APPENDIX - B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1910

WAYNE HARRIS,
Appellant

v.

SERGEANT STASH, Wilkes Barre Police Department; OFFICER GATRELL, Wilkes Barre Police Department; PUBLIC DEFENDER JOHN DONAVON; AGENT MACGUIRE, Wilkes Barre Police Department; DETECTIVE MALLOY, Wilkes Barre Police Department; COMMONWEALTH OF PENNSYLVANIA, Wilkes Barre, PA; DISTRICT JUSTICE AMESBURY, Wilkes-Barre, PA; LIEUTENANT CLARK, Wilkes Barre Township Police; OFFICER NASH, Wilkes Barre Township Police

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3-21-cv-01787)
District Judge: Honorable Robert D. Mariani

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 2, 2022
Before: HARDIMAN, PORTER, and MCKEE, Circuit Judges

(Opinion filed: February 14, 2023)

OPINION*

PER CURIAM

Appellant Wayne Harris, proceeding pro se and in forma pauperis, appeals from the District Court's order sua sponte dismissing his complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) for failing to state a claim, as well as the denial of his motion for reconsideration of that order. For the following reasons, we will affirm.

I.

In 2004, Harris, a citizen of Jamaica, filed a civil rights action against various individuals and entities alleging unlawful arrest, unlawful search, malicious prosecution, excessive force, discrimination, and other violations of his constitutional rights in connection with investigative activity occurring in 2003, including a 2003 arrest and subsequent guilty plea in Luzerne County, PA. While that complaint was pending, Harris was deported to Jamaica, where he currently resides. According to Harris, he "did not pursue his civil complaint" after his deportation. 3d Cir. ECF No. 9 at 4. The 2004 case was ultimately dismissed for failure to prosecute. See M.D. Pa. Civ. No. 3:04-cv-00802.

In October 2021, Harris filed a second civil action that is virtually identical to the civil action filed and abandoned in 2004, asserting the same claims against the same

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

parties. The only new information contained in the 2021 complaint is Harris' recounting of an alleged August 2021 phone call with the niece of a defendant. Harris alleged that, after he refused to rekindle a romantic relationship with the woman, she "angrily" stated that she had told her relatives that Harris took advantage of her sexually, that she and her relatives "plan[ned]" and "got rid" of Harris, and that her family "prison[ed] your ass and deport[ed] you." D.Ct. ECF No. 1 at 2. Harris asserted that this alleged statement indicated that "plaintiff abuse was personal as a result some of the defendants was her relative; And that the abuse to plaintiff was discrimination towards him for being black" because the woman was white. Id. at 2-3.

Pursuant to 28 U.S.C. § 1915(e)(2), Harris' complaint was screened by a Magistrate Judge, who recommended that the complaint be dismissed for failure to state a claim. See D.Ct. ECF No. 5. The Magistrate Judge noted three grounds for dismissal: (1) the action was barred by the law of the case doctrine, as the District Court already dismissed the same action in 2004 for failure to prosecute; (2) the claims were barred by the statute of limitations; and (3) Harris' claim of malicious prosecution failed as a matter of law because the underlying proceedings did not terminate in his favor, see Hector v. Watt, 235 F.3d 154, 155-56 (3d Cir. 2000). Determining that granting leave to amend would be futile, see Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004), the Magistrate Judge recommended that the complaint be dismissed with prejudice. The District Court partially adopted the recommendations and dismissed the case with prejudice "on the grounds that this action is time-barred and [Harris] cannot bring a claim for malicious

prosecution in a case where he pleaded guilty." D.Ct. ECF No. 7 at 1. The District Court specifically declined to base its dismissal on the law of the case doctrine. See Id. at 1, n.1. Harris' subsequent motion for reconsideration was denied as untimely. Harris appeals,[1] asserting that the District Court erred in dismissing his suit as time-barred because his "newly discovered evidence" constituted an exception to the statute of limitations and excused the untimeliness of his action. 3d Cir. ECF No. 9 at 5. Harris also asserts that his malicious prosecution claim should not have been dismissed because his guilty plea was not voluntary and "[t]herefore there was no guilty plea that could bar this suit, and the district court erred in dismissing this suit with prejudice." Id. at 10.[2]

