No. __-____

In the Supreme Court of the United States

ROBERT H. HEALY,

Petitioner,

v.

LEDURA WATKINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

CARSON J. TUCKER, JD, MSEL
Counsel of Record
LEX FORI, PLLC
DPT #3020
1250 W. 14 Mile Rd.
Troy, MI 48083-1030
(734) 887-9261
cjtucker@lexfori.org

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the district court's conclusion that "malicious prosecution" is a cognizable "tort" for purposes of a § 1983 suit under either the Fourth Amendment or Due Process Clauses of the Constitution?

2. Whether the Court of Appeals correctly declined to exercise appellate jurisdiction over the issue that the three-year statute of limitations applicable to Respondent's "malicious prosecution" claim under the Fourth Amendment accrued in 1979 at the latest?

PARTIES TO THE PROCEEDING

Petitioner, Robert H. Healy, is the Defendant-Appellant below. Respondent, Ledura Watkins is the Plaintiff-Appellee.

Defendant Ronald Badaczewski is an individual defendant in these proceedings.

There are no corporate parties and no other parties to the proceedings.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert H. Healy, petitions for a Writ of Certiorari to the Sixth Circuit Court of Appeals, which denied Petitioner's motion for a rehearing en banc to reconsider its January 28, 2021 Opinion and Judgment (1a-23a).[1]

OPINIONS BELOW

The Sixth Circuit issued its opinion and judgment on January 28, 2021 (1a-23a) affirming the August 8, 2019 opinion and decision of the United States District Court for the Eastern District of Michigan denying Petitioner's Motion to Dismiss (14a-15a).

These decisions comprise the substantive rulings from which Petitioner seeks a writ of certiorari.

[1] The appendix contains record entries from the proceedings below and is numbered in seriatum at the bottom center, 1a, etc.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1).

The Court of Appeals issued its opinion and judgment on January 28, 2021 (1a-23a). On March 16, 2021, the Court of Appeals denied Petitioner's motion for a rehearing en banc (24a-25a).

STATEMENT OF THE CASE

A. Introduction

In 1976, Respondent, Ledura Watkins (Watkins), was prosecuted and convicted for the murder of Yvette Ingram. He was sentenced to life in prison without parole. In 2017, Watkins presented new evidence demonstrating that a forensic analysis that had placed him at the scene of the crime was flawed. Based on this, Watkins' conviction was overturned.

Watkins filed suit under 42 U.S.C.S. § 1983 against Petitioner, Wayne County Prosecutor Robert H. Healy (Healy), the estate of Detective Neil Schwartz (Schwartz), and Detroit Police Evidence Technician, Ronald Badaczewski (Badaczewski).

Healy filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court denied Healy's motion and he appealed.

The Court of Appeals concluded it lacked appellate jurisdiction to hear most of Healy's arguments. However, it ruled that Healy was not entitled to

absolute immunity and that he had forfeited the issue of qualified immunity at this stage of the litigation.

B. Factual Background

On September 6, 1975, police found Yvette Ingram (Ingram) shot to death in her home after a robbery (2a, 75a). Ingram was a Detroit schoolteacher at Highland Park High School (Highland Park) and reputed drug dealer (*Id.*). Drugs, money, and three rings were stolen from Ingram (75a).

The Wayne County Medical Examiner's Office conducted and autopsy and concluded that Ingram died from two gunshot wounds to the right temple (*Id.*). Evidence technicians collected evidence, including several pieces of Ingram's hair at the crime scene. (75a-76a).

About a month after Ingram's murder, Travis Herndon, a classmate of Watkins at Highland Park, was arrested during an unrelated armed robbery investigation (3a, 76a). While in custody, Herndon told a now-deceased detective and a police officer that he and 19-year old Watkins robbed and killed Ingram on the orders of a corrupt Detroit Police Officer Gary Vazana (Vazana). Vazana was assigned to Highland Park beginning in the 1970's and became acquainted with both Herndon and Watkins.

