18-7062

IN THE
Supreme Court of the United St

LOUIS MATTHEW CLEMEN

*ner(s),*

v.

STATE OF FLORIDA, ET AL.,

*Respondent(s).*

On Petition for a Writ of Certiorari to the Florida Supreme Court

# PETITION FOR A WRIT OF CERTIORARI

LOUIS MATTHEW CLEMENTS,
*PRO SE*
1637 Hendry Street
Fort Myers, FL 33901
Cell – (239)-940-0630
JTKIRK1969@YAHOO.COM

## QUESTION(S) PRESENTED

1) Does FL.S. § 768.28 first claiming to allow Florida citizens to sue State Governmental Agencies for malicious prosecution and then dis- allowing it, in direct conflict with Title 42 U.S.C. Code § 1983 as well as the Fourth, Fifth, Eighth and Fourteenth Amendment's, render it unconstitutional?

2) Should Petitioner and other Florida Citizens be able to sue Florida State Governmental Agencies for Malicious Prosecution as provided by the US Constitution?

## LIST OF PARTIES

**APPELLEE(S) – "State of Florida"**

Florida Department of Corrections

State of Florida Office of the Attorney General

**DEFENDANT(S)**

Lee County, Florida (**dismissed with prejudice** by trial court as immune to suit)

City of Ft. Myers, Florida (**dismissed with prejudice** by trial court as immune to suit)

Lee County Sherriff's Office and Sheriff in Official Capacity (**dismissed with prejudice** by trial court as immune to suit)

City of Ft. Myers Police and Chief of Police in his official capacity (**dismissed with prijudice** by trial court as immune to suit)

Ft. Myers/Lee County branch of State Attorney's Office (**d/w/p** by trial court as immune to suit)

## TABLE OF CONTENTS



## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED



## STATUTES AND RULES

FL.S. § 768.28 (9)

FL.S. § 948.06.

Florida Rules of Civil Procedure 9.330

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the highest state court to deny review of the merits appears at Appendix C to the petition.

The opinion of the State Court of Appeals appears at Appendix A and D.

The opinion of the Trial Court appears at Appendix B.

## JURISDICTION

The date on which the highest state court decided my case was "not reviewable" was November 2, 2018. That court also indicated (quite rudely): "No motion for rehearing or reconsideration will be entertained by the court". A copy of that decision appears at Appendix C.

In *Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816),* this Court held that under Article III, the federal courts have jurisdiction to hear all cases arising under the Constitution and laws of the United States, and that This Court has appellate jurisdiction in all such cases, whether those cases are filed in state or federal courts. The Court issued another decision to the same effect in the context of a criminal case, *Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).* It is now well established that the This Court may review decisions of state courts that involve federal law.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Code § 1983

Fourth Amendment, US Constitution

Fifth Amendment, US Constitution

Eighth Amendment, US Constitution

Fourteenth Amendment, US Constitution

Article III, US Constitution

## INTRODUCTION

The Fifth Amendment and Fourteenth Amendment to the United States Constitution declare that governments cannot deprive any person of "life, liberty, or property" without due process of law. The Eighth Amendment (Amendment VIII) of the United States Constitution prohibits the federal government from imposing excessive bail, excessive fines, or cruel and unusual punishment. The U.S. Supreme Court has ruled that this amendment's Cruel and Unusual Punishment Clause also applies to the states.

The Fourth Amendment to the United States Constitution protects "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".

Title 42 U.S.C. Code § 1983 provides that "every person" who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.[3] The courts have been reluctant to clothe any person with immunity which would frustrate the statute's design of providing vindication to those wronged by the misuse of state power.[4] For this reason immunities are extended to government officials only when "overriding considerations of public policy nonetheless deman[d] that the official be given a measure of protection from personal liability" to ensure his or her ability to function effectively.[5]

A malicious prosecution may also violate the Fourth Amendment and thus create a claim under 42 U.S.C. § 1983. To establish a malicious prosecution claim under § 1983, the plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to the elements of Georgia's common law tort of malicious prosecution. For purposes of a § 1983 malicious prosecution claim, the elements under federal law include: (1) prosecution for a criminal offense; (2) instigated without probable cause; (3) with malice; (4) under a valid warrant, accusation or summons; (5) which has terminated favorably to the plaintiff; and (6) has damaged the plaintiff.

