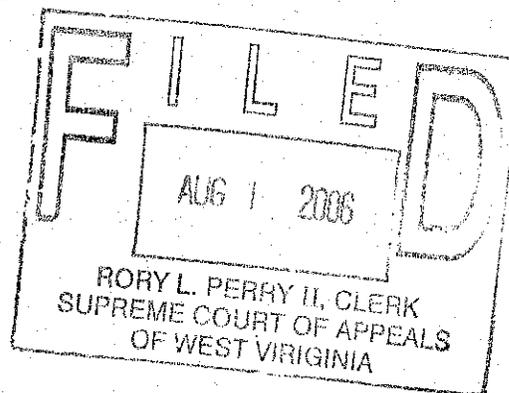


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 33132



CHARLES E. CANTERBURY,  
Petitioner

v.

WILLIAM R. LAIRD, IV, et al.,  
Respondent

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	i
KIND OF PROCEEDING AND NATURE OF RULING BELOW .....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY .....	1
ASSIGNMENT OF ERROR .....	5
A.    The trial court erred in granting appellee’s Motions for Summary Judgment on all Counts.....	5
ARGUMENT .....	5
A.    Appellant’s ongoing litigation should toll the running of the statute of limitations for his claim of false arrest as well as that of malicious prosecution.....	5
B.    The Circuit Court erred in determining that Appellees are clothed with statutory And qualified immunity.....	12
RELIEF REQUESTED .....	13

## TABLE OF AUTHORITIES

### CASES

<i>Beck v. City of Muskogee Police Dept.</i> , 195 F.3d 553, 558 (10th Cir.1999).....	10
<i>Booker v. Ward</i> , 94 F.3d 1052, 1056 (7th Cir.1996).....	11
<i>Brooks v. City of Winston-Salem</i> , 85 F.3d 178, 183 (4th Cir.1996).....	10
<i>Cada v. Baxter Healthcare Corp.</i> , 920 F.2d 446, 452-53 (7th Cir.1990).....	8
<i>Cabrera v. City of Huntington Park</i> , 159 F.3d 374, 380 (9th Cir.1998).....	10
<i>Calero-Colon v. Betancourt-Lebron</i> , 68 F.3d 1, 4 (1st Cir.1995).....	11
<i>Committee on Legal Ethics v. Printz</i> , 187 W.Va. 182, 416 S.E.2d 720 (1992) .....	3
<i>Covington v. City of New York</i> , 171 F.3d 117, 124 (2d Cir.1999).....	10
<i>Datz v. Kilgore</i> , 51 F.3d 252, 253 n. 1 (11th Cir.1995).....	10,11,
<i>Datz v. State</i> , 210 Ga.App. 517, 436 S.E.2d 506, 509 (1993).....	10
<i>Gauger v. Hendle</i> , 349 F.3d 354 (7th Cir.2003).....	7,9,10
<i>Harvey v. Waldron</i> , 210 F.3d 1008, 1015 (9th Cir.2000).....	10
<i>Heck v. Humphrey</i> , 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).....	7,8,9
<i>Hudson v. Hughes</i> , 98 F.3d 868, 872 (5th Cir.1996).....	9
<i>Klettner v. State Farm Mutual Automobile Insurance Company</i> , 205 W.Va. 587, 519 S.E.2d 870 (1999).....	7
<i>Lyons v. Davy-Pocahontas Coal Co.</i> , 75 W.Va. 739, 84 S.E. 744 (1915).....	5
<i>Mackey v. Dickson</i> , 47 F.3d 744, 746 (5th Cir.1995).....	10
<i>Montgomery v. De Simone</i> , 159 F.3d 120, 126 (3d Cir.1998).....	10,11
<i>Nieves v. McSweeney</i> , 241 F.3d 46, 52-53 (1st Cir.2001).....	10
<i>Okoro v. Bohman</i> , 164 F.3d 1059, 1061 (7th Cir.1999).....	9
<i>Okoro v. Callaghan</i> , 324 F.3d 488 (7th Cir.2003).....	9
<i>Preiser v. MacQueen</i> , 177 W.Va. 273, 352 S.E.2d 22 (1985).....	5
<i>Shamaeizadeh v. Cunigan</i> , 182 F.3d 391, 399 (6th Cir.1999).....	9,10
<i>Simmons v. O'Brien</i> , 77 F.3d 1093, 1097 (8th Cir.1996).....	10,11