II.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a District Court's sua sponte dismissal of a complaint under § 1915(e), see Dooley v. Wetzel, 957 F.3d 366, 373 (3d Cir. 2020), and review a District Court's order denying a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure for

[1] Harris' notice of appeal is timely because the District Court's order failed to comply with the separate judgment rule. See Fed. R. Civ. P. 58(a); see also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 224 (3d Cir. 2007) ("[A]n order is treated as a separate document if it satisfies three criteria: (1) it must be self-contained and separate from the opinion, (2) it must note the relief granted, and (3) it must omit (or at least substantially omit) the trial court's reasons for disposing of the claims.").

[2] Harris also asserts that the District Court erred "by accepting the Magistrate report and recommendation to dismiss plaintiff civil complaint that his claims were previously dismissed and the suit is re-litigated." 3d Cir. ECF No. 9 at 5. However, in adopting the report and recommendation, the District Court expressly rejected this basis for dismissal.

an abuse of discretion, see Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 673 (3d Cir. 1999).

The District Court correctly determined that Harris failed to state a claim for malicious prosecution. To prove a malicious prosecution claim under 42 U.S.C. § 1983, a plaintiff must meet a number of elements, including that the "criminal proceeding ended in his favor." Allen v. N.J. State Police, 974 F.3d 497, 502 (3d Cir. 2020). Despite Harris' assertion that his plea was involuntary, his convictions have not been invalidated or otherwise favorably terminated. Further, the voluntariness of his plea cannot be challenged in a § 1983 action, as success would necessarily imply the invalidity of his conviction. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Accordingly, his malicious prosecution claim is not cognizable under § 1983 and was properly dismissed. Id. at 487. However, the District Court erred in dismissing that claim with prejudice, as Harris may bring his malicious prosecution claim at a later time should his convictions be invalidated in the future. Id. at 484-85 (stating that a § 1983 claim based on an allegedly unconstitutional conviction or sentence does not accrue until the invalidation of that conviction or sentence); Curry v. Yachera, 835 F.3d 373, 379 (3d Cir. 2016) (modifying dismissal of Heck-barred malicious prosecution claims to reflect that the claims are dismissed without prejudice).

Harris' remaining claims were properly dismissed with prejudice on statute of limitations grounds. Although the statute of limitations is an affirmative defense, see Fed. R. Civ. P. 8(c), a court may dismiss claims sua sponte if a time-bar is obvious from

the face of the complaint and no further development of the record is necessary. See Fogle v. Pierson, 435 F.3d 1252, 1258 (10th Cir. 2006); see also Jones v. Bock, 549 U.S. 199, 215 (2007); Vasquez Arroyo v. Starks, 589 F.3d 1091, 1097 (10th Cir. 2009). The statute of limitations for civil rights suits under § 1983 in Pennsylvania is two years. See Lake v. Arnold, 232 F.3d 360, 368 (3d Cir. 2000); 42 Pa. Cons. Stat. § 5524(7). We agree with the District Court's conclusion that Harris' alleged new evidence does not alter the fact that his claims clearly accrued for statute of limitations purposes when the alleged wrongful acts occurred, and certainly not later than April 2004, when Harris was subjectively aware of the alleged constitutional violations, as evidenced by the filing of his earlier identical claims against the same parties. Sameric Corp. v. City of Phila., 142 F.3d 582, 599 (3d Cir. 1998). While Harris' "newly discovered evidence" might bring "new meaning and new understanding to the violation some years ago," 3d Cir. ECF No. 9 at 7, it does not constitute an "exception to the untimeliness provision," Id. at 8, or provide a new accrual point for the same claims that Harris, by his own admission, chose to abandon after his deportation to Jamaica. See Id. at 4.