Healy, who was an assistant prosecuting attorney for Wayne County, and Schwartz, who was then a Sergeant with the Detroit Police, interrogated Herndon about Ingram's murder (3a). Herndon stated that he and Watkins met with Vazana at a Holiday

Inn in Highland Park, where Vazana ordered them to kill Ingram because Vazana was dissatisfied with cocaine he had purchased from her (77a). Herndon then told Healy and Schwartz that they drove to Ingram's house in Vazana's car (which had a personalized license plate "VAZANA") and "used Vazana's pistol to kill Ingram." (4a, 77a).

Both Healy and Schwartz informed Herndon that they knew of Vazana's drug-dealing activities (77a). During the interrogation, Healy left the room and returned passing a note to Schwartz informing him that Vazana had been found shot to death in his residence. According to Watkins, Schwartz then passed the note to Herndon and Healy left the room while Schwartz attempted to record Herndon's statement implicating Watkins' in Ingram's murder (4a-5a, 78a).

At this point, Herndon told Schwartz that his earlier statement about Watkins was not true (3a). He stated that he and Vazana drove to Ingram's house where Vazana shot Ingram twice in the head while she was on her bed (3a, 77a-78a).

Schwartz left the interrogation room and spoke with Healy. Watkins claims that at this point Healy and Schwartz conspired to frame Watkins by claiming that he and Herndon killed Ingram. Healy claims that the discussion concerned immunity for Herndon's testimony concerning Watkins' involvement (4a).

Both Healy and Schwartz returned to the interrogation room and told Herndon that they wanted Watkins for Ingram's murder because they

believed he was also responsible for Vazana's murder. According to Watkins, Herndon told them that Watkins "had nothing to do with the murder, but Healy and Schwartz threatened him that they would charge him with Ingram's murder and another recent homicide unless he implicated Watkins (78a-79a). Herndon then agreed to testify against Watkins, and a statement was recorded in which Herndon implicated Watkins (4a, 79a).

On October 22, 1975, Schwartz filed a warrant request for Watkins' arrest. Herndon's statements were used as the basis of probable cause for Watkins' arrest (4a, 79a-80a). Watkins was arrested and tried for Ingram's murder.

Consistent with his prior statements, Herndon testified that both he and Watkins killed Ingram (4a, 79a-80a). Badaczewski testified that hair samples collected from the crime scene could have a "common origin" with a sample supposedly taken from Watkins. On March 16, 1976, a jury convicted Watkins of first-degree murder and he was sentenced to life in prison without the possibility of parole.

In 1980, Herndon, who was serving a lengthy sentence in the same prison as Watkins attempted to "recant" his 1976 trial testimony, stating, for the first time, that he told "two" different stories regarding Ingram's murder (116a). Plaintiff launched a series of collateral attacks to his conviction, including: (1) a motion for a new trial; (2) a 1980 evidentiary hearing regarding Herndon's "recanted" testimony"; (3) a 1981 delayed motion for a new trial; (4) a 1986 petition for a writ of habeas corpus in federal court; (5) a 1997

motion for relief from judgment; and (6) a 2014 motion for relief from judgment (117a-118a). Courts rejected all of Watkins' challenges and appellate courts affirmed those that he appealed.

In February 2014, Plaintiff filed a motion for relief from judgment, asserting "newly-discovered" evidence (119a). The state trial court denied the motion on October 27, 2014 and the Michigan of Court of Appeals denied Plaintiff's application for leave to appeal for the reason that the "newly-discovered" evidence did not conform to the Michigan Court Rules standards for such (129a-131a).

After a remand by the Michigan Supreme Court for the state trial court to consider Watkins' claim of "newly-discovered" evidence, without expressing any view regarding the merits of this "evidence," see *People v. Watkins*, 500 Mich. 851; 883 N.W.2d 758 (Mich. 2016), on January 20, 2017, Watkins filed an amended motion for relief from judgment, raising the following issues: (1) exculpatory evidence was withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) evidence existed to impeach Herndon's testimony; and (3) new scientific evidence casted doubt on the hair evidence. (Exhibit 6, 1/20/17 Motion w/o Exhibits).

In June 2017, only on the basis that the federal bureau of investigation does not presently consider microscopic hair analysis evidence like that which was presented in the 1976 trial to be scientifically accurate enough for criminal proceedings, the parties stipulated to dismiss the criminal case on the basis that there was insufficient evidence to proceed to a

new trial (116a-120a). The prosecutor's office stipulated that it could not re-test the hair evidence under new standards because "all evidence pertinent to the case had been destroyed" and therefore insufficient evidence remained to retry Watkins for Ingram's murder (31a-32a).