<i>State ex rel. Canterbury v. Blake</i> , 213 W.Va. 656, 584 S.E.2d 512 (2003).....	3
<i>Uboh v. Reno</i> , 141 F.3d 1000, 1006 (11th Cir.1998).....	10
<i>Unterreiner v. Volkswagen of America, Inc.</i> , 8 F.3d 1206, 1213 (7th Cir.1993).....	8
<i>Woods v. Candela</i> , 47 F.3d 545, 546 (2d Cir.1995) (per curiam).....	11
<i>Wallace v. City of Chicago</i> , 440 F3d 421 (2006).....	7
<i>Wilt v. State Automobile Mutual Insurance Company</i> , 203 W.Va. 165, 506 S.E.2d 608 (1998).....	6

**Statutes**

<i>West Virginia Code</i> § 55-2-12.....	5
<i>West Virginia Code</i> § 61-3-51 (1981).....	1, 2, 3, 6

**Treatise**

<i>When cause of action accrues, for purpose of starting the running of the statute of limitations against an action for malicious prosecution</i> , 87 A.L.R.2d 1047 (1963).....	6
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## **KIND OF PROCEEDING AND NATURE OF RULING BELOW**

Comes now Charles E. Canterbury, hereinafter "Appellant", by and through counsel, appealing the December 30, 2005 Order of the Fayette County Circuit Court (Hatcher, J., Case Number 04-C-293), granting summary judgment on all counts of Appellant's complaint.

## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The appellant, Charles E. Canterbury, who is 79 years old, operates a pawn shop at Hill Top in Fayette County, across the road from the WOAY television station. The shop is operated primarily as a retirement and hobby activity for appellant and is a minor source of retirement income for him. In the first part of June, 2001, Lieutenant W.K. Willis of the Ansted Police Department, and Detective J.K. Sizemore of the Fayette County Sheriff's Office, Prosecuting Attorney Paul Blake, Sheriff William Laird, and Detectives S.W. Kessler, J.E. Wriston, and Mount Hope Police Department detective Glen A. Chapman developed and approved a plan to use a confidential informant to "set up" the plaintiff to violate West Virginia Code § 61-3-51(1981).

West Virginia Code § 61-3-51(1981) provides that dealers in the business of purchasing gems or precious metals shall report their purchases to the Sheriff or chief of police within 24 hours, and to require an affidavit of ownership from the purchaser, and to accurately list each purchase in a permanent record book, open to inspection by law enforcement officers. West Virginia Code 61-3-51(1981) has not been enforced in Fayette County according to Sheriff Laird for at least 20 years. (*State v. Canterbury*, Hearing, October 12, 2003, p. 5).

After learning that Mr. Canterbury was not complying with these provisions, Detective Sizemore filed an affidavit to obtain a Fayette County magistrate's signature on a search warrant

for Mr. Canterbury's premises, and filed a felony criminal complaint against him for violating West Virginia Code 61-3-51(1981) on June 14, 2001.

At the time of the search of his business premises, Mr. Canterbury was arrested, processed, arraigned and subsequently released on bond. Numerous valuable items of jewelry and equipment were taken into possession by the officers executing the search warrant. Some of the items have never been returned. The coverage of the raid was broadcast on WOAY-TV and there was also extensive newspaper coverage of the raid, arrest and subsequent prosecutions. Mr. Canterbury suffered humiliation and psychological trauma, and was treated and continues to treat at the V.A. Center in Beckley, WV, where he was a patient for treatment of a stress disorder that originated from his service in combat during the Korean War. (Canterbury deposition, p. 158-165).