Nor do Harris' assertions provide a basis for equitable tolling of the statute of limitations. "Tolling is [an] extraordinary remedy, and is proper only when the principles of equity would make [the] rigid application [of a limitation period] unfair." D.J.S.-W ex rel. Stewart v. United States, 962 F.3d 745, 750 (3d Cir. 2020) (alterations in original) (internal citations and quotations omitted). Equitable tolling is available in situations "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of

action; (2) where the plaintiff in some extraordinary way has been prevented from asserting [his or] her rights; or (3) where the plaintiff has timely asserted [his or] her rights mistakenly in the wrong forum." Id. (internal quotations and citations omitted). Even in such situations, equitable tolling is not available if a litigant fails to "exercise due diligence in pursuing and preserving" their claims. Id. Harris' "new evidence" does not satisfy any of these situations. At most, the "evidence" presented by Harris provided a motive for events of which he was already aware, and in no way prevented him from pursuing his claims earlier. Further, Harris has not exercised diligence in pursuing and preserving his clams, as evidenced by his abandonment of his earlier 2004 action. As it is clear that Harris' claims accrued over fifteen years ago, and there is no basis for equitable tolling, the District Court properly dismissed Harris' remaining claims as time-barred.[3]

Finally, although Harris does not appear to challenge the District Court's denial of his motion for reconsideration in his appellate brief, we nonetheless discern no abuse of discretion in the District Court's decision. See Max's Seafood, 176 F.3d at 673.

III.

[3] To the extent that Harris alleges his new evidence is grounds to challenge his guilty plea, as had he known about this new evidence sooner "his criminal defense would have been successful," 3d Cir. ECF No. 9 at 12, such an argument was not raised in the District Court and is not properly raised for the first time on appeal. Even if properly raised, as discussed above, a § 1983 action is not the appropriate vehicle to challenge his plea or conviction.

For these reasons, we will affirm the judgment of the District Court, but will modify the order of dismissal to reflect that the malicious prosecution claim is dismissed without prejudice.

APPENDIX - A ~~EXHIBIT~~ (B)

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WAYNE HARRIS,	:	
	:	**CIVIL ACTION NO. 1:21-CV-1787**
Plaintiff,	:	**(JUDGE MARIANI)**
	:	
v.	:	
	:	
SERGEANT STASH, et al.,	:	
	:	
Defendants.	:	

FILED
SCRANTON
FEB 10 2022
Per
DEPUTY CLERK

ORDER

AND NOW, THIS 10th **DAY OF FEBRUARY 2022,** upon consideration of Plaintiff's Motion to Reconsider Dismissal (Doc. 8) filed on February 2, 2022, because the Motion seeks reconsideration of the Court's Order of November 19, 2021, in which the Court adopted Magistrate Martin C. Carlson's October 26, 2021, Report and Recommendation ("R&R) (Doc. 5), dismissed Plaintiff's Complaint, and closed the case (Doc. 7) and the Motion is not timely filed pursuant to Local Rule 7.10 of the Local Rules of Court of the Middle District of Pennsylvania or Federal Rule of Civil Procedure 59(e), **IT IS HEREBY ORDERED THAT** Plaintiff's Motion is **DENIED**.[1]

Robert D. Mariani
United States District Judge

[1] In his Motion, Plaintiff asserts that the Magistrate Judge "did not send plaintiff a timely copy of his Report and Recommendation." (Doc. 8 at 4.) However, the relevant receipt shows that a copy of the Report and Recommendation was sent to Plaintiff's address of record on October 26, 2021. (*See* Doc. 5 Recept.) Further, Plaintiff's Motion to Reconsider Dismissal clearly indicates that he received the R&R and the Court's November 19, 2021, Order.

EXHIBIT (A)

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WAYNE HARRIS,	:	
	:	
Plaintiff,	:	**CIVIL ACTION NO. 3:21-CV-1787 (JUDGE MARIANI)**
v.	:	**(Magistrate Judge Carlson)**
	:	
SERGEANT STASH, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, THIS 5th **DAY OF NOVEMBER 2021**, upon consideration of Magistrate Judge Martin C. Carlson's Report and Recommendation ("R&R") (Doc. 5) and all relevant documents for clear error or manifest injustice, **IT IS HEREBY ORDERED THAT**:

1. The R&R (Doc. 5) is **ADOPTED AS MODIFIED**;[1]
2. Plaintiff's Complaint is **DISMISSED WITH PREJUDICE** on the grounds that this action is time-barred and he cannot bring a claim for malicious prosecution in a case where he pleaded guilty (see Doc. 5 at 10-16);

