No. 05-1240

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

ANDRE WALLACE

Petitioner,

v.

CITY OF CHICAGO, KRISTEN KATO,
AND EUGENE ROY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As framed by Judge Posner in his opinion dissenting from the denial of rehearing en banc in this case,

> The panel decision creates an intercircuit conflict on a recurrent issue: when does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted?

2. When an arrest without probable cause results in eight years of incarceration before charges are dismissed after a final adjudication that a confession of dubious reliability was secured by exploiting the unlawful arrest and, as the tainted fruit of that arrest, is inadmissible under *Brown v. Illinois*, 422 U.S. 590 (1975):

> May damages be recovered in an action brought under 42 U.S.C. §1983 for the unlawful seizure that began at the time of arrest and continued to the time that charges were dismissed, or are damages limited to compensation for the brief period of time that elapsed from arrest to arraignment?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andre Wallace respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 8, 2006.

OPINIONS BELOW

The decision of the court of appeals (Pet.App. 1-18), and the opinion of Judge Posner dissenting from the denial of rehearing en banc, (Pet.App. 19-28), are not yet reported. The opinions of the district court (Pet.App. 30-36, 37-52) are not officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (Pet.App. 29) was entered on March 8, 2006.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

On January 17, 1994, a man named John Handy was shot and killed in a building located at 825 North Lawndale Avenue in Chicago. Handy had been working as a "house sitter" for a construction company that was rehabbing the building.

Chicago police officers Roy and Kato, respondents in this Court, arrested petitioner in the evening of January 19, 1994 in connection with the Handy murder: the officers came upon petitioner on the street near the scene of the murder, handcuffed petitioner, and transported him to a police station. Petitioner was then 15 years of age.

The officers placed petitioner into an "interview room" at the police station. There, petitioner told respondents Roy and Kato that he was seventeen years

of age, that he was not involved in the Handy homicide, and that he had been with two other persons at a restaurant at the time of the murder. Thereafter, respondents Kato and Roy tricked petitioner into making a false confession by playing "good cop/bad cop."

Based on the confession and without any other evidence to corroborate his involvement in the homicide, petitioner was charged with murder and prosecuted as an adult. The state trial judge denied motions challenging the arrest and seeking to suppress petitioner's confession and petitioner was found guilty of murder. On direct appeal, the Illinois Appellate Court concluded that plaintiff had been unlawfully arrested, and remanded the case for an attenuation hearing. *People v. Wallace,* 299 Ill.App.3d 9, 701 N.E.2d 87 (1998).

The trial judge reinstated petitioner's conviction on remand, but the Illinois Appellate Court reversed in an unpublished opinion, finding that the confession was the tainted fruit of the unlawful arrest and remanded for a new trial. Review was denied by the Illinois Supreme Court, *People v. Wallace,* 197 Ill.2d 582, 763 N.E.2d 776 (2001) (table). The prosecutor dismissed all charges against petitioner on April 10, 2002.

Petitioner filed this action on April 3, 2003, raising several state and federal claims. The district court granted summary judgment to respondents on petitioner's state law claims, (Pet.App. 30-37), and permitted petitioner to file an amended complaint on his federal claims.

Petitioner alleged in his amended complaint that he had been deprived of rights secured by the Fourth and Fourteenth Amendments when he was arrested in 1994

and when testimony about his post-arrest inculpatory statement was used against him at trial. The district court granted summary judgment to respondents on these claims. (Pet.App. 38-51.)

On appeal, a panel of the Seventh Circuit affirmed, holding that petitioner's claims about his arrest and subsequent confession were time barred. (Pet.App. 18.) To reach this result, the panel invoked a circuit rule that permits a panel to reverse a prior decision of the court of appeals by circulating its proposed decision to all active members of the court and inviting a vote on rehearing en banc. (Pet.App. 2 n*.) Using this rule, the panel overruled two of the Seventh Circuit's recent decisions, *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) and *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir. 2004), and adopted a bright line rule that all claims "for false arrest or similar Fourth Amendment violations" accrue at the time of arrest. (Pet.App. 13.) The court of appeals described its rule as "an arguable extension" of *Heck v. Humphrey*, 512 U.S. 477 (1994), (Pet.App. 12), but reasoned that "a clear accrual rule is superior to a case-by-case rule." (Pet.App. 14.)

Judge Posner dissented from the refusal of the Court to re-hear the case en banc, (Pet.App. 19-28), pointing out that the bright line rule adopted by the panel was at odds with *Heck v. Humphrey*, *supra*, and departed from "[e]very other case to address the issue." (Pet.App. 19.) "I count 12 cases to 0 against the panel's approach, with the other three cases . . . non-committal but consistent with the 12." (Pet.App. 28.)

REASONS FOR GRANTING THE WRIT

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This case presents the court with an opportunity to resolve what Judge Posner, dissenting below from the denial of rehearing en banc, aptly described as an "intercircuit conflict on a recurrent issue." (Pet.App. 19, 28.) The question, as framed by Judge Posner (Pet.App. 19), is as follows:

> When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted?

The rule that the Seventh Circuit adopted in this case is that "[i]ndividuals and attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of arrest." (Pet.App. 13.) This rule is fully applicable when, as in this case, the only evidence of guilt had been obtained by exploiting an unlawful arrest. As Judge Posner pointed out, (Pet.App. 28), the Seventh Circuit stands alone in this bright line rule.[1]

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1. The panel asserted that it was adopting a rule shared by five other circuits. (Pet.App. 15.) Judge Posner correctly pointed out that the panel misread cases from those five circuits. (Pet.App. 24-27.) See *infra* at 7-9.

The Seventh Circuit's categorical rule is contrary to the decision of this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), and is in conflict with the case by case analysis applied by the court of appeals for ten other circuits.[2]

In *Heck v. Humphrey, supra,* the Court held that 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."[3] (footnote omitted) 512 U.S. at 489-90. The Court held that the civil action would not accrue if success in the damage action "would necessarily imply the invalidity of [the plaintiff's] conviction or sentence." *Id.*

The example that the Court provided in *Heck* of a civil action that "would necessarily imply the invalidity" of a criminal conviction is a conviction for resisting arrest, where an element of the offense was that the criminal defendant intentionally prevented a lawful arrest. 512 U.S. at 486 n.6. Such a conviction would bar a §1983 action challenging the legality of the

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2. The Court of Appeals for the District of Columbia Circuit does not appear to have decided this issue in a published opinion. *But see Aleotti v. Baars*, 896 F.Supp. 1, 4 (D.D.C. 1995) (applying a fact specific analysis).

3. As a corollary to its rule of accrual, the Seventh Circuit holds that §1983 does not permit the recovery of damages for an unconstitutional conviction that was invalidated because it was based on the tainted fruit of an unlawful arrest. See *infra* at 11-16.

arrest. *Id.*

Aside from the Seventh Circuit, the courts of appeals are in agreement that *Heck* mandates that "in a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence." *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) Thus, a §1983 claim could not be brought in a case "where all the evidence to be presented was obtained as the result of an illegal arrest," until the criminal case had been resolved in favor of the civil rights plaintiff. *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 559 n.4 (10th Cir. 1999), The uniform reading of *Heck* — aside from that of the Seventh Circuit — is that "a §1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned." *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998).

In its decision in this case, the Seventh Circuit panel asserted that its categorical rule is consistent with decisions in five circuits. (Pet.App. 15.) Judge Posner, in his dissenting opinion, correctly observed that the panel's count is based on a misreading of these cases. (Pet.App. 24-27.) Moreover, the cases that the panel cited from the Third, Eighth, Tenth, and Eleventh Circuits have been superseded by more recent decisions from those circuits which show that "the general trend among the Courts of Appeals has been to employ the fact-based approach." *Gibson v. Superintendent of NJ Dept. of Law*, 411 F.3d 427, 449 (3d Cir. 2005).

The panel did not cite *Gibson, supra,* but relied on an earlier, and distinguishable, Third Circuit case, *Montgomery v. De Simone,* 159 F.3d 120, 126 (3d Cir. 1998). (Pet.App. 15; App. 25, Posner, J., dissenting from denial of rehearing en banc).

Similarly, the panel relied on *Simmons v. O'Brien,* 77 F.3d 1083 (8th Cir. 1996) (Pet.App. 15-16), which is distinguishable, (Pet.App. 26, Posner, J., dissenting from denial of rehearing en banc), and which has been superseded by *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1131 (8th Cir. 1999) (fact-based approach applied to uphold a district court's order dismissing §1983 claims of false arrest and imprisonment because the criminal conviction had not been set aside)

The panel's misreading of the Tenth Circuit's decision in *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553 (10th Cir. 1999), (Pet.App. 15) is apparent from that circuit's subsequent decision in *Laurino v. Tate* 220 F.3d 1213 (10th Cir. 2000). There, the court of appeals mandated a case by case analysis, because "*Heck* requires a court considering a §1983 damage claim relating to a plaintiff's conviction to determine whether a judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction; if so, then the plaintiff must obtain invalidation of the conviction before pursuing his action for damages." *Id.* at 1217.

Moreover, the Eleventh Circuit case relied on by the panel, *Datz v. Kilgore,* 51 F.3d 252 (11th Cir. 1995) (per curiam) is factually distinguishable, (Pet.App. 25-26), Posner, J., dissenting from denial of rehearing en banc), and has been superseded by

Hughes v. Lott, 350 F.3d 1157, 1161 (11th Cir. 2003), where the court held that the fact specific inquiry mandated by *Heck* requires a district court to "look both to the claims raised under §1983 and to the specific offenses for which the §1983 claimant was convicted." *Id.* at 1161 n.2.

The case by case analysis applied in all circuits aside from the Seventh Circuit is illustrated in three cases from the First Circuit, one of the circuits that the panel incorrectly cited as supporting its bright line rule. (Pet.App. 15.)

