No. A-_____

In the Supreme Court of the United States

CITY OF JOLIET, ILLINOIS, ET AL.,

Applicants,

v.

ELIJAH MANUEL,

Respondent.

APPLICATION TO THE HON. BRETT M. KAVANAUGH FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to 28 U.S.C. §2101(c) and Supreme Court Rules 13.5, 22, and 30.2, applicants the City of Joliet *et al.* (collectively, "the City") respectfully request an extension of time of thirty days within which to file a petition for a writ of certiorari in this matter, to and including February 21, 2019. The United States Court of Appeals for the Seventh Circuit issued its opinion and judgment on September 10, 2018. *See* App. 1. The City timely petitioned for rehearing en banc, and the United States Court of Appeals for the Seventh Circuit denied that petition on October 24, 2018. *See* App. 2. The time to file a petition for a writ of certiorari in this Court accordingly expires on January 22, 2019. This application is being filed more than 10 days before that date.

Copies of the United States Court of Appeals for the Seventh Circuit's opinion and its order denying rehearing en banc are attached. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

1. This case presents a significant question of law, which this Court expressly left open in remanding this case for further proceedings in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017)—when a Fourth Amendment claim for unlawful pretrial detention brought pursuant to 42 U.S.C. §1983 accrues for statute of limitations purposes. Two Justices would have decided that question and adopted the City's proposed rule—that respondent Elijah Manuel's Fourth Amendment claim accrued no later than the moment a court ordered Manuel's pretrial detention based on purportedly fabricated evidence—and therefore would have held that Manuel's claim is untimely. *See Manuel*, 137 S. Ct. at 922-923 (Thomas, J., dissenting); *id.* at 923, 926 (Alito, J., joined by Thomas, J., dissenting).

2. On remand, however, the Seventh Circuit not only rejected this accrual rule, favored by the only Members of this Court to address the issue, but adopted a new, continuing-tort rule in square conflict with other Circuits. *Compare* App. 1, at 4-6, *with, e.g.*, *McCune v. City of Grand Rapids*, 842 F.2d 903, 905-906 (6th Cir. 1988) (holding that wrongful incarceration is an "ill effect" of wrongful pre-incarceration process, not a "continuing violation"); *Spak v. Phillips*, 857 F.3d 458, 462 (2d Cir. 2017) (holding that Fourth Amendment §1983 claim does not accrue unless and until plaintiff's underlying criminal proceedings terminate in plaintiff's favor); *King v. Harwood*, 852 F.3d 568, 578-579 (6th Cir. 2017) (same), *cert. denied*, 138 S. Ct. 640 (2018). In the course of reaching this conclusion, moreover, the Seventh Circuit also broke sharply with this Court's repeated admonition that the bar to §1983 claims announced in *Heck v. Humphrey*, 512 U.S. 477 (1994), applies only to plaintiffs who are

subject to "*an extant conviction* which success in [the §1983] action would impugn." *Wallace v. Kato*, 549 U.S. 384, 393 (2007) (emphasis in original). Notwithstanding this longstanding limitation on *Heck*'s application, the decision below extends *Heck* to *any* §1983 plaintiff subject to "ongoing custody," App. 1, at 5—whether the plaintiff is detained pretrial or as the result of a conviction.

3. Good cause exists for this application. Since the Seventh Circuit denied the City's en banc petition on October 24, 2018, counsel's attention has been required on a number of matters. Counsel delivered oral argument on October 25, 2018 in *Loutfi v. American Water Heater Co.* (Ill. App. Ct. No. 17-0095), on November 29, 2018 in *In re Aqueous Film-Forming Foam Products Liability Litigation* (J.P.M.L. No. 2873), and on December 21, 2018 in *In re Nylaan Litigation* (Mich. Cir. Ct. No. 17-10716-CZ). Counsel also drafted or participated in drafting the reply brief in support of defendant's motion for summary disposition in *In re Nylaan Litigation* (Mich. Cir. Ct. No. 17-10716-CZ), filed on November 16, 2018; defendant's motion for judgment on the pleadings in *Protect Our Parks, Inc. v. Chicago Park District* (N.D. Ill. No. 18 CV 03424), filed on November 21, 2018; claimant's post-hearing brief in *Caesars Entertainment Corp. v. RSUI Indemnity Co.*, submitted to the arbitration panel on December 18, 2018; appellee's cross-reply brief in *Fillmore v. Taylor* (Ill. Sup. Ct. No. 122626), filed on January 7, 2019; and defendant's motion to dismiss in *Wilson v. Playtika, Ltd.* (W.D. Wash. No. 3:18-cv-05277-RBL), filed on January 10, 2019. In light of these obligations, counsel requires the additional requested time to prepare an appropriate petition for consideration by this Court.

