No. 23-5673

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PERCY BROWN,

Plaintiff-Appellant

v.

JEFFREY JEWELL,

Defendant-Appellee

On Appeal from the United States District Court for the Western District of Kentucky, Louisville Division
District Ct. No. 3:16-cv-460-DJH-RSE
Hon. Judge Hale Presiding

BRIEF OF APPELLANT PERCY BROWN

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Plaintiff-Appellant makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

/s/ Margaret Campbell

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ORAL ARGUMENT STATEMENT

Plaintiff-Appellant Percy Brown requests oral argument.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Mr. Brown's federal claims under 28 U.S.C. § 1331 and state law claims under 28 U.S.C. § 1367. Final judgment was entered on June 28, 2023. R.147, Page ID # 968. Notice of Appeal was timely filed on July 26, 2023. R.148, Notice of Appeal, PageID# 969. Jurisdiction in this Court is therefore proper under 28 U.S.C. § 1291.

ISSUE PRESENTED

1. Did Mr. Brown timely file his lawsuit under Kentucky's one-year statute of limitations when he filed suit less than one year after the Commonwealth dropped all charges against him?

STATEMENT OF THE CASE

Mr. Brown brought claims under 42 U.S.C. § 1983 and Kentucky law, alleging that the defendant officers framed him for murder, sexual assault, and witness intimidation, violating his constitutional rights. *See generally* R.54, Am. Complaint, PageID# 628.[1] As a result, Plaintiff spent more than seven years wrongfully imprisoned. R.54, Am. Complaint (¶ 1), PageID# 629.

Plaintiff's wrongful prosecution began with Jennifer French's murder in 2004. R.54, Am. Complaint (¶¶14-17), PageID# 631. Despite evidence implicating Cecil Gaines and Loveil Burks in French's murder, Defendants never pursued the real perpetrators. R.54, Am. Complaint (¶¶18-23). Instead, Louisville officers and University of Louisville Officer Defendant Jeffrey Jewell framed Mr. Brown for both Ms. French's murder and a series of other crimes. *Id.* (¶¶ 25-26), PageID# 634. All told, Plaintiff was indicted and reindicted six times on 34 charges between 2005 and 2015. R.45-5, Summary Chart, PageID# 555;

[1] The Court is required to accept Plaintiff's factual allegations as true. *J.P Morgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007). As explained in this section, Plaintiff has stated a claim against Defendant Jewell under § 1983 for violating his constitutional rights.

R.33-2, Indictment No. 05CR0035, PageID# 295, R.33-5, Indictment No. 08CR3710, PageID# 304, R.45-4, 09CR338, PageID# 548; R.45-6, Indictment No. 10CR0236, PageID# 557; R.45-7, Indictment No. 14CR1394, PageID# 560; R.33-11, Indictment No. 15CR0541, PageID# 317.

By April 5, 2016, all charges were finally dismissed. *Id.* (Am. Comp. ¶ 106), PageID# 649. Plaintiff filed suit less than one year later, on July 15, 2016. R.1, Complaint, PageID# 1. Plaintiff's suit was thus timely under *Heck v. Humphrey*, 512 U.S. 477 (1994) and *McDonough v. Smith*, 139 S. Ct. 2149 (2019). This line of cases holds thatthat a plaintiff may not file suit until the criminal prosecution has terminated in his favor.

Disregarding this factual backdrop, the District Court held that Plaintiff was required to file suit within one year of the dismissal of each individual charge. It ruled as much even though Mr. Brown's charges stemmed from the same nucleus of events. It ruled as much even though all of Mr. Brown's charges arose from the same witness statements accusing him of various crimes, some of which remained pending until April 5, 2016. If left unaltered, the District Court's

opinion will turn *Heck* and *McDonough* on its head. Without reversal, the floodgates to Section 1983 lawsuits will open and criminal defendants in Kentucky will not just be enabled and encouraged—but required—to file lawsuits when a single count of their pending charges is dismissed, even when additional, related charges remain pending. Reversal is warranted.

FACTUAL ALLEGATIONS

The following facts come from Plaintiff's Amended Complaint and supporting documentation. Plaintiff elaborates here on his factual allegations consistent with the pleadings.