On September 12, 2001, then-prosecutor Blake presented evidence to a Fayette County grand jury which returned an indictment against Appellant in Case Number 01-F-0085 (Fayette County), consisting of 24 counts, involving eight transactions, alleging violations of W.Va. Code § 51-3-51 (1981).(Indictment, C.A. 01-F-0085, Fayette County)

After pretrial motions, the Circuit Court of Fayette County certified the question "Do the provisions of West Virginia Code Chapter 51, Article 3, Section 51 apply to pawn brokers and transactions where items of personal property are pawned?" The judge, by letter opinion, answered the question in the negative. The parties filed a petition for review of certified question in this Court, which was refused, implicitly affirming the circuit court's answer.

After this action, only three counts of the indictment remained viable, as they did not involve pawns. Mr. Canterbury's counsel filed an additional motion to dismiss for lack of

specificity, which was granted.

Following an oral statement by the assistant prosecutor that a new indictment would be sought, by letter dated October 23, 2002, petitioner's counsel asked that the property seized by the officers be returned. The prosecutor refused, and re-indicted appellant.

Mr. Canterbury's counsel filed a petition for writ of prohibition with the West Virginia Supreme Court of Appeals on December 27, 2002 asking that Defendant Blake be prohibited from presenting the matter again to the grand jury, citing the abuse of power by the prosecuting attorney, and the irreparable prejudice, embarrassment, and deprivation of use of his personalty due to the continued prosecution of the then-76 year old Mr. Canterbury.

The January 15, 2003 re indictment contains two felony counts for violations of W.Va. Code § 61-3-51(a) and W.Va. Code § 61-3-51(b) for purchases not involving pawns. (Case Number 03-F-0005).

On June 23, 2003, the this Court issued a writ of prohibition on the grounds that the lower court was exceeding its legitimate power, and that because W.Va. Code § 51-3-51 (1981) has fallen into desuetude, Mr. Canterbury could not be made to stand trial for violating the statute, citing "a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it." *Committee on Legal Ethics v. Printz*, 187 W.Va. 182, 416 S.E.2d 720(1992). The facts as set out above are summarized in this Court's opinion in *State ex rel. Canterbury v. Blake*, 213 W. Va. 656, 584 S.E.2d 512. (2003).

The Circuit Court of Fayette County entered an Order dismissing the indictment on August 11, 2003.

On August 11, 2004, Appellant filed his complaint in Fayette County Circuit Court

pursuant to the West Virginia Constitution and common law of the State of West Virginia, against the County Commission of Fayette County, the City of Mount Hope, and the City of Ansted, and certain law enforcement and public officials who participated in instigating the prosecution of Appellant. The complaint raised several claims relating to the conspiracy, arrest and prosecution of the Appellant. The Complaint comprised seven counts, including false arrest, conspiracy, malicious prosecution, selective prosecution, failure to intercede, supervisory liability, and negligence.

Answers were filed on behalf of the County Commission of Fayette County, and Defendants Laird, Blake, and Sizemore; and by the City of Mount Hope, Foster and Chapman; and the City of Ansted and Dennis Spangler and W.K. Willis.<sup>1</sup> The Appellant filed a motion to recuse the presiding judge on the grounds that the presiding judge had a potential conflict of interest because the County Commission was a named defendant. The Court declined to consider this motion on its merits and offered the Appellant an opportunity to appeal to this Court. After consulting with counsel, Appellant decided that the presiding judge would be fair and equitable with him and did not elect to appeal the motion at that time.

The Appellant reached a settlement with the City of Ansted, Spangler and Willis and an order of dismissal was entered in regard to them. After discovery was conducted, the Fayette County defendants and the City of Mount Hope defendants filed motions for summary judgment on all claims. After a hearing on the motion, the Circuit Court of Fayette County granted an

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<sup>1</sup>Several defendants were no longer employed in an official capacity and were not served and the Appellant does not object to their subsequent dismissal from the case.

order of dismissal to the respondents on all claims on December 30, 2005.