In *Guzman-Rivera v. Rivera-Cruz*, 29 F.3d 3 (1st Cir. 1994), the court of appeals held that the plaintiff's claims would be barred by a criminal conviction, and remanded for a determination of whether the conviction had been "invalidated as required under *Heck*." In *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1 (1st Cir. 1995), where the plaintiffs had been acquitted, the First Circuit reversed the district court's conclusion that the §1983 claims had accrued at the date of arrest and held that, under *Heck*, the claims accrued at the time of acquittal. Thereafter, in *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001), the court of appeals, while recognizing that "that there may be rare and exotic circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest," 241 F.3d at 52 n.4, held that claims involving physical abuse or arrest accrued "at the time that those events occurred." *Id.* at 52. The court recognized that a Fourth Amendment claim involving a "continuing seizure" during the criminal prosecution would have accrued at the time of acquittal, *id.* at 53, but held that "the relatively benign nature of the pretrial release

conditions" in that case did not amount to "a post-arraignment seizure within the meaning of the Fourth Amendment."[4] *Id.* at 57.

The Seventh Circuit acknowledged that its bright line rule has been rejected by the courts of appeals for the Second, Fourth, Fifth, Sixth, and Ninth Circuits.[5] The courts of appeals from the First, Third, Eighth, Tenth, and Eleventh Circuits must be added to this total. See *ante* at 7-9. As Judge Posner noted in his opinion dissenting from the denial of rehearing en banc, the Seventh Circuit had forged "a lonely path," and presents this Court with "an intercircuit conflict on a recurrent issue." (Pet.App. 28.) Certiorari should be granted to resolve this conflict.

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4. The post-arraignment seizure in this case consists of 8 years of incarceration, which is far from "benign."

5. *Woods v. Candela,* 47 F.3d 545, 546 (2d Cir. 1995) (per curiam); *Covington v. City of New York,* 171 F.3d 117, 123 (2d Cir. 1999) *Brooks v. City of Winston-Salem,* 85 F.3d 178, 183 (4th Cir. 1996); *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000); *Ballenger v. Owens,* 352 F.3d 842, 846-47 (4th Cir. 2003) *Mackey v. Dickson,* 47 F.3d 744, 746 (5th Cir. 1995); *Hudson v. Hughes,* 98 F.3d 868, 872 (5th Cir. 1996); *Shamaeizadeh v. Cunigan,* 182 F.3d 391, 398-99 (6th Cir. 1999); *Baranski v. Fifteen Unknown Agents,* 401 F.3d 419, 433-36 (6th Cir. 2005) *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir. 2002); *Harvey v. Waldron,* 210 F.3d 1008, 1015 (9th Cir. 2000) *Cabrera v. City of Huntington Park,* 159 F.3d 374, 380 (9th Cir. 1998);

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The Seventh Circuit stands alone in limiting the damages that may be recovered in a §1983 action arising from an unlawful arrest to compensation "for injuries suffered from the time of arrest until . . . arraignment."[6] (Pet.App. 7.) Thus, even if petitioner had filed his §1983 action the day after his unlawful arrest, and the district court then stayed the action until the conclusion of the state criminal case, the Seventh Circuit's rule would not allow a jury to award petitioner damages for his eight years of his incarceration — damages would be limited to the brief period between arrest and arraignment.[7]

The Seventh Circuit's limitation on damages is contrary to the bedrock principle that §1983 incorporates the "background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape,* 365 U.S. 167, 187 (1961). *See, e.g., Brower v. County of Inyo,* 489 U.S. 593, 599

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6. The Seventh Circuit adopted this rule in *Gauger v. Hendle,* 349 F.3d 354, 362-63 (7th Cir. 2002), where it expressly reserved the question, that it resolved in this case (Pet.App. 13-14), of whether damages could be awarded a §1983 plaintiff for post-arraignment injuries on the theory that "the seizure of his person was from the beginning to the end of his incarceration unreasonable." 349 F.3d at 360.

7. The time between arrest and arraignment in felony cases in Illinois is typically thirty days.

(1989), where the Court held that police officers who establish a roadblock "in such manner as to be likely to kill [a motorist]," may be liable under §1983 for their unreasonable seizure. The Seventh Circuit's limitation on damages also renders §1983 a poor deterrent to unlawful arrests.

The Seventh Circuit explained its decision to depart from ordinary rules of proximate cause by asserting that "the injury occurs at the time of the arrest," (Pet.App. 7), and that "the scope of a Fourth Amendment claim is limited up until the point of arraignment." *Id.* Neither of these explanations can be reconciled with prior decisions of this Court holding that a confession secured as the proximate result of an illegal arrest is the "tainted fruit" of the arrest and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); *Taylor v. Alabama*, 457 U.S. 687 (1985). Just as the mere giving of *Miranda* warnings does not insulate a confession from an unlawful arrest, *Brown v. Illinois*, 422 U.S. at 602-03, the "point of arraignment" is not an intervening event that breaks the causal link between the unlawful arrest and eight years of incarceration.

The Court rejected a similar attempt to limit causation in *Malley v. Briggs*, 489 U.S. 593 (1989). There, the district court had held that a judge's decision to issue a warrant broke the causal chain between the application for the warrant and the subsequent arrest. The Court rejected this "no causation" rationale as "inconsistent with our interpretation of §1983." Id. at 345 n.7.

The Seventh Circuit's limitation on damages implements that circuit's view that §1983 does not provide a remedy to recover damages that could be obtained in an action for malicious prosecution, i.e., "damages for confinement imposed pursuant to legal process," *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). In *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), *opinion on denial of rehearing*, 260 F.3d 824 (7th Cir. 2001), the Seventh Circuit concluded that the "effective holding" of *Albright v. Oliver*, 510 U.S. 266 (1994) is "that the existence of a state court remedy for malicious prosecution extinguishes any remedy under §1983 for a prosecution without probable cause.[8] 256 F.3d at 751.

A different rule is applied in eight other circuits.

The Second, Third, Sixth, Eighth, and Tenth Circuits recognize a federal cause of action for "malicious prosecution," which consists of the elements of the common law tort of malicious prosecution plus the violation of a federal right. *Washington v. County of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004); *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003), *opinion following remand*, 430 F.3d 140 (3d Cir. 2005); *Thacker v. City of Columbus*, 328 F.3d 244, 258 (6th Cir. 2003); *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004); *Beedle v.*

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8. The Seventh Circuit stands along in this reading of *Albright.* See *Castellano v. Fragozo*, 352 F.3d 939, 958 (5th Cir. 2003) (en banc).

Wilson, 422 F.3d 1059, 1067 n.4 (10th Cir. 2005).

The Fourth and Eleventh Circuits allow recovery of "malicious prosecution damages" on a Fourth Amendment theory, unburdened by the element of malice that is part of the common law tort of malicious prosecution. *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) ("In order for a plaintiff to state a section 1983 malicious prosecution claim for a seizure violative of the Fourth Amendment, we have required that the defendant have 'seized [plaintiff] pursuant to legal process that was not supported by probable cause and that the criminal proceedings [have] terminated in [plaintiff's] favor.'" quoting *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183-84 (4th Cir.1996)); *Uboh v. Reno*, 141 F.3d 1000, 1003 (11th Cir. 1998) ("Labeling a section 1983 claim as one for a malicious prosecution can be a shorthand way of describing . . . the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.")

The First and Fifth Circuits have not taken a conclusive stand on this issue. *Nieves v. McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001) ("It is an open question whether the Constitution permits the assertion of a section 1983 claim for malicious prosecution on the basis of an alleged Fourth Amendment violation.") *Price v. City of San Antonio*, 431 F.3d 890, 895 (5th Cir. 2005) ("We hold only that insofar as any such claim exists, it would not accrue until criminal proceedings terminate in favor of the plaintiff.")

Review by this Court of the conflict about the availability of "malicious prosecution damages" in a §1983 action would permit the Court to resolve the issues discussed in the separate opinions in *Albright v. Oliver*, 510 U.S. 266 (1994).

The question before the Court in *Albright* was whether §1983 authorized a "malicious prosecution" claim on a substantive due process theory. 510 U.S. at 268. There, the petitioner had been charged with a non-existent offense and brought a Section 1983 action against the police officer who had initiated the criminal proceedings. The petitioner did not pursue a Fourth Amendment claim, even though "his surrender to the State's show of authority constituted a seizure for the purposes of the Fourth Amendment." 510 U.S. at 271 (plurality opinion). Instead, the petitioner in *Albright* asserted in this Court "that the action of respondents infringed his due process right to be free of prosecution without probable cause." *Id.*

Albright was decided without a majority opinion. A majority of the Court concluded that the right to be free from prosecution without probable cause was not a substantive due process right. 510 U.S. at 271 (Rehnquist, C.J., joined by O'Connor, Scalia, and Ginsburg, JJ); *id.* at 275 (Scalia, J., concurring); *id.* at 280 (Kennedy, J., concurring in judgment and joined by Thomas, J.); *id.* at 281 (Ginsburg, J., concurring); *id.* at 288-89 (Souter, J., concurring in judgment).

Several members of the Court in *Albright* wrote separately to support the Fourth Amendment as a vehicle for recovery. Justice Ginsburg, in her concurring opinion, endorsed what has come to be known as the

"continuing seizure" theory — that being held to answer criminal charges, being required to appear in court, and being subject to travel restrictions amounts to a seizure under the Fourth Amendment. 510 U.S. at 279. Justice Stevens, joined by Justice Blackmun, agreed with this "continuing seizure" approach in a dissent. *Id.* at 307.

Justice Souter, while not expressing any view about the "continuing seizure" theory, wrote in support of a Fourth Amendment approach and noted that the Courts of Appeals had frequently awarded damages for confinement imposed pursuant to legal process on Fourth Amendment claims. 510 U.S. at 289-90. Justice Kennedy, joined by Justice Thomas, agreed with the plurality that an arrest without probable cause "must be analyzed under the Fourth Amendment," and expressed the view that petitioner's due process claim was satisfied by the availability of a state tort remedy for malicious prosecution. *Id.* at 283-86.