In 2004, Louisville Metro Police Department (hereinafter "LMPD") officers and Defendant Jewell suspected that Mr. Brown was involved in a check-forgery scheme in the Louisville area. R.54, Am. Comp. (¶ 25), PageID# 634. Instead of pursuing the true perpetrators, and lacking evidence against Mr. Brown, LMPD Officers and Defendant Jewell decided to frame Plaintiff for various sexual assault crimes—and eventually, murder. *Id.* (¶¶ 24-25), PageID# 634.

Because there was no real evidence implicating Mr. Brown in the murder, LMPD officers and Defendant Jewell[2] doubled down and charged Mr. Brown with a series of crimes, all based on fabricated evidence. *Id.*, (¶ 25), PageID# 634. Although the mess that LMPD officers and Defendant Jewell created took eleven years to resolve, all charges against Mr. Brown eventually were dismissed. R.54, Am. Comp., PageID# 649.

Mr. Brown's 11-year nightmare began with the murder of Jennifer French in Louisville, Kentucky, on September 16, 2004. R.54, Am. Complaint (¶14), PageID# 631. Ms. French's murder happened after she purchased drugs from a man named Cecil Gaines. *Id.* (¶15), PageID # 631. Following the transaction, Gaines returned with another man, Loveil Burkes. *Id.* (¶ 16), PageID # 632. Burks entered the house and shot Ms. French. *Id.* (¶ 16), PageID# 631-32.

An eyewitness, Henry Humphries, saw Burks fleeing the scene. *Id.* (¶ 18), PageID# 632. Humphries identified Burks in a photo array. *Id.* (¶ 20), PageID# 632. Another eyewitness, Rhonda Trice, informed

[2] Defendant Jewell was employed by the University of Louisville Police Department. R.54, Am. Comp. (¶11), PageID# 630.

officers that Burks was the shooter and that Gaines had also been involved. *Id.* (¶ 19). Neither Burkes nor Gaines was charged with the shooting. *Id.*

Mr. Brown had nothing to do with the murder. *Id.* (¶ 30). He was at a casino in another state at the time. *Id.*, PageID# 635-36.

A few weeks later, on December 3, 2004, Montoya Tyson was arrested for attempting to cash a forged check. *Id.* (¶ 26), PageID# 634. After Tyson was arrested, officers learned that she knew Mr. Brown. *Id.* Defendant Jewell and LMPD Detective Smithers interrogated Tyson. Id. (¶ 27), PageID# 634. During the interrogation, Defendant Jewell fabricated a false statement from Tyson, implicating Mr. Brown in French's murder and accusing Mr. Brown of sodomizing Ms. Tyson. *Id.* (¶ 28), PageID# 635. Defendant Jewell and Detective Smithers provided Ms. Tyson all the information about the crimes, so they knew her statement was fabricated. *Id.* (Am. Comp. ¶¶ 27, 28). Tyson went along with the fabrication because she was promised a deal in exchange for her statement. *Id.*

Mr. Brown was arrested on December 27, 2004. *Id.* (¶ 31), PageID# 636. Plaintiff refused to be interrogated without a lawyer. *Id.*

(¶ 34), PageID# 637. In response, LMPD officers to threatened to frame him for the French murder. *Id.*

A few weeks later, on January 6, 2005, Plaintiff was indicted for two counts of sodomy involving Montoya Tyson. *Id.* (¶ 36), PageID # 637; R.33-2, 05CR-35 Indictment, PageID# 295. To secure the indictment, LMPD Detective Smithers testified to the fabricated statement he and Defendant Jewell had secured from Tyson. *Id.* (¶ 37), PageID# 637-38. Almost two years later—on the day of trial—the Commonwealth dismissed the indictment without prejudice. R.33-3, Dec. 5, 2006 Order, PageID# 296.

Then, three years after the French homicide, LMPD officers finally made good on their threat to frame Plaintiff for the French murder. *Id.* (Am. Comp. ¶ 34), PageID# 34). Plaintiff was charged with murder on December 16, 2008. *Id.* (¶ 61), PageID# 642; R.33-5, 08CR3710 Indictment, PageID# 304-05. In the same indictment, Plaintiff was charged with sodomy (Montoya Tyson) and intimidating participants in the legal process (Montoya Tyson and another woman, Michele Conley). *Id.* (¶ 61), PageID# 642; R.33-5, PageID# 304. The

entire indictment was eventually dismissed on March 17, 2009. R.33-8, Case No. 08CR3710 Order, PageID# 314.