On July 25, 2017, Watkins filed an action in the Michigan Court of Claims under Michigan's Wrongful Imprisonment Compensation Act (WICA), MCL § 691.1751 (135a-261a). This proceeding resulted in a decision by the Michigan Court of Appeals denying Watkins' claim for compensation (262a-270a). In denying Watkins' claim for compensation and civil relief, the court concluded:

> At trial, Herndon's testimony about how he and plaintiff committed the murder was the primary evidence against plaintiff. The hair analysis evidence corroborated Herndon's testimony that plaintiff was present, although defense counsel made the point on cross-examination that the hair could have been present in Ingram's house for months, consistent with testimony that [Watkins] had been to Ingram's house before. [Watkins'] conviction was vacated because of the limitations on microscopic hair analysis evidence and the prosecution's inability to test the hair evidence. Herndon's recantation, which the circuit court previously rejected as unreliable, did not

> contribute to the vacation of the conviction and the dismissal of the charge. Revising the import of the hair analysis evidence reduced the corroboration for Herndon's trial testimony, but it does not create a genuine issue of material fact regarding [Watkins'] involvement (266a-267a).

The court found that Watkins did not establish the requisite element to recover under the state statute, namely, that a WICA claimant show that "new evidence clearly and convincingly" demonstrates his or her innocence (267a). Watkins' appealed this decision to the Supreme Court of Michigan and his application remains pending.

Subsequent to the state action, Watkins filed suit in the Eastern District of Michigan under 42 U.S.C.S. § 1983 against Healy, the estate of Schwartz and Badaczewski. The Complaint pleads causes of action under § 1983 tethered to the Fourth, Fifth, Sixth and Fourteenth Amendments.

The Complaint alleges that during Healy's and Schwartz's interrogation of Watkins in October of 1975, Healy was acting in an investigatory capacity and was not entitled to immunity (77a). The Complaint further alleged that Healy "fabricated evidence" to manufacture probable cause (99a).

The Complaint further alleges that Healy violated Watkins' Fourth and Fourteenth Amendment rights (101a-102a). The Complaint also alleges malicious

prosecution and civil conspiracy arising from the alleged "fabrication of evidence" (102a). Watkins also pleads state law / common law claims for malicious prosecution and "intentional infliction of emotional distress" against Healy (107a-109a).

Based on the current state court action filed prior to the federal court action, Healy filed a motion in the District Court asking it to abstain from presiding over Watkins' subsequently filed § 1983 case (11a-128a). The court denied the motion on March 26, 2018.

Watkins' filed an amended complaint on December 12, 2018, pleading the same core causes of action against Healy: (1) fabrication of evidence in violation of the Fourth Amendment and Due Process Clause of the Fourteenth Amendment; (2) malicious prosecution in violation of the Fourth Amendment; (3) civil conspiracy in violation of the Fourth and Fourteenth Amendment; and (4) common-law (state law) malicious prosecution (33a).

Healy subsequently filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) (271a-315a). In his motion, Healy argued he was entitled to immunity as to the federal and state law claims and that the statute of limitations had expired. Specifically, Healy claimed he was entitled to absolute immunity and/or qualified immunity as to Watkins' Fourth Amendment claims related to "fabrication of evidence" (277a).

Healy also argued that the applicable statute of limitations barred Watkins' § 1983 and related state law claims (276a-277a). Healy also claimed immunity under Michigan state law as to Watkins' "malicious

prosecution" and "intentional infliction of emotional distress" claims (277a).

Focusing on the Fourth Amendment issue, Healy argued that there was no cognizable claim for "fabrication of evidence" either under a theory of "suppression" of favorable evidence or "manufacture" of damaging evidence (300a), citing *Mills v. Barnard*, 869 F.3d 473, 485 (6th Cir. 2017). Healy argued he did neither of these, relying only on Herndon's statements in 1975 (not Herndon's alleged 1980 recantations) (301a). Because the only theory that could be supported is that Healy somehow ignored favorable evidence (inconsistencies in Herndon's testimony), the Fourth Amendment claim could not be based on "fabricating evidence" (302a).