This case provides the Court with an opportunity to resolve the conflict among the circuits about whether a §1983 action allows the recovery of "damages for confinement imposed pursuant to legal process," *Heck v. Humphrey*, 512 U.S. 477, 484 (1994), by answering the Fourth Amendment question that was identified in the separate opinions in *Albright v. Oliver*. The importance of an effective damage remedy to enforce the Fourth Amendment warrants review by the Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

March, 2006

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In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3949

ANDRE WALLACE,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, KRISTEN KATO and EUGENE ROY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CV 2296—**Samuel Der-Yeghiayan,** *Judge.*

ARGUED MAY 31, 2005—DECIDED MARCH 8, 2006

Before EASTERBROOK, ROVNER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge*. From the age of fifteen until twenty-three, Andre Wallace was serving time in prison for his alleged participation in a murder. After several appeals, the Illinois Appellate Court found that the police had arrested him without probable cause and that his confession was not sufficiently attenuated from his

unlawful arrest. At that point, the prosecution decided to leave well enough alone, and Wallace was released. Only then did Wallace commence the present action: he filed a suit under 42 U.S.C. § 1983 in federal court asserting that Detectives Kato and Roy and the City of Chicago had violated his Fourth Amendment rights and that they had also committed the state torts of malicious prosecution and false imprisonment. The district court granted summar judgment in favor of all three defendants. We affirm. In doing so, we have found it necessary to clarify the law of our circuit concerning when a false arrest claim accrues. We reaffirm the holding of *Booker v. Ward*, 94 F.3d 1052, 105657 (7th Cir. 1996), that false arrest claims accrue at the time of arrest; to the extent that it is inconsistent with *Booker v. Ward* and the present opinion, we overrule *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003). [*]

I

On January 17, 1994, John Handy was shot and killed at 825 N. Lawndale Avenue near the intersection of Chicago Avenue and Lawndale. Handy had been working as a house sitter for a construction company

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[*] Because this opinion would overrule an earlier decision of this court, in the manner described in Part II.A. below, it has been circulated among all judges of this court in regular active service .A majority did not wish to hear the case en banc. Circuit Judge Posner voted to hear the case en banc for the reasons stated in his dissent.

and had apparently had a previous confrontation with drug dealers in the area .Detectives Kristen Kato and Eugene Roy were assigned to investigate Handy's murder. After discussing the murder with witnesses and informants in the neighborhood, the police brought Wallace and Laron Jackson in for questioning on the night of January 19, 1994. At the time, the police were not aware that Wallace was only 15 years old because Wallace had told them he was 17 years old.

During the course of the night, Detectives Kato and Roy took turns interrogating Wallace. Wallace, they claim, was free to leave the station house at any time. Wallace's account is somewhat different: he reported that Kato and Roy played "good cop/bad cop" with him to induce him to confess falsely. Kato was the bad guy; whenever Kato took a break, Roy spoke with Wallace and told him that if he confessed, Roy could get Kato to stop hurting him. This continued through the night. At about 4:15 a.m., the detectives confronted Wallace with Jackson's and another witness's statements that they saw Wallace running down the gangway from 825 N. Lawndale after hearing shots. Wallace then admitted that he was only 15. Around 6:00a.m., Wallace agreed to confess. A youth officer and an assistant state's attorney met with Wallace and read him his *Miranda* rights and took his written statement. In his complaint, Wallace claims that Kato told him not to tell the state's attorney that Kato had promised Wallace that he could go home after he gave his statement.

Before his trial, Wallace filed several motions to suppress his statements on the grounds that his arrest

had been made without probable cause and that the statements were coerced and violated his *Miranda* rights. His motions were all denied. On April 19, 1996, after a bench trial, Wallace was found guilty of first degree murder.

Wallace appealed. In an opinion issued on September 21,1998, the Illinois Appellate Court found that the police arrested him without probable cause and remanded for a hearing to determine whether his statements were sufficiently attenuated from his unlawful arrest to permit their use. On remand, the circuit court found that Wallace's confession was sufficiently attenuated from his arrest and affirmed his conviction. Wallace appealed again,and the Illinois Appellate Court reversed the circuit court's decision and remanded for a new trial. On April 10, 2002, the prosecution filed a *nolle prosequi* motion and dropped the case.

On April 2, 2003, Wallace filed the present suit, asserting that his Fourth Amendment rights had been violated and raising state law claims for false imprisonment and malicious prosecution. Kato and Roy filed an answer and a motion for summary judgment, and the City filed a motion to dismiss. On October 21, 2003, Wallace filed his response just a week before we decided *Gauger v. Hendle*, which held that under the circumstances presented there the statute of limitations did not begin to run until the defendant's conviction was invalidated. 349 F.3d at 361-62.

On March 30, 2004, the district court granted

summary judgment for Roy and Kato on all claims except Wallace's federal fair trial claim, which it denied without prejudice. The court also denied without prejudice the City's motion to dismiss under Fed. R. Civ. P. 12(b)(6). Wallace filed an amended complaint on April 28, 2004, reasserting his Fourth Amendment claims. The defendants answered and filed a second motion for summary judgment, which included an affirmative defense of collateral estoppel. Wallace's response asserted that the defendants had waived their collateral estoppel defense by failing to raise it in their answer to his amended complaint. The defendants moved to amend their answer.

On October 29, 2004, the court granted the defendants 'motion to amend their answer to assert their collateral estoppel defense and in the same order granted the defendants' motion for summary judgment. It concluded that Wallace had conceded that his false arrest claim was time-barred. Alternatively, the court held that even if Wallace was allowed to replead his claim under the more recent decision in *Gauger*, he would still be time-barred because Wallace could have brought the claim after the Illinois Appellate Court found on September 21, 1998, that Wallace was arrested without probable cause. This was so even though the appellate court remanded the case to the trial court to determine whether Wallace's confession was sufficiently attenuated from his illegal arrest. The district court concluded that at this point it was possible that even if Wallace was illegally arrested his conviction could still stand, and thus he could not take advantage of the *Gauger* rule.

II

A. False Arrest Claim

Wallace brought his false arrest claim for violation of his Fourth Amendment rights under 42 U.S.C. § 1983.Before turning to the merits of the claim, we address briefly the government's argument that it is waived (or more properly, forfeited) because Wallace failed to raise it in a timely manner in the district court. Our review of the record shows that Wallace initially conceded tha this false arrest claim was time-barred in the responsive papers he filed on October 21, 2003, under pre-*Gauger* law. After *Gauger* appeared a week later and before the district court ruled on the defendants' second motion for summary judgment, Wallace changed his position and asserted the merits of the false arrest claim. We therefore conclude that he neither waived nor forfeited this argument below.

Although federal law governs the question of the accrual of constitutional torts, state statutes of limitations and tolling doctrines apply once accrual has been determined. See *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989); see also *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir.1998). Wallace's false arrest claim is subject to the two-year statute of limitations supplied by Illinois law under 735ILCS § 5/13-202. In his case, that period was tolled until November 7, 1999, two years after Wallace turned eighteen years old, by virtue of 735 ILCS § 5/13-211. If Wallace's claim accrued as of April 10, 2002, when his conviction was finally nullified and the state dropped his case, then the suit filed on April 2, 2003, easily met the two-year deadline. If, on the other

hand, his claim accrued at the time of his arrest on January 20, 1994, his claim is time-barred, even taking into account the tolling that occurred during the period of his minority. Everything depends, therefore, on the accrual rule we must use.

In principle, there are at least three approaches we could take to the accrual of Fourth Amendment claims: (1) the Fourth Amendment claim arises at the time of the wrong (*i.e.*, the false arrest, the unlawful search); (2) the Fourth Amendment claim accrues only after the underlying conviction definitively has been set aside; or (3) as *Gauger* suggested, accrual depends on how central the evidence was to the conviction: if it was non-essential, use rule 1; if it was critical, use rule 2. Before settling on our preferred option, it is useful to review the underlying law in this area.

When a person's Fourth Amendment rights have been violated by a false arrest, the injury occurs at the time ofthe arrest. Thus, an individual is entitled to recover only for injuries suffered from the time of arrest until his arraignment. *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir.2004) ("[W]e have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment.");see also *Gauger*, 349 F.3d at 363 ("[T]he interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects."). On the other hand, as Wallace's own case illustrates, it is often the case that the prosecution cannot proceed without the fruits of an unlawful arrest (as Wallace's confession was) or an unlawful search. In those cases, the idea that

the claim accrues at the time of the injury runs into some tension with the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck*, the Court held that a constitutional claim that would undermine a criminal conviction if vindicated cannot be brought until the defendant's conviction is nullified. *Id.* at 486-87. This general rule, which works perfectly well for complaints like the ones about the knowing destruction of evidence and illegal identification procedure raised in *Heck*, has caused some courts—including this one in *Gauger*—to conclude that certain Fourth Amendment claims also do not accrue until after the defendant's conviction has been invalidated. See, *e.g.*, *Gauger*, 349 F.3d at 362; *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (holding thatFourth Amendment claims based on illegal search andseizure of evidence are not cognizable until the conviction isoverturned or charges dismissed); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999) (finding that generally false arrest claims accrue at the time of arrest, but that if success in the § 1983 case would "imply the invalidity of a conviction in a pending criminal prosecution," it does not accrue "so long as the potential for a judgment in the pending criminal prosecution continues to exist").

Heck itself instructs that a 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.

512 U.S. at 487 (emphasis in original) (footnotes omitted).Footnote seven in *Heck* anticipates at least some Fourth Amendment cases. It suggests that despite the general rule of *Heck,* a suit for damages arising from an unreasonable search could go forward as a §1983 claim without invalidating a criminal prosecution, because of the independent source or inevitable discovery doctrines. In *Gonzalez*, we saw two implications in the footnote: "(i) a claim based on an unlawful search or arrest may be brought immediately, because a violation of the fourth amendment does not necessarily impugn the validity of a conviction—the evidence may be properly admitted anyway, or it may be excluded and the defendant convicted on other evidence —and (ii) a claim of damages based on the injury of being convicted is impermissible until the conviction has been overturned." 133 F.3d at 553 (internal quotation marks omitted).

