to the complaint, these officers subjected Savory to an abusive thirty-one hour interrogation over a two-day period. The officers fabricated evidence, wrongfully coerced a false confession from the teen, suppressed and destroyed evidence that would have exonerated him, fabricated incriminating statements from alleged witnesses, and ignored ample evidence pointing to other suspects. No legitimate evidence implicated Savory. His arrest, prosecution and conviction were based entirely on the officers' fabricated evidence and illegally extracted false confession.

Savory was tried as an adult in 1977 and convicted of first degree murder. After that conviction was overturned on appeal, he was convicted again in 1981. He was sentenced to a term of forty to eighty years in prison. After Savory exhausted direct appeals and post-conviction remedies in state court, he unsuccessfully

sought federal habeas corpus relief. He repeatedly petitioned for clemency and also sought DNA testing. After thirty years in prison, he was paroled in December 2006. Five years later, in December 2011, the governor of Illinois commuted the remainder of Savory's sentence. That action terminated his parole (and therefore his custody) but left his conviction intact. On January 12, 2015, the governor pardoned Savory of the crime of murder,[1] and declared that Savory was "acquitted and discharged of and from all further imprisonment and restored to all the rights of citizenship which may have been forfeited by the conviction." The pardon was granted with an "Order Permitting Expungement Under The Provisions Of 20 ILCS 2630/5.2(e)." R. 71-3. On January 11, 2017, less than two years after the pardon, Savory filed suit against the City and the police officers.

That suit asserted six claims under 42 U.S.C. § 1983, five against the individual defendants and one against the City. The five counts against the individual defendants alleged that they: (1) coerced a false confession from Savory in violation of the Fifth and Fourteenth Amendments; (2) coerced a false confession from Savory in violation of his due process rights under the Fourteenth Amendment; (3) maliciously prosecuted Savory, depriving him of liberty without probable cause in violation of the Fourth and Fourteenth

[1] The governor simultaneously pardoned Savory of the crime of possessing contraband in a penal institution, a crime for which he was convicted in 1994.

Amendments;[2] (4) deprived Savory of his right to a fair trial, his right not to be wrongfully convicted, and his right to be free of involuntary confinement and

---

[2] Savory acknowledged that, at the time of filing his complaint, our circuit law held that a "so-called federal malicious prosecution claim" was not actionable under section 1983. R. 1, at 20 n.1. He nevertheless pled Count III under the Fourth and Fourteenth Amendments in order to preserve it pending the outcome of the Supreme Court's consideration of *Manuel v. City of Joliet, Ill.*, 590 F. App'x 641 (7th Cir. 2017). The Court subsequently held that "the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 920 (2017). The Court remanded the case for consideration of the elements of the claim and the accrual date. Acknowledging that courts are to look first to the common law of torts in defining the contours and prerequisites of a section 1983 claim, the Court declined to resolve the dispute between the parties as to the most analogous common-law tort. The Court also noted that common-law principles guide rather than control the definition of section 1983 claims, and that "[i]n applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." 137 S. Ct. at 921. Manuel argued that the claim resembled malicious prosecution and the defendant likened the claim to false arrest. We subsequently held that the nature of Manuel's claim was detention without probable cause, even though Manuel was being held by authority of a judicial decision that probable cause existed. Manuel had asserted that the police hoodwinked the judge by falsely asserting that pills he possessed contained unlawful substances. Manuel was released the day after the prosecutor dropped the charges. Because his detention was judicially authorized, we invoked the holdings of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck*, and held that the claim would accrue when the detention ended. *Manuel v. City of Joliet, Ill.*, 903 F.3d 667, 670 (7th Cir. 2018). In Savory's case, the district court did not separately analyze the accrual date for Count III. Now that the Supreme Court has resolved *Manuel*, the accrual date for Count III should be considered on remand.

servitude in violation of the Thirteenth and Fourteenth Amendments; and (5) failed to intervene as their fellow officers violated Savory's civil rights. In the sixth count, Savory alleged that the City's unlawful policies, practices and customs led to his wrongful conviction and imprisonment in violation of section 1983. Savory also brought state law claims against the defendants but later conceded that those claims were untimely under the state's one-year statute of limitations. Those claims are not part of this appeal.

The defendants moved to dismiss Savory's section 1983 claims on several grounds, but the district court addressed only one: the statute of limitations. The court recognized that, under *Heck v. Humphrey*, 512 U.S. 477 (1994), Savory could not bring his section 1983 claims unless and until he obtained a favorable termination of a challenge to his conviction. The parties agreed that the relevant statute of limitations required Savory to bring his claims within two years of accrual, but the parties disagreed on when the *Heck* bar lifted. Savory asserted that his claims did not accrue until he received a pardon from the Illinois governor on January 12, 2015, rendering his January 11, 2017 suit timely. The defendants asserted that the *Heck* bar lifted when Savory's parole was terminated on December 6, 2011, making his claims untimely. The district court concluded that the defendants had the better view of *Heck* and dismissed the claims with prejudice. Savory appeals.

II.

We review *de novo* a Rule 12(b)(6) dismissal on statute of limitations grounds. *Tobey*, 890 F.3d at 645; *Amin Ijbara Equity Corp. v. Village of Oak Lawn*, 860 F.3d 489, 492 (7th Cir. 2017). For a section 1983 claim, federal courts look to state law for the length of the limitations period. *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019). *See also Owens v. Okure*, 488 U.S. 235, 249–50 (1989) ("where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions"). In Illinois, the applicable limitations period is two years. *Tobey*, 890 F.3d at 645. However, the "accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (emphasis in original). Instead, certain aspects of section 1983 claims, including accrual dates, are "governed by federal rules conforming in general to common-law tort principles." *Id.* Under those common-law tort principles, claims accrue when a plaintiff has a complete and present cause of action. *Id.*; *McDonough*, 139 S. Ct. at 2155. So we must determine the first moment at which Savory had a complete and present cause of action.

A.

We begin our analysis of the accrual date for Savory's claims with *Heck*, which addressed whether and when a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. *Heck*, 512 U.S. at 478. While

Heck was serving a fifteen-year sentence for manslaughter, he brought a section 1983 action against two prosecutors and a state police inspector asserting that they engaged in an unlawful investigation that led to his arrest, that they knowingly destroyed exculpatory evidence, and that they caused an unlawful voice identification procedure to be used at his trial. 512 U.S. at 478–79.

The Court noted that such a case lies at the intersection of federal prisoner litigation under section 1983 and the federal habeas corpus statute. 512 U.S. at 480. The Court had first considered the potential overlap between these two statutes in *Preiser*, and held then "that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." *Heck*, 512 U.S. at 481 (citing *Preiser*, 411 U.S. at 488–90). Heck, however, was not seeking immediate or speedier release, but monetary damages, and so his claim was not covered by the holding of *Preiser*. Section 1983 created "a species of tort liability," and so in determining whether there were any bars to Heck's suit, the Court turned first to the common law of torts. *Heck*, 512 U.S. at 481, 483.

Heck's section 1983 claim most closely resembled the common-law tort of malicious prosecution, which allows damages for confinement imposed pursuant to legal process, including compensation for arrest and imprisonment, discomfort or injury to health, and loss of time and deprivation of society. *Heck*, 512 U.S. at 484. *See also McDonough*, 139 S. Ct. at 2156 (finding

that the plaintiff's section 1983 fabricated-evidence claim most closely resembled the tort of malicious prosecution). "One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. This requirement avoids creating two conflicting resolutions arising out of the same transaction—an extant, enforceable criminal conviction on the one hand, and a civil judgment implying the invalidity of that conviction on the other—and steers clear of parallel litigation over the issue of guilt. The requirement also prevents a convicted criminal from collaterally attacking the conviction through a civil suit:

> We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.
>
> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's

> issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Heck, 512 U.S. at 486–87 (footnotes omitted; emphasis in original).

The Court made pellucid the broad consequences of its plainly stated rule:

> We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action. Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.

Heck, 512 U.S. at 489. Returning to its comparison to common-law torts, the Court concluded that, just as a claim for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, "so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. at 489–90.

The Supreme Court has reaffirmed the *Heck* framework several times. *See Wallace*, 549 U.S. at 393 (noting that the *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has *not* been invalidated; *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.") (emphasis in original); *Nelson v. Campbell*, 541 U.S. 637, 646 (2004) (citing *Heck* for the proposition that "a § 1983 suit for damages that would 'necessarily imply' the invalidity of the fact of an inmate's conviction, or 'necessarily imply' the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence"); *Edwards v. Balisok*, 520 U.S. 641, 643, 645–48 (1997) (reaffirming the holding of *Heck* and extending it to claims challenging prison disciplinary proceedings that implicate the length of a prisoner's sentence). The Court most recently revisited *Heck* in *McDonough v. Smith*, 139 S. Ct. 2149 (2019). There, the Court held that a section 1983 claim for fabricating evidence in a criminal prosecution accrued upon acquittal, and not when the prosecutor's knowing

use of the fabricated evidence first caused some deprivation of liberty for the plaintiff. 139 S. Ct. at 2153–54.

The plaintiff in *McDonough* alleged that the prosecutor fabricated evidence in order to inculpate him, including falsifying affidavits, coaching witnesses to lie, and orchestrating a suspect DNA analysis to link McDonough to the crime. The prosecutor brought criminal charges against McDonough and presented the fabricated evidence at a trial which ended in a mistrial. The same prosecutor then retried McDonough, again presenting the fabricated evidence. The second trial resulted in an acquittal. McDonough asserted two claims in his section 1983 action, one for malicious prosecution and one for fabricated evidence. The district court dismissed the malicious prosecution claim as barred by prosecutorial immunity, and dismissed the fabricated evidence claim as untimely, finding that the claim accrued when the fabricated evidence was used against McDonough. The court of appeals affirmed, finding that McDonough had a complete fabricated-evidence claim as soon as he could show that the prosecutor's knowing use of fabricated evidence caused him some deprivation of liberty. Relying on *Heck* and its progeny, the Supreme Court reversed, concluding:

> The statute of limitations for a fabricated-evidence claim like McDonough's does not begin to run until the criminal proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor. This conclusion follows both from the rule for the most natural common-

> law analogy (the tort of malicious prosecution) and from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment.

139 S. Ct. at 2154–55. In McDonough's case, favorable termination occurred at acquittal after the second trial.[3]

The Court began the accrual analysis by identifying the specific constitutional right that had been infringed, a due process right not to be deprived of liberty as a result of the fabrication of evidence by a government officer. *McDonough*, 139 S. Ct. at 2155; *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 920 (2017).

---

[3] Savory argued in supplemental briefing that this holding in *McDonough* calls into question the continued validity of *Johnson v. Winstead*, 900 F.3d 428 (7th Cir. 2018). *McDonough* addressed claim accrual in the context of a trial resulting in mistrial, followed by retrial resulting in acquittal. *Johnson* addressed claim accrual in the context of a trial resulting in a conviction, followed by reversal on appeal, then retrial resulting in a second conviction, followed again by reversal on appeal. *McDonough* concluded that the claim accrued only at the resolution of the second trial. *Johnson* allowed for two accrual dates, one at favorable termination of the first trial (in the form of the appellate reversal) and the second at favorable termination of the second trial (again in the form of reversal on appeal). Savory asks this court to resolve the seeming inconsistency by finding that there is only one accrual date in a single criminal case with a retrial. To the extent that it is necessary to reconsider *Johnson*, we conclude that the more prudent course is to allow the district court to consider in the first instance, after full briefing from both the plaintiff and the defendants, whether and how *McDonough* affects *Johnson*.

Noting its frequent practice of deciding accrual issues by reference to common-law principles governing analogous torts, the Court concluded that the most analogous common-law tort for McDonough's fabricated-evidence claim was malicious prosecution.[4] *See Heck*, 512 U.S. at 484. Following that analogy, the Court concluded that McDonough could not bring his section 1983 fabricated evidence claim prior to the favorable termination of his prosecution. *McDonough*, 139 S. Ct. at 2156. Citing *Heck*, *Preiser*, 411 U.S. at 490, and *Younger v. Harris*, 401 U.S. 37, 43 (1971), the Court reiterated the rationales underlying the favorable-termination rule:

> [The] favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments. … The requirement likewise avoids allowing collateral attacks on criminal judgments through civil litigation. … These concerns track

---

[4] Savory also argued in supplemental briefing that we should overrule *Manuel v. City of Joliet, Ill.*, 903 F.3d 667 (7th Cir. 2018), to the extent that opinion rejected analogies to common-law torts in section 1983 actions. Savory contends that *McDonough* dictates–contrary to our 2018 *Manuel* opinion–that his claim for unlawful detention after legal process accrued at the same time as all of his other claims, specifically at the time of his pardon. We again conclude that, to the extent that it is necessary to consider this argument, the prudent course of action is for Savory to raise these issues first in the district court, where, with the benefit of full briefing, the court may consider in the first instance whether and how *McDonough* affects our 2018 decision in *Manuel*.

> similar concerns for finality and consistency that have motivated this Court to refrain from multiplying avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983.

McDonough, 139 S. Ct. at 2156–57 (internal citations and quotation marks omitted). Although *Heck* involved a plaintiff who had been convicted rather than a plaintiff who was acquitted, the Court found that:

> the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions. See *Preiser*, 411 U.S. at 490–491, 93 S.Ct. 1827. The principles and reasoning of *Heck* thus point toward a corollary result here: There is not " 'a complete and present cause of action,' " *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091, to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, see 512 U.S. at 486–487, 114 S.Ct. 2364, will the statute of limitations begin to run.

McDonough, 139 S. Ct. at 2158.

B.

Applying the analytical paradigm of *Heck* and *McDonough* to Savory's case, we first look at the nature of his section 1983 claims and conclude that, like Heck's claims, they strongly resemble the common-law

tort of malicious prosecution. Indeed, Savory's claims largely echo Heck's complaint, asserting the suppression of exculpatory evidence and the fabrication of false evidence in order to effect a conviction. There is no logical way to reconcile those claims with a valid conviction. Therefore, *Heck* supplies the rule for accrual of the claim. Because Savory's claims "would necessarily imply the invalidity of his conviction or sentence," his section 1983 claims could not accrue until "the conviction or sentence ha[d] been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487. In Savory's case, that occurred on January 12, 2015, when the governor of Illinois pardoned him.[5] *Gilbert v. Cook*, 512 F.3d 899, 900 (7th Cir. 2008) ("the plaintiff in an action under 42 U.S.C. § 1983 may not pursue a claim for relief that implies the invalidity of a criminal conviction, unless that conviction has been set aside by appeal, collateral review, or pardon."). Until that moment, his conviction was intact and he had no cause of action under section 1983. *Heck*, 512 U.S. at 489–90. His January 11, 2017, lawsuit was therefore timely under *Heck*, and we must reverse the district court's judgment and remand for further proceedings.

---

[5] At oral argument for the *en banc* rehearing, counsel for the defendants took the position that Savory's pardon was not a favorable termination because it was a general pardon rather than a pardon based on innocence. As we will discuss below, Savory's pardon does operate as a favorable termination for the purposes of the *Heck* analysis.

McDonough supports the same result. Because McDonough (who was not held in custody during his trials) was acquitted rather than convicted, his section 1983 claim would not have infringed upon the exclusivity of the habeas corpus remedy. The Court nevertheless indicated that the other concerns discussed in *Heck* still guided the outcome, and no section 1983 claim could proceed until the criminal proceeding ended in the defendant's favor or the resulting conviction was invalidated within the meaning of *Heck*. So too with Savory. Although his sentence had been served and habeas relief was no longer available to him (and thus habeas exclusivity was not at issue), the other considerations raised in *Heck* controlled the outcome: he had no complete cause of action until he received a favorable termination of his conviction, which occurred when the governor issued a pardon for the subject conviction.

C.

The defendants here contend that Savory's federal claims accrued when he was released from state custody in 2011, even though his conviction remained intact. The rule urged by the defendants would result in claims being dead on arrival in virtually all section 1983 suits brought in relation to extant convictions. "Congress has specifically required all federal courts to give preclusive effect to state–court judgments whenever the courts of the State from which the judgments emerged would do so[.]" *Allen v. McCurry*, 449 U.S. 90, 96 (1980). *See* 28 U.S.C. § 1738 (judicial proceedings of any court of any State "shall have the same full faith and credit in every court within the

United States and its Territories and Possessions as they have by law or usage in the courts of such State"). In *Allen*, the Supreme Court considered "whether the rules of res judicata and collateral estoppel are generally applicable to § 1983 actions."[6] 449 U.S. at 96. The Court concluded that the usual rules of preclusion apply in section 1983 actions. 449 U.S. at 103–05. Federal courts apply the preclusion law of the state where the judgment was rendered, so long as the state in question satisfies the applicable requirements of the Due Process Clause. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481–82 (1982). The *Heck* bar accounts for the preclusive effect of state court criminal judgments on civil litigation by lifting the bar only when the plaintiff has achieved a favorable termination of the criminal proceeding. *See Morgan v. Schott*, 914 F.3d 1115, 1120 (7th Cir. 2019) (the *Heck* rule is a version of issue preclusion under which the outstanding criminal judgment or disciplinary sanction, as long as it stands, blocks any inconsistent civil judgment). Under the defendants' rule, a section 1983 claim would accrue on release from custody even though the conviction remained intact, and even though preclusion rules would effectively prevent the plaintiff from bringing any claim inconsistent with the original criminal

---

[6] Under res judicata, also known as claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen*, 449 U.S. at 94. Under collateral estoppel, also known as issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.*

conviction. Claimants like Savory, who obtained a pardon several years after release from custody and who may have the most meritorious claims, would be too late. Nothing in *Heck* requires such a result.

D.

Although a straight-forward reading of *Heck* and its progeny (including *McDonough*) determines the outcome here, we must address the defendant's arguments that concurring and dissenting opinions of certain Supreme Court justices cobbled together into a seeming majority or the opinions of this court may somehow override the prime directive of *Heck*. Several of our post-*Heck* cases contain dicta or rely on reasoning that is in conflict with *Heck* and *McDonough*, and we must address and clarify those cases as well.

1.

The misunderstanding that led to the erroneous result in the district court here originated in a concurrence in *Heck* filed by Justice Souter and joined by Justices Blackmun, Stevens and O'Connor. In that concurrence, Justice Souter agreed that reference to the common-law tort of malicious prosecution was a useful starting point but he asserted that it could not alone provide the answer to the conundrum found at the intersection between section 1983 and the federal habeas statute. Ultimately, Justice Souter suggested a slightly different rule that he submitted would avoid any collision between section 1983 and the habeas statute:

> A state prisoner may seek federal-court § 1983 damages for unconstitutional conviction or

> confinement, but only if he has previously established the unlawfulness of his conviction or confinement, as on appeal or on habeas. This has the effect of requiring a state prisoner challenging the lawfulness of his confinement to follow habeas's rules before seeking § 1983 damages for unlawful confinement in federal court[.]

Heck, 512 U.S. at 498 (Souter, J., concurring).

For persons *not* in custody for the purposes of the habeas statute, "people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences," there would be no requirement to show "the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment" because:

> the result would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling. The reason, of course, is that individuals not "in custody" cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.

Heck, 512 U.S. at 500 (Souter, J., concurring).

In contrast, of course, the *Heck* majority's rule requires that a plaintiff *always* obtain a favorable resolution of the criminal conviction before bringing a section 1983 claim that would necessarily imply the invalidity of a conviction or sentence. The majority opinion specifically rejected Justice Souter's alternate rule:

> Justice SOUTER also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon that principle in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges. We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.

Heck, 512 U.S. at 490 n.10 (citations omitted). The Court thus expressly rejected a rule tied to the end of custody. In that same footnote, the Court also dismissed the notion that section 1983 must be interpreted in a manner that provides a remedy for all conceivable invasions of federal rights. *Id*. *See also Allen*, 449 U.S. at 103–04 (inability to obtain federal habeas corpus relief upon a Fourth Amendment claim does not render the doctrine of collateral estoppel inapplicable to a section 1983 suit on that same claim). In other words, there is not always a section 1983

remedy for every constitutional wrong. *See San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323, 342 (2005) (issues actually decided in valid state-court judgments may well deprive plaintiffs of the right to have their federal claims re-litigated in federal court). In *Allen*, for example, the Court made clear that an inability to pursue relief through the habeas statute would not relieve a section 1983 claimant of the preclusive effect of a state court judgment where the claimant had a full and fair opportunity to litigate the issue in state court. *Allen*, 449 U.S. at 102–05.