Still, the defendant officers continued piling on the charges, hoping that something would stick. R.45-5, Summary Chart, PageID# 555-56. In February 2009, LMPD Defendant Downs reindicted Plaintiff for murder (Jennifer French), sodomy (Jennifer Renfro and Montoya Tyson) and intimidating participants in the legal process (Montoya Tyson, Michele Conley, and Jennifer French). R.45-4, Indictment 09CR0338, PageID# 548-554. On January 26, 2010, Plaintiff was indicted for sodomy, assault, and wanton endangerment (all involving Nina Snow). R.45-6, Indictment No. 10CR0236, PageID# 557. In December 2009, the trial court denied Plaintiff's motion to sever the witness intimidation charges from the murder charge, "holding that those counts were properly joined for trial." R.45-3, Commonwealth's Memo., PageID# 539.

A few months later, on July 20, 2010, the Commonwealth filed a Motion to Consolidate two criminal proceedings against Plaintiff: Indictments 09CR0338 and 10CR236. Indictment 09CR0338 charged Mr. Brown with murder (Jennifer French), kidnapping (Jennifer

Renfro), sodomy (Jennifer Renfro, Montoya Tyson), intimidating a witness in the legal process (Montoya Tyson, Michele Conley, Jennifer Renfro), and wanton endangerment (Jennifer Renfro). R.45-5, Indictment 09CR0338, PageID# 548-554. Indictment 10CR236 charged Mr. Brown with sodomy, assault, and wanton endangerment, all involving Nina Snow. R.45-6, 10CR236 Indictment, PageID# 557-59.

In its motion, the Commonwealth argued that consolidation was appropriate because "[t]he charges arise out of a series of incidents in the fall of 2004. The nature of the crimes and the evidence are similar, and are all part of a pattern of conduct committed by the defendant." R.33-6, MTC (¶ 7), PageID# 307-09. According to the Commonwealth, under Kentucky Rule of Criminal Procedure 9.12, two or more offenses can be tried together if the offenses "could have been joined in a single indictment." R.33-6 (¶ 5), PageID# 308.

The trial court granted the Commonwealth's motion, reasoning that the "offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common plan or scheme." R.45-2, Jeff. Circuit Court Order, PageID# 537. Again, however, the Commonwealth dismissed these

charges by February 24, 2015. R.33-9, Order, PageID# 315 (dismissing Indictment No. 10-CR-0236, and Counts 2, 3, 4, 5, 9 of Indictment No. 09-CR-0338); R.33-10, Order, PageID# 316 (dismissing Indictment No. 09-CR-0338). Plaintiff was reindicted for sodomy involving Montoya Tyson—and charged with 14 other counts—on February 23, 2015. Consistent with the Commonwealth's position and the trial court's position, the district court dismissed Plaintiff's federal lawsuit in 2010 on comity grounds because Plaintiff's state criminal prosecution remained pending. Case No. 09-cv-653-JHM, Doc. 12, PageID# 34.

On May 29, 2014, Plaintiff was indicted for rape and sodomy. R.33-7, Indictment No. 14CR1394, PageID# 311. On July 31, 2014, the Commonwealth filed a second Motion to Transfer. R.33-7, PageID# 310. The Commonwealth sought to consolidate the new Indictment, No. 14-CR-1394, with charges from Indictment No. 09-CR-0338 and Indictment No. 10-CR-0236. The Commonwealth asserted that transfer and consolidation was appropriate because "[e]ach indictment involves similar acts and occurrence over a period of time, and could be tried together if indicted jointly." *Id.*, PageID# 311.

On January 20, 2015, the Commonwealth dismissed Mr. Brown's kidnapping, sodomy, and wanton endangerment charges. R.33-9, Jefferson County Order, PageID# 315. On February 24, 2015, the murder charge was dismissed. R.33-10, Order, PageID# 316. All remaining charges were dismissed on April 5, 2016. R.54, Am. Comp., PageID# 646; R.33-14, PageID# 328.