4. An extension of time will not prejudice Manuel, and his counsel, Stanley B. Eisenhammer, indicates that he does not oppose the requested extension.

For the foregoing reasons, the City hereby requests an extension of time, to and including February 21, 2019, within which to file a petition for a writ of certiorari.

January 11, 2019

Respectfully submitted.

MICHAEL A. SCODRO
Counsel of Record
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 701-8886
mscodro@mayerbrown.com

APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-1581

ELIJAH MANUEL,

Plaintiff-Appellant,

v.

CITY OF JOLIET, ILLINOIS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
On Remand from the Supreme Court of the United States.
No. 13 C 3022 — **Milton I. Shadur**, *Judge.*

ARGUED SEPTEMBER 19, 2017 — DECIDED SEPTEMBER 10, 2018

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

EASTERBROOK, *Circuit Judge.* Elijah Manuel was arrested and charged with possessing unlawful drugs. A judge decided that he would be held in jail pending trial. Forty-seven days later the prosecutor dismissed all charges after concluding that the pills Manuel had been carrying were legal. The next day he was released. Last year the Supreme Court

held that Manuel is entitled to seek damages on the ground that detention without probable cause violates the Fourth Amendment (applied to the states by the Fourteenth). *Manuel v. Joliet*, 137 S. Ct. 911 (2017). The Justices remanded the question whether Manuel sued in time. *Id.* at 920–22. The parties agree that Illinois law, which supplies the period of limitations under *Wilson v. Garcia*, 471 U.S. 261 (1985), gave Manuel two years from the claim's accrual. But federal law defines when a claim accrues. *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

Here are the potentially important dates:

- March 18, 2011: Manuel is arrested
- March 18, 2011: A judge orders Manuel to remain in custody for trial
- May 4, 2011: The prosecutor dismisses the charge
- May 5, 2011: Manuel is released
- April 22, 2013: Manuel sues under 42 U.S.C. §1983

Defendants contend that Manuel's claim accrued on March 18, when the judge ordered him held pending trial. If that's right, then Manuel sued too late. He maintains that the clock started on May 4, when his position was vindicated by dismissal of the prosecution. We do not accept either approach. We hold that Manuel's claim accrued on May 5, when he was released from custody. That makes this suit timely.

Defendants' position relies on *Wallace*, which held that a Fourth Amendment claim accrues (and the period of limitations starts) as soon as the plaintiff has been brought before a judge (or, in the language of both *Wallace* and *Manuel*, has

been held pursuant to legal process). 549 U.S. at 389–91. This position encounters two problems.

First, Wallace complained about his arrest rather than the custody that post-dated his appearance before a judge. *Wallace*, 549 U.S. at 386–87. Many violations of the Fourth Amendment concern pre-custody events: a search may invade privacy without the authorization of a warrant, or the police may use excessive force. These events can be litigated without awaiting vindication on the criminal charges, *Wallace* holds, because they do not deny the validity of any ensuing custody. *Id.* at 389–90. Manuel, by contrast, contests the propriety of his time in custody.

Second, the line that the Justices drew in *Wallace*—in which a claim accrues no later than the moment a person is bound over by a magistrate or arraigned on charges, see 549 U.S. at 389, and all Fourth Amendment claims are to be treated alike—did not survive *Manuel*. There the Court held that wrongful pretrial custody violates the Fourth Amendment "not only when it precedes, but also when it follows, the start of legal process in a criminal case." 137 S. Ct. at 918. When a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends. See, e.g., *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115–21 (2002). Notice that we speak of a continuing *wrong*, not of continuing *harm*; once the wrong ends, the claim accrues even if that wrong has caused a lingering injury. See *United States v. Kubrick*, 444 U.S. 111 (1979); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Turley v. Rednour*, 729 F.3d 645, 654–55 (7th Cir. 2013) (concurring opinion). *Manuel* shows that the wrong of detention without probable cause continues for the length of the unjustified detention. When a

search or seizure causes injury independent of time spent in custody, the claim accrues immediately; but when the objection is to the custody, a different approach must control.