But in *Spencer v. Kemna*, 523 U.S. 1, 21 (1998), Justice Souter again filed a concurrence expressing the view that he urged in his *Heck* concurrence, namely "that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy."[7] Justice Ginsburg, who had been in the majority in *Heck*, this time agreed with Justice Souter (who was also joined by Justices O'Connor and Breyer), joining his concurrence and filing her own: "Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully

[7] In Savory's case, of course, it was *not* impossible as a matter of law to satisfy the favorable-termination rule even though he had fully served his sentence and lacked access to habeas corpus. Savory sought and received an executive pardon. Illinois also provides a statutory remedy allowing petitioners to seek relief from final judgments in certain circumstances. *See* 735 ILCS 5/2-1401.

served, for example) fit within § 1983's 'broad reach.'" *Spencer*, 523 U.S. at 21 (Ginsburg, J., concurring). Justice Stevens dissented in *Spencer*, but he approved Justice Souter's basic premise: "Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice SOUTER explains, that he may bring an action under 42 U.S.C. § 1983." *Spencer*, 523 U.S. at 25 n.8 (Stevens, J., dissenting).

The defendants contended in the district court and maintain on appeal that this dicta in concurring and dissenting opinions, cobbled together, now formed a new majority, essentially overruling footnote 10 in *Heck*. But it is axiomatic that dicta from a collection of concurrences and dissents may not overrule majority opinions. *See Agostini v. Felton*, 521 U.S. 203, 217, 238 (1997) (the views of five concurring Justices that a case should be reconsidered or overruled cannot be said to have effected a change in the law when the propriety of that case was not before the Court; instead, the case controls until the Court reinterprets and overrules the binding precedent); *Cross v. United States*, 892 F.3d 288, 303 (7th Cir. 2018) ("Unless and until a majority of the Court overrules the majority opinions in [two prior cases], they continue to bind us."). The Supreme Court may eventually adopt Justice Souter's view, but it has not yet done so and we are bound by *Heck*. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative

of overruling its own decisions."). *See also Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) (noting that members of the Court had expressed the view that "unavailability of habeas for other reasons may also dispense with the *Hec*k requirement" but indicating that "[t]his case is no occasion to settle the issue.").

The defendants also assert that footnote 10 of *Heck* (which specifically rejected Justice Souter's proposed rule) was dicta, and therefore does not control the outcome here. The plaintiff in *Heck*, they note, was incarcerated and allowing a section 1983 suit during incarceration would have permitted an end-run around the habeas corpus statute. No such concern is present, they argue, in the scenario addressed in footnote 10 of *Heck*, specifically, persons who are no longer in custody and cannot bring habeas challenges. But *Heck* was concerned with more than the exclusivity of the habeas corpus remedy for persons in custody, or the intersection between habeas corpus and section 1983. The favorable termination rule in *Heck* also rested on concerns arising generally from collateral attacks on extant criminal convictions through civil law suits. Specifically, requiring a section 1983 plaintiff to prove favorable termination of the criminal conviction avoids parallel litigation over the issues of probable cause and guilt, and precludes the possibility that a plaintiff might succeed in a civil tort action after having been convicted in the underlying criminal prosecution, allowing the creation of conflicting judgments arising out of the same transaction. *Heck*, 512 U.S. at 485–86. These concerns were repeated recently in *McDonough* as rationales supporting the application of *Heck*'s favorable termination rule in a case that did not

implicate concerns about habeas corpus. Because the plaintiff had been acquitted rather than convicted, there was little likelihood of a collision between habeas corpus and section 1983. Yet the Court cited the continued relevance of the favorable-termination rule as being "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments." *McDonough*, 139 S. Ct. at 2156–57. In further support of the favorable termination rule, the Court also cited related concerns for finality, consistency, and the avoidance of unnecessary friction between the state and federal court systems. 139 S. Ct. at 2157. Although footnote 10 of *Heck* addressed a factual scenario that was not before the Court, to dismiss all of footnote 10 as dicta is to divorce a significant part of the Court's rationale from its holding. The Court was simply making clear how broadly it intended its holding to apply.

2.

The defendants also asserted below and argued on appeal that this court has abrogated the rule in *Heck*, citing five cases: *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006); *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012); *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017); and *Sanchez v. City of Chicago*, 880 F.3d 349 (7th Cir. 2018). According to the defendants, those cases "together sensibly hold an individual who is no longer in custody with no access to habeas corpus relief may bring a § 1983 action challenging the constitutionality of a still standing conviction without first satisfying the

favorable termination rule of *Heck*." Brief of Defendants-Appellees (hereafter "Defendants' Brief"), at 7–8. As we just explained, however, this court may not on its own initiative overturn decisions of the Supreme Court. Although four of those five cases came to correct resolutions, some of our language and reasoning has created confusion regarding the applicability of *Heck* in cases where habeas relief is not available. Indeed, it was on these cases that the district court relied in concluding that Savory had brought his claims too late. The confusion began in *DeWalt*, an opinion that had been circulated to the full court under Circuit Rule 40(e). *DeWalt*, 224 F.3d at 618 n.6 (noting that no judge in active service favored rehearing en banc).

a.

In *DeWalt*, we considered whether a prisoner could bring a section 1983 claim related to the loss of his prison job when the underlying disciplinary sanction had not been overturned or invalidated. Because DeWalt did not challenge the fact or duration of his confinement, a habeas petition was not the appropriate vehicle for his claims. 224 F.3d at 617. DeWalt challenged only a condition of his confinement—namely, the loss of his prison job—making a section 1983 claim the appropriate course of action. *Id*. We summarized our holding with the rule "that the unavailability of federal habeas relief does not preclude a prisoner from bringing a § 1983 action to challenge a condition of his confinement that results from a prison disciplinary action." 224 F.3d at 618. We discussed the minority views in *Spencer* and *Heck* in the context of

answering a then-open question, namely, "whether *Heck*'s favorable-termination requirement bars a prisoner's challenge under § 1983 to an administrative sanction that does not affect the length of confinement." 224 F.3d at 616. We concluded that it did not, a position later approved by the Supreme Court. *See Muhammad*, 540 U.S. at 754 (noting that the Seventh Circuit in *DeWalt* had taken the position that *Heck* did not apply to prison disciplinary proceedings in the absence of any implication going to the fact or duration of the underlying sentence, and likewise concluding that because Muhammad's claim did not seek a judgment at odds with his conviction or with the state's calculation of time to be served, *Heck*'s favorable-termination requirement was inapplicable). We reaffirm *DeWalt*'s basic holding today: a section 1983 complaint that challenges a disciplinary sanction related only to the conditions of confinement and that does not implicate the validity of the underlying conviction or the duration of the sentence (e.g. loss of good time credits) is not subject to *Heck*'s favorable termination requirement. *See also Muhammad*, 540 U.S. at 754–55.

But part of the reasoning and language of *DeWalt* went further than that and implied that, in all cases where habeas relief is unavailable, then section 1983 must provide an avenue of relief. *See DeWalt*, 224 F.3d at 617 ("Because federal habeas relief is not available to Mr. DeWalt, the language of § 1983 and the Court's decision in *Preiser* dictate that he be able to proceed on

his § 1983 action.").[8] This language suggesting that a section 1983 remedy must be available when habeas relief is unavailable is in conflict with footnote 10 of *Heck* and with our holding today. Moreover, it was unnecessary to the holding in *DeWalt*, and we now disavow that language.

In *DeWalt*, we also overruled our prior decisions in *Anderson v. County of Montgomery*, 111 F.3d 494 (7th Cir. 1997), and *Stone-Bey v. Barnes*, 120 F.3d 718 (7th Cir. 1997), to the extent that they applied the rule in *Heck* to situations in which habeas relief was not available:

> We are aware that our decisions in *Anderson v. County of Montgomery*, 111 F.3d 494 (7th Cir.1997), and *Stone–Bey v. Barnes*, 120 F.3d 718 (7th Cir. 1997), precluded plaintiffs from pursuing § 1983 actions when federal habeas was not available or when the prisoner had not first availed himself of that option. However, we note that both of these cases preceded *Spencer*. Indeed, our more recent cases have questioned the viability of *Anderson* and *Stone–Bey* in light of the Justices' reluctance to apply the *Heck* rule to situations in which habeas relief is not

---

[8] *Preiser* held that a section 1983 action "is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). *Muhammad* then later clarified that *Heck* does not apply to prison disciplinary suits related only to conditions of confinement when those suits do not raise any implication about the validity of the conviction or the length of the sentence. 540 U.S. at 754–55.

> available. *See Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir.) ("[T]here is probably an exception to the rule of *Heck* for cases in which no route other than a damages action under section 1983 is open to the person to challenge his conviction."), *cert. denied*, 528 U.S. 970, 120 S.Ct. 411, 145 L.Ed.2d 320 (1999); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir.1999) ("With Carr unable to get the disciplinary sanction reversed, five Justices would not consider the sanction a bar to a section 1983 suit even though that suit calls into question the validity of the sanction."); *Sylvester v. Hanks*, 140 F.3d 713, 714 (7th Cir.1998) (questioning whether *Heck* would preclude a § 1983 action to review placement in segregation given that "few states afford collateral review of prison disciplinary hearings"). Our decision today necessitates that we overrule *Anderson* and *Stone–Bey* to the extent they take the contrary position.

DeWalt, 224 F.3d at 617–18.

It was appropriate to overrule *Stone-Bey*, but not for the reason that we stated in *DeWalt*. *Stone-Bey* involved a prisoner's section 1983 challenge to conditions of confinement alone. In determining whether the *Heck* bar applied to his claim, we considered whether it made "any difference in applying *Heck* that the sentence imposed was one of disciplinary segregation alone, as opposed to segregation coupled with a loss of good-time credits," and erroneously concluded that it did not. 120 F.3d at 721. We then applied *Heck*'s favorable termination rule and barred

the prisoner's claim even though it did not implicate the validity of his conviction or sentence. That holding conflicts with *Muhammad*. *Stone-Bey* was in error but not because, as *DeWalt* stated, section 1983 must be available when habeas is not. 224 F.3d at 617. Instead, the holding in *Stone-Bey* was incorrect because *Heck* does not apply to conditions-of-confinement claims that do not implicate the validity of the underlying conviction or the length of custody.

There was no need to overrule *Anderson*. Anderson filed a section 1983 action that challenged the validity of his extant conviction, a claim that normally would be barred by *Heck* unless and until the plaintiff obtained a favorable termination of that underlying conviction. 111 F.3d at 498–99. Anderson argued that, because he had been released from prison and no longer had access to habeas relief, he must have access to section 1983. The *Anderson* panel rejected that contention for two reasons: first, Anderson was on "conditional release," a form of parole that likely meant he *did* retain access to habeas as a means of challenging his conviction. Second, *Heck* had rejected in footnote 10 the very argument which Anderson raised. We noted that, even if footnote 10 was dicta, the favorable termination rule of *Heck* also applied to persons no longer in custody because it was an element of the analogous common-law tort claim on which the section 1983 claim was based. That analysis was perfectly consistent with *Heck* and with our holding today.

b.

Simpson similarly addressed a claim by a prisoner related to disciplinary segregation and loss of

recreation privileges. Because the claim related to conditions of confinement rather than to the lawfulness of a conviction or duration of confinement, we held that *Heck's* favorable termination rule did not apply, reversing the district court's decision to the contrary. 450 F.3d at 306–07 (citing *Muhammad*, 540 U.S. at 754–55). That holding of *Simpson* is correct. But we also asserted that *Muhammad* and *DeWalt* established that:

> the doctrine of *Heck* and *Edwards* [*v. Balisok*] is limited to prisoners who are "in custody" as a result of the defendants' challenged acts, and who therefore are able to seek collateral review. Take away the *possibility* of collateral review and § 1983 becomes available. Simpson can't obtain collateral relief in either state or federal court, so he isn't (and never was) affected by *Heck* or *Edwards*.

Simpson, 450 F.3d at 307 (emphasis in original). This and similar passages in *Simpson* cannot survive our decision today. *Heck* did not lose its vitality because Simpson had been released from custody. Instead, *Heck* did not apply because Simpson's conditions-of-confinement claim did not implicate the validity of his conviction or the length of his sentence.

Muhammad in fact indicated that the Court had not yet had an occasion to revisit the minority views expressed in *Spencer*:

> Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement.

> See *Heck v. Humphrey*, 512 U.S. 477, 491, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (SOUTER, J., concurring in judgment); *Spencer v. Kemna*, 523 U.S. 1, 21–22, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (GINSBURG, J., concurring). This case is no occasion to settle the issue.

Muhammad, 540 U.S. at 752 n.2. *Simpson* read that footnote as conceding that *Heck* left this issue open. But footnote 2 of *Muhammad* merely acknowledged the possibility that the Court may someday revisit footnote 10 of *Heck*. Because it has not yet done so, we are bound by the holding and reasoning of *Heck*.

c.

Burd involved a section 1983 suit for damages, alleging that prison officials deprived the plaintiff of access to the prison library, which in turn prevented him from preparing a timely motion to withdraw his guilty plea. *Burd*, 702 F.3d at 431. We concluded that the damages that Burd was seeking to recover were predicated on a successful challenge to his conviction, and so *Heck* applied. 702 F.3d at 434–35. And "[t]he rule in *Heck* forbids the maintenance of such a damages action until the plaintiff can demonstrate his injury by establishing the invalidity of the underlying *judgment*." 702 F.3d at 435 (emphasis in original). That reasoning and holding was sound.

But in rejecting Burd's alternate theory, we endorsed the reasoning from *DeWalt* and *Simpson* that we now disavow. We stated "that *Heck* applies where a § 1983 plaintiff *could* have sought collateral relief at an earlier time but declined the opportunity and waited

until collateral relief became unavailable before suing." 702 F.3d at 436 (emphasis in original). We added:

> Permitting a plaintiff who ignored his opportunity to seek collateral relief while incarcerated to skirt the *Heck* bar simply by waiting to bring a § 1983 claim until habeas is no longer available undermines *Heck* and is a far cry from the concerns, as we understand them, of the concurring Justices in *Spencer* for those individuals who were precluded by a legal impediment from bringing an action for collateral relief.

702 F.3d at 436. Nothing in the record revealed any impediment to Burd seeking collateral relief while he was in custody. We therefore:

> join[ed] the Sixth and Ninth Circuits in holding that *Heck* bars a § 1983 action where: (1) [a] favorable judgment would necessarily call into question the validity of the underlying conviction or sentence and (2) the plaintiff could have pursued collateral relief but failed to do so in a timely manner.

702 F.3d at 436. That statement should have ended after item (1). The dicta of five Justices in *Spencer* did not overrule the holding and reasoning of *Heck*, and a plaintiff's failure to pursue habeas relief when it was available is irrelevant to whether the *Heck* bar applies. We repudiate that part of *Burd* that gives any significance to whether the plaintiff lost access to habeas relief through no fault of his own.

d.

The confusion that began in *DeWalt*, and that continued in dicta in *Simpson* and *Burd*, eventually led to a result in *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017), which was, in retrospect, incorrect. Although *Whitfield* was controlled by *Edwards v. Balisok*, *supra*, rather than by *Heck*, we relied in part on dicta from both *Burd* and *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999), to conclude that a former prisoner could pursue a section 1983 claim challenging prison disciplinary proceedings that led to loss of good time credits without first obtaining a favorable termination of those proceedings.

Whitfield sought damages under section 1983 for the retaliatory revocation of good time credits. 852 F.3d at 659. He pursued collateral review while he was in prison (albeit in a manner we characterized as not "procedurally perfect"), including a federal habeas claim, but was released from custody before his claims were resolved. We found that *Balisok* rather than *Heck* most directly governed Whitfield's section 1983 claims. *Whitfield*, 852 F.3d at 663. *Balisok* addressed the claim of a state prisoner alleging due process violations for procedures used in a disciplinary hearing that resulted in a loss of "good-time" credits. *Balisok*, 520 U.S. at 643. The *Balisok* Court found that "[t]he principal procedural defect complained of by respondent would, if established, necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 646. But Balisok had not demonstrated that the result of the disciplinary hearing had been set aside, and so the

Court found his claim not cognizable under § 1983. 520 U.S. at 648.

Whitfield first nodded to the holding in *Heck*, noting that in "section 1983 suits that did not directly seek immediate or speedier release, but rather sought monetary damages that would call into question the validity of a conviction or term of confinement, … a prisoner has no claim under section 1983 until he receives a favorable decision on his underlying conviction or sentence, such as through a reversal or grant of habeas corpus relief." *Whitfield*, 852 F.3d at 661. We also noted that *Balisok* extended the *Heck* bar to section 1983 suits brought by prisoners challenging the outcome of prison disciplinary proceedings in which the plaintiffs sought damages rather than earlier release. *Id*. We then attempted to distinguish *Balisok*:

> Had [Balisok] prevailed, the result of the disciplinary proceeding would have to have been set aside. Whitfield, in contrast, is arguing that the [disciplinary] hearings should never have taken place at all, because they were acts of retaliation for his exercise of rights protected by the First Amendment. He has no quarrel with the procedures used in the prison disciplinary system. He could just as well be saying that a prison official maliciously calculated an improper release date, or "lost" the order authorizing his release in retaliation for protected activity. In short, the essence of Whitfield's complaint is the link between retaliation and his delayed release; the fact that disciplinary proceedings were the mechanism is

> not essential. *Balisok* also took care to be precise, when it held that the petitioner's claim for prospective injunctive relief could go forward under section 1983, since it did not necessarily imply anything about the loss of good-time credits.

Whitfield, 852 F.3d at 663. Unlike Balisok, we asserted, Whitfield was not seeking to set aside the result of a process but rather was claiming that the process should not have occurred at all. And unlike Burd, Whitfield had pursued collateral relief to the degree possible, until he was released from custody and the district court dismissed his habeas petition as moot.

We found those factors distinguishing and allowed the claims to proceed. But Whitfield's circumstances were not truly distinguishable from those of Balisok or Burd. A plaintiff's good-faith but unsuccessful pursuit of collateral relief does not relieve him of *Heck's* favorable termination requirement. Because Whitfield had not yet obtained a favorable termination of the disciplinary proceedings that led to a loss of good time credit, he had no cognizable claim under section 1983. We must therefore overrule our decision in *Whitfield*.

e.

That leaves *Sanchez*, the last case on which the defendants relied. Sanchez brought section 1983 claims asserting wrongful arrest and excessive force, claims that would not necessarily imply the invalidity of his conviction, and so we noted correctly that *Heck* did not apply to those claims. 880 F.3d at 356. *See also Wallace*, 549 U.S. at 389–91 (statute of limitations for

a claim for false arrest begins to run upon initiation of legal process). But Sanchez also suggested that he was framed, a claim that would imply the invalidity of his conviction. We relied on *Whitfield* to find that "*Heck* does not bar a suit by a plaintiff who is no longer in custody but who pursued a collateral attack through appropriate channels while he was in custody, even if such efforts were unavailing." 880 F.3d at 356. Because Sanchez sought post-conviction relief in state courts before his release from custody, we concluded that *Heck* did not apply. That reasoning does not survive our decision today. But the final result in *Sanchez* is nevertheless correct, because we went on to conclude that Sanchez's claim that he was framed was subject to issue preclusion, and so there was no need to remand for a new trial. 880 F.3d at 358. *See also Green v. Junious*, 937 F.3d 1009, 1014 (7th Cir. 2019) (noting that *Heck* did not categorically bar the suit in *Sanchez* but the state criminal judgment had preclusive effect under traditional collateral-estoppel analysis).

E.

Our dissenting colleague urges the court to adopt an accrual rule tied to the end of custody. A claim accrues when a plaintiff has "a complete and present cause of action." *McDonough*, 139 S. Ct. at 2155; *Wallace*, 549 U.S. at 388; *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). When a section 1983 claim resembles the common-law tort of malicious prosecution, the Court treats favorable termination as an element of the claim. *McDonough*, 139 S. Ct. at 2156-57; *Heck*, 512 U.S. at 484. Without favorable termination, a plaintiff

lacks "a complete and present cause of action." Yet the dissent's rule would require a plaintiff to file suit without this essential element of the claim. *See Heck*, 512 U.S. at 489 ("deny[ing] the existence of a cause of action" until favorable termination of the conviction).

As a model for this rule, the dissent cites *Poventud v. New York*, 715 F.3d 57 (2d Cir. 2013), a decision vacated by the en banc Second Circuit.[9] *Poventud*, in turn, relied on *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999), and *Leather v. Eyck*, 180 F.3d 420 (2d Cir. 1999). *Jenkins*, like *DeWalt*, correctly decided that the *Heck* bar does not apply in conditions-of-confinement cases brought under section 1983. 179 F.3d at 27. *Jenkins* also included dicta that suggested that a section 1983 remedy must be available when habeas relief is not available. 179 F.3d at 27. That language is virtually identical to the dicta in our own cases that we disavow today. In *Leather*, the Second Circuit relied on the dicta from *Jenkins* to conclude that a section 1983 plaintiff who was assessed a fine but was never in custody could bring his claim even though his conviction was extant. 180 F.3d at 424. For the reasons we have discussed above, we find none of these cases persuasive.