PROCEDURAL HISTORY

A. The District Court Dismissed Plaintiff's *Pro Se* Lawsuit Filed After Dismissal of Plaintiff's Murder Charge

Plaintiff filed a *pro se* Complaint in the Western District of Kentucky on August 27, 2009. Case 09-cv-653-JHM, Doc. 1, PageID# 1-12. Plaintiff's Complaint alleged that LMPD officers created false police reports and fed information to witnesses, leading to his false arrest for murder. Case No. 09-653-JHM, Dckt. 12, PageID# 34. Plaintiff filed another *pro se* lawsuit on October 14, 2009. Case 09-cv-180-JHM, Doc. 1, PageID# 1-12. The Complaint asserted malicious prosecution, fabrication, and conspiracy claims, alleging that LMPD officers filed false police reports, gave false grand jury testimony. Case 09-cv-653, Order, PageID# 34-35.

The two cases were consolidated. Case 09-cv-653-JHM, Doc. 10, PageID # 32. Invoking the *Younger* abstention doctrine, the district court dismissed Plaintiff's individual capacity claims against the LMPD officers:

> The Supreme Court made clear in *Younger v. Harris*, 401 U.S. 37 (1971), that 'a federal court should not interfere with a pending state court criminal proceeding except in the rare situation where an injunction is necessary to prevent great and immediate irreparable injury.' *Fieger v. Thomas*, 74 F.3d 740, 743 (6th Cir. 1996) (citing *Younger*). "*Younger* abstention in civil cases requires the satisfaction of three elements. Federal courts should abstain when (1) state proceedings are pending; (2) the state proceedings involve an important state interest; and (3) the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims." *Hayse v. Wethington*, 110 F.3d 18, 20 (6th Cir. 1997).
>
> According to the complaint, Plaintiff has a pending criminal case against him in state court. The state has an important interest in adjudicating that criminal case. In light of the available avenues through which to raise a constitutional challenge, this Court will not interfere with an on-going Kentucky state court proceeding. While federal court relief might be a possibility in the future should state court remedies prove unavailable, Plaintiff has failed to show that the state courts are unable to protect his interests at this time.
>
> The record therefore indicates that *Younger* abstention is appropriate with respect to Plaintiff's constitutional and federal law claims against the Louisville Metro Defendants in their individual capacity. *Tindall v. Wayne County Friend of the Court*, 269 F.3d 533, 538 (6th Cir. 2001) (*Younger* abstention counsels federal court to refrain from adjudicating matter otherwise properly before it in deference to ongoing state criminal

> proceedings). Where *Younger* abstention is appropriate, it requires dismissal of those claims without prejudice. *Zalman v. Armstrong*, 802 F.2d 199, 207 n.11 (6th Cir. 1986).

Case No. 09-cv-653-JHM, Doc. 12, PageID# 34.

In short, the district court dismissed Plaintiff's claims because of his ongoing criminal case. *Id.*

B. In This Case, the District Court Ruled that Plaintiff Filed His Lawsuit Too Late Because He Waited for Dismissal of All Charges

Consistent with the district court's Order dismissing his *pro se* lawsuit, Plaintiff filed the Complaint in this case in 2016, after all charges had been dismissed. Plaintiff sued several defendants, including University of Louisville Police Officer Jeffrey Jewell, the Louisville Jefferson County Metro Government, and several Louisville Metro Police Department individual defendants. R.1, Complaint, PageID# 1.[3]

Defendant Jewell filed a Motion to Dismiss. R.29-1, MTD, PageID# 192. In his Motion, Jewell asserted that Plaintiff's claims against him were time-barred Id., PageID# 206. In response, Plaintiff

[3] Plaintiff has settled his claims with the Louisville Jefferson County Metro Government and the LMPD individual defendants. Only Defendant Jewell remains a party to this appeal.

asserted his claims did not accrue until April 6, 2016, when all charges were dismissed against him. R.34, Plaintiff's Resp., PageID# 359. On September 27, 2017, the district court granted Defendant Jewell's Motion to Dismiss. R.43, MTD Op., PageID# 453.

Plaintiff then filed a Motion for Reconsideration and for Leave to File an Amended Complaint. R.45, MTR, PageID# 472. The district court denied the Motion to Reconsider, ruling that Plaintiff had separate malicious prosecutions claims that accrued on different dates. R.53, Order, PageID# 623.

SUMMARY OF THE ARGUMENT

Heck v. Humphrey, 512 U.S. 477, 484 (1994) bars collateral attacks on criminal convictions through civil suits. Accordingly, the statute of limitations begins to run only when the criminal conviction has been invalidated in some fashion. Id. *McDonough* addresses accrual in § 1983 suits where—as here—a criminal prosecution does not result in a conviction. Consistent with *Heck*, *McDonough* holds that claims accrue only when the criminal prosecution has ended in defendant's favor. *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019).