In *Booker v. Ward,* we interpreted *Heck* to allow a false arrest claim to go forward before the defendant's convictionwas invalidated:

> [A] wrongful arrest claim, like a number of other Fourth Amendment claims, does not inevitably

> undermine a conviction; one can have a successful wrongful arrest claim and still have a perfectly valid conviction. Although in this case the Illinois Appellate Court's conclusion that Booker's confession was the inadmissible product of an unlawful arrest ultimately resulted in the dismissal of murder charges against Booker, in many cases, the prosecutor will have other witnesses or other evidence that will support a retrial.

94 F.3d at 1056 (citations omitted). The approach that the court took looked to the legal nature of the wrongful arrest claim, rather than to the specific facts of the case.

The *Gauger* opinion, in contrast, rejects an across-the board approach to Fourth Amendment claims in favor of a case-by-case examination under which at least some false arrest claims would not accrue until after the conviction was invalidated:

> It might be argued that Gauger could have sued right after his arrest, even if he might also have waited until his criminal conviction was thrown out. But we do not think that such a conclusion would be consistent with *Heck*. For he could not knock out the arrest without also (by virtue of *Wong Sun* [*v. United States*, 371 U.S. 471 (1963)]) invalidating the use in evidence of his admissions, without which, as we have said, he could not be convicted. *Heck*, to repeat, says that a criminal defendant can't sue for damages for violation of his civil rights, if the ground of his suit is inconsistent with his conviction having been constitutional until he gets the

> conviction thrown out.

349 F.3d at 362. See also *Wiley*, 361 F.3d at 997-98.

In our view, although it is conceivable that there are factual differences among Booker's, Gauger's, and Wallace's cases, the distinctions are unimportant in the end. In Gauger's case, the police suspected Gauger of murdering his parents. 349 F.3d at 356. They brought him in for questioning and Gauger made several incriminating statements that, according to his version of the interrogation, were stated as hypotheticals. *Id.* at 357. Gauger was convicted and sentenced to death. On appeal, the Illinois Appellate Court determined that his statements were inadmissible as the product of an unlawful arrest. *Id.* The court ordered a new trial, but the state never retried him and the charges were dropped after two members of the Outlaws motorcycle gang confessed killing Gauger's parents. *Id.* at 358. The resemblance to Wallace's case is plain.

It is true that in Booker's case, as in Wallace's, the state appellate court first remanded for an attenuation hearing before ordering a new trial. See *Booker v. Ward*, 94 F.3d at 1054. The result of the attenuation hearing was a conclusion that the confession was sufficiently attenuated from the defendant's unlawful arrest, but the Illinois Appellate Court reversed. *Id.* Just as in Wallace's case, at this point the prosecution filed a motion for a *nolle prosequi*, and the court dropped the charges against Booker. *Id.* It is telling that in both Booker's and Wallace's cases, the state appellate court formally decided that the defendant's criminal

prosecution could continue even though the arrests were unlawful. Only the pragmatic judgment of the prosecutors, which could have rested on a conclusion that it was unlikely that any additional evidence existed, or on a lack of resources for further investigation, or any of a number of other factors, caused the cases to end. The rule we articulated in *Booker v. Ward* recognizes that *ex ante* it is not readily apparent which criminal cases might proceed despite the consequences of the successful Fourth Amendment challenge. This, in our view, argues against a rule that requires judges several years after the event to decide whether a particular Fourth Amendment challenge would have been the death knell of the prosecution.

Even if a clear rule is what is needed, we still need to decide between options (1) and (2) above: that is, between a rule saying that all claims of this type accrue at the time of injury, and a rule that they all accrue only when the criminal conviction has been set aside. The footnote in *Heck* to which we referred earlier persuades us that the Supreme Court did not contemplate the second rule, as it took care to suggest that the statute of limitations should begin running on at least some claims at the time of the original injury. Although the Court refrained from holding that all Fourth Amendment claims accrue immediately, it had no need to reach that issue in *Heck*. We conclude that the approach taken by *Booker v. Ward*, while an arguable extension of *Heck*, is an extension that is justifiable in light of the policies behind both the statute of limitations and the need to avoid

unnecessary interference with the outcomes of criminal proceedings.

To the extent, therefore, that *Gauger* eschews a clear rule for false arrest claims in favor of an evaluation of the evidence, we disapprove its approach and instead reaffirm our holding in *Booker v. Ward* that a "§ 1983 unlawful arrest claim . . . accrue[s] on the day of [ ] arrest." *Id.* at 1056-57. Individuals and attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of arrest. It will still be possible, of course, for a district court to stay any such action until the criminal proceedings are concluded, should it conclude in its discretion that a stay would be useful. We note as well that we are addressing only the question of accrual; other doctrines, such as equitable tolling, may also affect the time in which a particular suit may be brought. See *Heck*, 512 U.S. at 489 (reserving judgment on whether equitable tolling applies in this context).

One additional qualification is necessary, which in our view answers the concerns expressed in the dissent. *Heck* itself recognized that it is possible for a § 1983 claim based on false arrest or a similar Fourth Amendment violation "necessarily [to] imply the invalidity of [a plaintiff's] conviction or sentence," *Heck*, 512 U.S. at 486 n.6, 487 (example of plaintiff convicted of resisting arrest who challenges legality of arrest). The case to which the Court pointed, however, is one in which the fact of a Fourth Amendment violation

is an element of the claim. In that relatively uncommon set of cases, there is an independent treason to insist that a plaintiff wait to sue until the criminal conviction has been set aside; if she does not, the possibility of inconsistent rulings on the validity of the arrest is too great. Our ruling addresses the normal run of cases, in which the Fourth Amendment violation affects only the evidence that might or might not be presented to the trier of fact. In those instances, we are convinced that a clear accrual rule is superior to a case-by-case approach.

As the parties have noted, the question of the prope rrule for accrual is an issue that has divided our sister circuits. Although their reasoning varies, the Second Fourth, Fifth, Sixth, and Ninth Circuits have held that false arrest claims that would undermine the defendant's conviction cannot be brought until the conviction is nullified. See *Harvey*, 210 F.3d at 1015 (acknowledging circuit split and holding flatly that "a § 1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned"); *Covington*, 171 F.3d at 124; *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999) (explicitly rejecting suggestion that § 1983 illegal search claims accrue at the time of injury, since such a rule would "misdirect the criminal defendant" from focusing on "mounting a viable defense to the charges against him"); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (holding that success on false arrest claim would "necessarily imply" that conviction for disturbing the

peace was invalid as not based on probable cause); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996) (*Heck* bars civil rights claims "when a § 1983 plaintiff's success on a claim that a warrantless arrest was not supported by probable cause necessarily would implicate the validity of the plaintiff's conviction or sentence"); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (stating that "a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest," but staying the civil action until the criminal prosecution was completed).

The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest. *Nieves v. McSweeney*, 241 F.3d 46, 52-53, 52 n.4 (1stCir. 2001) (stating that "it is pellucid that all claims based on the officers' physical abuse or arrest of the appellants accrued at the time that those events occurred . . . because the appellants had ample reason to know of the injury then and there," and characterizing as "rare and exotic" the "circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest"); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558, 559 n.4 (10th Cir. 1999) ("We generally disagree with the holdings in [*Covington* and *Mackey*] because they run counter to *Heck*'s explanation that use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction."); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998) (finding § 1983 false arrest claim not barred by *Heck*); *Simmons v.*

O'Brien, 77 F.3d 1093, 1095 (8th Cir. 1996) (finding § 1983 coerced confession claim not barred by *Heck*); *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (per curiam) (finding § 1983 illegal search claim not barred by *Heck*). By aligning ourselves with one side of this debate, we do not break any new ground.

B. False Confession Claim

Wallace also asserts a "false confession" claim that he claims is actionable under the Fourth Amendment, relying on the following language in *Gauger*:

> [Gauger's] incarceration resulted from the combination of a false arrest with (if his testimony is believed)a false account of his interrogation. If his testimony is believed, therefore, the seizure of his person was from the beginning to the end of his incarceration unreasonable, and shouldn't that bring the allegedly fraudulent account of his interrogation under the Fourth Amendment?

349 F.3d 360. In support of his claim, Wallace tries to distinguish a "continuing Fourth Amendment violation" from the "continuing seizure" theory discussed in JusticeGinsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994). See *id.* at 279 (Ginsburg, J., concurring). His efforts are necessary, at least in this court, because we have already rejected a "continuing seizure" theory inthe Fourth Amendment context. See *McCullah v. Gadert*, 344 F.3d 655, 661 (7th Cir. 2003) (citing *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3

(7th Cir. 1996)). Nonetheless, we find them unavailing. Wallace tries to find some support for it in *Chavez v. Martinez,* 538 U.S. 760 (2003), but as we read that case it dealt only with the Fifth Amendment and the due process clauses. We reject the idea of a stand-alone "false confession" claim based on the Fourth Amendment, rather than the Fifth Amendment or the due process clauses.

C. Fourteenth Amendment Claim

Finally, Wallace tries characterizing his false confession claim as a violation of his Fourteenth Amendment right to a fair trial. Wallace contends that our decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), allows for a "false confession" claim as a due process violation. In *Newsome*, we affirmed the district court's decision to deny qualified immunity to two officers who had withheld exculpatory evidence from the defendant. *Id.* at 753. The reason was because, under *Brady v. Maryland*, 373 U.S. 83 (1963), officers who withhold such material violate a defendant's right to a fair trial. 256 F.3d at 752. See also *Ienco v. City of Chicago*, 286 F.3d 994, 999 (7th Cir. 2002) (allowing plaintiff to amend complaint to assert due process claim against police officers who withheld evidence); *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988) (allowing claim against officers who allegedly fabricated evidence and concealed exculpatory evidence to go forward).