As such, Healy's conduct in 1975 (even if it was shown that he offered false or incomplete testimony), was entitled to absolute immunity (302a). Citing *Adams v. Hanson*, 656 F.3d 397, 402 (6th Cir. 2011) and *Koubriti v. Convertino*, 593 F.3d 459, 467 (6th Cir. 2010) for the proposition that prosecutors are immune from all § 1983 claims related to "withholding" or "suppressing" evidence.

Healy further argued that this immunity extends to suits "arising out of even unquestionably illegal or improper conduct by the prosecutor so long as the general nature of the action in question is part of the normal duties of the prosecutor" (302a-303a), citing *Cady v. Arenac County*, 574 F.3d 334, 340 (6th Cir. 2009). Healy pointed out that the Sixth Circuit has held that absolute immunity extends to situations where a prosecutor is alleged to have participated in

the pre-arrest or pre-trial phase of an investigation and later becomes aware of possible exculpatory evidence that is allegedly later not turned over at trial (303a), citing *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986). Healy's interaction with Herndon was merely associated with the preparation of prosecution – something for which prosecutor enjoy absolute immunity under prevailing law.

Healy also moved to dismiss on the basis of "qualified" immunity, arguing that in 1976 no "clearly established law" existed prohibiting his alleged conduct during Herndon's interrogation. There was no theory under the Fourth Amendment in 1976 where a witnesses' inconsistent statements could be considered "fabrication" as opposed to "suppression" of evidence in violation of the Fourth Amendment (306a). There was no law in or before 1976 that would have put Healy on notice that what he did was not protected by prosecutorial immunity (307a).

As it related to the alleged Fourth Amendment violation for "fabrication of evidence" "and conspiracy", Healy asserted that even if cognizable, the "three year statute of limitations" would bar Watkins' claims (306a-307a). Since the basis for Watkins' claims was Herndon's "new" testimony and inconsistencies arising therefrom, the latest date for accrual would have been the time that these were discovered; at the time of the criminal trial in 1976.

Healy also noted that this Court has intimated that "malicious prosecution" is not a cognizable claim in a § 1983 action (310a-311a).

The district court denied Healy's motion. It first analyzed Healy's claims that Watkins' action was barred by the applicable statute of limitations (34a-35a). The district court equated Watkins' claims against Healy as grounded in the tort of "malicious prosecution" (37a). As such, the district court further concluded that rather than accruing at the time of his detention and interrogation, Watkins' fourth amendment claim based on the common-law tort of malicious prosecution accrued at the time the "underlying criminal proceedings against him have terminated in his favor" (38a).

The district court noted the uncertainty as to whether "favorable termination of criminal proceedings" remains an element of any Fourth Amendment claim, but cited the Sixth Circuit's opinion in *Sykes v. Anderson*, 625 F.2d 294, 308-09 (6th Cir. 2010) for the proposition that the circuit recognizes that "favorable termination" is an element in the context of Watkins' Fourth Amendment claims. The district court implicitly assumed that the proceedings terminated in Watkins' favor, even though the Michigan state court of claims and Court of Appeals denied Watkins' claim for compensation for wrongful imprisonment on the basis that he had not proved his innocence (39a, 266a-267a).

The district court also assumed that "malicious prosecution" was the basis of Watkins' suit under § 1983 since it concluded that Watkins' claim was based on "post" judicial process (but pre-trial) proceedings (39a). Since Watkins filed his § 1983 action within three years of the 2017 "dismissal" by stipulation, the pre-trail claim was not time barred (40a).

Healy also argued that in 1975 a "favorable termination" element did not exist and hence, Watkins would not have benefitted from this element to extend the three-year statute of limitation (40a). Healy argued the "favorable termination" element did not come into play until this Court's 1994 decision in *Heck v Humphrey*, 512 U.S. 477 (1994), where it held that to recover damages for alleged unconstitutional conviction or imprisonment, the claimant must prove that the conviction or sentence terminated in his favor. The district court disagreed "at least for now" (41a).

