ORIGINAL

No. 18-9530

IN THE

SUPREME COURT OF THE UNITED STATES

TERRY MARGHEIM — PETITIONER
(Your Name)

vs.

KENNETH R. BUCK, EMELA BULJKO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TENTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TERRY MARGHEIM #37080-013
(Your Name)
INDEPRNDENCE HOUSE
2765 S. FEDERAL BLVD.
(Address)

DENVER, CO. 80236
(City, State, Zip Code)

303-936-2035
(Phone Number)

QUESTIONS PRESENTED

Are malice and favorable termination indicative of innocence, necessary elements to prove a violation of the Fourth Amendment?

If the legal process is tainted and probable cause is lacking, does the tainted determination accrue, extinguish, or somehow convert an unlawful seizure claim into a separate claim under the clarification by Manuel v. City of Joliet of Supreme Court precedent?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Non-participant filing attached. Appendix I.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The United States Court of Appeals decided my case on February 13, 2019, and appears at Appendix A.

A timely petition for rehearing was denied by the United States Court of Appeals on March 11, 2019, and a copy of the order denying rehearing appears at Appendix D.

There was also an interlocutory appeal in this case and a copy of the United States Court of Appeals published ruling appears at Appendix B.

The district court's ruling appears at Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Subsection 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitutional Amendment 4

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.

42 U.S.C. Subsection 1983. Civil action for deprivation of rights

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

STATEMENT OF THE CASE

1. In January of 2010, Petitioner Margheim was arrested in Greeley, Colorado, Weld County, and charged in Case # 10M251. He was released on bond and then failed to appear in March of 2010, for which the court revoked the bond and issued a warrant for his arrest.

2. On April 10, 2010, police arrested Margheim on the warrant Id. And also charged him with violation of protection order.

3. On April 12, 2010, Margheim was released after posting the new bond in 10M251 as well as the bond for protection order violation.

4. On April 22, 2010, Respondent Buljko filed a motion to revoke bond in 10M251 and issue a warrant for Margheim's arrest. The motion was supported by a sworn statement that Margheim had a 'new' offense, which was false.

5. On April 23, 2010, the Weld County Court, granted the motion Id., revoked the bond, and issued a warrant for Margheim's arrest based on Buljko's false statement Id.

6. On May 7, 2010, police arrested Margheim pursuant to the warrant. During the search incident to arrest, drugs were found, which led to the prosecution in Weld County Court Case # 10CR754.

7. On August 23, 2011, Margheim was arraigned on Case 10CR754.

8. On December 1, 2011, the Weld County Court, granted Margheim's motion to suppress, finding the arrest/search unlawful and void of probable cause in Case 10CR754.

9. On December 13, 2011, the Weld County District Attorney moved for dismissal in 10CR754, which the court granted. Margheim was then released from custody on the case.

10. On or about May 7, 2010, Buljko new of her mistake. She did not inform the courts and instead filed a motion to increase the bond that she had the court revoke in Case 10M251.

Buljko then helped the district attorney research and prepare for Margheim's suppression motion. (10CR754). **See Appx. F** (p. 17-18, Deposition of Buljko p. 64 lines 7-24, p. 57-58 lines 2-25).

PROCEDURAL

11. In June 2012, Margheim filed this action against Weld County District Attorney Kenneth R. Buck, Weld County Deputy District Attorney Buljko, and other non-participating defendants, for violating his rights under the Fourth and Fourteenth Amendments. See ECF # 8 **Appx. G**

12. In August 2013, the United States District Court dismissed the case by adopting Magistrates recommendation of time-bar. See ECF # 41, 42, **Appx. H**

13. In May 2014, the district court vacated the final judgment and ordered the case reopened against Buljko only as a Fourth Amendment malicious prosecution claim. See ECF # 57, **Appx. I**

14. In May 2015, Buljko argued for immunity in summary judgment ECF #101, which the court denied. ECF # 126

15. In April 2016, Buljko filed interlocutory appeal of the denial of immunity. ECF # 135

16. In April 2017, the Tenth Circuit reversed the district court and remanded with directions to grant qualified immunity. See **Appx. B**

17. In June 2017, the district court complied and entered judgment in favor of Buljko. ECF #'s 152, 153

18. In July 2017, Margheim file for relief pursuant to F.R.C.P. Rule 59(e), arguing error on the court's accrual finding and the interlocutory appeal's finding as well. ECF # 160

19. In March 2018, the district court denied relief. ECF # 164

20. In April 2018, Margheim filed notice of appeal. ECF # 165

21. In February 2019, the Tenth Circuit affirmed the district court's findings. **Appx. A.** In May 2019, rehearing was denied. **Appx. D.**

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit requires proof of malice and favorable termination indicative of innocence to show a violation of the Constitution under the Fourth Amendment. This is contrary to the writings of **Justices Alito, Gorsuch, and Thomas**. This is also split with the law of other circuits.

II. The Tenth Circuit's finding, that a claim accrues when there is a finding of probable cause, which is tainted, is contrary to this Court's precedent as clarified by *Manuel v. City of Joliet.*

ARGUMENT

I. Proof of malice and favorable termination indicative of innocence are unnecessary elements to show a violation of the Fourth Amendment.

The Tenth Circuit, relying on its precedent found, dismissal based on suppression of evidence not 'favorable' **Appx. B** at 21 par.3 and proof of malice is necessary. Id. At 6 par. 2

In **Manuel v. City of Joliet,** 137 S. Ct. 911; 197 L. Ed. 2d 312, 329 (2017), **Justice Alito**, with whom **Justice Thomas** joined, stated:

'[S]econd, while subjective bad faith, i.e., malice, is a core element of a malicious prosecution claim, it is firmly established that the Fourth Amendment standard of reasonableness is fundamentally objective. See *Ashcroft v. al-kid*, 563 U. S. 731, 736, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). These two standards-one subjective and the other objective-cannot co-exist.' ... '[F]inally, malicious prosecution's favorable-termination element makes no sense when the claim is that a seizure violated the Fourth Amendment. The Fourth Amendment, after all, prohibits *all* unreasonable seizures-regardless of whether a prosecution {197 L. Ed 2d 330} is ever brought or how a prosecution ends.' ... '[T]he favorable-termination element is similarly irrelevant to claims like Manuel's. Manuel alleges that he was arrested and held based entirely on falsified evidence. In such a case, it makes no difference whether the prosecution was eventually able to gather and introduce legitimate evidence and to obtain a conviction at trial.'

In Margheim's case the arrest warrant lacked probable cause. The unreasonable seizure is the same in Manuel as in Margheim's, the evidence was tainted by a violation of the Fourth Amendment.

Also, **Justice Gorsuch** concurring in **Cordova v. City of Albuquerque, 816 F.3d 645, 664 (10 CA 2016)**, wrote in part '[I]ndeed, it's far from obvious that a Fourth Amendment-based cause of action would wind up looking anything like a common law claim for malicious prosecution, for the tort traditionally has required proof of malice (while the Fourth Amendment

has historically been thought to involve objective "reasonableness" tests) and the institution of legal proceedings (something the Fourth Amendment has never demanded before a violation is found).' (cite omitted) ... '[T]he defendants contend for a rule requiring the plaintiff to prove not just that a prior criminal action was terminated in his favor, but that it was terminated in such a way suggesting his innocence on the merits. The court today adopts that standard and claims to do so as a matter of constitutional law. Meanwhile, many states do not require so much as a matter of common law, holding that termination won on procedural grounds, like the speedy trial dismissal in this case suffice.'

CIRCUIT SPLIT

See, **Smith v. Holtz 87 F.3d 108, 114 (3rd Cir. 1996),** '[A]ctual innocence is not required for a common law favorable termination, *see* Restatement of the Law of Torts Subsection 659, 660 (1938). And a dismiss of charges on double jeopardy grounds is a common law favorable termination.' (cite omitted) ... '[T]his means, among other things, that the rational of *Heck* will not support a requirement that a civil rights plaintiff like Smith must have a judicially established his innocence before invoking Subsection 1983.'

Also see, **Uboh v. Reno 141 F.3d 1000, 1006 (11 CA 1998),** '[A]ctual innocence, however, is not required for a common law favorable termination. *Smith v. Holtz,* 87 F.3d 108, 113 (3rd Cir. 1996).'

Also, **Proventud v. City of N.Y. 750 f.3d 121, 131 (2nd Cir. 2013),** '[U]nder the common law any final termination of a criminal proceeding in favor of the accused, such that a proceeding cannot be brought again, qualifies as a favorable termination for the purposes of a malicious prosecution action.'

Also, **Spak v. Phillips 857 F.3d 458, 464-5 (2nd Cir. 2016),** '[III.] The *Nolle Prosequi* Constituted a Favorable Termination for Claim Accrual Purposes'

Also, **Evans v. City of N.Y. 2015 U.S. Dist. LEXIS 38546, 2015 WL 1345374 @ * 19 E.D.N.Y. Mar. 25, 2015).** '[A]s to the element of favorable termination of the prosecution, a plaintiff need not "prove her innocence, or even that the termination of the criminal proceeding was indicative of innocence." '[T]he defendants assert that Shamaine cannot establish this element because "[a] dismissal based on the suppression of evidence does not qualify as a favorable termination" and because "the charges against Shamaine were dismissed because the evidence was suppressed." ' ... '[U]nder any fair reading of the court's order, the termination of Shamaine's prosecution was favorable to him for the purposes of a malicious prosecution claim.'

Margheim's dismissal was the same as in *Evans* Id. i.e. won by a dismissal based on the suppression of evidence.

And See, **Manuel v. City of Joliet, 903 F.3d 667; 2018 U.S. App. LEXIS 25594,** on remand from this Court, Headnote 3, 'Fourth Amendment malicious prosecution is the wrong characterization. There is only a Fourth Amendment claim-the absence of probable cause that would justify detention. The problem is the wrongful custody. There is no such thing as a constitutional right not to be prosecuted without probable cause. But there is a 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.'

SUMMARY

Margheim asserts that the Seventh Circuit has it correct. In the alternative, there is no such requirement under the Fourth Amendment that the seizure be of an innocent person or that it was done with malice in order to prove a violation of the Constitution, only that the seizure be unreasonable. There was no probable cause to arrest Margheim, thus, it was unreasonable, therefor the evidence uncovered by an unlawful search was tainted, and holding Margheim on the tainted evidence was unreasonable under the Fourth Amendment as well.

II. The accrual of an unlawful seizure claim, based on a tainted finding of probable cause is contrary to Manuel Id.

The district court found, Margheim's claim was always malicious prosecution or nothing. **Appx. C** p. 6 n. 2.

ARGUMENT

The probable cause finding for the issuance of the arrest warrant, was based solely on Buljko's false statement, resulting in probable cause lacking for the arrest and ensuing detention. **Appx. C,** p. 4 par. 3, p. 5 par.3.

The tainted finding of probable cause, was made prior to Margheim's arrest by way of the warrant application. Statement of The Case (SOC) #'s 4 and 5.

See, Justices; Thomas and Alito's descent in *Manuel,* Id. At 333, (discussing *Albright*) '[I] agree that *Albright's* seizure did not end with the issuance of the warrant (that would be

ridiculous since he had not even been arrested at that point) or the first appearance, see *ante*, at 8-9 and n.6, but it is impossible to read anything more into the holding in *Albright*.'

The district court in Margheim's case ruled that the false arrest accrued at the time of arrest. **Appx. C.** There was no subsequent finding of probable cause relating to the warrant and the court did not arraign Margheim until August 2011 on 10CR754. (SOC #7) Neither the legal process or the nature of the proceeding '[m]akes a difference for the purposes of the Fourth Amendment: Whatever its precise form, if the proceeding is tainted and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights.' *Manuel* Id. Headnote 6.

All of Margheim's legal proceedings were tainted from the beginning and although that '[L]egal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim-or somehow convert that claim into one founded on the Due Process Clause.' *Manuel* Id. Headnote 9.

Neither should a tainted finding in Margheim's case extinguish, convert, or accrue one Fourth Amendment Claim that stems od results from the same taint.

Buljko knew of the unlawful arrest on the day of or the very next day of the arrest. SOC Id. # 10. By not informing any of the Weld County Courts and assisting in the preparation and research for the suppression motion relating to the drug case, she perpetuated the seizure.

SUMMARY

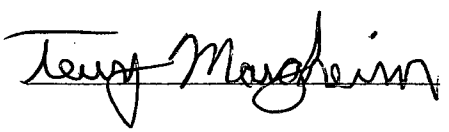
Just like the Seventh Circuit found on remand from this court Id., the claim at bar accrued upon the release of the detainee. In Margheim's case the claim is for an unreasonable in violation of the Fourth Amendment, which only requires proof of an unreasonable seizure.

CONCLUSION

By using the amalgamation of common law elements onto Subsection 1983 claims in order to defeat rather than to uphold claims under 42 U.S.C., undermines the statute and creates impossible barriers for redress of clear violation of the United States Constitution.

For the reasons stated above, this Court should grant certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit. The petition for a writ of certiorari should be granted.

Respectfully Submitted.



Date May 24, 2019