

19-5440 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JUL 30 2013

OFFICE OF THE CLERK

Lena m^cCollum — PETITIONER
(Your Name)

vs.

Hubert Peterkin, et al, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lena m^cCollum
(Your Name)

7085 Laurinburg Road
(Address)

Raeford, North Carolina 28376
(City, State, Zip Code)

(910) 635-5770
(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER THE ACCRUAL DATE FOR A CLAIM ALLEGING ILLEGAL SEARCH AND SEIZURE IS THE DATE OF EXECUTION FOR A DEFENDANT, WHO DID NOT DIRECTLY PARTICIPATE BUT WAS THE PROXIMATE CAUSE FOR THE EVENT, WHOSE WRONGDOING WAS CONCEALED AND UNACCESSIBLE UNTIL A LATER TIME?

II. WHETHER THE ACCRUAL DATE FOR A CLAIM ALLEGING ILLEGAL ENTRY AND SEARCH IS THE DATE OF ENTRY BY THE POLICE FOR A RESIDENT HAVING NO KNOWLEDGE OF ITS EXECUTION UNTIL A LATER PERIOD IN TIME?

LIST OF PARTIES

- ☐ All parties appear in the caption of the case on the cover page.
- ☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Timothy KAVANAUGH

Timothy Rugg

Samuel MORANT

Stanley DAVIS

Hoke County

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-5
REASONS FOR GRANTING THE WRIT	6-9
CONCLUSION.....	10

INDEX TO APPENDICES

APPENDIX A	Decision of United States Court of Appeals
APPENDIX B	Decision of United States District Court
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Wallace v. Kato, 549 U.S. At 388 (2007)	6
Kronisch v. United States, 150, F. 3d 112, 123 (2d cir. 1998)	7
Thomas v. McElroy, 463 F. App'x 591, 592 (7th cir. 2012)	7
O'Ferrell v. United States, 988 F. Supp. 1364, 1373-74 (M.D. Ala. 1998)	7
Adrian v. Selbe, 364 F. App'x 934, 937 (5th cir. 2010)	7
Ganek v. Leibowitz, 167 F. Supp. 3d 623, 633 (S.D. N.Y. 2016)	7

STATUTES AND RULES

OTHER

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

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 1, 2019.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment IV

STATEMENT OF THE CASE

On October 19, 2014, Defendants Timothy KAVANAUGH and Stanley DAVIS Arrested Plaintiff's son, Robert Lewis, in front of her home. (Doc. 2 at 10). After taking Lewis into custody, defendants KAVANAUGH and DAVIS then transported him across the street into Plaintiff's yard, where only her husband Waddell McCallum was at the home. (Id. at 10). Not long after that, defendant Samuel Morant arrived to execute a warrantless search inside Plaintiff's home, assisted by defendant KAVANAUGH, and then places Plaintiff's residence under seizure. (Id. at 11). By the time Plaintiff arrived home, defendants KAVANAUGH, Morant, DAVIS and her son were gone, leaving behind other deputies to continue the warrantless search and seizure. (Id. at 10-11). Plaintiff and her husband, both diabetics, were not allowed to enter their home for several hours until after imploring officers to let them enter to check their blood sugars. (Id. at 11-13). Then, eight and a half hours after the warrantless seizure of the home began, defendant Timothy Rugg and Detective William Tart arrived with a search warrant. (Id. at 12). On October 23, 2017, Plaintiff and her husband filed a §1983 Complaint, in the Middle District of North Carolina, for Fourth Amendment violations and a common law trespass claim stemming from the warrantless search and seizure of their home. (Id. at 1). The Defendants filed a 12(b)(6) Motion to Dismiss, under the Federal Rules of Procedure, alleging that Plaintiff's claims are facially time-barred, as they were filed 4-days past the applicable 3-year statute of limitations period. (Doc. 10 at 5). Plaintiff responded by saying she did not gain sufficient knowledge of all injuries giving rise to her claims on October 19, 2014, because she was not home when certain defendants violated her rights and had to rely on her son to fill her in on those details at a later period in time. Further, that she had no way in knowing of defendant Timothy Rugg's involvement in the violation of her rights until her son saw his police report on April 14, 2015, because this defendant was never present when the warrantless search and seizure was taking place. The District Court refused to consider these facts and granted the Defendant's motion to Dismiss,

STATEMENT OF THE CASE

tentatively, because the defendants failed to respond to Plaintiff's Motion for Joinder of Claims (Doc. 3) with her son, in violation of the Court's local Rule 7.3(k). Such that, the Court ordered further briefing from the parties to see in what ways, if any, the motion for Joinder affected the dismissal of Plaintiff's case. (Doc. 17 at 10-11). Plaintiff responded by asking the Court to reconsider her case for equitable tolling because she and her husband are not mentally or physically capable of litigating the present case without the assistance of her son, who has been faced with extraordinary circumstances due to his incarceration. (Doc. 19 at 4-5). Plaintiff then argued that her claims against defendants Timothy Kavanaugh, Samuel Morant and Stanley Davis did not accrue on October 19, 2014 because she did not witness them violating her rights, her husband was unable to tell her what happened due to his dementia, and she did not find out about these defendants' presence at her home until visiting her son a week later at the Hoke County Detention Center. (Id. at 6-7). Finally, Plaintiff reiterated that her supervisory liability claim against defendant Timothy Bugg did not begin to accrue until her son obtained access to his police report on April 14, 2015 and discovered that Bugg was responsible for ordering the warrantless search and seizure of her home without just cause. (Id. at 8-10), a fact that was impossible to know when there was no evidence that he ever participated in the events that violated her rights on October 19, 2014. The District Court ignored this evident fact. Plaintiff then timely appealed to the Fourth Circuit Court of Appeals, raising the same issues as mentioned above. However, the Court found no reversible error and Affirmed the District Court's decision.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant Certiorari because Plaintiff's complaint shows clear and undisputed evidence that Defendant Timothy Rugg was the proximate cause of all injuries she sustained on the date of October 19, 2014, because he commanded his subordinates to search and seize Plaintiff's residence without a warrant or just cause. (see Docket Entry 2 At 12, par. #23). The complaint further shows clear evidence that defendant Rugg was never present and did not participate when the warrantless search and seizure was being executed. (Id. At 10-12). Therefore, Plaintiff had no reason to suspect defendant Rugg of any wrongdoing on the date of October 19, 2014. Indeed, defendant Rugg's wrongdoing was concealed and inaccessible to Plaintiff until her son obtained access to his police report on April 14, 2015, revealing that he ordered the warrantless search and seizure without just cause. (see Docket Entry 15 At 7 and 15-1).