The policy reasons behind *Heck*'s and *McDonough*'s accrual rule are obvious. Federal-state comity requires that federal courts avoid interfering with or relitigate parallel issues under consideration in state court. *McDonough,* 139 S. Ct. at 2156-57. "Strong judicial policy" seeks to avoid conflicting resolutions arising from the same transaction and seeks to avoid the use of civil suits to attack extant criminal prosecutions. *Heck*, 512 U.S. at 484.

In sum, the statute of limitations accrues in § 1983 cases when—and only when—the criminal prosecution has ended in the defendant's favor. To require otherwise would impose an "untenable choice" between 1) letting claims expire, and 2) requiring plaintiffs to file civil suits against the same person still prosecuting them. *McDonough*, 139 S. Ct. at 2158. Here, Plaintiff filed his lawsuit less than one year after the 11-year criminal prosecution against him ended with the dismissal of all charges. His lawsuit thus was timely under *Heck* and *McDonough*.

ARGUMENT

I. Standard of Review

"The district court's decision regarding a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is

analyzed using the same de novo standard of review employed for a motion to dismiss under Rule 12(b)(6)." *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may only be granted if the moving party is nevertheless clearly entitled to judgment." *Id.*

II. The District Court Erred in Granting Defendants' Motion for Judgment on the Pleadings

A litigant may not file a claim under Section § 1983 until the criminal proceeding terminates in his favor. *Thompson v. Clark*, 596 U.S. 36, 44 (2022). Favorable termination requires that the prosecution end without a conviction. *Id.* at 39.

In *Heck*, a state prisoner serving a 15-year sentence for manslaughter sought money damages arising from alleged misconduct. *Heck v. Humphrey*, 512 U.S. 477, (1994). The Supreme Court ruled that the claim was not cognizable under § 1983. *Id.* at 483. It held that to state a viable claim under § 1983, a "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make

such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-78 (footnote omitted). "A claim for damages bearing that relationship to a conviction that has not been so invalidated is not cognizable under § 1983." *Id.* at 487.

In short, *Heck* bars "a collateral attack on the conviction through the vehicle of a civil suit." *Id*. at 484. The reasons for this rule are 1) there is "a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction, and 2) avoiding collateral attacks on criminal convictions through the vehicle of a civil suit." *Id.*; *see also Carr v. Louisville-Jefferson Cnty.*, 37 F.4th 389, 392 (6th Cir. 2022) (reminding that under *Heck*, criminal defendants must secure favorable termination of criminal proceedings and cannot use § 1983 as a vehicle to attack the validity of their convictions or their confinement).

The same policies apply here, where Plaintiff's criminal prosecution resulted in complete dismissal of charges. In *McDonough*, the plaintiff had been indicted on 38 counts of felony forgery and 36 counts of felony possession of a forged instrument. *McDonough v. Smith*, No. 1:15-cv-01505, 2016 WL 5717263, at *6 (N.D.N.Y. Sept. 30,

2016). The first trial ended in a mistrial. *McDonough v. Smith*, 139 S. Ct. at 2154. The second trial ended in an acquittal. *Id.* The issue before the Supreme Court was whether the statute of limitations began running at the time of acquittal of all charges, or sometime earlier. *Id.*

The Court held that the statute of limitations began running upon plaintiff's acquittal. In other words, *Heck*'s favorable termination requirement still applied where no conviction occurred:

> The principles and reasoning of *Heck* thus point toward a corollary result here: There is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has ended in defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run.

McDonough, 139 S. Ct. at 2158 (citations omitted).

The Supreme Court reiterated in *McDonough* that federal actions should not interfere with or relitigate parallel issues under consideration in pending state court criminal proceedings. *McDonough v. Smith*, 139 S. Ct. 2149, 2156-57 (2019). The Court reasoned that if the statute of limitations began running before the dismissal of all charges, "[a] significant number of criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a

civil suit against the very person who is in the midst of prosecuting them." *Id.* at 2158. As the Supreme Court explained:

> The first option is obviously undesirable, but from a criminal defendant's perspective the latter course, too, is fraught with peril: He risks tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context. Moreover, as noted above, the parallel civil litigations that would result if plaintiffs chose the second option would run counter to core principles of federalism, comity, consistency, and judicial economy.