In requiring favorable termination before allowing a section 1983 claim to proceed, *Heck* sets a high standard. Undoubtedly, as the dissent asserts, some valid claims will never make it past the courthouse door. *Heck* explains, though, why a high bar must be

---

[9] The en banc Second Circuit resolved the case on other grounds that have no bearing on the circumstances that we address here. *Poventud v. New York*, 750 F.3d 121 (2d Cir. 2014).

cleared before seeking damages in a civil action on claims that imply the invalidity of a criminal conviction. The Court sought to avoid parallel litigation on the issue of guilt, preclude the possibility of conflicting resolutions arising out of the same transaction, prevent collateral attacks on criminal convictions through the vehicle of civil suits, and respect concerns for comity, finality and consistency. *Heck*, 512 U.S. at 485–86. *See also McDonough*, 139 S. Ct. at 2156–57. We are not in a position to alter the *Heck* standard or set aside these concerns.

F.

We have said several times that Savory's claims did not accrue until he obtained a favorable termination of his conviction and that this occurred when the governor of Illinois pardoned him. We base this conclusion on *Heck* itself, which lists "expunge[ment] by executive order" as one of the ways in which a plaintiff may demonstrate favorable termination. *Heck*, 512 U.S. at 487. At the *en banc* oral argument, the defendants alerted the court for the first time that, if we were to hold that Savory's claim accrued on favorable termination, they intended to argue on remand that the governor's January 12, 2015, pardon is not a favorable termination. Under that theory, the defendants contend, Savory brought his claims not too late (as they claimed on appeal) but too early. The district court rested its dismissal of the case solely on the defendants' argument that Savory's claim was too late because it accrued on December 6, 2011, when his sentence was commuted, his custody ended, and he lost access to the remedy of habeas corpus. At no time in

the district court did the defendants argue in the alternative that Savory's federal claims were too early, or that the date of accrual was anything other than December 6, 2011. This entire appeal has been framed as a contest between two possible dates of accrual: the end of custody versus favorable termination. The defendants never suggested until the *en banc* oral argument that there was a third possible date for accrual, one that has yet to occur. Savory's claims have already been more than forty years in the making and we wish to avert further delays due to any misunderstanding of this court's holding today; and so we now clarify that the governor's January 12, 2015, pardon was a favorable termination for the purposes of the *Heck* analysis.

For many reasons, this holding should not be a surprise to the defendants. On the first page of their appellate brief, they stated that, "[O]n January 12, 2015, Savory was granted a general pardon from then Illinois Governor Pat Quinn. *That pardon set aside Savory's double murder conviction*." Defendants' Brief, at 1 (emphasis added). Although they later asserted that this general pardon was not based on innocence and failed to restore all of Savory's rights of citizenship (they interpret the pardon to withhold the right to sell, receive, or possess a firearm), they attached no significance to this assertion within the *Heck* framework. Defendant's Brief, at 5. Instead, they later conceded that this court has already stated that a section 1983 plaintiff's claims related to a conviction accrue at the time of a pardon. *See* Defendants' Brief, at 23 ("It is true that this Court, in *Newsome*, said it was the plaintiff's pardon that marked the accrual of

the § 1983 claims."). *See also Newsome v. McCabe*, 256 F.3d 747, 749, 752 (7th Cir. 2001) ("a claim based on wrongful conviction and imprisonment did not accrue until the pardon" and "the due process claim's accrual was postponed by *Heck* until the pardon."), abrogated on other grounds, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017).

The defendants attempted to distinguish *Newsome*, but that case is neither meaningfully distinguishable nor unique in characterizing a pardon by a state's executive as adequate for *Heck's* favorable termination requirement. In the context of discussing favorable terminations under *Heck*, we have often used "pardon" or "executive pardon" as synonyms for "expunged by executive order," the phrase that the Court employed in *Heck*. *Manuel v. City of Joliet, Ill.*, 903 F.3d 667, 670 (7th Cir. 2018) ("§ 1983 cannot be used to obtain damages for custody based on a criminal conviction—not until the conviction has been set aside by the judiciary or an executive pardon"); *Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014) ("a claim that implies the invalidity of a criminal conviction does not accrue … until the conviction is set aside by the judiciary or the defendant receives a pardon"); *Gilbert v. Cook*, 512 F.3d 899, 900 (7th Cir. 2008) ("the plaintiff in an action under 42 U.S.C. § 1983 may not pursue a claim for relief that implies the invalidity of a criminal conviction, unless that conviction has been set aside by appeal, collateral review, or pardon"). That a pardon is a favorable termination under *Heck* is well-settled.

Nevertheless, the defendants assert that Illinois employs two kinds of pardons, a general pardon and a

pardon based on innocence. They argue that only a pardon based on innocence is a favorable termination for the purposes of *Heck*. Because Savory has obtained only a general pardon and not a pardon based on innocence, the defendants indicated at oral argument that they intended to argue on remand that he brought his claims too soon. The contention that a pardon must be based on innocence in order to serve as a favorable termination finds no support in *Heck*, and we see no reason to impose that additional limitation on *Heck's* holding. If the Court had wanted to specify that the pardon must be based on innocence, it certainly could have done so, but it did not. Instead, the Court offered a list of possible resolutions that would satisfy the favorable termination requirement, and none require an affirmative finding of innocence. A conviction need only be "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487. Any of these outcomes can occur without a declaration of a defendant's innocence. *McDonough* added that acquittal is a favorable termination under *Heck* that starts the clock on claim accrual, another resolution that does not necessarily imply innocence. *McDonough*, 139 S. Ct. at 2161.

The Governor's pardon of Savory meets the standard articulated in *Heck*:

> Now, Know Ye, that I, PAT QUINN, Governor of the State of Illinois, by virtue of the authority vested in me by the Constitution of the State, do

> by these presents: PARDON JOHNNY [sic] L. SAVORY (SID: 23061880) of the said crime of which convicted, and JOHNNY [sic] L. SAVORY (SID: 23061880) is hereby acquitted and discharged of and from all further imprisonment and restored to all the rights of citizenship which may have been forfeited by the conviction.

R. 71-3. *See* Ill. Const. Art. 5, § 12 ("The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law."). This full pardon is followed by language authorizing expungement of the records of Savory's conviction, which in Illinois must be accomplished by application to a court that may, in its discretion order the records sealed. 20 ILCS 2630/5.2(e). It would be passing strange if the Governor authorized expungement of the *record* of conviction without first meaning to expunge the *conviction* itself. For the purposes of *Heck*, as the defendants themselves conceded on the first page of their brief, Savory's conviction was set aside with this pardon. Under *Heck*, his section 1983 claim accrued on that date.[10]

Finally, we note that the defendants' failure to raise this third possible accrual date in the district court and on appeal appears to have been a deliberate choice. In

---

[10] The defendants also suggested that the pardon did nothing more than discharge Savory from any further imprisonment. This assertion would render the pardon essentially meaningless in light of the commutation of sentence granted to Savory in 2011 which discharged him from all further custody. A pardon is broader in scope and effect than a commutation of a sentence.

the district court, the defendants also moved to dismiss Savory's state law claims, and Savory has not challenged that dismissal on appeal. One of Savory's state law claims was for the Illinois tort of malicious prosecution. R. 71, at 16. To proceed on that tort claim, Illinois requires that the plaintiff prove that the underlying criminal proceedings terminated in a manner *indicative of the innocence* of the accused, a higher standard than *Heck's* favorable termination accrual rule. *See Swick v. Liautaud*, 662 N.E.2d 1238, 1242 (Ill. 1996) ("a malicious prosecution action cannot be predicated on underlying criminal proceedings which were terminated in a manner not indicative of the innocence of the accused"). The defendants argued in the district court that Savory's general pardon was insufficient to meet this Illinois standard because it was not indicative of his innocence. R. 71, at 16–18.

In support of this contention, the defendants relied on a federal district court case that held that *both* a state law malicious prosecution claim and a section 1983 claim resembling malicious prosecution accrued when the plaintiff received an innocence pardon in 2003 rather than when he received a general pardon in 1978. *Walden v. City of Chicago*, 391 F.Supp.2d 660, 671–72 (N.D.Ill. 2005). But unlike the defendants in *Walden*, the defendants here did *not* raise that same argument in the district court in relation to the section 1983 claims. The defendants were therefore aware of this argument for a third possible accrual date and chose to raise it only in relation to the state law claim in the district court. And the defendants conceded on page one of their brief on appeal that the pardon set aside Savory's conviction. For all intents and purposes,

the claim is therefore waived and is not open to relitigation on remand. *Milwaukee Ctr. for Indep., Inc. v. Milwaukee Health Care, LLC*, 929 F.3d 489, 493–94 (7th Cir. 2019) (failure to bring an argument in the district court results in waiver on appeal; and a blatant attempt to contradict what has already been admitted in formal briefing will not be allowed). Because of this waiver and because Savory's pardon clearly meets the *Heck* standard for favorable termination, we leave for another day the consideration of whether some state executive action labeled "pardon" does not meet *Heck's* standard.

III.

Heck controls the outcome where a section 1983 claim implies the invalidity of the conviction or the sentence, regardless of the availability of habeas relief. Claims that relate only to conditions of confinement and that do not implicate the validity of the conviction or sentence are not subject to the *Heck* bar. We disavow the language in any case that suggests that release from custody and the unavailability of habeas relief means that section 1983 must be available as a remedy. That includes the cases on which the district court, in good faith, reasonably relied. *McDonough* confirms that habeas exclusivity is just one part of the rationale for *Heck's* holding. Concerns about comity, finality, conflicting judgments, and "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" all underpin *Heck's* favorable termination rule. *Heck*, 512 U.S. at 486. The Supreme Court may revisit the need for the favorable termination rule in

cases where habeas relief is unavailable, but it has not yet done so.

Savory's claims, which necessarily imply the invalidity of his conviction, accrued when he was pardoned by the governor of Illinois. His section 1983 action, filed within two years of the pardon, was therefore timely filed. We reverse the district court's judgment and remand for further proceedings.

REVERSED AND REMANDED.

EASTERBROOK, *Circuit Judge*, dissenting. The court is unanimous in concluding that only two potential accrual rules make sense: either a §1983 claim does not accrue until a criminal judgment has been set aside, or release from prison marks the claim's accrual even if the judgment is unaltered. All the exceptions, variations, and tergiversation found in earlier decisions of our panels, and other circuits,[1] must be cast aside. One clear rule or the other is essential.

Unlike my colleagues, however, I think that we should adopt the rule proposed by Justice Souter, concurring in *Heck v. Humphrey*, 512 U.S. 477, 491–503 (1994) (joined by three other Justices), and later espoused by Justice Ginsburg, see *Spencer v. Kemna*, 523 U.S. 1, 21–22 (1998), under which the end of custody marks the end of deferral. One court of appeals has followed that path. See *Poventud v. New York*, 715 F.3d 57, 61 (2d Cir. 2013), resolved en banc on other grounds, 750 F.3d 121 (2014); *Leather v. Eyck*,

---

[1] In one circuit the claim accrues on release if the ex-prisoner "could not have practicably sought habeas relief while in custody." *Griffin v. Baltimore Police Department*, 804 F.3d 692, 696 (4th Cir. 2015) (cleaned up). In another the claim accrues on release if the prisoner "was precluded as a matter of law from seeking habeas redress". *Powers v. Hamilton*, 501 F.3d 592, 601 (6th Cir. 2007) (cleaned up). In a third the law is similar, but the court lists the circumstances that it believes prevent a prisoner from obtaining collateral relief. *Guerrero v. Gates*, 442 F.3d 697, 704–05 (9th Cir. 2006). And in a fourth circuit the claim accrues on release if the prisoner has not been able to obtain collateral relief "through no lack of diligence on his part". *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010). None of these approaches enables either a plaintiff or a district judge to know when a claim has accrued and the clock is ticking.

180 F.3d 420, 424 (2d Cir. 1999); *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999). We should too.

The opinion in *Heck* states that a §1983 claim for unconstitutional conviction or imprisonment does not accrue until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus". 512 U.S. at 487. That is the source of my colleagues' bright-line rule. It also has the support of *Heck*'s footnote 10, 512 U.S. at 490 n.10:

> JUSTICE SOUTER also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon that principle in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges. *Post*, at 500. We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated. JUSTICE SOUTER opines that disallowing a damages suit for a former state prisoner framed by Ku Klux Klan-dominated state officials is "hard indeed to reconcile …with the purpose of §1983." *Post*, at 502. But if, as JUSTICE SOUTER appears to suggest, the goal of our interpretive

> enterprise under §1983 were to provide a remedy for all conceivable invasions of federal rights that freedmen may have suffered at the hands of officials of the former States of the Confederacy, the entire landscape of our §1983 jurisprudence would look very different. We would not, for example, have adopted the rule that judicial officers have absolute immunity from liability for damages under §1983, *Pierson v. Ray*, 386 U.S. 547 (1967), a rule that would prevent recovery by a former slave who had been tried and convicted before a corrupt state judge in league with the Ku Klux Klan.

I do not think, however, that either aspect of the opinion in *Heck* is conclusive.

Statements in *Heck* (other than note 10) about the need to wait for a prisoner's vindication discuss the claim at hand: by a prisoner then in custody. Opinions are not statutes and should not be read as if they were. See, e.g., *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978). Footnote 10 is the only part of the Court's opinion in *Heck* to address the appropriate treatment of plaintiffs whose custody has ended, and a clearer example of dicta is hard to imagine. The footnote concerns a subject that had not been briefed by the parties, that did not matter to the disposition of Heck's claim, and that the majority thought would not matter to anyone, ever. That belief has been embarrassed by the fact that many former prisoners contend that their convictions were wrongful but are no

longer in a position to seek collateral review.[2] *Heck* did not present for decision any question about the appropriate treatment of this situation. And the Justices themselves have told us that *Heck* did not decide the question.

> Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement. See *Heck v. Humphrey*, 512 U.S. 477, 491 (1994) (SOUTER, J., concurring in judgment); *Spencer v. Kemna*, 523 U.S. 1, 21–22 (1998) (GINSBURG, J., concurring). This case is no occasion to settle the issue.

Muhammad v. Close, 540 U.S. 749, 752 n.2 (2004). To say that "[t]his case is no occasion to settle the issue" is to say that the issue is open—in other words, that it was not settled by *Heck*, which occasioned an exchange of competing views but did not yield a holding. No later case has done so either. Certainly *McDonough v. Smith*, 139 S. Ct. 2149 (2019), did not do so. *McDonough* repeats *Heck*'s conclusion that an acquittal causes the claim to accrue, without discussing the question whether release from prison at the end of the sentence also does so. Justice Ginsburg, who joined the

---

[2] This circuit alone has seen dozens of such cases. The cases cited on the first page (including footnote 1) of this opinion represent the tip of the iceberg in other circuits. And four more circuits, which read *Heck* as my colleagues do, have addressed similar claims. See *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000); *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007).

opinion in *McDonough*, did not suggest that she has abandoned her view that a sentence's end permits suit.

Although footnote 10 is dictum, we are bound by the Court's rationales for holding that a person still in prison may not use §1983 to obtain damages on account of the conviction and confinement. There are three: first, the rule from *Preiser v. Rodriguez*, 411 U.S. 475 (1973), that §1983 cannot be used to obtain relief from ongoing custody (the right remedy is a collateral attack under 28 U.S.C. §§ 2241, 2254, or 2255); second, the rule that people in state custody must exhaust state remedies before obtaining federal review (see 28 U.S.C. §2254(b)(1)); third, the rule that a criminal conviction is a judgment that the loser normally may not contradict in another court. The first two rationales drop out after a person has been released from prison, and the third is not a federal bar when the judgment was entered by a state court. The effect of a state judgment depends on state law. 28 U.S.C. §1738; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

Neither §1983 nor any other federal statute specifies when a claim accrues. That time has been established by the Supreme Court as a matter of federal common law. See *Wallace v. Kato*, 549 U.S. 384, 388 (2007). *Wallace* adjusted the accrual rules to address claims arising under the Fourth Amendment, a category of suits that had been the subject of dictum in some of *Heck*'s other footnotes (512 U.S. at 486–87 nn. 6, 7) but did not represent a holding any more than note 10 did. Then *Manuel v. Joliet*, 137 S. Ct. 911 (2017), adjusted *Wallace* to address situations in which

custody without probable cause continued after an initial judicial appearance. Both *Wallace* and *Manuel* set out to produce accrual doctrines that respect the need to allow remedies for serious wrongdoing, while avoiding premature litigation. We can and should do the same.

The Justices expressed concern in *Manuel* and its successor *McDonough* about a rule starting the time so early that legitimate claims would be lost. We should be equally concerned about a rule starting the time so late that claims never accrue. The majority's approach does just that.

Some sentences are too short to allow collateral relief. We routinely see cases in which it has taken a decade to pursue a direct appeal, collateral review in state court, and collateral review in federal court. If confinement ends before collateral review begins, the custody requirement prevents all further review. If the sentence is fully served while state collateral review is ongoing, federal collateral review cannot begin. (Only state prisoners "in custody" can seek review under §2254(a).) So a rule under which a §1983 claim does not accrue as long as the criminal judgment stands means that thousands of defendants sentenced to less than five or ten years in prison can *never* present a §1983 claim, no matter how egregious the constitutional violations that led to wrongful conviction and custody.

Released prisoners can obtain relief under the majority's approach if their convictions are set aside by pardon (Savory's situation) or certificate of innocence. Yet in most states pardons are rare, and pardons for federal crimes are rarer still. Getting a certificate of

innocence is wickedly hard in both state and federal systems, because the applicant must show factual innocence, and even an acquittal does not establish that. See *Pulungan v. United States*, 722 F.3d 983 (7th Cir. 2013). Proof of innocence—the need to prove a negative—is difficult to come by. Again Savory may be an exception; he eventually found conclusive DNA evidence. Few wrongly convicted persons are so fortunate.

Delayed availability of evidence is another problem. Proof that a given police officer systematically lied or fabricated evidence in a way that produced convictions may not become available until any particular sentence is over. It may take decades for official misconduct to come to light. Under the majority's rule this delay means that a §1983 claim will *never* accrue unless the former prisoner can obtain a pardon or certificate of innocence. On my view, by contrast, the claim accrues no later than release from prison.

Even after a prisoner's release, suit may be blocked by the preclusive effect of the state judgment, but that is a matter of state law under §1738 and should be dealt with in the same way as any other invocation of issue or claim preclusion. Likewise, if a state claim does not accrue as a matter of state law—if, for example, exoneration is an element of a malicious-prosecution claim—a federal court should honor that rule.

Ex-prisoners who, despite exercising reasonable diligence, cannot obtain essential evidence within two years of their release, may invoke the doctrine of equitable tolling to postpone the time to litigate. It is

neither necessary nor appropriate to have a *federal* rule that defers accrual indefinitely. Savory's claim may well be timely on my approach, but he did not make an equitable-tolling argument in the district court, see 338 F. Supp. 3d 860, 866 (N.D. Ill. 2017), and does not make one here.

Congress could create by legislation a rule foreclosing damages until a plaintiff, although no longer in prison, has been vindicated by a pardon or certificate of innocence, but such a rule cannot be found in any enacted statute. As long as accrual is governed by federal common law we ought to implement a rule that protects the states' principal interests (avoiding the use of §1983 to attack ongoing custody and ensuring that prisoners present their contentions to the state judiciary) without needlessly blocking potentially legitimate federal claims. Savory's victory today comes at a terrible price—the extinguishment of many substantively valid constitutional claims.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley
Dirksen United States
Courthouse
Room 2722 -
219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

January 7, 2020

Before: DIANE P. WOOD, Chief Circuit Judge
FRANK H. EASTERBROOK, Circuit Judge
MICHAEL S. KANNE, Circuit Judge
ILANA DIAMOND ROVNER, Circuit Judge
DIANE S. SYKES, Circuit Judge
DAVID F. HAMILTON, Circuit Judge
AMY C. BARRETT, Circuit Judge
MICHAEL B. BRENNAN, Circuit Judge
MICHAEL Y. SCUDDER, Circuit Judge
AMY J. ST. EVE, Circuit Judge

No. 17-3543	JOHNNIE LEE SAVORY, Plaintiff - Appellant v. WILLIAM CANNON, SR., as special representative for Charles Cannon, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:17-cv-00204 Northern District of Illinois, Eastern Division District Judge Gary Feinerman	

The District Court's judgment is **REVERSED,** with costs, and the case is **REMANDED**, for further proceedings, in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment**(form ID: **132**)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 17-3543

[Filed July 1, 2019]

JOHNNIE LEE SAVORY, *Plaintiff-Appellant,*

v.

WILLIAM CANNON, SR., as special representative for Charles Cannon, *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cv-00204

Gary Feinerman, *Judge*.

By the Court:

O R D E R

The parties are ordered to file briefs explaining the bearing of the Supreme Court's opinion in *McDonough v. Smith*, 588 U.S. —, 2019 WL 2527474 (June 20,

2019), on the above captioned appeal. The briefs may not exceed fifteen pages and shall be filed within two weeks of the issuance of this Order.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 17-3543

[Filed January 7, 2019]

JOHNNIE LEE SAVORY, *Plaintiff-Appellant,*

v.