Concerning Healy's argument he was entitled to absolute immunity, the district court interpreted Healy as having "fabricated" Herndon's statement, rather than viewing Herndon's multiple statements as mere inconsistencies (49a-50a). According to the district court, at this time, Healy was not acting as an "advocate" for the state as a prosecutor intimately associated with the judicial phase of the criminal process, but rather when Healy was performing "investigative functions" (50a).

Healy argued that at the time he engaged in the activities for which he was being sued absolute immunity applied to all activities engaged in by prosecutors (56a). Healy argued that the law of absolute immunity drew no distinction between "investigative" and "prosecutorial" acts as described by this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (56a-57a). The district court ruled that at the time of Healy's alleged wrongful acts, the Sixth Circuit did not recognize "blanket immunity" for

prosecutors and instead confined a prosecutor's ability to avail himself of absolute immunity to activities "closely associated with the judicial process" (58a).

The district court also disagreed with Healy's argument that he did not in fact "fabricate" evidence, but merely relied on one version of events recounted by Herndon to implicate Watkins (59a-60a). The district court reasoned that since Healy knew that the statement implicating Watkins was untrue because it was made after Herndon had earlier stated that Watkins was not involved, and he knowingly coerced Herndon into making this statement, Watkins sufficiently alleged that Healy had fabricated evidence (60a).

The district court also allowed Watkins' claim of a "Due Process" violation based on Healy's alleged fabrication of evidence over Healy's claim of absolute immunity as to that claim (63a-64a).

The district court rejected Healy's argument that the "due process" claim was barred by the statute of limitations for the same reason that it rejected that argument with respect to the Fourth Amendment claim (66a). Similarly, the district court rejected Healy's argument that the due process claim failed because Watkins' allegations did not demonstrate that Healy actually fabricated evidence for the same reason that it had rejected this argument with respect to Watkins' claim of a Fourth Amendment violation (66a).

The district court ruled that Healy was also not entitled to absolute immunity for "malicious

prosecution" as to Watkins' state law claim. The district court reasoned that Healy had not yet shown that he was entitled to absolute immunity under Michigan law for the same reasons he had not yet shown that he was entitled to absolute immunity as to Watkins' federal claims (68a).

Healy appealed. The Sixth Circuit affirmed. The court first analyzed whether and to what it extent it had "appellate jurisdiction", and addressed whether it had jurisdiction to review Healy's six issues per the collateral-order doctrine or via its pendent appellate jurisdiction" (7a).

The court noted that 28 U.S.C.S. § 1291 grants appellate jurisdiction to the courts of appeals "only from 'final decisions' of the district courts," citing *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985), and a district court's order denying a Rule 12(b)(6) motion to dismiss is usually not a final decision (8a-9a). The court noted a judicially created exception to this rule is the collateral-order doctrine, which held that some issues are immediately appealable if they fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated (9a), citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 542 (1949).

The court concluded it had appellate jurisdiction to review the district court's denial of absolute immunity for the federal-law and state-law immunity

arguments only (9a). Specifically, it limited its review to (1) whether the Supreme Court's prosecutorial-immunity jurisprudence, namely *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), applies retroactively to the events underlying Watkins' § 1983 suit, and (2) whether Healy satisfied the burden under Fed. R. Civ. P. 12(b)(6) to show that absolute immunity is justified with respect to Watkins' claims. The court declined to exercise jurisdiction over the remaining issues, including the statute of limitations arguments (11a).

The court ruled Healy was not entitled to absolute immunity for his alleged actions. The court held that this Court's decision in *Buckley*, *supra*, applied retroactively to Healy's 1976 conduct. The court also held that the alleged conduct engaged in by Healy was not within the scope of his role as an advocate and prosecutor (13a-14a).

First, Healy allegedly threatened to charge Herndon with two murders, even though Herndon had told Healy that Watkins was not involved in Ingram's murder; second, Healy promised Herndon immunity for testifying at Watkins's trial; third, Healy purportedly "assist[ed] with the interrogation of Herndon"; and fourth, Healy allegedly conspired with Schwartz to "intimidat[e] and coerc[e]" Herndon into falsely implicating Watkins" (14a). The court concluded that at all relevant times, Healy was acting as an investigator – Watkins' alleged that Herndon's statement, which Healy helped to procure was the sole basis for the probable cause needed for Schwartz to apply for an arrest warrant (16a).