Appellant filed his petition for appeal with this Court. This Court agreed to hear appellant's petition..

### ASSIGNMENTS OF ERROR

A.. APPELLANT'S ONGOING LITIGATION SHOULD TOLL THE RUNNING OF THE STATUTE OF LIMITATIONS FOR HIS CLAIM OF FALSE ARREST AS WELL AS THAT OF MALICIOUS PROSECUTION.

### ARGUMENT

Appellant asks the Court to provide him an opportunity to pursue his claims for malicious prosecution and false arrest, all of which were erroneously dismissed. The Order dismissing the second prosecution of the appellant was filed on August 11, 2003.. Appellant's complaint was filed on August 11, 2004.

West Virginia Code § 55-2-12 provides:

“Every personal action for which no limitation is otherwise prescribed shall be brought(a) Within two years next after the right to bring same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.”

Appellant's action for malicious prosecution was filed within the one year statute. An action for malicious prosecution may be maintained if it can be proved that the prosecution was malicious, that it was without *reasonable* or probable cause, and that it terminated favorably to plaintiff. Syl. Pt. 1, *Lyons v. Davy-Pocahontas Coal Co.*, 75 W.Va. 739, 84 S.E. 744 (1915). The action must be initiated within one year of the action alleged to have been maliciously prosecuted. *Preiser v. MacQueen*, 177 W. Va. 273, 352 S.E. 2d 22 (1985). See also, *When cause*

*of action accrues, for purpose of starting the running of the statute of limitations against an action for malicious prosecution, 87 A.L.R.2d 1047 (1963).*

The trial court erred in dismissing appellant's claim for malicious prosecution when it applied an improper standard in granting summary judgment to the appellees, in deciding that "there exists no credible evidence existed to suggest, much less prove by a preponderance of the evidence that the Defendants' action in pursuing the prosecution of the Plaintiff on charges of violating West Virginia Code 61-3-51 were malicious or lacked probable cause." (Order, December 30, 2005, p.11). The Court had reviewed the arresting officer's report which was filed as an exhibit to appellant response to the motion for summary judgment, the authenticity of which was not challenged. A fair reading of the report indicates that the arrest was pretextual. In addition, the Court had previously received presided at the criminal hearings and received the Sheriff's testimony that the statute had never been enforced in Fayette County. This evidence alone raised a genuine issue of material fact as to whether or not the prosecution was reasonable or based on improper motives and appellant's case was supported by the investigative report.

The appellant's claim for false arrest should also have been allowed to proceed to the jury. The claim was dismissed for failure to meet the statute of limitations which the Court determined ran from the time of the arrest in 2003. (Order, December 30, 2005, p. 7).

The issue of when the statute of limitation has been addressed in regard to unfair claim settlement practices. In *Wilt v. State Automobile Mutual Insurance Company*, 203 W.Va. 165, 506 S.E.2d 608 (1998), (Unfair Claims Practices Act governed by one-year statute of limitations), this Court declined to rule on when the period began to accrue. Later, in *Klettner v.*

*State Farmer Mutual Automobile Insurance Company*, this Court held that the one-year statute of limitations applicable to automobile accident victims' claim of unfair settlement practice by the liability insurer was tolled and did not begin to run until the appeal period expired on the underlying tort cause of action. 205 W.Va. 587, 519 S.E.2d 870 (1999). The rationale for the decision was that the issue of liability and damages remain unsettled until the underlying case is resolved and the avoidance of duplicitous litigation.

As with appellant, the reasonable damages cannot be known until the underlying case is resolved.

It is instructive to read Federal Circuit Judge Posner's dissent in *Wallace v. City of Chicago*, 440 F.3d 421 (2006):

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, 114 S.Ct. 2364, 129 L.Ed.2d 383 (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, 114 S.Ct. 2364. The Court gave the following example of "a § 1983 action 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, 114 S.Ct. 2364 (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 \*431 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 wipe out 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, 452-53 (7th Cir.1990).