WILLIAM CANNON, SR., as special representative for Charles Cannon, *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-00204 – **Gary Feinerman**, *Judge.*

ARGUED OCTOBER 25, 2018 —
DECIDED JANUARY 7, 2019

Before ROVNER, HAMILTON, and BARRETT, *Circuit Judges*.

ROVNER, *Circuit Judge.* Johnnie Lee Savory spent thirty years in prison for a 1977 double murder that he

insists he did not commit. Even after his release from prison, he continued to assert his innocence. Thirty-eight years after his conviction, the governor of Illinois pardoned Savory. Nearly two years after the pardon, Savory filed a civil rights suit against the City of Peoria ("City") and a number of Peoria police officers alleging that they framed him. The district court dismissed the suit as untimely. We reverse and remand for further proceedings.

I.

In January 1977, Peoria police officers arrested fourteen-year-old Savory for the rape and murder of nineteen-year-old Connie Cooper and the murder of her fourteen-year-old brother, James Robinson. According to Savory's complaint, which we must credit when assessing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), these officers subjected Savory to an abusive thirty-one hour interrogation over a two-day period. *Tobey v. Chibucos*, 890 F.3d 634, 645 (7th Cir. 2018) (in reviewing a district court's decision on a motion to dismiss pursuant to Rule 12(b)(6), we accept as true all well-pleaded facts and draw all reasonable inferences in favor of the non-moving party). The officers fabricated evidence, wrongfully coerced a false confession from the teen, suppressed and destroyed evidence that would have exonerated him, fabricated incriminating statements from alleged witnesses, and ignored ample evidence pointing to other suspects. No legitimate evidence implicated Savory. His arrest, prosecution and conviction were based entirely on the officers' fabricated evidence and illegally extracted false confession.

Savory was tried as an adult in 1977 and convicted of first degree murder. After that conviction was overturned on appeal, he was convicted again in 1981. He was sentenced to a term of forty to eighty years in prison. After Savory exhausted direct appeals and post-conviction remedies in state court, he unsuccessfully sought federal habeas corpus relief. He repeatedly petitioned for clemency and also sought DNA testing. After thirty years in prison, he was paroled in December 2006. Five years later, in December 2011, the governor of Illinois commuted the remainder of Savory's sentence. That action terminated his parole (and therefore his custody) but left his conviction intact. On January 12, 2015, the governor issued a pardon that "acquitted and discharged" Savory's conviction. On January 11, 2017, less than two years after the pardon, Savory filed suit against the City and the police officers.

That suit asserted six claims under 42 U.S.C. § 1983, five against the individual defendants and one against the City. The five counts against the individual defendants alleged that they: (1) coerced a false confession from Savory in violation of the Fifth and Fourteenth Amendments; (2) coerced a false confession from Savory in violation of his due process rights under the Fourteenth Amendment; (3) maliciously prosecuted Savory, depriving him of liberty without probable cause in violation of the Fourth and Fourteenth Amendments; (4) violated his right to be free of involuntary confinement and servitude under the Thirteenth and Fourteenth Amendments; and (5) failed to intervene as their fellow officers violated Savory's civil rights. In the sixth count, Savory alleged that the

City's unlawful policies, practices and customs led to his wrongful conviction and imprisonment in violation of section 1983. Savory also brought state law claims against the defendants but later conceded that those claims were untimely under the state's one-year statute of limitations. Those claims are not part of this appeal.

The defendants moved to dismiss Savory's section 1983 claims on several grounds but the district court addressed only one: the statute of limitations. The court recognized that, under *Heck v. Humphrey*, 512 U.S. 477 (1994), Savory could not bring his section 1983 claims unless and until he obtained a favorable termination of a challenge to his conviction. The parties agreed that the relevant statute of limitations required Savory to bring his claims within two years of accrual but the parties disagreed on when the *Heck* bar lifted. Savory asserted that his claims did not accrue until he received a pardon from the Illinois governor on January 12, 2015, which would make his January 11, 2017 suit timely. The defendants asserted that the *Heck* bar lifted when Savory's parole was terminated on December 6, 2011, making his claims untimely. The district court concluded that the defendants had the better view of *Heck* and dismissed the claims with prejudice. Savory appeals.

II.

We review *de novo* a Rule 12(b)(6) dismissal on statute of limitations grounds. *Tobey*, 890 F.3d at 645; *Amin Ijbara Equity Corp. v. Village of Oak Lawn*, 860 F.3d 489, 492 (7th Cir. 2017). Our analysis begins and ends with *Heck*, the controlling case. *Heck* addressed

whether and when a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. *Heck*, 512 U.S. at 478. While Heck was serving a fifteen-year sentence for manslaughter, he brought a section 1983 action against two prosecutors and a state police inspector asserting that they engaged in an unlawful investigation that led to his arrest, that they knowingly destroyed exculpatory evidence, and that they caused an unlawful voice identification procedure to be used at his trial. 512 U.S. at 478–79.

The Court noted that such a case lies at the intersection of federal prisoner litigation under section 1983 and the federal habeas corpus statute. 512 U.S. at 480. In analyzing the claim, the Court first found that Heck's section 1983 claim most closely resembled the common law tort of malicious prosecution, which allows damages for confinement imposed pursuant to legal process, including compensation for arrest and imprisonment, discomfort or injury to health, and loss of time and deprivation of society. 512 U.S. at 484. An element that must be pleaded and proved in a malicious prosecution case is termination of the prior criminal proceeding in favor of the accused. This requirement avoids creating two conflicting resolutions arising out of the same transaction, steering clear of parallel litigation over the issue of guilt. The requirement also prevents a convicted criminal from collaterally attacking the conviction through a civil suit:

> We think the hoary principle that civil tort actions are not appropriate vehicles for

challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to

> proceed, in the absence of some other bar to the suit.

Heck, 512 U.S. at 486–87 (footnotes omitted; emphasis in original).

The Court made pellucid the broad consequences of its plainly stated rule:

> We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action. Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.

Heck, 512 U.S. at 489. Returning to its comparison to common law torts, the Court concluded that, just as a claim for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, "so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. at 489–90. *See also Wallace v. Kato*, 549 U.S. 384, 393 (2007) (noting that the *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has *not* been invalidated; *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.").

Applying this rule to Savory's case, we first look at the nature of his section 1983 claims and conclude that,

like Heck's claims, they strongly resemble the common law tort of malicious prosecution. Indeed, Savory's claims largely echo Heck's complaint, asserting the suppression of exculpatory evidence and the fabrication of false evidence in order to effect a wrongful conviction. The statute of limitations for such claims in Illinois is two years. *Heck* supplies the rule for accrual of the claim. Because Savory's claims "would necessarily imply the invalidity of his conviction or sentence," his section 1983 claims could not accrue until "the conviction or sentence ha[d] been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487. In Savory's case, that occurred on January 12, 2015, when the governor of Illinois pardoned him. Until that moment, his conviction was intact and he had no cause of action under section 1983. *Heck*, 512 U.S. at 489–90. His January 11, 2017 lawsuit was therefore timely under *Heck*, and we must reverse the district court's judgment and remand for further proceedings.

We said that our analysis began and ended with *Heck* but for the sake of clarity, we must address the defendant's arguments that concurring and dissenting opinions of certain Supreme Court justices cobbled together into a seeming majority or the opinions of this court may somehow override the prime directive of *Heck*. The misunderstanding that led to the erroneous result here originated in a concurrence in *Heck* filed by Justice Souter and joined by Justices Blackmun, Stevens and O'Connor. In that concurrence, Justice

Souter agreed that reference to the common law tort of malicious prosecution was a useful starting point but he asserted that it could not alone provide the answer to the conundrum found at the intersection between section 1983 and the federal habeas statute. Ultimately, Justice Souter suggested a slightly different rule that he submitted would avoid any collision between section 1983 and the habeas statute:

> A state prisoner may seek federal-court § 1983 damages for unconstitutional conviction or confinement, but only if he has previously established the unlawfulness of his conviction or confinement, as on appeal or on habeas. This has the effect of requiring a state prisoner challenging the lawfulness of his confinement to follow habeas's rules before seeking § 1983 damages for unlawful confinement in federal court[.]

Heck, 512 U.S. at 498 (Souter, J., concurring).

For persons **not** in custody for the purposes of the habeas statute, "people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences," there would be no requirement to show "the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment" because:

> the result would be to deny any federal forum for claiming a deprivation of federal rights to those

> who cannot first obtain a favorable state ruling. The reason, of course, is that individuals not "in custody" cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights. That would be an untoward result.

Heck, 512 U.S. at 500 (Souter, J., concurring).

In contrast, of course, the *Heck* majority's rule requires that a plaintiff **always** obtain a favorable resolution of the criminal conviction before bringing a section 1983 claim that would necessarily imply the invalidity of a conviction or sentence. The majority opinion specifically rejected Justice Souter's alternate rule:

> Justice SOUTER also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon that principle in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges. We think the principle barring collateral attacks—a long-standing and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.

Heck, 512 U.S. at 490 n.10 (citations omitted).

The Supreme Court has reaffirmed the *Heck* framework several times. *See Wallace*, 549 U.S. at 393; *Nelson v. Campbell*, 541 U.S. 637, 646 (2004) (citing *Heck* for the proposition that "a § 1983 suit for damages that would 'necessarily imply' the invalidity of the fact of an inmate's conviction, or 'necessarily imply' the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence"); *Edwards v. Balisok*, 520 U.S. 641, 643 (1997) (same). But in *Spencer v. Kemna*, 523 U.S. 1, 21 (1998), Justice Souter again filed a concurrence expressing the view that he urged in his *Heck* concurrence, namely "that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." Justice Ginsburg, who had been in the majority in *Heck*, this time agreed with Justice Souter (who was also joined by Justices O'Connor and Breyer), joining his concurrence and filing her own: "Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach.'" *Spencer*, 523 U.S. at 21 (Ginsburg, J., concurring). Justice Stevens dissented in *Spencer*, but he approved Justice Souter's basic premise: "Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice SOUTER explains, that he may bring an action under 42 U.S.C. § 1983." *Spencer*, 523 U.S. at 25 n.8 (Stevens, J., dissenting).

The defendants contended in the district court and maintain on appeal that this *dicta* in concurring and dissenting opinions, cobbled together, now formed a new majority, essentially overruling footnote 10 in *Heck*. But it is axiomatic that *dicta* from a collection of concurrences and dissents may not overrule majority opinions. *Cross v. United States*, 892 F.3d 288, 303 (7th Cir. 2018) ("Unless and until a majority of the Court overrules the majority opinions in [two prior cases], they continue to bind us."). The Supreme Court may eventually adopt Justice Souter's view but it has not yet done so and we are bound by *Heck*. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). *See also Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) (characterizing as unsettled the position taken by Justice Souter in *Heck* and by Justice Ginsburg in *Spencer* that "unavailability of habeas for other reasons may also dispense with the *Hec*k requirement").

The defendants also asserted below and continue to argue on appeal that this court has abrogated the rule in *Heck*, citing four cases: *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006); *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012); and *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017). According to the defendants, those cases "together sensibly hold an individual who is no longer in custody with no access to habeas corpus relief may

bring a § 1983 action challenging the constitutionality of a still standing conviction without first satisfying the favorable termination rule of *Heck*." Brief of Defendants-Appellees, at 7–8. As we just explained, this court may not on its own initiative overturn decisions of the Supreme Court, and in fact none of the cited cases overturned the core holding of *Heck* or purported to do so.

In *DeWalt*, we considered whether a prisoner could bring a section 1983 claim related to the loss of his prison job when the underlying disciplinary sanction had not been overturned or invalidated. Because DeWalt did not challenge the fact or duration of his confinement, a habeas petition was not the appropriate vehicle for his claims. 224 F.3d at 617. DeWalt challenged only a condition of his confinement—namely, his prison job—making a section 1983 claim the appropriate course of action. *Id*. We summarized our holding with the rule "that the unavailability of federal habeas relief does not preclude a prisoner from bringing a § 1983 action to challenge a condition of his confinement that results from a prison disciplinary action." 224 F.3d at 618. We discussed *Spencer* and *Heck* only in the context of answering an open question, namely, "whether *Heck*'s favorable-termination requirement bars a prisoner's challenge under § 1983 to an administrative sanction that does not affect the length of confinement." 224 F.3d at 616. We concluded that it did not, a position later approved by the Supreme Court. *See Muhammad*, 540 U.S. at 754 (noting that the Seventh Circuit in *DeWalt* had taken the position that *Heck* did not apply to prison disciplinary proceedings in the absence of any

implication going to the fact or duration of the underlying sentence, and concluding that because Muhammad had similarly raised no claim on which habeas relief could have been granted on any recognized theory, *Heck*'s favorable-termination requirement was inapplicable).

Simpson similarly addressed a claim by a prisoner related to the conditions of his confinement rather than the lawfulness of his conviction or duration of confinement. Simpson alleged that when he complained about prison staff, they retaliated against him by issuing bogus conduct reports and arranging for him to be disciplined. 450 F.3d at 305. As a result, he was subjected to 300 days in segregation and lost twenty-five days of recreation privileges. We reversed the district court's dismissal for failure to state a claim. The district court had concluded that, under *Heck*, Simpson could not bring a suit that was inconsistent with the findings of the prison disciplinary board unless a state court set those findings aside. We reaffirmed the core holding of *Heck*, "that a prisoner whose grievance implies the invalidity of ongoing custody must seek review by collateral attack." 450 F.3d at 306–07. But we also noted that *Heck* was not applicable to Simpson's claims because "neither disciplinary segregation nor a reduction in the amount of recreation is a form of 'custody' under federal law." 450 F.3d at 307. Simpson was not bringing a claim that implied the invalidity of his underlying conviction or sentence and was therefore not subject to *Heck*'s favorable-termination requirement. We noted that *Muhammad* and *DeWalt* established that:

> the doctrine of *Heck* and *Edwards* is limited to prisoners who are "in custody" as a result of the defendants' challenged acts, and who therefore are able to seek collateral review. Take away the possibility of collateral review and § 1983 becomes available. Simpson can't obtain collateral relief in either state or federal court, so he isn't (and never was) affected by *Heck* or *Edwards*.

Simpson, 450 F.3d at 307. Read out of context, we understand how this passage and other passages in *Simpson* confused the issue in the district court. Some of this language could be read to imply that the inability to obtain habeas relief because the sentence has been served could relieve a section 1983 litigant of *Heck*'s favorable-termination requirement. But *Heck* itself rejected that position and *Muhammad* made clear that the Court had not yet had an occasion to settle the minority views expressed in *Heck* and *Spencer*.

Neither *Burd* nor *Whitfield* support a contrary result. Burd brought a section 1983 suit for damages, alleging that prison officials deprived him of access to the prison library, which in turn prevented him from preparing a timely motion to withdraw his guilty plea. *Burd*, 702 F.3d at 431. Burd asserted that *Heck* did not apply to his claim because he would not necessarily have been successful in seeking to withdraw his plea. We concluded that the damages that Burd was seeking to recover were predicated on a successful challenge to his conviction, and so *Heck* applied. 702 F.3d at 434–35. And "[t]he rule in *Heck* forbids the maintenance of such a damages action until the

plaintiff can demonstrate his injury by establishing the invalidity of the underlying judgment." We also rejected Burd's alternate theory, that he should be allowed to proceed with his section 1983 claim even though it implied that his conviction was invalid because his sentence was fully discharged and habeas relief was unavailable to him. 702 F.3d at 435–36. But Burd had failed to pursue habeas relief when it was available to him during his time in custody. We therefore held "that *Heck* applies where a § 1983 plaintiff could have sought collateral relief at an earlier time but declined the opportunity and waited until collateral relief became unavailable before suing." 702 F.3d at 436.

Whitfield addressed a unique factual scenario that bears no resemblance to Savory's case. *Whitfield* reaffirmed *Heck*, noting that in "section 1983 suits that did not directly seek immediate or speedier release, but rather sought monetary damages that would call into question the validity of a conviction or term of confinement, … a prisoner has no claim under section 1983 until he receives a favorable decision on his underlying conviction or sentence, such as through a reversal or grant of habeas corpus relief." *Whitfield*, 852 F.3d at 661. Whitfield sought damages under section 1983 for the retaliatory revocation of good time credits. 852 F.3d at 659. He sought collateral review while he was in prison (albeit in a manner we characterized as not "procedurally perfect"), including a federal habeas claim, but was released from custody before his claims were resolved.

We found that *Balisok* rather than *Heck* most directly governed Whitfield's section 1983 claims. *Whitfield*, 852 F.3d at 663. *Balisok* addressed the claim of a state prisoner alleging due process violations for procedures used in a disciplinary hearing that resulted in a loss of "good-time" credits. *Balisok*, 520 U.S. at 643. The *Balisok* Court found that "[t]he principal procedural defect complained of by respondent would, if established, necessarily imply the invalidity of the deprivation of his good-time credits." 520 U.S. at 646. But Balisok had not demonstrated that the result of the disciplinary hearing had been set aside, and so the Court found his claim not cognizable under § 1983. 520 U.S. at 648.

We distinguished *Balisok* in *Whitfield*:

> Had [Balisok] prevailed, the result of the disciplinary proceeding would have to have been set aside. Whitfield, in contrast, is arguing that the hearings should never have taken place at all, because they were acts of retaliation for his exercise of rights protected by the First Amendment. He has no quarrel with the procedures used in the prison disciplinary system. He could just as well be saying that a prison official maliciously calculated an improper release date, or "lost" the order authorizing his release in retaliation for protected activity. In short, the essence of Whitfield's complaint is the link between retaliation and his delayed release; the fact that disciplinary proceedings were the mechanism is not essential. *Balisok* also took care to be

> precise, when it held that the petitioner's claim for prospective injunctive relief could go forward under section 1983, since it did not necessarily imply anything about the loss of good-time credits.

Whitfield, 852 F.3d at 663. Unlike Balisok, Whitfield was not seeking to set aside the result of a process but rather was claiming that the process should not have occurred at all. And unlike Burd, Whitfield had pursued collateral relief to the degree possible, until he was released from custody and the district court dismissed his habeas petition as moot. In *Whitfield*, we thus addressed a fact scenario at the outer edges of *Balisok*. It has little bearing on Savory's claims, which lie at the core of *Heck*.

III.

We end where we began: *Heck* controls the result here. Savory's claims, which necessarily imply the invalidity of his conviction, did not accrue until he was pardoned by the governor of Illinois. His section 1983 action was therefore timely filed, and we reverse the district court's judgment and remand for further proceedings.

REVERSED AND REMANDED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley
Dirksen United States
Courthouse
Room 2722 -
219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

January 7, 2019

Before: ILANA DIAMOND ROVNER, Circuit Judge
DAVID F. HAMILTON, Circuit Judge
AMY C. BARRETT, Circuit Judge

No. 17-3543	JOHNNIE LEE SAVORY, Plaintiff - Appellant v. WILLIAM CANNON, SR., as special representative for Charles Cannon, et al., Defendants - Appellees
Originating Case Information:	

District Court No: 1:17-cv-00204
Northern District of Illinois, Eastern Division
District Judge Gary Feinerman

The judgment of the District Court is **REVERSED,** with costs, and the case is **REMANDED,** in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment**(form ID: **132**)

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

17 C 204
Judge Gary Feinerman

[Filed December 1, 2017]

JOHNNIE LEE SAVORY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CHARLES CANNON, MARCELLA BROWN TEPLITZ, BETH BELL, as Special Representative of Russell Buck, Peter Gerontes, and John Timmes, JOHN FIERS, CHARLES EDWARD BOWERS, JOHN STENSON, GEORGE PINKNEY, E. HAYNES, WALTER JATKOWSKI, GLEN PERKINS, ALLEN ANDREWS, HAROLD MARTENESS, MARY ANN DUNLAVEY, CARL TIARKS, DENNIS JENKINS, and CITY OF PEORIA, ILLINOIS,	)
	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Johnnie Lee Savory was arrested in January 1977 for the rape and murder of Connie Cooper and the murder of James Robinson, and was convicted later that year. Doc. 1 at ¶¶ 1, 77. After the Appellate Court of Illinois reversed the convictions due to a *Miranda* violation, *see People v. Savory*, 403 N.E.2d 118 (Ill. App. 1980), Savory was re-tried in 1981, convicted again, and sentenced to 40-80 years' imprisonment, *see People v. Savory*, 435 N.E.2d 226 (Ill. App. 1982). After those convictions were affirmed, Savory pursued unsuccessfully several avenues of relief in state and federal court, including two federal habeas actions. *See*, *e.g.*, *Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987) (federal habeas); *Savory v. Peters*, 1995 WL 9242 (N.D. Ill. Jan. 9, 1995) (federal habeas); *People v. Savory*, 756 N.E.2d 804 (Ill. 2001) (suit under Illinois law to compel scientific testifying of evidence); *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006) (§ 1983 suit seeking access to physical evidence to conduct DNA testing). Savory was released from prison on parole in 2006. Doc. 1 at ¶ 78. Savory's parole terminated on December 6, 2011. Doc. 71 at 10. (Although the parole termination date is not in the complaint, the state trial court in a 2013 action by Savory to obtain DNA testing stated that "[h]is parole was terminated on December 6, 2011," *People v. Savory*, 77 CF 565, Order at 2 (Cir. Ct. of Peoria Cnty., Ill. Aug. 6, 2013) (reproduced at Doc. 71-2 at 2), and Savory's attorneys confirmed at the October 25, 2017 hearing in this case that the date is correct.) On January 12, 2015, Savory received a pardon from the Governor of Illinois. Doc. 1 at ¶ 87; Doc. 71-3.