The State of Florida therefore, by erring in the dismissal of this case for "Sovereign Immunity" has denied Petitioner his right to collect damages (of $14,000 per day spent in jail) from the Malicious Prosecution, Cruel and Unusual punishment as well as the successive loss of life, liberty and property by illegal search and seizures from being arrested by Defendants 7 times (twice without warrants) and spending 241 days in jail as a result of those arrests.

## STATEMENT OF THE CASE

This case revolves around the Petitioner, with no previous criminal record, being coerced into accepting a plea deal in the State of Florida for State probation for a period of 5 years (6/4/2008-6/4/2013) and placed on electronic monitoring. In addition to the coercion, Petitioners attorney did not properly inform him of the "type" of probation he would be placed on, the terms and restrictions, nor the impact it would have on his reputation and character; it was moot as Petitioner wanted a trial.

30 days after being placed on probation, Petitioner motioned to withdraw his plea, citing coercion, and go to trial. This was denied. A post-conviction proceeding was then initiated, denied twice by Florida's highest Court and because Petitioner was never afforded the opportunity to call any witnesses on his behalf, in any of the evidentiary hearings, it

still lives on in Petitioners Habeas Corpus case (see 2:17-CV-396-FtM-99CM).

Meanwhile, this 5 year probation period still languished on and Petitioner was arrested 7 times for VOP, the bulk being technical violations involving the defective electronic monitoring equipment (See Petitioners Suit vs. 3M Electronic Monitoring 2:16-CV-00776-SPC-CM/18-13866-H). Regardless of the defective equipment, none of the VOP were arrestable offenses, and because of that fact, PROBABLE CAUSE did not exist. After each VOP hearing and jail stay, Petitioner was either coached (improperly) to plead guilty, was (improperly) found guilty. He then began to represent himself and learn the statutes and (with or without a Public Defender or Private Attorney hired by his mom) refused to plead guilty anymore, and was ALWAYS reinstated to probation (the proceedings always terminated in the Petitioners favor). They could technically not do anything as they were not VOP offenses. There WAS NO PROBABLE CAUSE. The Malice can be inferred by lack of probable cause. Thus confirming Malicious Prosecution.

The law in Florida is well-settled that a malicious prosecution action requires the occurrence of the following five elements: (1) a criminal or civil judicial proceeding was commenced against the plaintiff; (2)

the proceeding was instigated by the defendant; (3) the proceeding ended in favor of the plaintiff; (4) the proceeding was instigated with malice or without probable cause; and (5) the plaintiff suffered damages as a result of the defendant's filing of the litigation. *Kalt v. Dollar Rent-A-Car, 422 So. 2d 1031 (Fla. 3d DCA 1982).*

On 2/03/2016, when Petitioner was off probation he brought suit in Federal Court (CASE #: 2:16-cv-101-FtM-99MRM) in order to avoid a "conflict of interest" issue in the courts that had convicted him. Petitioner also explained that he waited for his probation period to end out of fear of retribution by FDOC. This fear was corroborated by several VOP arrests that occurred during important phases of his post-conviction (FL 3.850) proceedings, making him miss important filing dates, etc. The Federal "malicious prosecution" case was dismissed as the Petitioners were "immune to suit". Petitioner wishes he knew then what he knows now, he would have continued that case.

On 12/28/2016, Petitioner was then forced to take his case to State Court which is the subject of this Petition. This case was initiated as a "Constitutional Challenge of Statute". In the trial court and Petitioners "Motion for Summary Judgment" (*Summary Judgment and evidence* provided in [APX. B]), he provided the following proof that all the VOP

arrests were incorrect and malicious in accordance with any Florida violations of any law, statute, condition, etc. Petitioner was bound to follow:

A. Petitioner's VOP's were not "willful or substantial", a vital Florida caveat to a VOP conviction.

B. Petitioner's VOP's were "technical" not "material".

C. Petitioner did not violate his "terms of supervision".

D. Petitioner did not break FDOC "rules of Electronic Monitoring".

E. Respondents were not properly following FL.S. § 948.06.

F. Petitioner had video evidence of the faultiness of the Electronic Monitoring equipment.

G. Petitioner had/has (from previous VOP hearings) eyewitnesses that did/can corroborate the faultiness of the Electronic Monitoring (EM) equipment.