As these brief summaries demonstrate, *Newsome*, *Ienco,* and similar cases do not stand for the proposition that there is a free-standing due process claim whenever

unfair interrogation tactics (short of those that may shock the conscience and thereby implicate the Supreme Court's substantive due process rulings) are used to obtain a confession. Instead, they are grounded in traditional notions of what is required for a fair trial, including the *Brady* right to be given exculpatory material. In the end, all Wallace has is a complaint about the arrest and the subsequent confession, and that is the claim we have found to be time-barred. He cannot escape that result merely by re-characterizing the claim under a different part of the Constitution.

III

The City argued in the alternative that Wallace was not entitled to bring his suit under the *Heck* rule because the state court proceedings did not conclude in his favor. It reasons that the state *trial* court found that his confession was voluntary; that this finding was not disturbed as a matter of Illinois law when the state appellate court reversed and remanded the trial court's judgment; and that Wallace cannot prevail in his § 1983 action if this central fact is taken as established. Because we have resolved this appeal in favor of all three defendants on the statute of limitations ground, we decline to reach the City's alternative argument. It depends centrally on the intricacies of the law of collateral estoppel in Illinois, which is a topic on which all we could do in any event is to follow the Illinois courts to the best of our ability.

The judgment of the district court is AFFIRMED.

POSNER, *Circuit Judge*, dissenting from denial of rehearing en banc. The panel decision creates an intercircuit conflict on a recurrent issue: when does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted? The panel holds that, except in the rare case in which a violation of the Fourth Amendment is an element of the crime with which the defendant is charged, it always accrues at the time of the arrest, search, or confession. Every other case to address the issue, including our own *Gauger v. Hendle*, 349 F.3d 354 (7th Cir.2003), holds that it *usually* accrues then, but not if the Fourth or Fifth Amendment claim, if valid, would upset the conviction. If it would, the claim does not accrue unless and until the conviction is vacated. In other words, a civil rights suit is not a permissible vehicle for a collateral attack on a conviction.

That is the holding of *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court said that the district court must "consider whether a judgment [in the civil rights suit] 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." *Id*. at 486-87. The Court gave the following example of "a § 1983action that does not seek damages directly attributable to conviction or

confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful": "A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. . . . He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, . . . the § 1983 action will not lie." 512 U.S.at 486 n. 6 (emphasis in original). Faced with this flat statement, the panel carves the exception to its new rule that I mentioned in the first paragraph but does not give a reason for limiting the Court's exception to the particular illustration that the Court gave. The panel says only: "we are convinced that a clear accrual rule is superior to a case-by-case approach." It does not explain the source of its conviction.

Its accrual rule is not "clear," as I'll point out; it is also inconsistent with the principles of accrual. A suit cannot be filed—the claim on which it is based cannot have accrued—at a time when, because a condition precedent to suit has not been satisfied, the suit must be dismissed. The panel holds that the suit must be filed within the limitations period for section 1983 suits (usually two years) from the date of the arrest, search, or, as in this case, confession, even if at the end of the two years the plaintiff's conviction has not been vacated and even if

the only evidence of his guilt presented at his criminal trial was the challenged evidence or confession. This is so, the panel holds, even though, to quote *Heck*, a judgment in the plaintiff's favor in the civil suit "would necessarily imply the invalidity of his conviction" because it would wipeout all of the evidence against him.

And if the plaintiff waits to sue until his conviction is vacated, he will not have the full statutory period within which to sue because he will be able to avoid dismissal only by appealing to the doctrine of equitable tolling. (That's assuming equitable tolling is available in *Heck* cases, a question the panel leaves open.) Equitable tolling permits a plaintiff to delay suing beyond the statutory limitations period if he is unable despite all due diligence to sue within the period; but as soon as he is able to sue he must. He is denied the benefit of the full statutory period. *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1213 (7th Cir. 1993); *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 45253 (7th Cir. 1990).

So the panel's decision puts the squeeze on these plaintiffs, contrary to normal principles of accrual, which do no force you—in fact do not allow you—to sue before you have a claim. If you have been convicted and success on your civil rights claim would undermine your conviction, you have no civil rights claim unless and until you get the conviction set aside. If the search turned up no evidence, or the confession was excluded at the criminal trial, or the other evidence of guilt was

overwhelming, the claim does not challenge the conviction and so it accrues at the time of the search. But that is not every case.

The proper response is to adopt a presumption against the unlikely result. (The panel does not discuss that alternative.) The presumption would be that even if the plaintiff's Fourth or Fifth Amendment defense had prevailed in the criminal proceeding against him, he still would have been convicted, either because the violation had not produced evidence used against him in that proceeding or because, though it had, there was plenty of other evidence to convict him. The presumption would be rebutted if, for example, the only evidence of his guilt was evidence seized in a search that he challenges in his section 1983 suit. This is not a hypothetical case; it is our twin *Okoro* cases, *Okoro v. Bohman*, 164 F.3d 1059, 1061 (7th Cir. 1999), and *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003). The plaintiff, who had been convicted of a drug offense on the basis of heroin found during a search of his home, brought a federal civil rights suit in which he claimed that he had offered to sell the police jewels (which he claimed they stole from him in response to his offer), not drugs. His conviction was never reversed or otherwise nullified. We held the suit barred by *Heck* because if he was believed he should not have been convicted, since the heroin was essential to the conviction; and so his Fourth Amendment suit for the allegedly stolen jewelry was barred. *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996), is a similar case with the same result.

Another clear case is *Gauger* itself. His conviction, we pointed out, "rested crucially on the statements that he made to the police when he was questioned after being arrested. Earlier we said that he might well have been prosecuted even if his version of the interrogation had been accepted, because his version was incriminating though not as much so as the prosecutors' version. With no statement at all in evidence, however, he could not have been convicted of guilt of his parents' murder beyond a reasonable doubt; the other evidence—the lack of forced entry or signs of struggle, for example—was probative merely as corroboration of his statements construed as a confession or at least as damaging admissions. So when he showed that the statements were the product of a false arrest and hence were inadmissible at his criminal trial, he successfully impugned the validity of his conviction, as the state implicitly conceded when it dropped the charges against him following the reversal of his conviction." 349 F.3d at 361-62.

There will be tough borderline cases, but the tough cases are not resolved by the decision today. They will simply be fought out as equitable-tolling cases rather than accrual cases—if equitable tolling is available, a question on which the panel, as I noted, reserves judgment: so much for the panel's having adopted a "clear rule." If equitable tolling is unavailable, then Fourth and Fifth Amendment claimants will automatically file within the statutory perioddated from the search—and then plead with the district court to disobey *Heck* and not dismiss the suit, even if it is not

yet ripe because the conviction has not been set aside and its validity depends on the validity of the search. As the Sixth Circuit sensibly observed in *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999), "just as a convicted prisoner must first seek relief through habeas corpus before his § 1983 action can accrue, so too should the defendant in a criminal proceeding focus on his primary mode of relief—mounting a viable defense to the chargesa gainst him—before turning to a civil claim under § 1983."The panel does not discuss that observation.

The panel denies that it is creating an intercircuit conflict. It says that there is already a conflict and it is just taking sides. Citing five cases, the panel states flatfootedly: "The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest . . . . By aligning ourselves with one side of this debate, we do not break any new ground." That is incorrect None of those cases hold that such claims *always* accrue at the time of arrest. All they hold is that *normally* a Fourth Amendment claim accrues them. Not one of them even *say s*(as distinct from holds) that it always does, and two of the five explicitly allow for later accrual in exceptional cases.

The five cases are *Nieves v. Sweeney*, 241 F.3d 46, 52-53 (1st Cir. 2001); *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 558 (10th Cir. 1999); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998); *Simmons v. O'Brien*, 77 F.3d 1093, 1097 (8th Cir.

1996), and *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (per curiam). *Nieves* acknowledges that there may be cases "in which a section 1983claim based on a warrantless arrest will not accrue at the time of the arrest." 241 F.3d at 52 n. 4. Even the passage that the panel quotes from *Nieves* acknowledges that a section 1983 claim does not always accrue at the time of arrest. *Id*. *Beck* also acknowledges such a possibility. 195 F.3d at 558-59. In *Montgomery*, the plaintiff's claims, which were for false arrest and false imprisonment, were unrelated to the outcome of the criminal prosecution against her. Her "claim for false arrest . . . covers damages only for the time of detention until the issuance of process or arraignment, and not more. In addition, Montgomery's section 1983false imprisonment claim relates only to her arrest and the few hours she was detained immediately following her arrest. Montgomery therefore reasonably knew of the injuries that form the basis of these 1983 claims on the night of her arrest." 159 F.3d at 126 (citations omitted).

In *Datz*, a search case, the court held that the plaintiff did not have to wait until the outcome of his criminal case to bring his civil case because it was uncertain whether a ruling in the civil case that Datz's search had been illegal would be inconsistent with his criminal conviction, for "even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error." 51 F.3d at 253 n. 1. Since Datz was convicted of being a felon in possession of a firearm, and the firearm was found in the

search, it might seem that his conviction could not coexist with invalidating the search. But as the state court that upheld his conviction noted, "ammunition for the weapon also was found in two locations in appellant's house. The police evidence custodian testified appellant contacted him numerous times, by phone and in person, seeking return of 'his AR-15 rifle.' " *Datz v. State*, 436 S.E.2d 506, 509 (Ga. App. 1993). If there is untainted evidence here, the panel's result might well be correct, but there is no discussion of the other evidence in its opinion. In *Simmons* the only issue discussed is whether admission of a coerced confession can be a harmless error; as far as appears, no issue was made of whether the admission of the confession had been harmless. 77 F.3d at 1094-95. The panel does not discuss *Montgomery*, *Datz*, or *Simmons*; its characterization of them (e.g., "finding § 1983 coerced confession claim not barred by *Heck*") is consistent with the principle that the claim *usually* accrues later.