Just shy of two years later, on January 11, 2017, Savory filed this 42 U.S.C. § 1983 suit against the City of Peoria, several Peoria police officers, and a polygraph operator. The complaint alleges that Defendants coerced Savory's confession, fabricated evidence, and destroyed and withheld exculpatory evidence, all in violation of the United States Constitution and Illinois law. Doc. 1. Defendants move on several grounds under Federal Rule of Civil Procedure 12(b)(6) to dismiss the suit. Doc. 71.

The only ground that need be addressed is the statute of limitations. True enough, "[w]hen a defendant charges noncompliance with the statute of limitations, dismissal under Rule 12(b)(6) is irregular, for the statute of limitations is an affirmative defense." *Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 613 (7th Cir. 2014) (brackets and internal quotation marks omitted). Because "complaints need not anticipate and attempt to plead around defenses," *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004), dismissal on limitations grounds is appropriate only when it is clear from the facts that may be considered on a Rule 12(b)(6) motion that the claim is time-barred, *see Mongolian House*, 770 F.3d at 614. This case presents that circumstance. *See Collins v. Vill. of Palatine*, __ F.3d __, 2017 WL 5490819, at *2 (7th Cir. Nov. 16, 2017); *Amin Ijbara Equity Corp. v. Vill. of Oak Lawn*, 860 F.3d 489, 492 (7th Cir. 2017); *Rosado v. Gonzalez*, 832 F.3d 714, 716 (7th Cir. 2016).

Savory concedes that his state law claims do not comply with 745 ILCS 10/8-101(a), which establishes a one-year limitations period for suits brought against

local governments and their employees, Doc. 79 at 33, so those claims are dismissed. The limitations period for Savory's § 1983 claims is two years. *See Dominguez v. Hendley*, 545 F.3d 585, 588 (7th Cir. 2008). Savory filed this suit on January 11, 2017, so whether the federal claims are untimely turns on whether they accrued before January 12, 2015. Resolution of the accrual question turns on an application of *Heck v. Humphrey*, 512 U.S. 477 (1994).

The *Heck* doctrine provides that "a § 1983 suit for damages that would necessarily imply the invalidity of the fact of an inmate's conviction … is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a … challenge to his conviction." *Nelson v. Campbell*, 541 U.S. 637, 646 (2004) (internal quotation marks omitted). The parties agree that Savory could not have brought his § 1983 claims until the *Heck* bar lifted because those claims, if successful, would necessarily imply the invalidity of his convictions. The parties further agree that Savory's § 1983 claims accrued when the *Heck* bar on those claims lifted. Doc. 71 at 17; Doc. 79 at 12-13. The parties dispute, however, when the *Heck* bar lifted.

As Savory sees it, the *Heck* bar was in place until January 12, 2015, when he received a favorable (in his view) termination of his conviction in the form of a gubernatorial pardon. Doc. 79 at 14. If that is correct, then the § 1983 claims accrued on January 12, 2015 and thus are timely. As Defendants see it, the *Heck* bar lifted on December 6, 2011, when Savory's parole was terminated. Doc. 71 at 17. If that is correct, then § 1983 claims accrued on December 6, 2011, the limitations

period on those claims expired on December 6, 2013, and the claims are untimely. Defendants are correct, and understanding why requires some explanation.

Heck as a general rule prevents convicted criminals from challenging their intact convictions via § 1983 instead of via the habeas statute, which is the exclusive remedy for persons "who challenge the fact or duration of their confinement." *DeWalt v. Carter*, 224 F.3d 607, 614 (7th Cir. 2000). An exception to the rule arises from the fact that federal habeas relief is available only to individuals who are "in custody." 28 U.S.C. § 2254(a); *see Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) ("We have interpreted the [habeas statute] as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed."); *Stanbridge v. Scott*, 791 F.3d 715, 718 (7th Cir. 2015) ("Federal courts have jurisdiction over a habeas petition only if the petitioner is in custody pursuant to the judgment of a State court.") (internal quotation marks omitted). In *DeWalt*, the Seventh Circuit held that because habeas is not an option after a person is no longer in custody, a post-custody § 1983 claim challenging the validity of a conviction does not interfere with the operation of the habeas statute, and thus *Heck* does not bar the claim. *See* 224 F.3d at 617 ("[W]here habeas is not applicable, the requirements of the habeas statute do not supersede the explicit right to proceed under § 1983."). As the Seventh Circuit later explained in *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006): "[A] prisoner whose grievance implies the invalidity of ongoing custody must seek review by collateral attack … . Only after the custody is over may the prisoner use § 1983 to

seek damages against persons who may have been responsible; indeed, the § 1983 claim does not accrue until the custody ends." *Id*. at 306-07.

The question then becomes when Savory's custody ended. The answer under Seventh Circuit precedent is when his parole terminated. *See Burd v. Sessler*, 702 F.3d 429, 435 (7th Cir. 2012) ("Once [the plaintiff's] supervised release [the modern Illinois equivalent of parole] expires, any subsequent habeas corpus petition may be foreclosed due to failure to meet the 'in custody' requirement of habeas corpus."). So, because Savory's § 1983 claims accrued when the *Heck* bar lifted, because the *Heck* bar lifted when Savory could no longer seek federal habeas relief, and because Savory could no longer seek habeas relief as of the termination of his parole on December 6, 2011, Savory's § 1983 claims accrued on that date, and the statute of limitations expired two years later, on December 6, 2013. It follows that those claims, which Savory did not file until January 11, 2017, are barred by the statute of limitations. *See Whitfield v. Howard*, 852 F.3d 656, 658 (7th Cir. 2017) (noting that the "statute of limitations does not begin to run until [the] *Heck* bar lift[s]").

Savory responds that *DeWalt* and *Simpson* do not hold that the *Heck* bar lifts once custody ends; rather, according to Savory, those decisions hold only that *Heck* does not apply to claims that never could have been brought in a habeas petition. In both *DeWalt* and *Simpson*, the plaintiffs challenged prison disciplinary actions that affected the conditions of their confinement, such as being fired from a prison job. *See Simpson*, 450 F.3d at 305; *DeWalt*, 224 F.3d at 617. As

Savory sees it, because habeas is available only to those who challenge the fact or duration of their confinement, *see DeWalt*, 224 F.3d at 617 ("[H]abeas is the proper vehicle for presenting a claim if but only if the prisoner is seeking to 'get out' of custody in some meaningful sense.") (internal quotation marks omitted), habeas *never* was an avenue for challenging the disciplinary actions that injured the *DeWalt* and *Simpson* plaintiffs. Savory thus reads *DeWalt* and *Simpson* as holding that, although *Heck* does not bar a § 1983 suit when habeas was never an option, when a plaintiff challenges a conviction, *Heck* continues to bar a § 1983 suit unless and until the conviction is favorably terminated, regardless of whether the plaintiff remains in or has left custody. Doc. 79 at 17.

Savory's reading of *DeWalt* and *Simpson* may be faithful to their facts, but it cannot be reconciled with their reasoning. The legal principle underlying both decisions is much broader than Savory acknowledges: When habeas is not available, § 1983 is; and, more specifically, when habeas *was* available but no longer is, § 1983 *becomes* available. Both decisions recognize the implications of the principle they articulated. *Simpson* explicitly contemplated a case like Savory's: "[A]fter the custody is over[,] the prisoner [may] use § 1983 to seek damages against persons who may have been responsible." 450 F.3d at 307. And *DeWalt* noted that it was overruling *Anderson v. County of Montgomery*, 111 F.3d 494, 499 (7th Cir. 1997), which had held that *Heck* barred the suit of an individual who "was not incarcerated when he brought his § 1983 claims and thus had no habeas corpus relief available to him." *See DeWalt*, 224 F.3d at 617-18. In overruling

Anderson, *DeWalt* necessarily held that an individual not in custody, and thus no longer able to seek federal habeas relief, was *not* barred by *Heck* from bringing a § 1983 claim. *See Pickens v. Moore*, 806 F. Supp. 2d 1070, 1075 n.4 (N.D. Ill. 2011) ("It is a distinction without a difference that habeas relief is unavailable to Pickens not because he is challenging the conditions of his confinement … but rather because he is no longer incarcerated. In that regard *DeWalt* explicitly overruled *Anderson* … , which had held that the *Heck* bar applied without regard to the fact that the claimant was no longer incarcerated and thus had no habeas relief available to him.").

Savory's interpretation of *DeWalt* and *Simpson* is also inconsistent with the Seventh Circuit's recent *Whitfield* decision, which held that a plaintiff who had recently been released from custody could bring a claim through § 1983 that he could have brought (and did bring) through habeas while he was in custody. 852 F.3d at 664-65. The plaintiff in *Whitfield* challenged the allegedly retaliatory revocation of his good-time credits, which delayed his release from prison by sixteen months. *Id*. at 658. Because the loss of the credits affected the duration of his incarceration, habeas was the exclusive vehicle for his challenge while he remained in custody. *Id*. at 661. Indeed, the plaintiff had filed a federal habeas petition, but it was dismissed as moot after he completed his sentence. *Id*. at 659. By permitting the plaintiff to bring a post-custody § 1983 claim, the Seventh Circuit made clear that the *Heck* bar lifts when a prisoner is released from custody, even for claims that challenge the fact or

duration of confinement and therefore that could have been brought in a habeas petition. *Id*. at 663, 665.

Seventh Circuit precedent recognizes, as an exception to *DeWalt* and *Simpson*, one circumstance in which the *Heck* bar stays in place even after a plaintiff is no longer in custody: where the plaintiff "has a constitutional claim, yet (perhaps for strategic reasons) sits it out while in custody and waits to bring her claim until habeas corpus is jurisdictionally barred because the 'custody' requirement is no longer met." *Id*. at 664 (citing *Burd*, 702 F.3d at 436)). This exception adheres to the rationale of *DeWalt* and *Simpson*: Because *Heck*'s purpose is to protect the habeas remedy's exclusivity, *Heck* continues to apply to those individuals who attempt to evade the habeas statute's strictures by waiting out their sentences and only then filing § 1983 claims. The exception does not apply to Savory because, as noted above, he sought federal habeas relief not only once, but twice, during his custody.

Finally, Savory argues that the *Heck* opinion itself suggests that the favorable termination of a challenge to the plaintiff's conviction is a necessary prerequisite to bringing a § 1983 claim, even if the plaintiff is no longer in custody. *See Heck*, 512 U.S. at 490 n.10. Savory acknowledges that a majority of the Justices have expressed the view in concurrences that the *Heck* bar does not apply to plaintiffs who are no longer in custody, *see Spencer v. Kemna*, 523 U.S. 1, 18-21 (1998) (Souter, J., concurring); *id*. at 21-22 (Ginsburg, J., concurring); *Heck*, 512 U.S. at 491-503 (Souter, J., concurring), but argues that this principle has never

been expressed in a majority opinion. The Seventh Circuit considered at great length and then rejected this very argument in *DeWalt*, definitively concluding that the view expressed in the above-cited concurrences represents governing law. *See* 224 F.3d at 615-17 & n.5. That ends the matter as far as a district court is concerned. *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) ("In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of this court whether or not they agree.") (citations omitted); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) ("[O]nly an express overruling relieves an inferior court of the duty to follow decisions on the books.").

* * *

It is possible that Defendants, or at least one or some of them, inflicted a grave injustice on Savory. But absent circumstances not present here—such as equitable tolling, *see Shropshear v. Corp. Counsel of City of Chicago*, 275 F.3d 593, 595-97 (7th Cir. 2001) (applying Illinois equitable tolling law to a § 1983 claim), which Savory does not invoke and therefore has forfeited, *see Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 825 (7th Cir. 2015) ("[A] party generally forfeits an argument or issue not raised in response to a motion to dismiss."); *G&S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court."); *Domka v. Portage Cnty.*, 523

F.3d 776, 783 n.11 (7th Cir. 2008) ("[W]here a party raises a specific argument for the first time on appeal, it is waived even though the 'general issue' was before the district court.")—statutes of limitation are unforgiving, even under the most compelling circumstances. *See Maples v. Thomas*, 565 U.S. 266, 281 (2012) ("[W]hen a petitioner's postconviction counsel misses a filing deadline, the petitioner is bound by the oversight."); *Johnson v. McBride*, 318 F.3d 587, 590 (7th Cir. 2004) (dismissing as untimely a death row inmate's one-day-late federal habeas petition). Because Savory's claims are barred by the applicable statutes of limitations, this suit is dismissed. The dismissal is with prejudice because repleading could not possibly cure the claims' untimeliness. *See Conover v. Lein*, 87 F.3d 905, 908 (7th Cir. 1996) (noting that an untimely claim should be dismissed with prejudice).

December 1, 2017

/s/
United States District Judge

APPENDIX G

ILND 450 (Rev. 10/13) Judgment in a Civil Action

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Case No. 17 C 204
Judge Gary Feinerman

[Filed December 1, 2017]

Johnnie Lee Savory,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
Cannon et al,	)
	)
Defendant(s).	)
	)

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

□ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which □ includes pre–judgment interest.
□ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s) and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment is entered in favor of Defendants Charles Cannon, et al., and against Plaintiff Johnnie Lee Savory.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Gary Feinerman on a motion.

Date: 12/1/2017 Thomas G. Bruton, Clerk of Court

/s/ Jackie Deanes, Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 17-3543

[Filed March 6, 2019]

JOHNNIE LEE SAVORY, *Plaintiff-Appellant,*

v.

WILLIAM CANNON, SR., as special representative for Charles Cannon, *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-00204

Gary Feinerman, *Judge*.

By the Court:

O R D E R

The petition for rehearing en banc is **GRANTED**. The opinion and judgment entered by the panel are **VACATED**. Oral argument will be heard on a date to be set by further order.

APPENDIX I

EXHIBIT B

State of Illinois
Executive Department

TO: Circuit Clerk, Peoria County, Circuit Court of Peoria County, Illinois; Circuit Clerk, Knox County, Circuit Court of Knox County, Illinois

Whereas, JOHNNY L. SAVORY (SID: 23061880) was convicted of the crime of **Murder/Intent to Kill/Injure; Bring/Poss Contraband in Penal Institution, Case: 77CF565; 93CF122** in the **Circuit; Circuit** Court of **Peoria; Knox** County and was sentenced **June 12, 1981; September 21, 1994** to **40 to 80 Years IDOC; 2 Years IDOC (cc),**

Whereas, it has been represented to me that **JOHNNY L. SAVORY (SID: 23061880)** is a fit and proper subject to Executive Clemency.

Now, Know Ye, that I, PAT QUINN, Governor of the State of Illinois, by virtue of the authority vested in me by the Constitution of the State, do by these presents:

PARDON

JOHNNY L. SAVORY (SID: 23061880)

of the said crime of which convicted, and **JOHNNY L. SAVORY (SID: 23061880)** is hereby acquitted and discharged of and from all further imprisonment and

restored to all the rights of citizenship which may have been forfeited by the conviction.

Grant Pardon With Order Permitting Expungement Under The Provisions Of 20 ILCS 2630/5.2(e), Excluding The Right To Ship, Transport, Possess, or Receive Firearms, Which May Have Been Forfeited By The Conviction.

DATED: January 12, 2015

/s/Patt Quinn
PAT QUINN
GOVERNOR

[SEAL]

By the Governor:

/s/Jessee White
JESSE WHITE
SECRETARY OF STATE

PARDON RECEIPT

A **PARDON** was issued by the Governor on **January 12, 2015,** to **JOHNNY L. SAVORY (SID: 23061880),** who was convicted of the crime of **Murder/Intent to Kill/Injure; Bring/Poss Contraband in Penal Institution, Case: 77CF565; 93CF122** in the **Circuit; Circuit** Court of **Peoria; Knox** County and was sentenced **June 12, 1981; September 21, 1994** to **40 to 80 Years IDOC; 2 Years IDOC (cc).**

The **PARDON** certificate was delivered to and received by **JOHNNY L. SAVORY (SID: 23061880)** on _____, _____.

_____

S/ **JOHNNY L. SAVORY (SID: 23061880)**

Return to:
Prisoner Review Board
Suite A
319 East Madison Street
Springfield, Illinois 62701

APPENDIX J

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-3543

[Filed February 4, 2019]

JOHNNIE L. SAVORY,
Plaintiff-Appellant,

v.

CHARLES CANNON, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 1:17-cv-00204.
The Honorable **Gary Feinerman**, Judge Presiding.

PETITION FOR REHEARING *EN BANC*

JAMES G. SOTOS
Counsel of Record
JOHN J. TIMBO
SARA J. SCHROEDER
LISA M. MEADOR
THE SOTOS LAW FIRM, P.C.

141 W. Jackson Blvd., #1240A
Chicago, Illinois 60604
(630) 735-3300

Counsel for Defendants-Appellees

* * *

[*Appearance & Circuit Rule 26.1 Disclosure Statements, Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

RULE 35(b)(1) STATEMENT

Defendants-Appellees request rehearing *en banc* of the panel's January 7, 2019 decision reversing the dismissal of Plaintiff Savory's Complaint. *See Savory v. Cannon*, 912 F.3d 1030 (7th Cir. 2019). This petition satisfies Fed. R. App. 35 (b) because the panel's application of *Heck v. Humphrey*, 512 U.S. 477 (1994) to further delay accrual of Savory's §1983 claims, despite his being out of custody, and without access to *habeas* relief, is in direct conflict with:

- *Sanchez v. City of Chicago*, 880 F.3d 349 (7th Cir. 2018) (holding *Heck* does not bar §1983 claims challenging the legality of a conviction where plaintiff is no longer in custody for *habeas* purposes and pursued appropriate collateral relief while in custody);

- *Hoeft v. Joanis*, 727 Fed.Appx. 881, 883 (7th Cir. 2018) ("The Supreme Court has not addressed whether *Heck* applies to plaintiffs who sue for wrongful convictions after they have been released from custody, when they may no longer obtain collateral relief. But we have ruled that *Heck* does not apply when an out-of-custody plaintiff sought collateral review before a release from prison....")

- *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000) (invoking Circuit Rule 40(e) and overruling *Anderson v. County of Montgomery*, 111 F.3d 494 (7th Cir. 1997), which had held *Heck* barred §1983 claims challenging the legality of a conviction even if plaintiff was no longer in custody and had no access to *habeas* relief);

- *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006) (§1983 claims challenging the fact or duration of

custody accrue when custody ends because *Heck* is inapplicable when *habeas* is unavailable);

• *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012) (holding §1983 action may proceed without regard to *Heck* so long as released plaintiff pursued collateral relief while in custody so as not to skirt the *Heck* bar);

• *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017) (*Heck* does not bar §1983 actions where plaintiff is out of custody and pursued appropriate collateral relief while in custody).

The panel decision further conflicts with the considered dictum of five Supreme Court justices in *Spencer v. Kemna*, 523 U.S. 1 (1998), later adopted by this court in *DeWalt*, pronouncing that individuals out of custody, with no access to *habeas*, may bring §1983 actions alleging the unconstitutionality of a conviction irrespective of *Heck's* favorable termination rule.

This matter further presents a question of exceptional importance because the panel decision transcends this case to impermissibly bar former prisoners from seeking recompense under §1983, unless they can first convince a state governor to pardon them, in contravention of the remedial purposes underlying §1983.

ARGUMENT[1]

En banc review should be granted because, in straining to provide a remedy to Savory, the panel decision directly conflicted with several of this court's precedents and imposes an impermissible hurdle on prisoners who have completed their sentences and seek a federal forum to demonstrate the illegality of their conviction. A primary purpose underlying 42 U.S.C. §1983, was to provide a federal remedy to protect all citizens against state sponsored infringement of constitutional rights. *See* Cong. Globe, 42nd Cong., 1st Sess., 335, 374-376. Congress deemed a federal remedy necessary because the states could not be counted on to protect Fourteenth Amendment rights due to their "prejudice, passion, neglect, [or] intolerance." *Monroe v. Pape,* 365 U.S. 167, 180 (1961). Consistently, §1983 does not condition the right to file suit on the approval of state officials (*Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982)), yet as explained below, the panel's decision will require just that (in conflict with this Circuit's *stare decisis*) by necessitating that released prisoners first obtain a pardon from a state governor before being allowed to pursue a §1983 action.