H. Petitioner has evidence of faultiness of The EM equipment in other States (See Petitioners case vs 3M Electronic Monitoring 2:16-CV-00776-SPC-CM/18-13866-H).

I. In Florida, though hearsay evidence *is* allowed for VOP hearings (but cannot be the determining factor), Respondent, FDOC did not provide any solid proof either from the monitoring company [Pro Tech, 3M] nor its representatives, to arresting officers or the Court that the "bracelet gone" alerts occurred.

J. The VOP's, the Respondents charged Petitioner with were not supported by any statute, rule or condition Plaintiff was responsible for meeting.
K. The Respondents, according to FL.S. § 948.06, in each VOP case followed procedure for "material" VOP instead of "technical" VOP, leading to Plaintiff spending 241 days in county jail needlessly and causing him PTSD and other health issues.
L. Petitioner being arrested on a VOP for failure to take an annual polygraph due to lack of funds is contrary to FL.S. § 948.06 in that VOP's are not allowed for failure to pay fees or monetary reasons.

The above mentioned evidence was wasted breath. The trial court, in support of all the Respondents motions, dismissed with prejudice for being "immune to suit" and not being able to sue in civil court for something that happened in criminal court and cited case law. Petitioner argued the case cited pertained to "youthful offenders" [APX. B]. Respondents also claimed that Petitioner should have brought suit against not the entities, but individuals "in their official capacity", which is also in direct conflict with the Statute in Question [APX B].

In the Appeals court [APX A], Respondents argued, Petitioner did not argue the Statute was unconstitutional until motioning for written opinion. Petitioner provided the Appeals Court with the original filing form which indicated it was filed as

"Constitutional challenge of Statute" and argued the Appeals court would first have to affirm "immunity" before the challenge of statute argument became legitimate. Regardless, FL 2nd District Court of Appeals "affirmed". Petitioner then motioned for written opinion and certification of Question and Conflict (the first argument of the unconstitutionality) in lieu of a motion for rehearing as Petitioner was bound by Florida rules forbidding new evidence that was not brought up in the trial court (FRAP. 9.330 "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding"). Petitioner's motions for written opinion and certification of conflict and question were denied by the Appellate court.

The Florida Supreme Court followed suit claiming it could not review without a written opinion from the Appeals Court [APX C].

But FL.S. § 768.28 [APX. A] clearly contradicts itself and deprives Petitioner under color of law that which it claims to provide remedy for: This *Pro Se Petitioner* knows little about legalese. He is still praying his line spacing is correct. Apparently, there have been several other litigants in the past who have come up against this Statutes double-talk.

Therefore, such a conflict of complex words woven within FL.S. § 768.28 can be best untangled by one of Florida's very own Judges in his opinion in one such case...

> "CARLISLE, JAMES T., *Associate Judge, concurring specially: I agree this case must be reversed because the record does not reflect any evidence that Fowler suffered as a result of the prosecution as opposed to the arrest. I disagree that Section 768.28(9)(a), Florida Statutes, bars recovery* ***because I think that portion of it which immunizes the City from the malicious acts of its employees is unconstitutional.***
> *The argument was made in this case that once the directed verdict was entered in favor of Thomas and Cowley on the malicious prosecution claim, no verdicts could be entered against the City. The argument has a certain syllogistic appeal. Corporations, including municipal corporations, are legal fictions. As such, they cannot act in themselves but may do so only through their agents or employees. Therefore, to bring an action against a municipality a plaintiff must show some act or omission on the part of the municipal employee. When people conspire together to*

*do malicious acts, however, they usually do so in secret. Therefore, it is possible to prove a malicious act by a corporation acting through unknown officers or employees.*

*The fact of the matter is corporations, including municipal corporations, can act meanly and maliciously. They can be small and petty and avaricious. It is also true the acts of corporations, including municipal corporations, often transcend the acts of individual employees. It is possible for corporations to carry out malicious designs whereby individual tasks performed by employees are so attenuated from each other that the employees go about their tasks unaware of any wrongdoing. It is possible for corporations, including municipal corporations, to act in such a way that it is difficult if not impossible to unfold the shrouds of corporate bureaucracy and lay hands on the author of a malicious enterprise. It is often difficult for the trier of fact to find the employees with whom a plaintiff came into direct contact of doing anything more than "following orders." I believe there may well be cases in which it is possible to find that the city acted maliciously wholly independent of the actions of the municipal*