Id.

In short, consistent with *McDonough*, the plaintiff "had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor. *Id.* at 2159; *see also Manuel v. City of Joliet*, 580 U.S. 357, 371 (2017) (noting that Courts of Appeals "have pegged the statute of limitations to the dismissal of the criminal case") (emphasis added).

In *King v. Harwood*, 852 F.3d 568, 575 (6th Cir. 2017), the plaintiff was charged with murder and tampering with physical evidence. The Kentucky Court of Appeals later vacated plaintiff's *Alford* plea, and her case was remanded for trial on the same charges. *Id.* at 579. The charges were then dismissed before trial. *Id.* The Sixth Circuit concluded that her lawsuit was timely, because the statute of

limitations began running only when the indictment was finally dismissed. *Id.*; *id.* at 579 ("[T]he one-year statute of limitations did not begin to run until October 9, 2014, when King's indictment was dismissed . . . .").

Because a plaintiff must prove favorable termination of the criminal proceeding, "the statute of limitations in such an action does not begin to run until 'the plaintiff knows or has reason to know of' such favorable termination." *Id.* (first citing *Heck*, 512 U.S. at 484; then citing *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 635 (6th Cir. 2007). "Were it not so, the plaintiff would be compelled to sue during the pendency of the allegedly malicious prosecution, risking the possibility of the plaintiff's 'succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* (citing *Heck*, 512 U.S. at 484)

In *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017), the Sixth Circuit concluded the plaintiff's § 1983 claims accrued only when the entire indictment had been resolved. *Id.*; *see also McCune v. City of*

Grand Rapids, 842 F.2d 903, 907 (6th Cir. 1988) (holding that § 1983 malicious prosecution claim was timely because plaintiff filed lawsuit less than two years after all charges were dropped).

Similarly, other courts have ruled that the entire criminal prosecution must end before the statute of limitations begins running. *See Murphy v. Lynn*, 53 F.3d 547, 548 (2d Cir. 1995) ("for claims based in malicious prosecution, this period starts to run only when the underlying criminal action is conclusively terminated"); *Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991) ("The perverse result of such a rule is that claimants would have to file § 1983 suits before they even know they have a cause of action, *i.e.*, before a prosecution has ended favorably to them. Why defendants would advocate for the filing of premature lawsuits defies our understanding as well as the uniform precedent of other circuit courts."); *Peters v. City of Mount Rainier*, 2014 WL 4855032, at *12 (D. Md. Sept. 29, 2014) ("By all indications, Peters' criminal proceeding terminated in his favor when all of the charges against him were *nol prossed* on August 3, 2012. There is simply nothing to suggest that by *nol prossing* Peters' charges the prosecutors intended to do anything other than abandon their entire

criminal prosecution of Peters."). In sum, under *Heck* and its progeny, the statute of limitations begins running only when all charges have been dismissed.

Plaintiff's Amended Complaint alleges that the entire 11-year criminal prosecution against Plaintiff was a sham and a conspiracy. R.54, Am. Comp. (¶¶ 38-46). Defendant Jewell was involved in the conspiracy during its earliest phase, when he fabricated a statement from Montoya Tyson against Plaintiff in both the French homicide and sexual assault. *Id.* (Am. Comp. ¶¶ 30-31). Plaintiff was indicted, reindicted, and incarcerated on charges involving Tyson for the next 11 years. See R. 33-14, PageID# 328 (dismissing sodomy charges involving Tyson on April 5, 2016). When Plaintiff's murder charge was dismissed in February 2015, the sodomy charges involving Tyson remained until April 2016. *Id.*

In essence, had Plaintiff sued under § 1983 immediately after dismissal of the murder charge, he would have been litigating a § 1983 claim involving the same officers, same witness, same statement, and same facts that were still the subject of pending charges in state court. This result directly contradicts the Supreme Court's directives in *Heck*

and *McDonough*. *See, e.g.*, *Heck*, 512 U.S. at 484 (barring collateral attacks on convictions through civil suits because of "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions"); *McDonough*, 139 S. Ct. at 2158 ("There is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing.").