The cases that the panel acknowledges are in conflict withits accrual rule are, besides *Gauger*, *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000); *Shamaeizadeh v. Cunigan*, *supra*, 182 F.3d at 399; *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996), and *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995). The list is incomplete. Mysteriously omitted, without comment, are *Uboh v. Reno*, 141 F.3d 1000, 1006-08 (11th Cir. 1998), and *Woods v. Candela*, 47 F.3d 545,

546 (2d Cir. 1995) (per curiam). *Nieves*, at least, must be added to the list along with *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1stCir. 1995), cited in *Nieves*, as well as our decision in *Booker v. Ward*, 94 F.3d 1054, 1056 (7th Cir. 1996), where we said, examining the proceedings in the Illinois courts, "that success on Booker's unlawful arrest claim would not necessarily undermine the validity of his conviction." That's the test, all right. And note that *Beck*, one of the cases the panel cites for its rule, expressly declined to reject *Covington*. 195 F.3d at 559 n. 4.

The panel may have been misled by the reference in *Harvey v. Waldron*, *supra*, 210 F.3d at 1015, to "a split in the circuits." The court in *Harvey* mischaracterizes the approach of courts (including itself!) that reject the approach taken by the panel today. It describes them as holding that a Fourth or Fifth Amendment claim *never* accrues until and unless the conviction is vacated. Those courts hold only that such a claim *sometimes* doesn't accrue until then, for example if there is no other evidence to support the conviction besides evidence claimed to have been obtained illegally. So in *Harvey* the court went on to satisfy itself that the evidence alleged to have been illegally seized was essential to Harvey's conviction. *Id*. at 1015-16.

The panel is right that there are two groups of cases. Butthey are consistent. One holds that a Fourth or Fifth Amendment claim accrues at the time of arrest, assuming the conviction does not depend on the

evidence alleged to have been illegally seized. The other holds that the claim does not accrue then if the conviction does depend on that evidence.

I count 12 cases to 0 against the panel's approach, with the other three cases (*Montgomery*, *Simmons*, and *Datz*) noncommittal but consistent with the 12. So one-sided a score should give us pause. If there is a compelling practical reason for flouting conventional statute of limitations principles, forging a lonely path, and creating more work for the Supreme Court, which now faces an intercircuit conflict on a recurrent issue, the panel has not explained what it might be.

In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3949

ANDRE WALLACE,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, KRISTEN KATO and EUGENE ROY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CV 2296—**Samuel Der-Yeghiayan,** Judge.

JUDGMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

Date: March 8, 2006

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

ANDRE WALLACE,	)	
	)	
Plaintiff,	)	
	)	No. 03 CV 2296
-vs-	)	
	)	*(Judge Der-Yeghiayan)*
CITY OF CHICAGO and	)	
CHICAGO POLICE	)	
OFFICERS KRISTEN KATO	)	
and EUGENE ROY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the court on Defendant Kristen Roy's ("Roy") and Eugene Kato's ("Kato") motion for summary judgment and on Defendant City of Chicago's ("City") motion to dismiss. For the reasons stated below we grant the motion for summary judgment in part and deny it in part without prejudice and we deny the motion to dismiss without prejudice.

BACKGROUND

On January 19, 1994 Roy and Kato, detectives for the Chicago Police Department, were assigned to investigate the murder of John Herbert Handy ("Handy"). The police reports indicated that Handy had been shot in a building located at 825 N. Lawndale Avenue in Chicago, Illinois. The reports also indicated that Handy was

employed as a house sitter for a construction company which was rehabbing the building. In addition, the police reports indicated that Handy and the proprietor of the construction company had a confrontation with drug dealers near the building prior to the shooting. The killer apparently entered the building through a window in the back of the building, shot Handy with a 9mm weapon three times, and then fled down a gangway along the building.

After learning of the murder, two other officers familiar with the area interviewed witnesses at the scene and witnesses and other informants indicated that Laron Jackson ("Jackson") and Plaintiff Andre Wallace ("Wallace") were dealing drugs at the crime scene on the night of the murder. On January 19, 1996 the police picked up Wallace and Jackson and took them to the police station. Defendants assert that at that point Jackson and Wallace were not under arrest and that they did not ask to go home. Kato and Roy first began interrogating Wallace and Jackson around 9:30 p.m. During the night Jackson eventually told police that Wallace had been working as "security" for the drug dealers on the night of the murder and was carrying a 9mm gun. Jackson also told police that he saw Wallace running down the gangway along the building after he heard shots fired. At 4:15 p.m. the police confronted Wallace with Jackson’s statements. The police first discovered that Wallace was only fifteen years old and they called in a youth officer to assist them. At 6:00 a.m. an Assistant State’s Attorney was brought in and Wallace signed a written statement waiving his Miranda rights and admitting that he shot Handy three times.

At 6:00 a.m. an Assistant State's Attorney was brought in and Wallace signed a written statement waiving his Miranda rights and admitting that he shot Handy three times.

At trial Wallace did not argue that he was innocent. Instead, at closing he argued that he killed Handy in self defense and at least during mutual combat arguing that he should be convicted of second degree murder rather than first degree murder. On appeal the appellate court ruled that Wallace had been seized for a significant amount of time prior to his written confession and the court remanded the case to the trial court to determine if the confession was legal. On remand the trial court found the confession to be admissible, but on the second appeal the appellate court ruled that the confession was inadmissible. Subsequently, the Assistant State's Attorney moved to nolle prosequi the charges against Wallace.

Wallace has filed a claim against Defendants pursuant to 42 U.S.C. §1983 ("Section 1983") alleging false imprisonment, excessive force, and unlawful arrest. Wallace also included a false imprisonment claim and a malicious prosecution claim based upon Illinois law. Kato and Roy have filed a motion for summary judgment on all counts and the City has filed a motion to dismiss.

LEGAL STANDARD

Summary judgment is appropriate when the record reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In seeking a grant of summary judgment the moving party must identify

"those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). This initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id.* at 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations or denials in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A "genuine issue" in the context of a motion for summary judgment is not simply a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586(1986). Rather, a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000). The court must consider the record as a whole, in a light most favorable to the non-moving party, and draw all reasonable inferences that favor the non-moving party. *Anderson*, 477 U.S. at 255; *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000).

DISCUSSION

I. False Arrest and Malicious Prosecution Claims

In his answer brief to the instant motions Wallace concedes that a claim for false arrest would be time-

barred and therefore contends that he does not assert a claim of false arrest. Therefore, we grant summary judgment on the false arrest claims. In his answer brief Wallace also admits that his malicious prosecution claims are flawed and should be dismissed with prejudice. Therefore, we grant summary judgment on the malicious prosecution claims.

II. Section 1983 Claims

Defendants argue that Wallace's Section 1983 claims are barred by the statute of limitations. Section 1983 does not expressly provide a statute of limitations period and thus the federal courts are required to adopt the forum state's statute of limitations period for personal injury claims. *Wilson v. Garcia,* 471 U.S. 261, 276 (1985). The appropriate statute of limitations period for Section 1983 claims filed in Illinois is two years. 735 ILCS §5/13-202; *Ashafa v. City of Chicago*, 146 F.3d 459, 461 (7th Cir. 1998). It is clear that, except for his denial of a fair trial claim, which we will address below, Wallace's Section 1983 claims are time-barred. Wallace even admits in his answer brief that all of his claims are time barred, except for his state law false imprisonment claim and his federal denial of a fair trial claim. Therefore, we grant summary judgment on all the Section 1983 claims except for Wallace's denial of a fair trial claim.

III. State False Imprisonment Claim

Wallace argues that his false imprisonment claim limitations period was tolled until he was released from prison. Under Illinois law a statute of limitations generally begins to run "when facts exist which authorize the bringing of the cause of action." *Kozasa v. Guardian*

Elec. Mfg. Co., 99 Ill.App.3d 669, 425 N.E.2d 1137, 1141 (1981). Wallace alleges that he was falsely imprisoned beginning on January 19, 1994 and thus at that time he could have brought his false imprisonment claim. *See Pierce v. Pawelski*, 2000 WL 1847778, at *2 (N.D.Ill. 2000) (holding that false imprisonment claim was time-barred because claim accrued at initial point of alleged false imprisonment). Therefore, we grant summary judgment on the state false imprisonment claim.

IV. Federal Denial of Fair Trial Claim

Wallace claims that he is bringing a federal denial of a fair trial claim. In *Heck v. Humphrey*, the United States Supreme Court held that a Section 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. 477, 489-90 (1994). Defendants did not address this claim directly in their motion for summary judgment because such a claim was not readily apparent from the complaint. It was only in the answer to the instant motions that Wallace made it clear that he is pursuing such a claim in order to avoid the effects of the statute of limitations and it was only in Defendants' reply brief that Defendants were first able to address the claim. Neither of the parties have devoted sufficient briefing regarding this claim. Therefore, we shall deny summary judgment on the federal denial of a fair trial claim because of the liberal notice pleading requirements set forth by the

V. Municipal Liability

The City filed a motion to dismiss. Under federal law, in order to find a municipality liable under Section 1983 the individual defendants must be found liable.

Los Angeles v. Heller, 475 U.S. 796, 799 (1986). Under Illinois law a "local public entity is not liable for any injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCLS 10/2-109. Since, the federal denial of a fair trial claim is still alive this motion to dismiss is premature. However, based upon Defendants' contesting the federal denial of a fair trial claim it appears likely that another motion for summary judgment will be forthcoming and the City's motion to dismiss arguments may be applicable. Therefore, we deny the City's motion to dismiss without prejudice.

CONCLUSION

Based on the foregoing analysis, we grant the motion for summary judgment except for the federal denial of a fair trial claim. We deny the motion for summary judgment on the federal denial of a fair trial claim without prejudice and we deny the motion to dismiss without prejudice.

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

ANDRE WALLACE,	)	
	)	
Plaintiff,	)	
	)	No. 03 CV 2296
-vs-	)	
	)	*(Judge Der-Yeghiayan)*
CITY OF CHICAGO and	)	
CHICAGO POLICE	)	
OFFICERS KRISTEN KATO	)	
and EUGENE ROY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the court on Defendants Kriston Kato's ("Kato") and Eugene Roy's ("Roy") second motion for summary judgment and motion for leave to amend their answer to the amended complaint. For the reasons stated below, we grant the motion for leave to amend the answer and grant the motion for summary judgment in its entirety.