*employee. That is not the case here, however.*

*If we adopt appellant's argument we must concede a* ***Catch-22 situation*** *arises when someone sues a municipality for a tort which involves malice, such as malicious prosecution.* ***First, the plaintiff must prove that the often impecunious municipal employees acted maliciously. If he fails in this, his action against the municipality must also fail because liability is founded upon the doctrine of respondeat superior. If he is able to prove malice on the part of the employee, Section 768.28(9), Florida Statutes, kicks in and the city is immune.*** *See: CITY OF COCONUT CREEK v. Fowler | 474 So.2d 820 (1985).*

Let's get to the nitty gritty of the Statute:

**FL.S. § 768.28 (9)(a),** states: ... *"No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function,* ***unless such officer, employee, or agent acted in bad faith or with***

***malicious purpose*** *or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee,* ***unless such act or omission was committed in bad faith or with malicious purpose*** *or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.* ***The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.***

Other pertinent parts of the Statute are as follows:

**FL.S. § 768.28 (1)** *Waiver of sovereign immunity in tort actions; the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts... actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions... if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.* ***Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.***

**FL.S. § 768.28 (2)** *As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including counties and municipalities....*

**FL.S. § 768.28 (5)** *The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances...*

Another question in this case could be whether the Fourth Amendment or the due process clause of the

14th Amendment governs a claim of "malicious prosecution", a question similar to the in *Albright v. Oliver*. This Petitioner does not know and leaves it up to this Court.

In *Albright v. Oliver*, Kevin Albright had filed a claim asserting that his allegedly false arrest (quickly followed by release on bond) constituted a due process violation. A four-justice plurality ruled that the Fourth Amendment, not the due process clause, governed Albright's claim (although Justice Anthony Kennedy, joined by Justice Clarence Thomas, suggested that due process should govern his claim if it continued beyond the bail decision, that is, if "legal process" continued a "malicious" prosecution). In the years since Albright, the federal courts of appeals, by "broad consensus," have determined that the Fourth Amendment governs constitutional "malicious prosecution" claims, as even the U.S. Court of Appeals for the 7th Circuit recognized in this case (while saying it remained "bound" by its own contrary precedent).

*Heck v. Humphrey* in 1994 and *Wallace v. Kato* in 2007, have debated but not settled the constitutional basis for Section 1983 "malicious prosecution" claims. So another question in this could be also whether the Fourth Amendment continues to govern such a claim even after an initial arrest, when a claimant's

detention is continued by "legal process" based on false government actions and evidence.

That being said, since each time Petitioner was arrested, without "probable cause", it was usually without bond and on the contingency of a "VOP hearing" to determine guilt or innocence, the "malicious prosecution" may also be governed by *Manuel v. Joliet, 580 U.S. ___ (2017),* in which This Court held that a criminal defendant may bring a claim under the Fourth Amendment of the United States Constitution to challenge pretrial confinement.

## REASONS FOR GRANTING THE PETITION

The court should grant this petition for the following reasons:

A controversy exists on whether FL.S. § 768.28 is constitutional. A declaration from this Court would settle this issue. A declaration from this Court would also serve a useful purpose in clarifying the legal issues in dispute throughout the State of Florida regarding this statute. This Court could order Governor Scott or Governor-elect Ron DeSantis to use his executive power to reorganize/clarify/rework FL.S. § 768.28 so it is Constitutional and allows for Florida Citizens to bring suit for malicious prosecution against Florida Governmental Entities. In the absence of a declaration, FL.S. § 768.28 would continue to be enforced and would prevent

Petitioner's case from being won on merits. A declaration by this Court enjoining the State Courts from enforcing this statute would allow him and other Florida Citizens to lawfully sue State Governmental Entities for malicious prosecution. The Petitioner and Florida Citizens would continue to suffer irreparable harm if this Court does not issue a declaration. There is no remedy at law because only a declaration by this Court would allow Petitioner's case to continue and be won on merits and collect monetary damages owed in the suit.

## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Date, 12/9/2018

Louis Matthew Clements,
*Pro Se*
1637 Hendry Street
Fort Myers FL 33901
Cell - (239) 940-0630
jtkirk1969@yahoo.com