---

[1] References to the district court record are noted as "R." followed by docket and page number, and references to appellate briefs are noted as "Pl. Br." and "Def. Br." followed by docket and page number.

I. The Panel's Decision Improperly Departed from Existing Circuit Precedent and Creates Intra-Circuit Conflict.

The panel rested its decision to impose a *Heck* bar on a former prisoner's right to challenge the legality of his conviction under §1983 almost exclusively on *Heck's* pronouncement that:

> We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to §1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution. We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Savory, 912 F.3d at 1033, citing *Heck,* 512 U.S. at 486-7.

But the panel's view that it was bound by that holding, and that Savory's case "began and ended" with *Heck* (*Savory*, 912 F.3d at 1033), was incorrect because

Heck, unlike Savory, was still incarcerated when he sued under §1983. *Heck*, 512 U.S. at 478. Furthermore, the panel's decision to "end" at *Heck* ignored the Circuit's *stare decisis* that upholds the right of released prisoners, with no access to *habeas* relief, to pursue §1983 actions challenging the legality of their convictions where they first sought collateral relief while in custody. (*e.g., Sanchez*, 880 F.3d 349; *Hoeft*, 727 Fed.Appx. at 883, *DeWalt*, 224 F.3d 607).[2]

To start, *Heck's* imposition of a favorable termination condition on Heck's right to sue was supported by the Court's concerns "for finality and consistency and [its general reluctance to] expand opportunities for collateral attack…." *Id*. at 485. These concerns are at their apex in the context of a prisoner under sentence who already has access to a wide array of state and federal remedies for constitutional challenges to confinement, including appeal, post-conviction, clemency, and *habeas*. Indeed, the point of *Heck* was to reconcile the potential collision brewing at the "intersection of the two most fertile sources of federal-court prisoner litigation…42 U.S.C. §1983, and the federal habeas corpus statute, 28 U.S.C. §2254." *Id*. at 480.

But unlike Heck, Savory was paroled in 2006 and formally released from custody in 2011, 5 years before he sued. Def. Br., Dkt. 22 at 5. At that point, concern

---

[2] *Sanchez* and *Hoeft* were cited in Defendants' response brief (Def. Br., Dkt. 22 at p. 19), and *Sanchez* was further emphasized in a supplemental submission following oral argument. (Dkt. 43 at 4). Neither case was acknowledged in the panel decision.

over collision with *habeas* proceedings evaporated because Savory no longer had access to that remedy. The importance of this custodial distinction was first recognized by Justice Souter in a four Justice concurrence in *Heck* itself, where he explained that subjecting individuals not in custody to a *Heck* bar would "deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling." *Heck*, 512 U.S. at 500 (Souter, J., concurring).

Four years after *Heck*, Justices Ginsberg Breyer, and Stevens also embraced Justice Souter's *Heck* concurrence, in *Spencer v. Kemna*, 523 U.S. 1, 18-22, 25 n.8 (1998) (Souter, J., joined by O'Connor, Ginsberg, and Breyer J.J., concurring; Stevens, J., dissenting). The Justices explained in *Spencer* that *Heck* is best understood as a common-sense effort to minimize federal interference with state criminal proceedings by forestalling §1983 challenges to extant criminal convictions while plaintiff serves his sentence. *Id.* While a prisoner is in custody, requiring that a favorable termination of his conviction precede any §1983 claim is a sensible way to avoid adding another collateral remedy to a prisoner's arsenal, and with it all the attendant risks of potentially inconsistent decisions. *Id.*

But, as recognized by the Justices in *Spencer*, the completion of a criminal sentence and ensuing release from custody changes everything. Once a prisoner has paid his debt to society, he has no further access to *habeas* relief, and a §1983 claim is often the *only* available remedy to address the illegality of his

conviction. As a result, *Heck's* concerns for an over-abundance of remedies evaporates, as does its concern over a collision between the federal *habeas* statute and §1983.

Viewed against that backdrop, the panel's view that Savory's case "began and ended with *Heck*," *Savory,* 912 F.3d at 1033, is fundamentally flawed. Indeed, just last year this Court specifically held that a plaintiff who, following release from custody, alleged under §1983 that he was "framed", was not barred by *Heck* despite not first having his conviction invalidated, because "*Heck* does not bar a suit by a plaintiff who is no longer in custody but who (like Savory) pursued a collateral attack through appropriate channels while he was in custody, even if such efforts were unavailing." *Sanchez*, 880 F.3d at 356. *See also Hoeft*, 727 Fed.Appx. at 883 (*Heck* does not apply to §1983 action alleging coerced confession where plaintiff is out of custody and sought collateral review before release.)

This Circuit's adoption of the *Spencer* and *Heck* concurrences traces to *DeWalt v. Carter*, 224 F.3d 607 (2000), where this court announced the rule that "a §1983 action must be available to challenge constitutional wrongs where federal *habeas* is not available." *DeWalt*, 224 F.3d at 617. Any ambiguity as to the breadth of this court's commitment to that rule was eliminated when, by Circuit Rule 40(e), it overruled previous holdings that contradicted the *Spencer* justices, including *Anderson v. County of Montgomery*, 111 F.3d 494 (7th Cir. 1997). *See DeWalt,* 224 F.3d at 617-18, n.6. In *Anderson*, this court had relied on the exact same reasoning as the instant panel

– that *Heck* trumps Justice Souter's concurrence – to apply the *Heck*-bar to the out-of-custody plaintiff. 111 F.3d at 499. *DeWalt* explained the decision to overrule *Anderson* on the basis that it pre-dated *Spencer,* and "in light of the [*Spencer*] Justices' reluctance to apply the *Heck* rule to situations in which *habeas* relief is not available," *DeWalt*, 224 F.3d at 617.

Indeed, the divergent manners in which *DeWalt* and the instant panel dealt with *Spencer,* further demonstrates the need for *en banc* consideration. In overruling *Anderson*, *DeWalt* deferred to *Spencer* in explaining that it was "hesitant to apply the *Heck* rule in such a way as would contravene the pronouncement of five sitting justices." 224 F.3d at 616-17. This court further decided DeWalt's claims "in the absence of binding Supreme Court precedent, and in light of the guidance offered by the concurrences in *Heck* and *Spencer." Id*. But the instant panel concluded contrarily that it was bound by *Heck*, and dismissed the concurrences as "minority views" and "*dicta* from a collection of concurrences and dissents [that] may not overrule majority opinions", while acknowledging that "[t]he Supreme Court may eventually adopt Justice Souter's view but it has not yet done so and we are bound by *Heck*." *Savory,* 912 F.3d at 1036. Indeed, the panel cited *Heck's* footnote 10 as the majority rule that bound it to reject Justice Souter's rule, *Savory,* 912 F.3d at 1035, even though the Supreme Court itself has since acknowledged that whether the unavailability of *habeas* dispenses with the *Heck* requirement remains unsettled. *See Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004).

II. The Panel Decision Transcends this Case to Impermissibly Bar Former Prisoners From Utilizing §1983 Until They Receive a Gubernatorial Pardon.

Ultimately, the panel's decision to rigorously apply *Heck* may have been inspired more by its concern that, only by doing so, could Savory obtain a hearing on his claims of official misconduct. Indeed, Savory argued (Pl. Br., Dkt. 12 at 41, Dkt. 26 at 18), and the panel inquired (Oral Argument at 16:49, *Savory v. Cannon*, Case No. 17-3543 (7th Cir. October 25, 2018)), as to how Savory's claims could have survived claim and issue preclusion[3] defenses if he had been forced to file suit, without the benefit of a *Heck* bar, within two years of his 2011 release.

But the breadth of preclusion doctrines was not a concern that animated *Heck*, which was only intended to minimize federal interference in pending state criminal proceedings and more specifically, avoid circumvention of *habeas* through §1983 claims. *Heck*, 512 U.S. 485-87. Further, analysis of the true scope of preclusion reveals that the panel decision actually betrays principles of federalism and finality upon which preclusion doctrines are premised; and just as importantly, will impermissibly deny deserving plaintiffs access to §1983, in contravention of the purposes of the Civil Rights Act.

---

[3] Claim and issue preclusion are interchangeably referred to as *res judicata* and collateral estoppel respectively. For ease of reference the former nomenclature is utilized here.

To be sure, preclusion may well have defeated Savory's claims, as well as those of most other former prisoners' §1983 challenges to convictions which have not been overturned or expunged. But that is as intended. When a former prisoner, like Savory, has unsuccessfully brought multiple claims, on direct appeal, post-conviction, and *habeas*, preclusion's principles of finality are *supposed* to signal an end to otherwise endless litigation, notwithstanding a litigant's strident insistence that he was wronged. For instance, in *Sanchez, supra,* 880 F.3d at 356-58, this court agreed with a plaintiff's assertion that, because he was not in custody, *Heck* did not bar his §1983 claim alleging he had been framed, but nonetheless concluded that principles of preclusion barred his suit due to final state court determinations in his criminal case. *Id*.

Indeed, principles of finality underlying preclusion doctrines are "essential to the operation of our criminal justice system," *Foster v. Chatman*, 136 S.Ct. 1737, 1759 (2016) (Alito, J., concurring), and should not be lightly tossed aside. Preclusion doctrines ensure courts are not overwhelmed with the flood of federal challenges to state criminal convictions that Savory incorrectly predicts would flow from removing the *Heck* bar upon a prisoner's release from custody. Pl. Br., Dkt. 12 at 39. Simply stated, if a litigant cannot demonstrate that his criminal conviction was reversed or expunged while he was under sentence, principles of preclusion should ordinarily bar §1983 litigation over the legality of his conviction, and a *Heck* bar is unnecessary to further deter such claims. Indeed, *Heck*

was never intended to stem the tide of §1983 claims instituted by released prisoners.

That said, Savory's suggestion that preclusion doctrines are so broad that they will bar all former prisoners' well-founded claims in the absence of a *Heck* bar is dramatically exaggerated. Pl. Br., Dkt. 12 at 41. Indeed, claim and issue preclusion are equitable doctrines, which must not be applied "unless it is clear that no unfairness results to the party being estopped." *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1023 (7th Cir. 2006). Thus, preclusion would not bar a §1983 claim by a plaintiff who alleged he was framed, and that his conviction was corrupted by concealment of evidence which only surfaced, through no fault of his own, after he completed his sentence. *See, e.g., Wsol v. Carr,* 2001 WL 1104641 *8 (N.D. Ill. Sept. 18 , 2001) (collateral estoppel does not apply when important newly discovered evidence surfaces so long as plaintiff "was in no way responsible for the lack of such evidence"); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 962 F.Supp. 122, 123 (N.D. Ill. 1997) (same).

But plaintiffs victimized by concealed evidence would not fare so well under the panel decision here. By way of illustration, in *Bembenek v. Donohoo*, 355 F.Supp.2d 942, 948-50 (E.D. Wis. 2005), defendants argued *Heck* barred a released prisoner's §1983 claim alleging she was framed for murder, even though the claim was based on new evidence discovered after her release from custody, because her conviction was not overturned or invalidated. Denying the motion, the court relied on *DeWalt* and *Spencer* in concluding *Heck*

was inapplicable because plaintiff was not in custody and had no remedy for her claims of official misconduct, other than §1983. *Id.*

Notably, the instant panel's decision would have barred Bembenek's lawsuit unless she were first able to secure a gubernatorial pardon, in contravention of §1983's purpose to provide a federal remedy for official abuse of State created power. Maybe Bembenek would have obtained a pardon; maybe not. But query if the governor was a former prosecutor involved in the alleged misconduct who could prevent a §1983 suit from being filed simply by denying the pardon. Or even if uninvolved in her case, but due to political leanings or platform positions on criminal justice, the governor simply found it expedient to deny the pardon, or to sit on it with no resolution. Under the instant panel decision, a governor's corruption, willful ignorance, mere laziness, or contrary views, could forever deny the plaintiff a federal forum; or at least until a state executive with a favorable view of plaintiff's case took office. Such a result cannot be squared with the fundamental purposes of §1983.

Indeed, the court need look no further than the facts of this case to grasp the absurdity of conditioning access to §1983 on a released prisoner's ability to convince a governor to pardon him. During his 30 years of incarceration, Plaintiff exercised every option for collateral relief, including two *habeas* petitions, which were all rejected, including one by this Court. *See Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987). Following his formal release from custody in 2011, with his conviction still standing, Plaintiff directed turned

to Illinois' governor. But there is no known process governing such pleas, no record of what forms these pleas took, no record if there was a hearing, or whether there were simply phone calls that accompanied written submissions, or whether the governor himself knew anything about the case, or whether a deputy or other aide made the ultimate decision, or on what basis.

Rather, all that is known is that in 2011, former Governor Quinn commuted Savory's sentence, and then four years later, with no explanation, he elected to issue Savory a general "pardon", though not based on innocence.[4] Unsatisfied, Savory then submitted a supplemental petition for executive clemency to Illinois Governor Bruce Rauner requesting a pardon based on innocence. On January 11, 2019, the Prisoner Review Board issued a letter to Savory's counsel informing Savory's supplemental petition, which was heard in October 2016, was denied by Governor Rauner. The letter further indicated the reasoning for granting or denying clemency would not be disclosed, however, Savory was welcome to file yet another clemency petition once incoming Illinois Governor Jay Pritzker began his term. *Id*. In the event he too denies Savory's anticipated petition, it can be reasonably expected that, absent any legal barriers to additional petitions (and

---

[4] "Since at least 1977, Illinois has adhered to the view that two forms of pardon are presently used by the Governor of this state, one based upon innocence of the defendant and the other merely pardoning the defendant without reference to his innocence." *Walden v. City of Chicago*, 391 F.Supp.2d 660, 671 (N.D. Ill. 2005). Savory's pardon fell into the latter category. *See* R., Dkt. 71-1, Ex. B.

there are none), Plaintiff will continue to ask every future Governor for clemency.[5] That, of course, is his right, but the notion that a clandestine process which provides unlimited bites at the apple should be the trigger for asserting claims under §1983 is absurd and inconsistent with the fundamental purposes of the Civil Rights Act.

And finally, the absence of any finality stemming from the panel decision completely disregards the important purposes underlying statutes of limitations. *See United States v. Kubrick,* 444 U.S. 111, 125 (1979) (the very purpose of statutes of limitations is as compelling as the statutory rights to which they are attached.). Statutes of limitations communicate what is a reasonable time for plaintiffs to develop and assert claims while "protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *Id.*

---

[5] Governor Rauner's denial occurred after the panel issued its opinion. Defendant-Appellees received a copy of the letter from the Peoria County State's Attorney's Office on January 18, 2019. On January 31, 2019, Savory's counsel declined Defendants' request to stipulate to add Governor Rauner's denial of Savory's latest clemency petition to the record, because it was not considered below or by the panel, and because the record was not created until after the appeal was decided. Defendants-Appellees thus have filed a motion to supplement the record on appeal, contemporaneous with the instant motion, on February 4, 2019, and have attached Governor Rauner's letter as an exhibit thereto.

Here, it is hard to imagine a scenario more dismissive of the purposes underlying statutes of limitations than what is created by the panel decision. Limitations periods on wrongful conviction claims are already postponed, often for decades, until a conviction is reversed or invalidated, or the prisoner completes his sentence and is released. Further postponing the process by requiring released prisoners to first obtain a gubernatorial pardon means it can go on forever, with no endpoint. *See Stephan v. Goldinger*, 325 F.3d 874, 876 (7th Cir. 2003) (the theory of statutes of limitations is that even if one has a just claim it is unjust to wait and provide notice after the limitations period has expired and the right to be free from stale claims trumps the right to prosecute them.) Limitations periods promote justice by preventing the surprise of dormant claims that defendants believed have long extinguished, and by sparing "courts the burden of having to adjudicate claims that because of their staleness may be impossible to resolve with even minimum accuracy." *Id*.

CONCLUSION

Heck is a common-sense limitation on the ability of prisoners to circumvent well established remedies including *habeas* for challenging the legality of confinement. It was not intended as a limitation on the breadth of preclusion doctrines, nor as a bar on a released prisoner's right to pursue a §1983 claim absent a state governor's prior approval. Once Savory was released, *Heck* was no longer a concern, and he still had two years to sue. While that suit would likely have confronted preclusion obstacles, Savory could

have overcome those obstacles by establishing an equitable exception, such as the discovery of previously unavailable new evidence. Absent such a showing, preclusion doctrines should have defeated Savory's claims, and *Heck* was not intended to save them due to the expedience of a vague pardon. That result directly contradicted this court's controlling precedents and the considered dictum of five justices in *Spencer,* and was fundamentally at odds with the purposes underlying §1983. As a result, this court should hear this case *en banc* in order to secure and maintain uniformity of the court's decisions and to address the questions of exceptional importance presented.

Date: February 4, 2019

Respectfully submitted,

/s/ James G. Sotos
JAMES G. SOTOS, Attorney No. 6191975
One of the Attorneys for Defendants-Appellees

James G. Sotos
John J. Timbo
Sara J. Schroeder
Lisa M. Meador
THE SOTOS LAW FIRM, P.C.
141 W. Jackson Blvd., #1240A
Chicago, IL 60604
(630) 735-3300
Fax (630) 773-0980
jsotos@jsotoslaw.com

* * *

[*Certificate of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX K

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-3543

[Filed July 15, 2019]

JOHNNIE L. SAVORY,
Plaintiff-Appellant,

v.

CHARLES CANNON, SR.,
as special representative for
Charles Cannon, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:17-cv-00204—Gary Feinerman, *Judge.*

SUPPLEMENTAL BRIEF OF JOHNNIE LEE SAVORY

Arthur Loevy
Jon Loevy
Steven Art*
Julia Rickert

Megan Pierce
LOEVY & LOEVY
311 N. Aberdeen St.
Third Floor
Chicago, IL 60607
(312) 243-5900
steve@loevy.com

Flint Taylor
John L. Stainthorp
PEOPLE'S LAW OFFICE
1180 N. Milwaukee Ave.
Chicago, IL 60642
(773) 235-0700

Locke E. Bowman
Tony Balkissoon
THE RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
Northwestern University
School of Law
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-1271

**Counsel of Record*

* * *

[*Appearance & Circuit Rule 26.1 Disclosure Statements, Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

INTRODUCTION

If Supreme Court precedent before *McDonough v. Smith*, 139 S. Ct. 2149 (2019), left room to debate the accrual rule that applies to this case, *McDonough* resolves that question conclusively in Savory's favor. *McDonough* confirms everything Savory has argued already in this appeal. Savory's §1983 claims accrued when his conviction was set aside—not with his earlier release from custody.

McDonough imposes a favorable-termination requirement in all cases challenging state criminal proceedings and their resulting judgments. "Only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*," the Court pronounced, "will the statute of limitations begin to run." *Id.* at 2158. Only means only—no other event will cause the statute of limitations to run. Under *McDonough*, §1983 claims challenging a state criminal case cannot be filed, if ever, until the criminal case terminates in the defendant's favor. There are no exceptions.

This conclusion is confirmed not only by *McDonough*'s express language, but also by the Court's reasoning and the policy considerations it invoked. *McDonough* reiterates that accrual rules are fashioned by analogy to common-law torts and that claims challenging state criminal cases are analogous to malicious prosecution, making favorable termination a prerequisite to suit. The opinion states that a respect for state functions dictates that §1983 cannot be used to collaterally attack state-court judgments. It notes that claims within the domain of habeas corpus—those

seeking the type of relief exclusive to federal habeas, such as invalidation of a conviction—cannot be pursued using §1983 prior to favorable termination of the state criminal case. And it stresses that avoiding conflicting civil and criminal judgments is important, and that a regime requiring a large number of §1983 claims to be filed and stayed would be undesirable. A favorable-termination requirement, *McDonough* concluded, best serves "core principles of federalism, comity, consistency, and judicial economy." 139 S. Ct. at 2158.

Thus, the Supreme Court has imposed a uniform accrual rule for all §1983 claims challenging state criminal proceedings and their resulting judgments: those claims do not accrue until favorable termination of the criminal case. Savory's criminal case did not terminate in his favor until his conviction was set aside by the governor's pardon. On that date, Savory's §1983 claims accrued, and this suit was timely filed. This Court should reverse.

ARGUMENT

I. *McDONOUGH* HOLDS THAT CLAIMS LIKE SAVORY'S ACCRUE WITH FAVORABLE TERMINATION OF THE CRIMINAL CASE

There is no fair reading of *McDonough* that supports the Appellees' view that Savory's §1983 claims accrued when he was released from custody. Custody played no role in the Court's decision. Instead, the Court categorically held that the limitations period for due process claims challenging state criminal proceedings "does not begin to run until the criminal proceedings against the defendant (*i.e.*, the §1983

plaintiff) have terminated in his favor." 139 S. Ct. at 2154-55. There is no reasonable definition of "favorable termination" that would encompass mere release from custody. Savory's criminal case did not terminate favorably until his pardon.