The court rejected Healy's argument that this Court's decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976) and not *Buckley*, *supra*, would apply to the analysis of his actions. As Healy had argued in the district court, in 1975 and 1976 his actions were protected by absolute immunity and it was not appropriate or just to evaluate his conduct in light of precedent (*Buckley*) established nearly two decades later (17a). Like the district court, the Court of Appeals ruled that the law in 1975 and 1976 in the Sixth Circuit was identical to *Buckley* (19a). That is, a prosecutor engaged in certain "investigative" activities was not entitled to absolute immunity because such conduct was not "associated with the judicial process" (*Id*.).

The court ruled that Healy had forfeited the arguments concerning his potential entitlement to qualified immunity, although noting he may raise the issue at a later stage of the proceedings, i.e., upon a motion for summary judgment (21a).

Healy advances the following grounds in support of his petition.

REASONS FOR GRANTING THE PETITION

1. A cause of action under § 1983 must be tethered to a specific constitutional violation. *Baker v. McCollan*, 443 U.S. 137, 139-140, 144, and n. 3 (1979).

The first step is to identify the specific constitutional right allegedly infringed upon. *Id*. at 140. See also *Graham v. Connor*, 490 U.S. 386, 394 (1989) and *Albright v. Oliver*, 510 U.S. 266, 271

(1994). There must be a specific, identifiable and cognizable "tort" tied to a specific constitutional amendment. *Id.*

In the instant case, the district court equated Watkins' Fourth and Fourteenth Amendment claims against Healy as being grounded in the "tort" of "malicious prosecution" (37a). However, "malicious prosecution" is not a viable tort recognized by this Court under § 1983. The Sixth Circuit, along with nine other circuits has held that it is, but the Seventh Circuit has ruled that such a claim is not cognizable. See also *Manuel v. City of Joliet*, ___US___; 137 S Ct 911, 923; 197 L Ed 2d 312, 327 (2017).

This issue is significantly entrenched as unresolved among the Circuit Courts. This Court has not answered the question. *Albright v. Oliver*, 510 U.S. 266 (1994). Indeed, there is a solidified "conflict" between the circuits as to whether a malicious prosecution claim maybe brought under the Fourth Amendment. *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001). But see, *Hernandez-Cuevas v. Taylor*, 723 F. 3d 91, 99 (1st Cir. 2013); *Manganiello v. New York*, 612 F. 3d 149 (2nd Cir. 2010); *McKenna v. Philadelphia*, 582 F. 3d 447, 461(3rd Cir. 2009); *Evans v. Chalmers*, 703 F. 3d 636, 647 (4th Cir. 2012); *Sykes v. Anderson*, 625 F. 3d 294, 308 (6th Cir. 2010); *Grider v. Auburn*, 618 F. 3d 1240, 1256 (11th Cir. 2010).

"[W]hether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment" is a question that was raised, but left

unanswered, by the Court in *Albright*. See *Manuel*, 137 S Ct 911, 922 (Alito, J, dissenting) (noting that the court had not yet addressed what it had "agreed to decide…whether a claim of malicious prosecution may be brought under the Fourth Amendment" at all).

Malicious prosecution itself does not fit neatly into the torts generally associated with the Fourth Amendment right to be free from *unreasonable searches and seizures*. See *Albright*, *supra*; *Manuel*, *supra*. This is because "[c]ommon law and state tort law do not define the scope of liability under § 1983." *Castellano v Fragozo*, 352 F3d 939, 948 (5th Cir. 2003). There is "[n]o freestanding constitutional right to be free from malicious prosecution." *Id*. at 945.

"The first inquiry in any §1983 suit," is "to isolate the precise constitutional violation with which [the defendant] is charged." *Baker v. McCollan*, 443 U. S. 137, 140 (1979). The district court based its analysis on the assumption that "malicious prosecution" was the proper analogue. However, to make out a claim for malicious prosecution, a plaintiff generally must show three things: (1) "that the criminal proceeding was initiated or continued by the defendant without 'probable cause,'" (2) "that the defendant instituted the proceeding 'maliciously,'"and (3) that "the proceedings have terminated in favor of the accused," 3 Restatement (Second) of Torts §653(b); W. Keeton, D. Dobbs, P. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 876 (5th ed. 1984).