So the panel's decision puts the squeeze on these plaintiffs, contrary to normal principles of accrual, which do not 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 \*432 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 period dated 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 charges against 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 *says* (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. McSweeney, 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 1983 claim 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 \*433 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 1983 false 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, 210 Ga.App. 517, 436 S.E.2d 506, 509 (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 with its 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

(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 (1st Cir.1995), cited in *Nieves*, as well as our decision in *Booker v. Ward*, 94 F.3d 1052, 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 \*434 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. But they 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.

C.A.7 (Ill.),2006.  
*Wallace v. City of Chicago*  
440 F.3d 421

Although there is no West Virginia case directly on point, it seems unfair, unreasonable and a denial of due process of require that a tort claim for false arrest should *always* be brought while the underlying criminal case is still pending. In the instant case, the appellant was subjected to a tortuous course of litigation involving two appeals to this court, and a remand to the circuit court before his criminal prosecution and the threat of imprisonment was alleviated. Appellant could not have meaningfully brought his complaint for false arrest while his criminal

the circuit court before his criminal prosecution and the threat of imprisonment was alleviated. Appellant could not have meaningfully brought his complaint for false arrest while his criminal case was still pending, and that matter was pending under August 11, 2003. In his situation, appellant's complaint on this count was timely filed. As Judge Posner illustrates, there is considerable disagreement in the federal circuits as to the fairness of requiring claims be filed while the criminal case is ongoing.

**B. The Circuit Court erred in determining that the Respondents are clothed with statutory and qualified immunity**

**Argument**

**B. Appellants should not be entitled to immunity.**

The lower court determined that the Respondents were entitled to statutory and qualified immunity because they violated no right of which they should have been aware.

Appellant testified that his personal property was taken and not returned, despite requests from his attorney to do so. (Canterbury deposition, p. 139-153)

Sheriff Laird testified that the West Virginia Code § 61-3-51 had never been enforced, to his knowledge, in Fayette County. In order to make a viable claim against an official sufficient to overcome the common law doctrine of qualified immunity, it is sufficient to show that the official acted maliciously, fraudulently and oppressively, *Parkulo v. West Virginia Board of Probation*, 199 W.Va. 161, 483 S.E.2d 507 (1996). It is incredible that law enforcement and prosecuting attorneys would have considered themselves to be acting in good faith in conducting a public raid and arresting a 76 year old man for said charge. This matter should be should be permitted to proceed to a jury for a full and fair determination.

**RELIEF REQUESTED**

For the errors cited above, and for such other errors as may be apparent on the face of the record, the Appellant prays that this Court set aside the granting of summary judgment on all counts in this matter, except for selective prosecution, and remand this matter to Fayette County Circuit Court for trial.

**REQUEST FOR ORAL ARGUMENT**

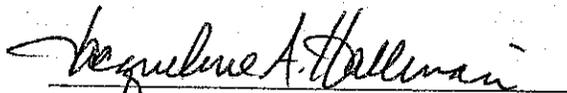
Appellant requests oral argument.

Respectfully submitted,

**CHARLES E. CANTERBURY**

**By Counsel**

By Counsel:



Jacqueline Hallinan, Esq.

Bar Number 5189

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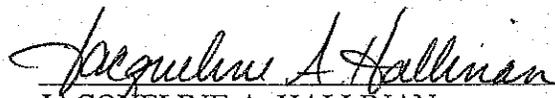
304/346-1201

CERTIFICATE OF SERVICE

I, Jacqueline A. Hallinan, counsel for the plaintiff, do hereby certify that the attached  
"BRIEF OF APPELLANT" was served upon counsel of record by United States Mail, postage  
pre-paid, this 20<sup>th</sup> day of July, 2006, addressed as follows:

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JACQUELINE A. HALLINAN