[1] The Court does not adopt the recommendation that this case be dismissed pursuant to the law of the case doctrine (*see* Doc. 5 at 8-10) because Plaintiff's previous case based on the issues raised in the above-captioned action was dismissed on procedural grounds (Civil Action No. 3:04-CV-802 Docs. 31, 32). *See, e.g., Hamilton v. Levy*, 322 F.3d 776, 787 (3d Cir. 2003) ("The law of the case doctrine limits relitigation of an issue once it has been decided in an earlier stage of the same litigation." (internal quotation and citation omitted)); *see also Hayman Cash Register Company v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982) ("Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances.")

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WAYNE HARRIS,	:	CIV NO. 3:21-CV-1787
	:	
Plaintiff,	:	(Judge Mariani)
	:	
v.	:	(Magistrate Judge Carlson)
	:	
SERGEANT STASH, et al.,	:	
	:	
Defendants.	:	

REPORT AND RECOMMENDATION

I. Factual Background

It is said that doing the same thing over and over again but expecting different results is the highest form of folly. So it is here.

This *pro se* lawsuit comes before us for a legally mandated screening review of the *pro se* plaintiff's complaint. (Doc. 1). This is the second time that Wayne Harris has attempted to sue local authorities over his 2003 arrest and guilty plea conviction on state charges in Luzerne County, Pennsylvania. Harris' initial lawsuit was filed on April 12, 2004 and was dismissed on February 11, 2005, after Harris failed to provide the court with an address where we could communicate with the plaintiff, a violation of the rules of this court. Harris v. Malloy, Civil Bo. 3:04-CV-802.

Sixteen years then passed before Harris, who now resides in Jamaica, filed the instant complaint on October 18, 2021. (Doc. 1). A comparison of the two complaints reveals that they are virtually identical. In fact, pages four through nine of the 2021 complaint are taken directly from Harris' 2004 pleading. Both complaints allege misconduct by local authorities in their investigation and prosecution of Harris in 2003, but both complaints also disclose the same fundamental flaw in this false arrest, malicious prosecution civil rights lawsuit: Harris admits that he pleaded guilty to these state crimes. (Doc. 1, ¶ 36). Thus, Harris' current complaint is a belated effort to resurrect a legally flawed lawsuit that has been dismissed for more than a decade.

Harris has submitted an application for leave to proceed *in forma pauperis*. (Doc. 4). For the reasons set forth below, we will conditionally GRANT this motion for leave to proceed *in forma pauperis* (Doc. 4) and direct that the lodged *pro se* complaint be deemed filed, but it is recommended that the complaint be dismissed.

II. Discussion

A. Screening of *Pro Se* Complaints–Standard of Review

This court has an ongoing statutory obligation to conduct a preliminary review of *pro se* complaints brought by plaintiffs given leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915(e)(2)(B)(ii). Specifically, we are obliged to review the

complaint to determine whether any claims are frivolous, malicious, or fail to state a claim upon which relief may be granted. This statutory text mirrors the language of Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides that a complaint should be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

With respect to this benchmark standard for legal sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has aptly noted the evolving standards governing pleading practice in federal court, stating that:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) continuing with our opinion in Phillips [v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)] and culminating recently with the Supreme Court's decision in Ashcroft v. Iqbal 556 U.S. 662, 129 S. Ct. 1937 (2009) pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. Jordan v. Fox Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). However, a court "need not credit a complaint's

bald assertions or legal conclusions when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not "assume that a ... plaintiff can prove facts that the ... plaintiff has not alleged." Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in order to state a valid cause of action a plaintiff must provide some factual grounds for relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do." Id. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." Id.

In keeping with the principles of Twombly, the Supreme Court has underscored that a trial court must assess whether a complaint states facts upon which relief can be granted when ruling on a motion to dismiss. In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Supreme Court held that, when considering a motion to dismiss, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678. Rather, in conducting a review of the adequacy of complaint, the Supreme Court has advised trial courts that they must:

> [B]egin by identifying pleadings that because they are no more than conclusions are not entitled to the assumption of truth. While legal

> conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id., at 679.