BACKGROUND

On January 19, 1994, Roy and Kato, detectives for the Chicago Police Department, were assigned to investigate the murder of John Herbert Handy ("Handy"). The police reports indicated that Handy had been shot in a building located at 825 N. Lawndale Avenue in Chicago, Illinois. The reports also indicated that Handy was

employed as a house sitter for a construction company which was rehabbing the building. In addition, the police reports indicated that Handy and the proprietor of the construction company had a confrontation with drug dealers near the building prior to the shooting. The killer apparently entered the building through a window in the back of the building, shot Handy with a 9mm weapon three times, and then fled down a gangway along the building.

After learning of the murder, two other officers familiar with the area interviewed witnesses at the scene and witnesses and other informants indicated that Laron Jackson ("Jackson") and Plaintiff Andre Wallace ("Wallace") were dealing drugs at the crime scene on the night of the murder. On January 19, 1996, the police picked up Wallace and Jackson and took them to the police station. Defendants assert that at that point Jackson and Wallace were not under arrest and that they did not ask to go home. Kato and Roy first began interrogating Wallace and Jackson around 9:30 p.m. During the night, Jackson eventually told police that Wallace had been working as "security" for the drug dealers on the night of the murder and was carrying a 9mm gun. Jackson also told police that he saw Wallace running down the gangway along the building after he heard shots fired. At 4:15 p.m. the police confronted Wallace with Jackson’s statements. The police first discovered that Wallace was only fifteen years old and they called in a youth officer to assist them. At 6:00 a.m. an Assistant State’s Attorney was brought in and Wallace signed a written statement waiving his Miranda rights and admitting that he shot Handy three times.

At trial Wallace did not argue that he was innocent. Instead, at closing he argued that he killed Handy in self defense and at least during mutual combat arguing that he should be convicted of second degree murder rather than first degree murder. On appeal the appellate court ruled that Wallace had been seized for a significant amount of time prior to his written confession and the court remanded the case to the trial court to determine if the confession was legal. On remand the trial court found the confession to be admissible, but on the second appeal the appellate court ruled that the confession was inadmissible. Subsequently, the Assistant State's Attorney moved to nolle prosequi the charges against Wallace.

Wallace brought the instant action and filed a claim against Defendants pursuant to 42 U.S.C. 1983 ("Section 1983") alleging false imprisonment, excessive force, and unlawful arrest. Wallace also included a false imprisonment claim and a malicious prosecution claim based upon Illinois law.

On March 20, 2004, we granted Defendant Katos' and Roy's motion for summary judgment on all claims except, we denied without prejudice the motion for summary judgment on the denial of fair trial claim. We also denied without prejudice the City's motion to dismiss, which was based on the lack of liability on the part of the individual officers. On April 21, 2004, we granted Wallace leave to file an amended complaint. The amended complaint alleges that Wallace was denied a fair trial under the Fourteenth and Fourth Amendments because of Defendants' conduct when Wallace was arrested, inculpatory statements by Wallace that were unlawfully obtained against him, and the introduction of

evidence about his confession at his state trial. Kato and Roy have filed a second motion for summary judgment on all claims.

LEGAL STANDARD

Summary judgment is appropriate when the record reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In seeking a grant of summary judgment the moving party must identify "those portions of 'the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). This initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id.* At 325. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations in the pleadings, but, "by affidavits or as otherwise provided for in [Rule 56], must set forth specific facts showing that there is a gen

DISCUSSION

I. Motion to Amend Answer

Defendants have moved to amend their answer to the amended complaint. Wallace objects to the filing of an amended answer and argues that Defendants waived the collateral estoppel defense by not including it in their answer to the amended complaint. Federal Rule of Civil Procedure 8(c) states, "In pleading to a preceding pleading, a party shall set forth affirmatively ... any other matter constituting an avoidance or affirmative defense."

Wallace cites *Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 735 (7th Cir. 2004) in support of its waiver argument. In *Castro*, the district judge denied the defendant's motion for leave to amend its answer to include additional affirmative defenses, emphasizing the lengthy delay due to the defendant's "motion practice" and the defendant's lack of any reasonable excuse for its failure to raise its affirmative defense earlier. *Id.* Although there was some dispute about which party caused the delay, the Seventh Circuit emphasized that "a district court is in a much better position than we to judge the course and progress of cases before it, and [the Seventh Circuit] will defer to the district judge's firsthand knowledge of the cause of delays unless its conclusion strikes [the Seventh Circuit] as completely unreasonable." *Id.*

Like the defendant in Castro, Defendants Kato and Roy have asked this court to amend their original answer to include the affirmative defense of collateral estoppel. However, Kato's and Roy's present request for leave to amend differs significantly from the request denied in Castro. In Castro, the suit was filed on October 21, 1999. *Id.* On April 17, 2000, the defendant filed its first answer containing three affirmative defenses, and in February of 2001, the defendant filed its summary judgment motion which was denied on June 21, 2001. *Id.* Six months later, on December 14, 2001, the defendant filed a motion to tack on additional defenses to its answer. *Id.* Central to the court's denial in Castro was the extraordinary delay between the defendant's answer and its request for leave to amend, which was approximately 18 months, and the defendant's lack of any reasonable excuse for why it waited so long to assert its

additional defenses. *Id.* In contrast, in the instant action Defendants Kato and Roy filed their second motin for summary judgment less than 30 days after filing their answer to the amended complaint and have sought to amend the answer in a timely fashion.

In addition, Defendants were only put on notice that Wallace's pre-trial criminal proceedings might be relevant by Wallace's amended complaint. It was only after receipt of certain pre-trial transcripts relating to the amended complaint that Defendants realized that there were potential collateral estoppel issues. The rationale behind Rule 8(c) is to "avoid surprise and undue prejudice to the plaintiff by providing her notice and the opportunity to demonstrate why the defense should not prevail." *Venters v. City of Delphi,* 123 F.3d 956, 967 (7th Cir. 1997). As with all motions for leave to amend, the district court has the discretion to allow an answer to be amended to assert an affirmative defense not raised at the outset. *Id.*; Fed.R.Civ.P. 15(a). Although a defendant should not be permitted to "ambush a plaintiff with an unexpected defense," if the defendant acts in a timely fashion after the availability of the affirmative defense becomes reasonably apparent, a district court is well within its authority to grant leave to amend. *See Venters,* 123 F.3d at 968 (stating that "appellate courts are not inclined to find a technical failure to comply with Rule 8(c) fatal when the district court has chosen to recognize a belatedly affirmative defense, so long as the record confirms that the plaintiff had adequate notice of the defense and was not deprived of the opportunity to respond.").

Wallace's arguments that he will be prejudiced by allowing Defendants leave to amend their answer are

unconvincing. Wallace refers vaguely to some "expense" incurred although this expense is not specified, and even if Wallace could show some minimal expense, it is doubtful that it would amount to the "undue prejudice" necessary for the court to go against its liberal allowance of leaves to amend under 15(a). See Fed.R.Civ.P. 15(a) (stating that "leave shall be freely given when justice so requires"). Plaintiff also argues that leave to amend should be denied because such amendment would be futile. Although futility is a legitimate reason for the district court to deny leave to amend, *Park v. City of Chicago,* 297 F.3d 606, 612-13 (7th Cir. 2002), we do not find Defendants' defense futile and will examine the issue further in our discussion of the merits of their collateral estoppel claim. Finally, we will not penalize Defendants for their difficulties in addressing Wallace's inarticulate allegations in his complaint and amended complaint in this action. It was Wallace's lack of clarity in his first complaint that prevented the court from resolving all issues in the first dispositive motion and required the additional expense and time of the parties and the additional utilization of judicial resources to address the second motion for summary judgment. Therefore, we grant Defendants' motion to amend their answer to the amended complaint.

II. Collateral Estoppel

Defendants argue that Wallace is barred from arguing that his confession was coerced under the doctrine of collateral estoppel. A federal court should generally "accord[ ] preclusive effect to issues decided by state courts." *Allen v. McCurry,* 449 U.S. 90, 95-96 (1980) (stating that "res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on

adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."); 28 U.S.C. 1738. *See also Wilhelm v. County of Milwaukee,* 325 F.3d 843, 846 (7th Cir. 2003) (stating that "[u]nder 28 U.S.C. 1738, federal courts must give a state court judgment the same preclusive effect that it would receive under state law.").

Under Illinois law for the doctrine of collateral estoppel a defendant must show that: "(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom the estoppel is asserted was a party or in privity with a party to the prior adjudication. *Bajwa v. Metropolitan Life Ins. Co.,* 208 Ill.2d 414, 804 N.E.2d 519, 532 (004). Since the doctrine of collateral estoppel is an equitable doctrine, "collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped." *Id.*

Illinois courts have found that a ruling on a defendant's motion to suppress in a criminal trial has a preclusive effect on a later case. *See e.g. People v. Owens,* 102 Ill.2d 145, 464 N.E.2d 252, 255 (1984) (affirming lower court's ruling estopping inmate from arguing his confession should have been suppressed because the matter was decided in a motion to suppress hearing in the trial court); *People v. Miller,* 124 Ill.App.3d 620, 464 N.E.2d 1197, 1199 (1984) (stating that "[i]t is well established in Illinois that a defendant may not repeatedly relitigate a pretrial motion to suppress" unless there is additional evidence or peculiar circumstances warranting reconsideration, but merely

discovering a new argument is not sufficient.).