Manuel's position, which relies on an analogy to the tort of malicious prosecution—in which the claim does not accrue until the plaintiff has prevailed ("been vindicated") in the criminal case—might have seemed sensible before the Supreme Court spoke. As the Supreme Court recounted, it was popular among other courts of appeals, which characterized the claim as "Fourth Amendment malicious prosecution." *Manuel*, 137 S. Ct. at 921. If that's the claim, then what could be better than a rule devised for malicious-prosecution suits? Indeed, the defendants themselves conceded when this case was last here that, if the wrong is (as Manuel insisted) "Fourth Amendment malicious prosecution," then the accrual date is May 4. But the Justices deprecated the analogy to malicious prosecution.

After *Manuel*, "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention. 137 S. Ct. at 917–20. The problem is the wrongful custody. "[T]here is no such thing as a constitutional right not to be prosecuted without probable cause." *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013). But there *is* a constitutional right not to be held in custody without probable cause. Because the wrong is the detention rather than the existence of criminal charges, the period of limitations also should depend on the dates of the detention.

The wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends. (The

parties have debated whether a need to prove malice affects the claim's accrual. But after the Supreme Court's decision this is a plain-vanilla Fourth Amendment claim, and analysis under that provision is objective. See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).)

A further consideration supports our conclusion that the end of detention starts the period of limitations: a claim cannot accrue until the would-be plaintiff is entitled to sue, yet the existence of detention forbids a suit for damages contesting that detention's validity.

Preiser v. Rodriguez, 411 U.S. 475 (1973), holds that the right way to contest ongoing state custody is by a petition for a writ of habeas corpus under 28 U.S.C. §2241 or §2254, not by an action under §1983 seeking an injunction requiring release. *Heck v. Humphrey*, 512 U.S. 477 (1994), adds that §1983 cannot be used to obtain damages for custody based on a criminal conviction—not until the conviction has been set aside by the judiciary or an executive pardon. Although *Heck* dealt exclusively with §1983 proceedings that imply the invalidity of a conviction, *Edwards v. Balisok*, 520 U.S. 641 (1997), extended its approach to custody that rests on the decision of a prison's administrative panel revoking some of a prisoner's good-time credits.

After *Preiser*, *Heck*, and *Edwards*, §1983 cannot be used to contest ongoing custody that has been properly authorized. Those decisions do not concern the way to deal with executive custody that lacks a judicial imprimatur—for example, detention in a police department's cells before presentation to a judge. But Manuel was held by authority of a judicial decision that probable cause existed to show that he had committed a drug offense. He contends that the police

hoodwinked the judge by falsely asserting that the pills he possessed had tested positive for an unlawful drug, and if he is right he is entitled to damages. Still, his detention was judicially authorized, which given *Preiser* means that a §1983 suit had to wait until his release. *Heck* tells us that a claim does not accrue before it is possible to sue on it. 512 U.S. at 489–90. Once he was out of custody and could sue, Manuel's claim accrued. He filed this action within two years and is therefore entitled to a decision on the merits.

The judgment of the district court is reversed, and the case is remanded for proceedings consistent with this opinion and the Supreme Court's.

APPENDIX 2

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 24, 2018

Before

DIANE P. WOOD, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 14-1581

ELIJAH MANUEL,
Plaintiff-Appellant,

v.

CITY OF JOLIET, ILLINOIS, *et al.*,
Defendants-Appellees.

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

On Remand from the Supreme Court of the United States.

No. 13 C 3022
Milton I. Shadur, *Judge.*

Order

Defendants-appellees filed a petition for rehearing and rehearing en banc on October 9, 2018. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Judge Flaum did not participate in the consideration of this petition.