Thus, following Twombly and Iqbal a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, a complaint must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. As the Third Circuit has stated:

> [A]fter Iqbal, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

Fowler, 578 F.3d at 210-11.

As the Court of Appeals has observed:

> The Supreme Court in Twombly set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955).

> This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint which pleads facts "merely consistent with" a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.'"

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861 (2012).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." Id.

Santiago v. Warminster Tp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting Iqbal, 129 S. Ct. at 1950).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no

party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); see also U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 382, 388 (3d Cir. 2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment"). However, the court may not rely on other parts of the record in determining a motion to dismiss, or when determining whether a proposed amended complaint is futile because it fails to state a claim upon which relief may be granted. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

In addition to these pleading rules, a civil complaint must comply with the requirements of Rule 8(a) of the Federal Rule of Civil Procedure, which defines what a complaint should say and provides that:

> (a) A pleading that states a claim for relief must contain (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8.

Thus, a well-pleaded complaint must contain more than mere legal labels and conclusions. Rather, a *pro se* plaintiff's complaint must recite factual allegations that

are sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation, set forth in a "short and plain" statement of a cause of action.

It is against the legal benchmarks that we assess the sufficiency of Harris' complaint and find, for the reasons set forth below, that the complaint should be dismissed.

B. The Law of the Case Doctrine Bars This Case.

In a case such as this, where a lawsuit has previously been dismissed some 15 years ago due to Harris' failure to prosecute, the law of the case doctrine applies and bars further consideration of this claim. "Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. . . . The purpose of this doctrine is to promote the 'judicial system's interest in finality and in efficient administration.'" Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 165 (3d Cir. 1981) (quoting Todd & Co., Inc. v. S.E.C., 637 F.2d 154, 156 (3d Cir. 1980)). The contours of this settled doctrine were described by the United States Supreme Court in the following terms:

> Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

Arizona v. California, 460 U.S. 605, 618 (1983) (citations omitted).

The "[l]aw of the case rules have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" In re Pharmacy Benefit Managers Antitrust Litigation, 582 F.3d 432, 439 (3d Cir. 2009) (reversing arbitration order in antitrust case on law-of-the-case grounds) (citations omitted). It is clear that "[t]he ... doctrine does not restrict a court's power but rather governs its exercise of discretion." Id. (quoting Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron Inc., 123 F.3d 111, 116 (3d Cir. 1997)). In exercising that discretion, however, courts should "be loathe to [reverse prior rulings] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would make a manifest injustice." Id. (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)). In addition to that narrow class of cases where the prior ruling was manifestly unjust, the type of "extraordinary circumstances" that warrant a court's exercising its discretion in favor of reconsidering an issue decided earlier in the course of litigation typically exist only where (1) new evidence is available, or (2) a supervening new law has been announced. Id. (citing Pub. Interest Research Group of N.J., Inc., 123 F.3d at 117)).

In our view, the law of the case doctrine applies here and guides us in our consideration of this complaint since the district court has already dismissed this

NOT FW Failure to State Cause For Relief

action in 2005 due to Harris' failure to prosecute. Harris has not shown that any narrow exception to the law of the case doctrine applies here since there is no new evidence beyond what Harris describes as an acrimonious, long-distance exchange with a former girlfriend that took place more than a decade after the events described in his complaint. Moreover, no supervening favorable new law has been announced. Quite the contrary, as discussed below, the substantive law still compels a dismissal of this case. Therefore, the law of the case doctrine bars this belated effort to reinstate a claim that has long been dismissed due to Harris' inaction.