This appeal asks when the statute of limitations began to run on Savory's §1983 claims challenging his criminal prosecution and conviction. It is difficult to imagine a more direct answer to that question than: "*Only* once the criminal proceeding ha[d] ended in [Savory]'s favor, or [Savory's] resulting conviction ha[d] been invalidated within the meaning of *Heck*[.]" *McDonough*, 139 S. Ct. at 2158 (citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)) (emphasis added). Importantly, Savory did not satisfy either of these conditions until he was pardoned. Considering *McDonough* and *Heck* together, it is impossible to conclude that Savory should have filed suit while his conviction was intact.

It is important that the Court used the word "only" when it set out the conditions that will cause the limitations period to run on §1983 claims challenging state criminal cases. *Id.* In so doing, *McDonough* provided the lower courts with an exclusive list of the events that cause claims like Savory's to accrue. The criminal case must have resolved in the defendant's favor; and if the case resulted in a conviction, invalidation of the conviction is a prerequisite. Savory's criminal case did not resolve in his favor when he was released—he had merely served his sentence—and his conviction was not invalidated until it was expunged by executive order.

McDonough did not qualify this rule whatsoever. The Court did not suggest that there might be an exception for the large category of state criminal defendants who are convicted and later released from prison. It did not even hint that its decision turned on whether the particular criminal defendant before the court is in custody or can obtain federal habeas relief. There was no mention of the concurring or dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), or Justice Souter's concurrence in *Heck*. *McDonough* contains no trace of the arguments for an early accrual rule advanced by the Appellees and accepted by the district court in this case.

The panel wrote, "*Heck* controls the result here." *Savory v. Cannon*, 912 F.3d 1030, 1038 (7th Cir. 2019). Even if there might have been a dispute about whether *Heck* controlled at that time, *McDonough* resolves that dispute without room for debate.

II. *McDONOUGH* REAFFIRMS THAT *HECK*'S FAVORABLE-TERMINATION REQUIREMENT APPLIES WHENEVER A CONVICTION IS CHALLENGED

The Appellees might contend that *McDonough* can be distinguished because the plaintiff there was not convicted. But *McDonough* explains that this is a distinction without a difference, and it reaffirms that *Heck*'s "favorable-termination requirement . . . applies *whenever* 'a judgment in favor of the plaintiff would necessarily imply' that his prior conviction or sentence was invalid." 139 S. Ct. at 2157 (quoting *Heck*, 512 U.S. at 487) (emphasis added).

The Court in *McDonough* emphasized repeatedly that it was merely extending *Heck*'s favorable-termination framework to all §1983 claims challenging state criminal proceedings conducted pursuant to legal process, whether or not a conviction was the result. "*Heck* explains why favorable termination is both relevant and required for a claim . . . that would impugn a conviction," the Court wrote, "and that rationale extends to an ongoing prosecution as well . . . . If the date of the favorable termination was relevant in *Heck*, it is relevant here." *McDonough*, 139 S. Ct. at 2160; see also *id.* at 2158 ("The principles and reasoning of *Heck* . . . point toward a corollary result here[.]"); *id.* at 2157 ("Because a civil claim such as McDonough's . . . implicates the same concerns [discussed in *Heck*], it makes sense to adopt the same rule.").

As it extended *Heck*'s rule to all suits challenging state criminal cases, *McDonough* reaffirmed the principal holding of *Heck*, which controls here:

> [T]he Court in *Heck* held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a plaintiff in a §1983 action first had to prove that his conviction had been invalidated in some way, [*Heck*, 512 U.S. at 486]. This favorable-termination requirement, the Court explained, applies whenever "a judgment in favor of the plaintiff would necessarily imply" that his prior conviction or sentence was invalid. *Id.*, at 487.

139 S. Ct. at 2157. And when *McDonough* emphasized that the statute of limitations begins to run "only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*," 139 S. Ct. at 2158, the Court cited *Heck*'s rule that a §1983 plaintiff must "prove that the conviction . . . has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . , or called into question by a federal court's issuance of a writ of habeas corpus[.]" 512 U.S. at 486-87.[1]

The Appellees argued before *McDonough* that Supreme Court and Seventh Circuit cases following *Heck* relaxed its favorable-termination requirement. But *McDonough* has foreclosed this argument by making clear that the requirement persists in full force: *whenever* a §1983 judgment would imply that a conviction is unconstitutional, the invalidation of that conviction is a prerequisite to suit. 139 S. Ct. at 2157. *McDonough* represents an expansion of this favorable-termination requirement to all §1983 suits attacking state criminal cases. Savory's criminal case terminated in his favor with his pardon, and only then could he sue.

---

[1] Even the dissenting Justices, who would have dismissed the case as improvidently granted, agreed that *Heck* bars a §1983 plaintiff from recovering damages for an unconstitutional conviction until the conviction has been "reversed, expunged, invalidated, or otherwise called into question." *McDonough*, 139 S. Ct. at 2161-62 & n.1 (Thomas, J., dissenting) (citing *Heck*, 512 U.S. at 486-87).

III. THE REASONING OF *McDONOUGH* SUPPORTS SAVORY AS WELL

Savory has contended that *Heck*'s reasoning and the policy considerations it invoked also support his accrual position. Doc. 12 at 17-21; Doc. 28 at 3-4, 16-22; Doc. 58 at 3-5, 9-11. The Court relied on precisely the same reasoning and policy concerns in *McDonough*. In addition to its express language, *McDonough*'s reasoning and policy discussion supports Savory's position.

A. *McDonough* Confirms That Accrual Rules Are Fashioned by Analogy to Common-Law Torts and That Claims Challenging State Criminal Cases Resemble Malicious Prosecution

McDonough reaffirms that the accrual of §1983 claims is a federal question answered "by referring to the common-law principles governing analogous torts." 139 S. Ct. at 2156. The Court decided the claims in *McDonough*, like those in *Heck,* were analogous to common-law malicious prosecution. *Id.* ("[B]oth claims challenge the integrity of criminal prosecutions undertaken 'pursuant to legal process.'"). The Court noted that "two constitutional claims may differ yet still both resemble malicious prosecution more than any other common-law tort," and that *Heck* "analogiz[ed] malicious prosecution to several distinct claims." *Id.* at 2156 n.5.

Malicious prosecution, the Court reiterated, is "a type of claim that accrues only once the underlying criminal proceedings have resolved in the plaintiff's

favor." *Id.* at 2156. Because "favorable termination is both relevant and required for a claim analogous to malicious prosecution," such §1983 claims do not accrue until a favorable termination is obtained. *Id.* at 2160. Like McDonough's and Heck's §1983 claims, Savory's claims are most analogous to malicious prosecution, and so they accrued with favorable termination of his criminal case.

B. *McDonough* Reiterates That §1983 Cannot Be Used to Collaterally Attack A State Criminal Judgment

McDonough's favorable-termination requirement followed not only "from the rule for the most natural common-law analogy," but also "from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment." 139 S. Ct. at 2155. *McDonough* stressed repeatedly that deferring accrual until favorable termination "avoids allowing collateral attacks on criminal judgments through civil litigation." *Id.* at 2157. And it reaffirmed *Heck*'s sentiment that "'concerns for finality and consistency' . . . have motivated [the] Court to refrain from multiplying avenues for collateral attack on criminal judgments through civil tort vehicles such as §1983." *Id.* at 2157 (quoting *Heck*, 512 U.S. at 485).

The Court recognized that blocking §1983 suits that collaterally attack state criminal judgments promotes respect for state-court proceedings and judgments, among other important comity principles. *McDonough*, 139 S. Ct. at 2156-57 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973), and *Younger v. Harris*, 401 U.S.

37, 43 (1971)). In addition, by deferring a §1983 suit until the state court judgment is invalidated, *McDonough* and *Heck* avoid the preclusion problems that would otherwise be presented. *McDonough*, 139 S. Ct. at 2158-59; see also 28 U.S.C. §1738; *Allen v. McCurry*, 449 U.S. 90, 105 (1980); Doc. 28 at 18-21 (explaining that all §1983 claims attacking extant and final state criminal judgments would be barred by preclusion and abstention principles under existing Supreme Court precedents).

In line with these considerations, Savory could not have used §1983 to collaterally attack his extant conviction without undermining fundamental finality and comity principles, and such a suit would have called for abstention or would have been precluded as a result of the then-existing state criminal judgment. Doc. 12 at 19-21, 41-42; Doc. 28 at 16-21; Doc. 58 at 9-11.

C. *McDonough*'s Limited Discussion of Federal Habeas Corpus Supports Savory's Proposed Favorable-Termination Rule

McDonough contains just two mentions of federal habeas corpus. 139 S. Ct. at 2157 n.6 & 2158. The Court said nothing to support the district court's view that "[w]hen habeas is not available, §1983 is," R.95 at 6, and it did not even suggest that its favorable-termination requirement applies only when a litigant is in custody. The Court's decision simply did not turn on the "availability" of habeas relief. On the contrary, what little the Court did say about habeas firmly supports Savory's proposed accrual rule.

McDonough observed that "the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions." 139 S. Ct. at 2158. Like other cases in the *Heck* line, *McDonough* thought it important to guard against §1983 claims that infringe in the domain of habeas by barring suits that seek the *type of relief* reserved to habeas corpus. The Court noted that claims falling within that domain include both those that challenge convictions and also those that challenge the criminal case prior to a conviction. *Id.*; see also *id.* at 2157 n.6. A plaintiff raising such a claim "ha[s] a complete and present cause of action . . . only once the criminal proceedings against him terminate[] in his favor." *Id.* at 2159.

Savory's claims fall "within the domain of habeas corpus." First, the passage of *McDonough* quoted directly above acknowledges that claims challenging state criminal convictions fall within that domain. *Id.* at 2158. Second, Savory's §1983 claims allege constitutional defects in his state criminal case, and re-litigation of federal claims passed upon by state criminal courts is at the core of federal habeas. 28 U.S.C. §2254(d); *Brown v. Allen*, 344 U.S. 443 (1953). Third, and most fundamentally, throughout the 150 years that lower federal courts have enjoyed the power to grant relief from state criminal judgments, the writ of habeas corpus has always been the exclusive mechanism for providing such relief. See generally *Fay v. Noia*, 372 U.S. 391, 399-415 (1963). And the Supreme Court noted in *Allen* that, in passing §1983, Congress did not provide an alternative avenue to obtain federal relief from a state criminal judgment.

449 U.S. at 104 & n.24 ("It is difficult to believe that the drafters of [§1983] considered it a substitute for a federal writ of habeas corpus[.]").

When a claim seeks invalidation of an extant state criminal judgment, federal relief is obtained, if at all, using §2254, and not by way of a civil suit under §1983. *Heck* mandated that this categorical restriction applies even if the litigant is no longer in custody, 512 U.S. at 490 n.10; and even after state remedies are exhausted, *id.* at 489 ("Even a prisoner who has fully exhausted available state remedies has no cause of action under §1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus."). *McDonough* reiterated the restriction. "The proper approach in our federal system," *McDonough* explains, "is for a criminal defendant who believes that the criminal proceedings against him [violates due process] to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings." 139 S. Ct. at 2159.

Unless and until a criminal case terminates favorably, §2254 supplies the exclusive mechanism for federal relief from a state criminal case and its judgments. Only with favorable termination of Savory's criminal case did concerns about infringing on habeas dissipate.[2]

---

[2] The *domain* of habeas is not defined by whether habeas relief is *available* to the particular litigant before the court. The district court incorrectly embraced that view when it employed the false premise that "[w]hen habeas is not available, §1983 is[.]" R.95 at 6. A claim does not suddenly fall outside of the domain of habeas

D. Other Concerns Highlighted by *McDonough* Support Savory

The Court highlighted a number of other considerations in *McDonough*, which also support Savory's position. First, it noted that the favorable-termination requirement "is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments." *Id.* at 2156-57. Conflicting state and federal proceedings, the Court emphasized, "would run counter to core principles of federalism, comity, consistency, and judicial economy." *Id.* at 2158. If §1983 suits challenging the validity of extant convictions were permitted, it would spawn routine conflicts between federal and state proceedings and judgments.

Second, when *McDonough* imposed a blanket favorable-termination rule, it rejected the respondent's suggestion that concerns about conflicting state and federal cases could be avoided by staying federal suits filed before favorable termination. *Id.* at 2158-59. The Court decided that where a claim necessarily challenges a state criminal case, "there is no reason to

---

simply because the litigant advancing that claim cannot satisfy one or more of the statutory requirements of §2254. Those statutory requirements establish the conditions required before a federal court can grant relief on claims falling within the domain of habeas—they do not define the domain of habeas itself. Instead, whether a claim falls within the domain of habeas corpus depends on the type of relief sought. Claims seeking to invalidate a state criminal judgment or custody fall within that domain, whether or not the litigant advancing the claim can obtain relief under §2254.

put the onus to safeguard comity on district courts exercising case-by-case discretion[.]" *Id.* at 2158. The Appellees here advance precisely the same proposal rejected by the Court in *McDonough*, arguing that Savory's concerns about preclusion and abstention in suits challenging extant state convictions could be mitigated by staying those suits until the criminal case came to an end. Doc. 22 (Appellees' Response Br.) at 30. That proposal was rejected in *McDonough* and it should be rejected here as well.

Third, the Court in *McDonough* was concerned about putting criminal defendants/civil plaintiffs in a position where their federal claims might expire. 139 S. Ct. at 2158. Along the same lines, it worried that an accrual rule that did not require favorable termination would "potentially prejudic[e] litigants[.]" *Id.* at 2158. In his briefs, Savory has highlighted the extreme prejudice that plaintiffs like him would suffer if their claims accrued upon release. Doc. 28 at 18-21; Doc. 58 at 11-12. And he has noted the preclusion and abstention problems that would result. Doc. 12 at 41-42. Doc. 28 at 18-21; Doc. 58 at 9-11. In summary, if the Appellees' rule were adopted, Savory's §1983 claims would have required dismissal in federal court at the time of his release from custody, and the statute of limitations would have run by the time his conviction was set aside. *McDonough* sought to avoid these unsavory results.

Fourth, *McDonough* noted that without a favorable-termination requirement, many litigants would file federal claims just to preserve them, "cluttering dockets with dormant, unripe cases." 139 S. Ct. at

2158. Again, Savory has discussed at length the flood of unmeritorious cases that would clutter district court dockets if the Appellees' rule became the law. Doc. 12 at 38-41; Doc. 28 at 21-22. Every state criminal defendant released from custody could come to federal court and raise constitutional claims litigated in state criminal proceedings. *McDonough* sought to limit the set of claims that make it to federal court by extending the favorable-termination requirement.

Finally, *McDonough* emphasized that deferred accrual "respects the autonomy of state courts[.]" 139 S. Ct. at 2159. As Savory has argued, the district court's early accrual rule pays no respect to principles of comity or the role of federal and state courts in our federal system. Doc. 12 at 19-21, 38-39; Doc. 28 at 16-18; *Preiser*, 411 U.S. at 491; *Younger*, 401 U.S. at 44.

* * *

The reasoning and the policy concerns invoked in *McDonough* apply with equal force to this appeal. In this way, too, *McDonough* confirms that Savory's position is correct.

IV. THIS COURT SHOULD RECONSIDER ASPECTS OF *JOHNSON* AND *MANUEL II* THAT ARE AFFECTED BY *McDONOUGH*

This Court's prior cases are largely consistent with the favorable-termination rule discussed in *McDonough* and *Heck*.[3] Savory's case, however, presents subsidiary

---

[3] *McDonough* confirms *Newsome v. McCabe*, 256 F.3d 747, 749 (7th Cir. 2001), which held that a claim "based on wrongful conviction and imprisonment did not accrue until the pardon," even though

accrual issues that were addressed by this Court in *Johnson v. Winstead*, 900 F.3d 428 (7th Cir. 2018), cert. denied, No. 18-1013, 2019 WL 450291 (U.S. June 28, 2019) & No. 18-1186, 2019 WL 1172186 (U.S. June 28, 2019), and *Manuel v. Joliet*, 903 F.3d 667 (7th Cir. 2018) (*Manuel II*), cert. denied, No. 18-1093, 2019 WL 861187 (U.S. June 28, 2019). Parts of *Johnson* and *Manuel II* do not survive *McDonough*, and Savory's case presents an opportunity for this Court to address those aspects of *Johnson* and *Manuel* II sitting *en banc*, if it so chooses.

A. *Johnson*'s View That Constitutional Claims Accrue At Different Times During A Single Criminal Case Should Be Overruled

Johnson holds that *Heck*'s deferred-accrual rule governs claims alleging that a conviction was obtained in violation of the Fifth Amendment right against self-incrimination, and it categorically barred such claims "unless the plaintiff can show that the conviction has already been invalidated." 900 F.3d at 439; *see also id.* at 439 n.2 (decision circulated under Circuit Rule 40(e)). This holding of *Johnson* correctly applies

---

the plaintiff had been released earlier; it confirms this Court's decisions pegging accrual to exoneration, and not to earlier release from custody, Doc. 28 at 12 & n.7; and it confirms the many cases holding that wrongful conviction claims accrue with invalidation of the conviction, Doc. 12 at 23-25 & n.7. Moreover, as the panel explained, the decisions in *Dewalt v. Carter*, 224 F.3d 607 (7th Cir. 2000), *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006), *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012), and *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017), are consistent with *McDonough*'s favorable-termination rule. *Savory*, 912 F.3d at 1036-38; Doc. 12 at 31-37; Doc. 28 at 7-10 & nn.4-6; Doc. 58 at 7-8 & nn.2-3.

McDonough. Savory alleges Fifth Amendment claims, R.1 ¶¶ 5,31-55, 88-98, and those claims did not accrue until his conviction was set aside.

But *Johnson* also held that not all of the plaintiff's Fifth Amendment claims were timely. Johnson was arrested and indicted in June 2004; he was first convicted in October 2007; a state appellate court reversed that conviction based on a trial error and remanded for a new trial in September 2010; Johnson was convicted again in March 2012; the appellate court reversed again in December 2014; and Johnson filed suit in August 2015. 900 F.3d at 432-34. This Court concluded that, because Johnson's first conviction had been reversed and remanded for a new trial in 2010, any claims relating to his first criminal conviction accrued with that earlier reversal and were time barred by the time the suit was filed in 2015. *Id.* at 432, 439.

This aspect of *Johnson* does not survive *McDonough*. In a situation where a criminal defendant is convicted multiple times in the same criminal case, a state-court appellate decision along the way that reverses and remands for a new trial does not represent a favorable termination of the criminal case if on remand the case continues and another conviction is obtained. Though a criminal defendant whose conviction is reversed and who is awaiting retrial might technically satisfy *Heck*'s requirement of showing "that the conviction or sentence has been reversed on direct appeal," 512 U.S. at 486-87, he still cannot establish that "the criminal proceeding has ended in the defendant's favor," as *McDonough*

requires, 139 S. Ct. at 2158. Put differently, when a single criminal case is at issue, at each moment from the issuance of legal process until the case's final favorable termination, the criminal defendant's constitutional claims either impugn a criminal proceeding or a criminal judgment (or both), and under *Heck* and *McDonough* they are therefore subject to a deferred-accrual rule. Properly understood, *Heck* and *McDonough* establish that all claims challenging a state criminal case or its resulting judgments must await a final favorable termination of that case.[4]

---

[4] The fact that the Court held *Johnson* for its decision in *McDonough* and then denied certiorari (instead of granting, vacating, and remanding) does not change the analysis. *Winstead*, No. 18-1013, 2019 WL 450291 (U.S. June 28, 2019) (denying police officers' petition); *Johnson*, No. 18-1186, 2019 WL 1172186 (U.S. June 28, 2019) (denying conditional cross-petition). That is because the cert. petition filed by the officers in the Supreme Court advocated for an early accrual rule. Petition, *Winstead*, No. 18-1013, at i, *available at* https://www.supremecourt.gov/DocketPDF/18/18-1013/86711/20190201155353710_Winstead%20Cert%20Petition.pdf. That position was foreclosed by *McDonough*. Meanwhile, the petition filed by Johnson was conditional, and it asked for review of the multiple-conviction aspect of *Johnson* addressed here only if the Court granted the officers' petition. Conditional Cross-Petition, *Johnson*, No. 18-1186 at 5, *available at* https://www.supremecourt.gov/DocketPDF/18/18-1186/91014/20190306191932107_johnson%20Conditional%20CROSS-Petition%20%20For%20Writ%20Of%20Certiorari%20ELECTRONIC.pdf. In other words, the Supreme Court did not need to correct the portions of *Johnson* that were consistent with *McDonough*, and so it denied the officers' petition; and the Court was not asked to consider the portions of *Johnson* that conflict with *McDonough*, except in the event that it granted the officers' petition, which it did not.

If there were any doubt that this aspect of *Johnson* is no longer good law, *McDonough*'s reasoning, discussed above, leaves no room for *Johnson*'s rule, which would cause federal civil claims relating to a recently reversed state conviction to spring to life amidst an ongoing re-prosecution in the same state criminal case. That rule ignores the analogy to malicious prosecution; it would spawn parallel litigation and create conflicting judgments between state and federal courts; and it would prejudice criminal defendants/civil plaintiffs in exactly the ways the Supreme Court found inappropriate in *McDonough*. *Supra* Parts III.B-D.

Like Johnson, Savory was twice convicted of the same crimes. R.1 ¶ 1. All of his claims—those relating to his first criminal trial, his first criminal conviction, his trial between the two convictions, and his second conviction—accrued with his pardon. To the extent that *Johnson* suggests a different result, it should be reconsidered following *McDonough*.

B. *Manuel II*'s Rejection of Tort Analogies Should Be Overruled

On remand from the Supreme Court in *Manuel*, this Court was asked to determine the accrual rule for a §1983 claim alleging an unlawful detention pursuant to legal process. *Manuel II*, 903 F.3d at 668.[5] Manuel

---

[5] Manuel claimed he was prosecuted based on fabricated evidence, *Manuel v. Joliet*, 137 S. Ct. 911, 914 (2017), just like McDonough, *McDonough*, 139 S. Ct. at 2153. Manuel alleged a Fourth Amendment illegal seizure, 137 S. Ct. at 915-16, while McDonough

contended that his claims accrued with favorable termination of his criminal case, arguing by analogy to malicious prosecution. *Manuel II*, 903 F.3d at 669-70. This Court rejected the argument, concluding that "the Justices deprecated the analogy to malicious prosecution" in *Manuel*, and that Manuel's claim therefore accrued when he was released from custody, not with the favorable termination of his criminal case. *Id.*

To the extent that the Supreme Court deprecated the analogy to malicious prosecution in *Manuel*, it extolled it again in *McDonough*, relying principally on that analogy to support its conclusion that claims alleging constitutional violations attendant to state criminal proceedings accrue only with favorable termination. *Supra* Part III.A. Savory alleges that he was unlawfully detained after legal process issued, R.1 ¶¶ 99-103, and *McDonough* dictates—contrary to *Manuel II*—that those claims accrued at the same time as all of his other claims, with his pardon and the favorable termination of his criminal case.[6]

---

alleged that his Fourteenth Amendment right to due process was violated, *McDonough*, 139 S. Ct. at 2155.

[6] As with *Johnson*, the Supreme Court held *Manuel II* for its decision in *McDonough* and then denied certiorari. *Manuel*, No. 18-1093, 2019 WL 861187 (U.S. June 28, 2019). Again, this does not change the analysis. Like *Johnson*, the petition in *Manuel II* asked the Court to impose an early accrual rule, Petition, *Manuel*, No. 18-1093, at i, *available at* https://www.supremecourt.gov/DocketPDF/18/18-1093/89139/20190221170828692_Cert%20Pet.pdf; a possibility that was ruled out by *McDonough*.

Separately, it is important to point out that *Manuel II*'s conclusion that Manuel's Fourth Amendment claim accrued when

CONCLUSION

Johnson observed that "[a]pplying *Heck* categorically is sound as a matter of limitations law where the need for clear rules is especially acute." 900 F.3d at 439. *McDonough* reiterated that "clear accrual rules are valuable[.]" 139 S. Ct. at 2160. This Court can adopt Savory's proposal that §1983 cases challenging state criminal proceedings and their resulting judgments must wait until the criminal case terminates favorably; or it can adopt the Appellees' rule, which makes the accrual of §1983 claims attacking state criminal cases dependent not on favorable termination, but instead on whether habeas is "available" to the particular litigant before the court. Savory's rule is categorical, clear, and easy to apply; the Appellees' rule is a morass. Fortunately, *McDonough* and *Heck* mandate Savory's approach. Savory's criminal case terminated when his conviction was set aside by the pardon. Doc. 22 at 1 (conceding that the pardon set aside Savory's conviction). His lawsuit filed within two years of that date is timely.

---

he was released from custody is still correct, but under the different theory that the illegal seizure continued until he was released from custody. 903 F.3d at 670 ("The wrong of detention without probable cause continues for the duration of the detention."); see also *McDonough*, 139 S. Ct. at 2158 n.7. Recall that prosecutors favorably terminated Manuel's criminal case one day *before* he was released. *Manuel II*, 903 F.3d at 669. Accordingly, the constitutional violation outlasted the criminal case. If Manuel had been held for a limited time, *after* which prosecutors dropped charges and terminated the criminal case, then *McDonough* would control and Manuel's claim would have accrued with the later favorable termination, and not the earlier release from custody.

July 15, 2019

RESPECTFULLY SUBMITTED,

JOHNNIE LEE SAVORY

By: /s/ Steven Art

Counsel for Johnnie Lee Savory

Arthur Loevy
Jon Loevy
Steven Art
Julia Rickert
Megan Pierce
LOEVY & LOEVY
311 N. Aberdeen St., 3rd Fl.
Chicago, IL 60607
(312) 243-5900
steve@loevy.com

Flint Taylor
John L. Stainthorp
PEOPLE'S LAW OFFICE
1180 N. Milwaukee Ave.
Chicago, IL 60642
(773) 235-0700

Locke E. Bowman
Tony Balkissoon
THE RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
Northwestern University
School of Law

375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-1271

* * *

[*Certificate of Compliance, Certificate of Compliance with this Court's Electronic Case Filing Procedure (C)(3) and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX L

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-3543

[Filed July 15, 2019]

JOHNNIE L. SAVORY,
Appellant-Plaintiff,

v.

CHARLES CANNON, et al.,
Appellees-Defendants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 1:17-cv-00204
The Honorable **Gary Feinerman**, *Judge Presiding*.

APPELLEES-DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING THE BEARING OF THE SUPREME COURT'S OPINION IN *MCDONOUGH V. SMITH*

Counsel for Appellees-Defendants:

JAMES G. SOTOS
JOHN J. TIMBO
SARA J. SCHROEDER
LISA M. MEADOR
THE SOTOS LAW FIRM, P.C.
141 W. Jackson Blvd., #1240A
Chicago, IL 60604
(630) 735-3300
jsotos@jsotoslaw.com
jtimbo@jsotoslaw.com
sschroeder@jsotoslaw.com
lmeador@jsotoslaw.com

* * *

[*Appearance & Circuit Rule 26.1 Disclosure Statements, Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

INTRODUCTION

This case and *McDonough v. Smith*, 139 S. Ct. 2149 (2019), both involve the accrual of § 1983 claims under *Heck v. Humphrey*, 512 U.S. 477 (1994), but that is all they have in common. *McDonough* resolved an inter-circuit conflict on the specific issue of whether a criminal defendant's fabrication of evidence claim immediately accrued notwithstanding the pendency of his criminal case (similar to the false arrest claim in *Wallace v. City of Chicago*, 549 U.S. 384 (2007)), or whether accrual on the claim was *Heck*-barred until the proceedings concluded in the defendant's favor. Absent from *McDonough* was any reference to the intra-circuit conflict presented here on the question of whether *Heck's* favorable termination rule, regardless of the nature of the underlying § 1983 claim, drops away once the availability of habeas relief is foreclosed by a prisoner's release from custody. Similarly, *McDonough* did not address the question of exceptional importance presented here in regards to the panel decision impermissibly barring former prisoners from seeking recompense under § 1983, unless they can first convince a state governor to pardon them, in contravention of the remedial purposes underlying § 1983.

That said, *McDonough* did reaffirm one overriding principle of relevance to the present case, specifically that *Heck* "is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter…." *McDonough*, 139 S. Ct. at 2157. Those concerns, firmly grounded in principles of federalism and comity, are prominent when a prisoner

in custody chooses § 1983 instead of the federal habeas corpus statute to "collateral[ly] attack [ ] the conviction through the vehicle of a civil suit." *Heck v. Humphrey*, 512 U.S. at 480. But once a prisoner is released from custody, those concerns dissipate and *Heck* is no longer needed to supplement the well-established doctrines of res judicata and collateral estoppel as the guardians of federalism and comity. To hold otherwise would illogically condition a released prisoner's right to pursue a meritorious federal civil rights claim on his ability to first convince a given State's elected executive to grant him a gubernatorial pardon.

ARGUMENT

This appeal concerns whether *Heck v. Humphrey* bars a prisoner who is no longer in custody and no longer has access to habeas corpus from challenging the legality of his conviction under § 1983. A majority of Supreme Court Justices, and a line of cases from this Circuit, have said that *Heck* does no such thing. *See Spencer v. Kemna*, 523 U.S. 1, 18-22, 25 n.8 (1998) (considered dictum of five Supreme Court justices pronouncing that individuals out of custody, with no access to habeas, may bring § 1983 actions alleging the unconstitutionality of a conviction irrespective of *Heck's* favorable termination rule); *Hoeft v. Joanis*, 727 Fed. Appx. 881, 883 (7th Cir. 2018) ("[This Circuit] has ruled that *Heck* does not apply when a an out-of-custody plaintiff sought collateral review before a release from prison…."); *Sanchez v. City of Chicago*, 880 F.3d 349, 356 (7th Cir. 2018) (holding *Heck* does not bar § 1983 claims challenging the legality of a conviction where plaintiff is no longer in custody for habeas purposes

and pursued appropriate collateral relief while in custody); *Whitfield v. Howard*, 852 F.3d 656, 664-65 (7th Cir. 2017) (*Heck* does not bar § 1983 actions where plaintiff is out of custody and pursued appropriate collateral relief while in custody); *Burd v. Sessler*, 702 F.3d 429, 436 (7th Cir. 2012) (holding § 1983 action may proceed without regard to *Heck* so long as released plaintiff pursued collateral relief while in custody so as not to skirt the *Heck* bar); *Simpson v. Nickel*, 450 F.3d 303, 307 (7th Cir. 2006) (§ 1983 claims challenging the fact or duration of custody accrue when custody ends because *Heck* is inapplicable when habeas is unavailable); *DeWalt v. Carter*, 224 F.3d 607, 617-18 n.6 (7th Cir. 2000) (invoking Circuit Rule 40(e) to overrule Circuit precedent, based on *Spencer*, that had held *Heck* barred § 1983 claims challenging the legality of a conviction even if plaintiff was no longer in custody and had no access to habeas relief).

By contrast, *McDonough* examined a wholly separate and narrow issue: whether a due process fabrication of evidence claim accrued when the evidence was first used in McDonough's criminal case, or later, when he was acquitted. *McDonough*, 139 S. Ct. at 2154-55. At the outset and throughout the opinion, *McDonough* emphasized that it was only addressing the accrual rule for that distinct issue. *See id.* at 2155 n.2, 2160 n.10 (declining to address accrual rules for claims that are not before the Court).

I. *McDonough* did not address plaintiffs who are no longer in custody.

The most important distinction between *McDonough* and *Savory* is the status of the plaintiff. In

determining whether *Heck*'s favorable termination rule bars a § 1983 claim, *McDonough* mentions two types of plaintiffs: those who, as in *Heck,* were convicted and still incarcerated and those who, like the *McDonough* plaintiff, were acquitted of criminal charges. *See id.* at 2157-58. *McDonough* makes no mention of a plaintiff like Savory, who served his sentence, gained his freedom, and therefore, no longer had access to habeas corpus as a means to redress alleged constitutional harms. As a result, *McDonough* did not consider whether *Heck's* favorable termination rule should be dispensed with once the pragmatic concern which spawned *Heck* – the potential clash between § 1983 and the habeas corpus statute – is eliminated upon release from custody.

McDonough applied the *Heck* bar to a fabrication of evidence claim because it was substantively indistinguishable from the malicious prosecution claim at issue in *Heck*. *See id.* at 2156-2158. By contrast, the instant case has nothing to do with the application of the *Heck* bar to specific types of § 1983 claims, but rather focuses more broadly on whether *Heck* retains any vitality in connection with any civil rights claims once the plaintiff has been released from custody.

II. *McDonough* did not analyze or mention *Heck's* concurrence or *Spencer v. Kemna*.

At the heart of this appeal is the long-simmering debate over Justice Souter's four-Justice concurrence in *Heck*, expanded to five Justices in *Spencer v. Kemna*, which proclaimed that "a former prisoner, no longer in custody, may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement

without being bound to satisfy a favorable termination requirement that would be impossible as a matter of law for him to satisfy." *Spencer,* 523 U.S. at 21. *McDonough* had no occasion to address that debate; rather, the Court relied upon well-settled aspects of *Heck* to hold that plaintiff's fabrication of evidence claim accrued when he was acquitted. *McDonough*, 139 S. Ct. at 2158. To be sure, *Heck*'s favorable termination rule appropriately applies to fabrication of evidence claims that fall directly within the purview of habeas corpus, which is the exclusive remedy for a prisoner challenging the fact or duration of his confinement. *See Heck*, 512 U.S. at 480-82. In that regard, there is little doubt that a civil finding that the prosecutor fabricated the evidence presented against McDonough would have wreaked havoc with still-pending state criminal charges which were premised upon that very same evidence. In the present case, by contrast, there have been no significant criminal proceedings since Savory was paroled in 2006, and no criminal proceedings at all since he was released from parole in 2011.

In reaching the unremarkable conclusion that McDonough's civil claim against his prosecutor could not proceed while he was being prosecuted, *McDonough* made no mention of Justice Souter's opinions in *Heck* and *Spencer* or of any of the half dozen decisions from this Circuit that conflict with the panel decision. *See supra*, pp. 2-3. Indeed, *McDonough* does not even remotely bear on the salient question presented in this appeal, which is whether *Heck's* favorable termination rule falls away once access to habeas is removed. *See Simpson v. Nickel*, 450 F. 3d at 306-07 ("[A] prisoner whose grievance implies the invalidity of ongoing

custody must seek review [through habeas corpus.] Only after the custody is over may the prisoner use § 1983 to seek damages against persons who may have been responsible; indeed, the § 1983 claim does not accrue until the custody ends.").

Beyond not citing or discussing any of the key authorities relevant to this appeal, *McDonough* said nary a word about the interplay between habeas corpus and § 1983, beyond acknowledging that "the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus…." *McDonough*, 139 S. Ct. at 2158. With *McDonough* having no occasion to consider whether *Heck* drops away when the prisoner is released and habeas corpus becomes unavailable, the view of the five *Spencer* Justices remains the last word on the issue: *Heck* is no bar to § 1983 actions brought by released prisoners who are no longer in custody.

III. *McDonough* did not contemplate principles of federalism, judicial economy, the scope of § 1983 or finality as they apply in the context of this appeal.

McDonough further rested the "soundness" of its holding on the real world consequences that would result from civil fabrication of evidence claims being filed when criminal defendants first became aware such evidence was being used against them. *McDonough*, 139 S. Ct. at 2158. The overriding concern was that parallel litigation created by concurrent § 1983 civil suits and criminal trials "would run counter to core principles of federalism, comity, consistency, and judicial economy" (*Id.* at 2159),

principles intended to minimize federal interference in state criminal proceedings and avoid circumvention of the exclusivity of habeas relief. *See Heck*, 512 U.S. at 485-87. The *McDonough* Court was unpersuaded that discretionary district court options to stay or abstain from active litigation would safeguard comity concerns to a degree that justified the filing of civil lawsuits simultaneous with parallel criminal proceedings. *McDonough*, 139 S. Ct. at 2158-59.

In the present context, by contrast, district courts addressing § 1983 claims brought by released prisoners are armed with the full array of comity-based preclusion doctrines, including res judicata, collateral estoppel, and *Rooker-Feldman,*[1] which adequately safeguard principles of federalism and ensure that only meritorious claims will occupy significant judicial resources. *See Whitfield v. Howard*, 852 F.3d at 664 ("A challenge [brought by a released prisoner] that would undermine a state-court conviction or sentence would still face *Rooker-Feldman* jurisdictional problems or res judicata issues in a lower federal court."). Indeed, when a former prisoner has already unsuccessfully litigated constitutional claims, either through direct appeal, postconviction, and/or habeas corpus, the finality principles of claim and issue preclusion will generally signal a prompt end to what could otherwise be endless litigation. For instance, in *Sanchez v. City of Chicago*,

---

[1] Under the *Rooker-Feldman* doctrine, lower federal courts do not have subject matter jurisdiction over claims seeking review of state court judgments. *See Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983).

880 F.3d at 356-58, this Court agreed with plaintiff's assertion that, because he was not in custody, *Heck* did not bar his § 1983 claim alleging he had been framed, but nonetheless concluded that principles of preclusion barred his suit due to final state court determinations in his criminal case. By barring § 1983 litigation by plaintiffs who unsuccessfully pursued collateral relief while incarcerated, principles of claim and issue preclusion ensure that federal courts are not cluttered with federal challenges to state criminal convictions, absent a justifiable basis to warrant equitable relief from such preclusion, such as the discovery of new evidence. *See Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1023 (7th Cir. 2006) (claim and issue preclusion are equitable doctrines, which must not be applied "unless it is clear that no unfairness results to the party being estopped."); *United States v. Luna*, 2019 WL 1098936, at *4 (N.D. Ill. Mar. 8, 2019) (a party may avoid collateral estoppel by showing that "newly discovered evidence was essential to a proper decision in the prior action and ... that he was in no way responsible for the lack of such evidence in the prior action."); *Brokaw v. Weaver,* 305 F.3d 660, 665-68 (7th Cir. 2002) (*Rooker-Feldman* does not apply if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings.).

Indeed, and as suggested above, grounding the dismissal of insubstantial claims on claim or issue preclusion, rather than artificially extending *Heck* beyond its intended reach, still ensures that the overwhelming majority of § 1983 lawsuit challenges to criminal convictions would be defeated at the outset unless the plaintiff can demonstrate that "unfairness

[would] resul[t] to the party being estopped." *Sornberger,* 434 F.3d at 1023. Thus, preclusion would not bar a § 1983 claim by a plaintiff who alleged he was framed, but was unable to previously have his conviction overturned because his criminal case was corrupted by concealment of evidence which only surfaced, through no fault of the plaintiff, after he completed his sentence. *See Bembenek v. Donohoo*, 355 F.Supp.2d 942, 948-50 (E.D. Wis. 2005) (finding § 1983 lawsuit challenging still-standing conviction was permitted via *Spencer* and *DeWalt*, and was not barred by preclusion doctrines because new evidence surfaced after plaintiff's release from custody).

On the other hand, extending *Heck*'s favorable termination rule to released prisoners who no longer have access to habeas corpus would effectively strip away the last federal remedy available to a plaintiff who discovers, after he is released and through no fault of his own, that the criminal case against him was corrupted. A rule of that kind would force such an aggrieved plaintiff to first secure a gubernatorial pardon before having access to federal court, in contravention of the fundamental purposes of the Civil Rights Act. *See* Cong. Globe, 42nd Cong., 1st Sess., 335, 374-376 (a primary purpose underlying 42 U.S.C. § 1983 was to provide a federal remedy to protect all citizens against state sponsored infringement of constitutional rights); *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) ("It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion,

neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens . . . might be denied by the state agencies.").

On the flip side, imposing such a condition on § 1983 claims can also perversely toll the statute of limitations in perpetuity as former prisoners attempt to persuade successive state governors every four years for a pardon. This very real likelihood destroys any possibility of finality for potential civil defendants who have a right to rely on a definitive time when they can no longer be sued. *See United States v. Kubrick*, 444 U.S. 111, 125 (1979) (the very purpose of statutes of limitations is as compelling as the statutory rights to which they are attached.). Indeed, the open-ended possibility of a § 1983 lawsuit which could be triggered at any time on the whim of a receptive state governor offends the very purpose of a statute of limitations, which provides a reasonable time for plaintiffs to develop and assert their claims while "protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence…." *Id.*

Presently, even the current reach of *Heck* to prisoners in custody commonly results in the filing of reversed conviction claims twenty, thirty, or even more years after the alleged misconduct. This lengthy delay in accrual is well-justified given federalism concerns surrounding a still-in-custody prisoner and the very nature of wrongful conviction claims. But extending *Heck* to encompass released prisoners effectively eliminates principles of finality altogether. None of

these important concerns, central to the instant appeal, were even touched upon in *McDonough*.

CONCLUSION

McDonough did not address whether a plaintiff who is no longer in custody and has no access to habeas corpus should be subjected to *Heck's* favorable termination rule, nor did it address the key issues concerning the scope of the civil rights act or principles of finality which are at the heart of this appeal. Consequently, *McDonough's* common sense extension of the *Heck* bar to encompass fabrication of evidence claims brought by an acquitted criminal defendant has no bearing on the pending appeal before this Court.

Date: July 15, 2019

Respectfully submitted,

/s/ Sara J. Schroeder
SARA J. SCHROEDER, Atty. No. 6322803
One of the Attorneys for Appellees- Defendants

The Sotos Law Firm, P.C.
141 W. Jackson Blvd., #1240A
Chicago, IL 60604
(630) 735-3300
sschroeder@jsotoslaw.com

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]