The Fourth Circuit's Affirmation of the District Court's view on this matter conflicts with this Court's decision in *Wallace v. Kato*, 549 U.S. At 388 (2007) namely, that "accrual occurs when the Plaintiff has^A complete and present cause of action... [T]hat is, when the plaintiff can file suit and obtain relief." According to *Wallace*, the accrual period for a cause of action begins to run only after the Plaintiff possesses^{as} sufficient facts to file a suit and obtain relief from the person who has caused them harm.

Now, if the District Court's view was right, then Plaintiff had a right to sue and obtain relief against defendant Rugg on the date of October 19, 2014, and on any day thereafter until October 19, 2017, or 3-years later. However, this view is clearly erroneous because the law would not permit Plaintiff to file a lawsuit for the harms that she suffered (i.e. warrantless search and seizure) at the hands of a, then, unknown defendant (i.e. Timothy Rugg) whose existence or wrongdoing could not be

REASONS FOR GRANTING THE PETITION

Associated or identified with the harm that Plaintiff suffered on the date of October 19, 2014.

Several decisions from other Courts of Appeal are in conflict with the Fourth Circuit's decision in Plaintiff's case. They plainly hold that the statute of limitations does not begin to run until the defendant's wrongdoing is unsealed and accessible to the plaintiff. See, e.g., *Kronisch v. United States*, 150 F.3d 112, 123 (2d Cir. 1998). Although the statute of limitations for Bivens actions in New York is three years, such claims typically accrue "at the time of injury," but they will be equitably tolled so long as defendant's concealment of their wrongdoing prevented plaintiff from becoming aware of, or discovering through the exercise of reasonable diligence, his cause of action."; see *Thomas v. McElroy*, 463 F. App'x 591, 592 (7th Cir. 2012). "A claim asserting that a search violated the Fourth Amendment accrues - and the limitations period begins to run - as soon as the plaintiff knows, or should know about the search and the facts making it unlawful."; see *O'Ferrell v. United States*, 998 F. Supp. 1364, 1373-74 (M.D. Ala. 1998) (rejecting a statute of limitations defense where it [was] uncontested that the search warrants were not unsealed until 1996. Until then, [Plaintiff] could not have known who all had sworn to the match of the documents, or exactly what they swore to."); *Adrian v. Selbe*, 364 F. App'x 934, 937 (5th Cir. 2010) (holding that Bivens claims accrued on the date plaintiff "had actual knowledge... that [the Affiant] allegedly lied in his affidavit"); and *Ganek v. Leibowitz*, 167 F. Supp. 3d 623, 633 (S.D. N.Y. 2016) (holding that accrual started when affidavit containing officer's false statements in support of warrant was unsealed and accessed

REASONS FOR GRANTING THE PETITION

by plaintiffs), rev'd on other grounds, 874 F.3d 73 (2d Cir. 2017).

*Note: "Adrian" and "Gank" were used by the District Court in its order to dismiss Plaintiff's claims as time-barred. However, these two cases more favorably support Plaintiff's view. (See Docket Entry 17 at 8).

Plaintiff prayerfully asks this Honorable Court to accept this petition for review.

As to Plaintiff's claims against defendants Timothy KAVANAUGH, Samuel MORANT and Stanley DAVIS, her complaint makes clear, in the first 18 paragraphs, that she was unaware that defendants KAVANAUGH, MORANT and DAVIS were ever at her home on the day of October 19, 2014. Because by the time she arrived home, these defendants and her son were gone before she could meet them. (Docket Entry 2 at 10-12). Plaintiff's complaint supports her contention that her husband Waddell McCollum was suffering from dementia and could not tell her about the above named defendants' presence at her home, because he could not explain to his niece why or what the police were doing in his yard when she asked. (Id. at 11, par. #10-11). And the complaint shows evidence that Mr. McCollum was so disoriented and confused that he fell off the front porch. (Id. at 13, par. #25). Lastly, Plaintiff made it clear that she did not learn of defendants KAVANAUGH, MORANT and DAVIS' presence at her home until she visited her son a week later at the Hoke County Detention Center on Monday, October 27, 2014. (Docket Entry 19 at 7-8). Therefore, Plaintiff's claims against the above named defendants could not accrue until she gained

REASONS FOR GRANTING THE PETITION

Actual Knowledge of the injuries that they caused on the date of October 19, 2014.

The Fourth Circuit's decision to time bar Plaintiff's claims against the aforementioned defendants whom she had no knowledge of them being at her home on October 19, 2014 conflicts with this Honorable Court's decision in Wallace supra.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lena McCallum

Date: July 27, 2019