Wallace argues that issues involved in the motion to suppress ruling ought to be relitigated because the case fits into the "peculiar circumstances" exception to collateral estoppel. *See People v. Hopkins,* 52 Ill.2d 1, 284 N.E.2d 283, 285 (1972) (stating that peculiar circumstances which might limit how collateral estoppel can be used against a defendant in a criminal case might include the "variety of reasons [the criminal defendant] might not wish to appeal" or additional evidence.). Wallace has not given a sufficient reason for his failure to appeal the motion to suppress ruling. According to Wallace, if Defendants had raised the collateral estoppel defense in their original answer, Wallace would have had more time to gather evidence, he could provide the rationale for his criminal appellate attorney's choice not to raise the voluntariness of his confession on appeal. (Ans., par. 10). However, it was due to Wallace's inarticulate pleading and his vague references to his claims that reasonably prevented Defendants from raising the defense sooner. Absent the lack of clarity in Wallace's pleadings this issue would have been addressed long ago. Wallace has not shown the existence of any peculiar circumstances that fall within the collateral estoppel exception. *See People v. Mordican,* 64 Ill.2d 257, 356 N.E.2d 71, 73-74 (1976) (stating that when the defendant was acquitted, he had no opportunity for appellate review of the trial court's denial of his motion to suppress evidence and that his case fit into the "peculiar circumstances" exception defined by People v. Hopkins and collateral estoppel could not be used against him).

Hopkins and Mordican, are both distinguishable from the instant case because they involve criminal

prosecutions where the state was trying to prevent a criminal defendant from putting on an aspect of his defense by invoking collateral estoppel. 284 N.E.2d at 284, 356 N.E.2d at 72-73. The rationale underlying the "peculiar circumstances exception" adopted by the court in Hopkins is drawn from Justice Burger's dissent in *Ashe v. Swenson.* 397 U.S. 436 (1970). In his dissent, Justice Burger points out that the traditional policy rationales for applying collateral estoppel in civil cases, conservation of judicial resources and providing finality to plan for the future, are necessarily of less importance in a criminal trial. *Id.* at 464.

The Northern District of Illinois considered a case factually similar to the instant case in *Thomson v. Mueller,* 976 F.Supp. 762 (N.D.Ill. 1997). In *Thompson,* the defendant was arrested and charged with aggravated battery and resisting arrest. *Id.* at 763. As part of his defense, he filed a motion to quash the arrest claiming the officers lacked probable cause. *Id.* The judge concluded there was probable cause and the motion to quash the arrest was denied, but the defendant was acquitted on other grounds. *Id.* The defendant then filed an eight-count complaint in federal court against the arresting officers and the municipality alleging a false arrest, false imprisonment, malicious prosecution and excessive force brought pursuant to 42 U.S.C. §1983 and §1988, as well as state claims. *Id.* In the federal action the defendant sought summary judgment on the false arrest, false imprisonment and malicious prosecution claims, arguing that probable cause is an absolute bar to such claims and since the state judge already concluded that probable cause existed the plaintiff was barred from presenting the claim under the doctrine of collateral estoppel. *Id.* at

464. The district court granted the motion for summary judgment finding that Thompson was collaterally estopped from challenging the state judge's determination. *Id.* at 765-66.

The court in *Thompson* indicated that peculiar circumstances exist "if there was no possibility of an appeal" or the "party against whom the prior decision is invoked did not have a full and fair opportunity to litigate...." *Id.* at 765. In *Thompson* the court noted that the issue of probable cause was "thoroughly litigated", consisting of two days worth of testimony and multiple briefs, and was based on the judge's assessment of witness credibility (making the appeal unlikely). *Id.* at 766. Since the plaintiff already had a chance to thoroughly litigate his probable cause claim, and his appeal would have been highly unlikely to succeed had he been allowed to appeal the judge's finding, the court in *Thompson* held that it would not be unjust to find collateral estoppel barring the plaintiff from relitigating the issues from the probable cause hearing in his civil case. *Id.*; *James v. Conception*, 1998 WL 729757 *5 (N.D. 1998) (stating that the courts use case-by-case approach from *Thompson*, and finds that although civil plaintiff did not have the ability to appeal, the pretrial probable cause hearing in his criminal case was sufficiently thorough, and his appeal had a sufficiently low likelihood of succeeding, that collateral estoppel did apply).

Wallace asks this court to apply the "peculiar circumstances" exception to collateral estoppel to this case, and to allow Wallace to relitigate the substance of his motion to suppress in the instant civil case. However, the instant case is a civil action rather than a criminal action. In addition, Wallace already had a chance to

thoroughly litigate the issues raised in his motion to suppress his confession, and unlike the plaintiff in Thompson, Wallace was given the opportunity to appeal his suppressed confession, but chose not to do so.

During Wallace's criminal trial, he filed a motion to suppress evidence which alleged that his confession was coerced, and was based on the same evidence of physical and mental abuse stated in Wallace's civil complaint presently before this court. (Amended Compl. par. 5). Wallace admits, pursuant to Local Rule 56.1, that in his motion to suppress, Wallace alleged the same physical and psychological abuse Plaintiff alleges in his present amended complaint. (R SF 47-53). Wallace's allegation that Defendants Roy and Kato's physical and psychological coercion led to his confession in violation of the Fifth Amendment was the center of his motion to suppress. Wallace was afforded an extensive hearing on his motion, spanning four days, involving testimony from Wallace himself and from nine witnesses and arguments from the parties. (R SF 46-53). The trial court denied Wallace's motion to suppress his confession based on coercion. (R SF 55). While true that the trial court judge did not articulate the rationale for his denial of Wallace's motion to suppress, it is clear that if the judge had found Wallace's evidence of abuse by Kato and Roy to be credible, he would have granted the motion to suppress the confession. *See Williams v. Valtierra*, 2001 WL 1263495, *2 (N.D.Ill.2001) (stating that although the state court judge did not issue an opinion stating his reasons for denying the plaintiff's motion to suppress in the plaintiff's criminal trial, the judge could not have found that the plaintiff's confession was coerced and failed to suppress his confession, therefore

the issue of coercion is precluded in the plaintiff's §1983 civil claim).

Finally, Wallace argues that although the state trial judge denied Wallace's motion to suppress, this denial was not "essential to the final judgment" as there was no "final judgment" in Wallace's case. However, the "final judgment" required in the third prong of the collateral estoppel test is only the final judgment as to the issue the moving party seeks to preclude, not to a final judgment in Wallace's criminal case as a whole. *See id.* (stating that the decision at issue in determining whether there was a "final judgment" is not the ultimate criminal conviction, rather it is the denial of plaintiff's motion to suppress in her criminal case). Roy and Kato have met their burden of showing that collateral estoppel should bar Plaintiff Wallace's Section 1983 claims based upon his coerced confession. Therefore, we grant the motion for summary judgment on the due process claim.

III. Waiver and Time-barred Claims

Defendants argue that Wallace has waived certain claims and that some claims are time-barred. In regards to the first motion for summary judgment before this court, the court granted Roy's and Kato's summary judgment motion on Wallace's Fourth Amendment claims because they were time-barred by a two year statute of limitations applied to all 1983 claims filed in Illinois. *Hildebrandt v. Illinois Dept. of Natural Resources*, 347 F.3d 1014, 1036 (7th Cir. 2003); 735 ILCS 5/13-202. Plaintiff argues that the applicable tolling of the statute of limitations was changed by two Seventh Circuit decisions, *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) and *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir.2004), which were decided after Wallace answered Defendants' first motion for summary judgment.

However, Defendants cited *Gauger* in their reply brief to the first motion for summary judgment prior to the court's decision on the first motion for summary judgment. This court fully considered the holding in Gauger in making its ruling on the first motion for summary judgment. (W SJ Reply 3). Wallace did not file a motion for reconsideration and by failing to question this court's ruling, even though Wallace has had months to do so, Wallace waived his right to reassert his Fourth Amendment claims in this Amended Complaint.

Also, even if this court did allow Wallace to replead his Fourth Amendment Claims under Gauger and Wiley, his claims would still be time barred. In *Gauger*, the Seventh Circuit set down the rule that when a constitutional claim under Section 1983 for false arrest would, if vindicated, undermine a state conviction, the statute of limitations is not tolled until the charges against the defendant are dropped. 349 F.3d at 360-361. The rule is based on *Heck v. Humphrey* in which the Court held that before bringing a civil action connected to a criminal conviction, if the alleged unlawful actions in the civil action "would render [the] conviction or sentence invalid," a plaintiff needs to establish that the conviction has been reversed. 512 U.S. 477, 486-487 (1994).

The false arrest claim in this case is distinguishable from the false arrest claim in *Gauger*. In *Gauger* the plaintiff could not file his Section 1983 false arrest claim until the case against him was dismissed because the disposition of his civil suit would undermine his conviction. 349 F.3d at 354. However, in the instant action Wallace could have filed his false arrest claim after the Appellate Court issued its order on September 21, 1998. Wallace's Section 1983 claim would not have been barred by Heck after the Appellate Court's ruling because the Appellate Court remanded Wallace's case to determine whether his confession was sufficiently attenuated

from Wallace's illegal arrest to be admissible. In other words, the court acknowledged the possibility that, even if Wallace was illegally arrested, his conviction could still stand. Therefore, after the Appellate Court ruling, Wallace's potential success on a false arrest claim would not imply the invalidity of his criminal conviction. *See Gauger*, 349 F.3d at 361 (stating that "[w]hat we have rejected is a rule that false-arrest and other Fourth Amendment claims are always premature while the plaintiff still faces criminal punishment."). Since Wallace filed his Fourth Amendment claim more than four years after it became actionable, it is still time-barred. Therefore, we grant Defendants' motion for summary judgment as to Wallace's Fourth Amendment Section 1983 claims.

IV. Cognizable Denial of Fair Trial Claim

Defendants argue that Wallace does not state a cognizable denial of a fair trial claim. For the reasons explained in *Gauger*, Wallace lacks a cognizable denial of a fair trial claim. Wallace was present during the alleged misconduct by Defendants and thus there was no failure to disclose information to him resulting in an unfair trial. *Id.* at 360. Wallace argues that the holding in *Gauger* is limited to cases containing malicious prosecution claims. However, the court in *Gauger* provides no such limitation. The court explained its rationale in a general sense and did not specifically tie its analysis to a malicious prosecution claim. *Id.* Wallace has not provided any other valid arguments indicating that he has a valid denial of a fair trial claim.

CONCLUSION

Based on the foregoing analysis, we grant Defendants' motion for leave to amend their answer and grant their motion for summary judgment in its entirety.