Subjective bad faith, i.e., malice, is the core element of a malicious prosecution claim. See *Ashcroft v. al-Kidd,* 563 U.S. 731, 736 (2011).

However, it is firmly established that the Fourth Amendment standard of reasonableness is fundamentally objective. *Id*. These two standards – one subjective and the other objective – cannot co-exist. Moreover, it is not at all clear that favorable termination has occurred in this case. The state court of claims presiding over Watkins' claim for compensation under Michigan's wrongful imprisonment act concluded that the necessary element of his innocence had not been established. The prosecution never conceded that Watkins was not guilty, only noting that it had insufficient evidence to initiate a new trial because the evidence and forensics had been destroyed in the 42 years since the prosecution.

This Court has consistently refused to treat the Fourth Amendment as a font of tort law. This is important in this case given the fact that the only arguably tethered claim underlying Watkins' § 1983 suit is malicious prosecution.

This also poses an irreconcilable dilemma with respect to the accrual of the statute of limitations, which would be three years as to a malicious prosecution claim from a date of favorable termination. But, in order to conclude that a "claim" under § 1983 "accrued" there has to be a showing that the claim is even cognizable. Therefore, whether a claim is cognizable under § 1983 must be answered in order to properly address the statute of limitations issue.

As Justice Alito noted in criticizing the Court's refusal to address this conflict among the circuit

courts in *Manuel*, there is no good reason why claims for fabrication or falsification of evidence must await favorable termination. *Manuel*, 137 S. Ct. at 926. "Malicious prosecution" is a "strikingly inapt tort analogy." *Id.* (internal quotations omitted). If the Fourth Amendment does not give rise to a malicious prosecution claim, then Watkins' claim would be time barred.

While the Circuit Court declined to exercise jurisdiction over this issue, it is a discrete question of law that is inextricably intertwined with Healy's claim of absolute immunity and the more subtle issue of whether the district court's use of the "tort" of malicious prosecution to constitutionally anchor the § 1983 claim is even viable.

The question remains open regarding when a Fourth Amendment "fabrication of evidence" claim accrues and the limitations period begins to run under § 1983. This Court has only noted that the Fourth Amendment applies to pre-trial, not post-trial / post-conviction deprivations. A § 1983 claim accrues when a claimant knows or has reason to know that the act providing the basis of his or her injury has occurred.

Extending the statute of limitations for decades for a Fourth Amendment claim based upon facts and harm that were apparent or should have been apparent at the time of trial works a fundamental unfairness and prejudice to the defense. This Court has similarly noted that in the context of Fourth Amendment claims, "defendants need to be on notice to preserve beyond the normal limitations period evidence that will be needed for their defense; and a

statute that becomes retroactively extended, by the action of the plaintiff in crafting a conviction-impugning cause of action, is hardly a statute of repose." *Wallace v. Kato*, 549 U.S. 384, 395 (2007).

In the 42 years since Watkins' detention and trial: (1) the lead investigator passed away; (2) evidence such as the hair samples are gone because the Detroit Police Department was not on notice to preserve the evidence because of a planned civil suit; (3) the independent memories of the surviving defendants have faded; (4) Healy's case file was destroyed under normal document retention policies; and (5) other witnesses who testified at trial may also have passed away, may have no memory of the events, or may not be able to be located.

2. Moreover, assuming *arguendo* that some of the interests claimed by Watkins to be protected by the Due Process Clause include those protected by the common law of torts (such as freedom from malicious prosecution), see discussion *supra*, Justice Kennedy stated that this Court's "precedents make clear that a state actor's random and unauthorized deprivation of that interest cannot be challenged under [§ 1983] so long as the State provides an adequate post-deprivation remedy." *Albright*, 510 U.S. at 283-284. There, Justice Kennedy concluded that because the state provides a cause of action for malicious prosecution, a § 1983 claim is barred under the holding of *Parratt v. Taylor*, 451 US 527 (1981), overruled on other grounds in *Daniels v. Williams*, 474 U.S. 327 (1986). Where a state did not provide a tort remedy for malicious prosecution there would be force to the argument that the malicious initiation of a

baseless criminal prosecution infringes an interest protected by the Due Process Clause and enforceable under § 1983. Otherwise, not. *Id*.