C. Harris' Claims Are Time-Barred.

Harris' tardy complaint is also clearly time-barred by the applicable statute of limitations. When conducting a screening review of a *pro se* complaint under 28 U.S.C. § 1915, a court may consider whether the complaint is barred under the applicable statute of limitations. As the Third Circuit has explained when it affirmed the screening dismissal of a *pro se* complaint on statute of limitations grounds:

> Civil rights claims are subject to the statute of limitations for personal injury actions of the pertinent state. Thus, Pennsylvania's two year statutory period applies to [these] claims. See Lake v. Arnold, 232 F.3d 360, 368 (3d Cir.2000). The limitations period begins when the plaintiff knows or had reason to know of the injury forming the basis for the federal civil rights action. Gera v. Commonwealth of Pennsylvania, 256 Fed.Appx. 563, 564-65 (3d Cir.2007). Although we have not addressed the issue in a precedential decision, other courts have held that although the statute of limitations is an affirmative defense, district court may *sua sponte* dismiss a complaint under § 1915(e) where the defense is

EXHIBIT (E)

> obvious from the complaint and no development of the factual record is required. See Fogle v. Pierson, 435 F.3d 1252, 1258 (10th Cir.2006); see also Eriline Co. S.A. v. Johnson, 440 F.3d 648, 656-57 (4th Cir.2006) (citation omitted)(finding that a district court's screening authority under § 1915(e) "differentiates in forma pauperis suits from ordinary civil suits and justifies an exception to the general rule that a statute of limitations defense should not be raised and considered sua sponte.").

Smith v. Delaware County Court 260 F. App'x. 454, 455 (3d Cir. 2008); see also Jackson v. Fernandez, No. 08-5694, 2009 WL 233559 (D.N.J. Jan. 26, 2009); Hurst v. City of Dover, No. 04-83, 2008 WL 2421468 (D. Del. June 16, 2008).

It is well-settled that claims brought pursuant to 42 U.S.C. § 1983 are subject to the state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). In Pennsylvania, the statute of limitations for a personal injury action is two years. 42 Pa. Cons. Stat. § 5524. A cause of action accrues for statute of limitations purposes when the plaintiff knows or has reason to know of the injury that constitutes the basis of the cause of action. Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998); see also, Nelson v. County of Allegheny, 60 F.3d 1010 (3d Cir. 1995).

While this two-year limitations period may be extended based upon a continuing wrong theory, a plaintiff must make an exacting showing to avail himself of this grounds for tolling the statute of limitations. For example, it is well settled that the "continuing conduct of [a] defendant will not stop the ticking of the

limitations clock [once] plaintiff obtained requisite information [to state a cause of action]. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy." Barnes v. American Tobacco Co., 161 F.3d 127, 154 (3d Cir. 1998) (quoting Kichline v. Consolidated Rail Corp., 800 F. 2d 356, 360 (3d Cir. 1986)). See also Lake v. Arnold, 232 F.3d 360, 266-68 (3d Cir. 2000). Instead:

> The continuing violations doctrine is an "equitable exception to the timely filing requirement." West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir.1995). Thus, "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am., 927 F.2d 1283, 1295 (3d Cir.1991).In order to benefit from the doctrine, a plaintiff must establish that the defendant's conduct is "more than the occurrence of isolated or sporadic acts." West, 45 F.3d at 755 (quotation omitted). Regarding this inquiry, we have recognized that courts should consider at least three factors: (1) subject matter-whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency-whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence-whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. See id. at 755 n. 9 (citing Berry v. Board of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir.1983)). The consideration of "degree of permanence" is the most important of the factors. See Berry, 715 F.2d at 981.

Cowell v. Palmer Township. 263 F.3d 286, 292 (3d Cir. 2001).

In the instant case, Harris' claims clearly accrued for purposes of the statute of limitations in April of 2004, since he filed the identical lawsuit in this court at that time. Harris' subjective recognition of these claims some fifteen years ago now acts as a bar to him reasserting this complaint after more than a decade has passed. Simply put, the undisputed facts of record show that Harris' complaint runs afoul of the two-year statute of limitations which applies to civil rights claims. Accordingly, this time-barred complaint must be dismissed.

D. Harris May Not Bring a Malicious Prosecution Claim in a Case Where He Pleaded Guilty.

Finally, this complaint fails because it continues to rest upon a fatally flawed legal premise. At bottom, Harris seeks to bring a civil rights action premised on claims of malicious prosecution based upon a valid state criminal conviction which has not otherwise been set aside or overturned.