Had Plaintiff pursued a § 1983 case based solely on the murder charge, he could have prevailed in his § 1983 case alleging that Defendant Jewell and LMPD officers fabricated Montoya Tyson's statement. Simultaneously, he could have been prosecuted in state court on charges arising from the same facts. This outcome is precisely the result that *Heck* and *McDonough* forbid. For these reasons, in 2010, the District Court dismissed Plaintiff's § 1983 action on federal-state comity grounds. Case No. 09-cv-653-JHM, Doc. 12, PageID# 34 ("According to the Complaint, Plaintiff has a pending criminal case against him in state court. The state has an important interest in adjudicating that criminal case. In light of the available avenues

through which to raise a constitutional challenge, the Court will not interfere with an on-going Kentucky state court proceeding.").

McDonough is explicit about why § 1983 plaintiffs must wait until the criminal prosecution favorably terminates to file their claims. Had Plaintiff filed his claims before the resolution of his criminal case, he would have faced the "untenable choice" between 1) letting his claims expire, and 2) "filing a civil suit against the very person who is in the midst of prosecuting [him]." *McDonough*, 139 S. Ct. 2149 at 2158. Indeed, Plaintiff did file two *pro se* civil suits while he still had pending charges, but the district court dismissed his lawsuits since his criminal case was unresolved. Case No. 09-cv-653-JHM, Doc. 12, PageID# 34.

All of Plaintiff's charges were part of the same criminal prosecution. They cannot be separated for purposes of accrual. In 2010, the Commonwealth sought to consolidate Plaintiff's indictments. R.33-6, MTC (¶ 7), PageID# 307-09. In support, the Commonwealth represented that the murder and sodomy charges, among other charges, were all part of the same series of incidents; that "the nature of the crimes and the evidence are similar, and are all part of a pattern of conduct committed by the defendant." *Id.* The trial court agreed that

the offenses all arose from the same acts and constituted parts of a common plan or scheme. R.45-2, Jeff. Circuit Court Order, PageID# 537. The Commonwealth sought to consolidate indictments for a second time in 2014, asserting that all of Plaintiff's acts were similar acts and occurrences, and could be tried jointly. R.33-7, PageID# 311. Because Plaintiff's various charges and indictments were always considered by the Commonwealth and the trial court as part of a single criminal prosecution against Plaintiff, it makes no sense to separate those charges for purposes of accrual.

To impose different accrual dates on different charges that are all part of the same criminal prosecution will result in a massive waste of judicial resources. Plaintiffs will be forced to file a new lawsuit every time a charge is dismissed. For example, in *McDonough* the plaintiff had been indicted on 38 counts of felony forgery and 36 counts of felony possession of a forged instrument, resulting in a 174-page, 1,220 paragraph Complaint. *McDonough*, 2016 WL 5717263, at *6. If those charges had been dismissed at different times, requiring the plaintiff to file a lawsuit based on each dismissal date, the duplicity of lawsuits would have overwhelmed the district court.

As a result, in *McDonough*, the Supreme Court expressed that when a plaintiff's claim "questions the validity of a state proceeding, there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases." *McDonough*, 139 S. Ct. at 2158 (citing *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) ("a scheme requiring 'conscientious defense attorneys' to file unripe suits 'would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any'")). Here, as in *McDonough*, judicial economy requires a single accrual date for charges arising from the same criminal prosecution.

III. Conclusion

Reversal is required here. As it stands, the district court's ruling will multiply the number of lawsuits that § 1983 litigants file in the district courts of the Sixth Circuit. Every time a charge is dropped—no matter what charges remain pending in the criminal case—a § 1983 litigant must file suit. Even when the charges arise from the same facts. Even when those charges are part of the same indictment. Even when

the civil defendants are still prosecuting the plaintiff. Even when the state criminal prosecution remains unresolved. This result is untenable under *Heck* and *McDonough*. And it is untenable in practice.

Plaintiff respectfully asks the Court to reverse the district court's dismissal of his claims against Defendant Jewell.

Respectfully submitted,

DATED: January 26, 2024 /s/ Margaret Campbell

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CERTIFICATE OF COMPLIANCE UNDER FRAP 32(g)

I, Margaret Campbell, an attorney, hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 5,013 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). This brief complies with the typeface and type style requirements of FED. R. APP. P. 32(a)(5) and 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 Word in Century, 14-point for the body and footnotes.

s/ Margaret Campbell

CERTIFICATE OF SERVICE

I, Margaret Campbell, an attorney, certify that I filed the foregoing Brief of Appellant Percy Brown on January 26, 2024, via CM/ECF, thereby delivering it to counsel of record via CM/ECF.

s/ Margaret Campbell

ADDENDUM:
Designation of Relevant District Court Documents from Case No. 3:16-cv-460

Record Entry Number	Document Description	Page ID# Range
1	Complaint	1-26
13	Motion to Dismiss for Failure to State a Claim	127-128
13-1	Memorandum in Support of Motion to Dismiss	129-148
13-2	Ex. 1 – Charging Document	149-152
13-3	Ex. 2 – Order, *Comm. v. Brown*	153-156
13-4	Ex. 3 – Order, *Comm. v. Brown*	157-158
29-1	Motion to Dismiss (Redacted)	192-224
33	Motion to Dismiss by Louisville Jefferson County Metro Government et al.	281-282
33-1	Memorandum in Support of Motion to Dismiss	283-294
33-2	Ex. 1 – Indictment	295
33-3	Ex. 2 – Order, *Comm. v. Brown*	296
33-4	Ex. 3 – Indictment	297-303
33-5	Ex. 4 – Indictment	304-306
33-6	Ex. 5 – Motion to Transfer and Consolidate	307-309
33-7	Ex. 6 – Motion to Transfer	310-313
33-8	Ex. 7 – Order, *Comm. v. Brown*	314
33-9	Ex. 8 – Order, *Comm. v. Brown*	315
33-10	Ex. 9 – Order, *Comm. v. Brown*	316
33-11	Ex. 10 – Indictment	317-322
33-12	Ex. 11 – Order, *Comm. v. Brown*	323
33-13	Ex. 12 – Motion to Re-Assign Trial Date	324-327
33-14	Ex. 13 – Order, *Comm. v. Brown*	328

Record Entry Number	Document Description	Page ID# Range
33-15	Ex. 14 – *Roth v. City of Newport*, Westlaw Case	329-332
33-16	Ex. 15 – *Divita v. Ziegler*, Westlaw Case	333-344
34	Plaintiff's Response to Jeffrey G. Jewell's Motion to Dismiss	346-381
34-1	Ex. 1 – Order, *Comm. v. Brown*	382
34-2	Ex. 2 – Memorandum and Opinion, Brown v. Butler et al.,	383-388
34-3	Ex. 3 – Indictment	389-394
36	Jeffrey G. Jewell's Reply in Support of Motion to Dismiss Complaint	399-408
39	Plaintiff's 12(f)(2) Motion to Strike Portions of Reply in Support of Defendants' Motion to Dismiss	432-435
41	Response to Motion to Strike	446-449
43	Memorandum Opinion and Order	453-466
45	Plaintiff's Motion for Reconsideration and Leave to File Amended Complaint	472-501
45-1	Ex. 1 – First Amended Complaint	502-534
45-2	Ex. 2 – Order, *Comm. v. Brown*	535-537
45-3	Ex. 3 – Commonwealth's Supplemental Memorandum in Support to Transfer and Consolidate	538-547
45-4	Ex. 4 – Indictment	548-554
45-5	Ex. 5 – Chart	555-556
45-6	Ex. 6 – Indictment	557-559
45-7	Ex. 7 – Indictment	560-561

Record Entry Number	Document Description	Page ID# Range
45-8	Ex. 8 – Complaint, *Brown v. Butler et al.*	562-569
45-9	Ex. 9 – Complaint, *Brown v. Parnell*	570-574
45-10	Ex. 10 – Memorandum, Brown v. Butler	575
48	Jeffrey G. Jewell's Response in Opposition to Motion for Reconsideration and for Leave to File Amended Complaint	580-592
53	Order re: Motion for Reconsideration	619-627
54	First Amended Complaint	628-661
57	Jeffrey G. Jewell's Answer to Amended Complaint	664-681
76	Jeffrey G. Jewell's Motion for Judgment on the Pleadings	736-742
78	Plaintiff's Response to Jewell's Motion for Judgment on the Pleadings	753-761
78-1	Ex. 1 – Voluntary Statement of Accused	762-766
78-2	Ex. 2 – Voluntary Statement	767-768
78-3	Ex. 3 – Typed Statement	769-818
79	Jeffrey G. Jewell's Reply in Support of Motion for Judgment on the Pleadings	819-822
85	Order re: Jeffrey G. Jewell Termination as Defendant	828-831
147	Order re: Dismissal of Case	968
148	Notice of Appeal	969-971

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