This case has the potential to upend municipal liability paradigms and fundamentally effect, if not destroy, the ability to have liability insurance underwritten on municipal risk. It is also noteworthy because of the length of time that has passed, the state of the law at the time the underlying events took place surrounding the investigation into Watkins, and, importantly, the fact that the state court provided exhaustive post-trial proceedings and a statute allows compensation to those wrongfully imprisoned. In this latter regard, Watkins' application for leave to appeal to the state supreme court on the WICA claim remains pending.

3. The Circuit Court also declined to address the statute of limitations issue on jurisdictional grounds. Regarding this, the court stated it was "[w]ary that Healy seeks 'to parlay [a] Cohen-type collateral order[] into [a] multi-issue interlocutory appeal ticket'" invoking its "discretion" to decline to exercise pendent appellate jurisdiction over any of the five other issues (11a), citing *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 49-50 (1995).

However, as the Circuit Court noted, there is also a split of authority over whether "pendent appellate jurisdiction permits review of an otherwise unappealable statute-of-limitations defense in other contexts (11a), citing *Rendell-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997); *Wilkins v. DeReyes*, 528 F.3d 790, 796 (10th Cir. 2008).

The Fourth, Fifth and Tenth Circuit have declined to exercise pendent appellate jurisdiction over a statute-of-limitations defense when they have appellate jurisdiction over a denial of immunity. See, e.g., *Johnson v. Johnson*, 694 F. App'x 945, 947 (5th Cir. 2017); *Sanchez v. Hartley*, 810 F. 3d 750, 761 (10th Cir. 2016); *Ochoa Lizarbe v. Rivera Rondon*, 402 F. App'x 834, 837 (4th Cir. 2010).

Here, the circuit court concluded "[b]ecause the circuits differ as to whether pendent appellate jurisdiction should be invoked at all, what the scope of such jurisdiction is, and when it is appropriate to review pendent issues, we follow our own precedent in deciding whether to exercise our discretionary pendent appellate jurisdiction" (11a).

However, this Court stated (and agreed with) in *Ashcroft v. Iqbal*, 556 U.S. 662, 674 (2009) that the collateral orders that are "final" under *Mitchell* turn on "abstract" rather than "fact-based" issues of law. See 515 U.S. at 317. Categories of "fact-based" and "abstract" legal questions used to guide the Court's decision may not be well defined. Here, however, the order denying Healy's motion to dismiss falls well within class of cases that are "abstract" legal questions, and indeed, unique in the realm of § 1983 litigation.

Moreover, this Court always has jurisdiction over issues raised in the lower court proceedings. *The Francis White*, 105 U.S. 381, 386-388 (1881). Thus, even if the circuit court refused to exercise jurisdiction, this Court's jurisdiction is fundamentally different – under the Constitution this Court has

jurisdiction over all issues and questions of law brought before it. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33; 3L. Ed. 259 (1812).

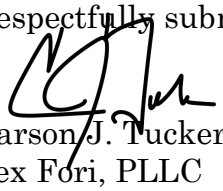
CONCLUSION

Regardless of the bifurcation of the jurisdictional question by the Circuit Courts, this Court has steadfastly noted that immunity is from litigation not just from suit. *Mitchell v. Forsyth*, 472 U.S. 511, 522-523 (1985). This overarching theme instructs that the Court will exercise its function as the ultimate arbiter of constitutional questions and all questions of law arising under the constitution (which § 1983 is supposed to do); and will address questions that relate to the question over which the Circuit Court did exercise jurisdiction in keeping with the judicial economy such review provides. This case presents two discrete issue of law that are in terminal conflict among the circuit courts and should be resolved.

RELIEF REQUESTED

Petitioner respectfully requests the Court to grant his petition or summarily reverse the Court of Appeals' decision and remand for judgment in favor of Healy on grounds of absolute immunity.

Respectfully submitted,



Carson J. Tucker
Lex Fori, PLLC
Attorney for Petitioner
(734) 887-9261

Dated: August 13, 2021