This he cannot do. Quite the contrary, it is well-settled that an essential element of a civil rights malicious prosecution claim is that the underlying criminal case must have been terminated in favor of the civil rights claimant. Therefore, where, as here, the civil rights plaintiff brings a malicious prosecution or false arrest claim based upon a state case that resulted in a conviction, the plaintiff's claim fails as a matter of law. The Court of Appeals has aptly observed in this regard:

> The Supreme Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." Heck v. Humphrey, 512 U.S. 477, 483, 114 S.Ct. 2364, 129 L.Ed.2d 383(1994) (quoting Memphis Community School Dist. v. Stachura, 477 U.S. 299, 305, 106 S.Ct. 2537, 91 L.Ed.2d 249(1986) (internal quotation marks omitted)). Given this close relation between § 1983 and tort liability, the Supreme Court has said that the common law of torts, "defining the elements of damages and the prerequisites for their recovery, provide[s] the appropriate starting point for inquiry under § 1983 as well." Heck, 512 U.S. at 483 (quoting Carey v. Piphus, 435 U.S. 247, 257–58, 98 S.Ct. 1042, 55 L.Ed.2d 252,(1978)). The Supreme Court applied this rule in Heck to an inmate's § 1983 suit, which alleged that county prosecutors and a state police officer destroyed evidence, used an unlawful voice identification procedure, and engaged in other misconduct. In deciding whether the inmate could state a claim for those alleged violations, the Supreme Court asked what common-law cause of action was the closest to the inmate's claim and concluded that "malicious prosecution provides the closest analogy ... because unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process." Heck, 512 U.S. at 484. Looking to the elements of malicious prosecution, the Court held that the inmate's claim could not proceed because one requirement of malicious prosecution is that the prior criminal proceedings must have terminated in the plaintiff's favor, and the inmate in Heck had not successfully challenged his criminal conviction. Id.

Hector v. Watt, 235 F.3d 154, 155–156 (3d Cir.2000).

Thus, "our precedents are clear that § 1983 plaintiffs alleging arrest and prosecution absent probable cause may bring malicious prosecution claims under the Fourth Amendment, but are entitled to relief only if they are innocent of the crime for which they were prosecuted." Washington v. Hanshaw, 13–1116, 2014 WL 67887 (3d Cir. Jan.9, 2014) Therefore, "a plaintiff claiming malicious prosecution

must prove *actual* innocence as an element of his *prima facie* case." Steele v. City of Erie, 113 F. App'x 456, 459 (3d Cir.2004). In this case, it is evident from Harris' complaint that his prior state criminal prosecution did not terminate favorably for him, since he was convicted in this state case and served a sentence as a result of this conviction. Indeed, Harris recites that he pleaded guilty to this offense, and does not plausibly allege that he was actually innocent of this crime. Since "one requirement of malicious prosecution is that the prior criminal proceedings must have terminated in the plaintiff's favor." id., the immutable fact of Harris' guilty plea conviction presently defeats any federal civil rights claims based upon false arrest or malicious prosecution in this state case, and compels dismissal of these claims. In short, this complaint is based upon the fundamentally flawed legal premise that Harris can sue for malicious prosecution even though he stands convicted on his own guilty plea of the crimes charged against him. Since this premise is simply incorrect, Harris' complaint fails as a matter of law. Guider v. Evans, No. 1:14-CV-00331, 2014 WL 2472123, at *6–8 (M.D. Pa. June 2, 2014).

In sum, in its current form, this complaint fails to state a claim upon which relief may be granted for many reasons. We are mindful of the fact that in civil rights cases *pro se* plaintiffs often should be afforded an opportunity to amend a complaint before the complaint is dismissed in its entirety, see Fletcher-Hardee Corp. v. Pote

Concrete Contractors, 482 F.3d 247, 253 (3d Cir. 2007), unless granting further leave to amend is not necessary in a case such as this where amendment would be futile or result in undue delay, Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004). However, in this case Harris' complaint—which is filed more than a decade too late and runs afoul of the favorable termination rule as well as the law of the case doctrine—cannot be saved through any more artful form of pleading. Therefore, finding that granting leave to amend would be futile in this case it is recommended that this tardy and meritless lawsuit be dismissed with prejudice.

III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the plaintiff's complaint be dismissed with prejudice.

The plaintiff is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge,

however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 26th day of October 2021.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge