No. 21-726

Supreme Court of the United States

AUGUSTIN TORRES GONZALEZ,
Petitioner,

v.

STEVEN HAHL, NEW YORK STATE POLICE INVESTIGATOR, INDIVIDUALLY, A/K/A STEPHEN HAHL; COUNTY OF DELAWARE; AND CYNTHIA L. BOGDAN-CUMPSTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS DELAWARE COUNTY AND CYNTHIA BOGDAN-CUMPSTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK W. MILLER, ESQ.
Counsel of Record
The Law Firm of Frank W. Miller
6575 Kirkville Road
East Syracuse, New York 13057
Tel.: (315) 234-9900
Fax: (315) 234-9908

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

POINT I

CERTIORARI SHOULD NOT BE GRANTED FOR REVIEW OF THE DISMISSAL OF THE CLAIMS AGAINST RESPONDENTS DELAWARE COUNTY AND CYNTHIA BOGDAN-CUMPSTON BECAUSE THE BASES FOR THEIR DISMISSAL HAVE NOT BEEN CHALLENGED IN THE PETITION

The arguments in the Petition for Writ of Certiorari are entirely concerned with whether the courts below correctly determined that Respondent Steven Hahl had probable cause and/or arguable probable cause to arrest and prosecute Petitioner. Review of the "Questions Presented" shows they address only the probable cause issue, and whether Respondent Hahl's alleged "deviations" from state procedure vitiated probable cause. (*See* Petition p. 1.) These arguments do not apply to the dismissals of Respondents Delaware County and Cynthia Bogdan-Cumpston, because they were not dismissed based on the finding of probable cause.

Instead, the courts below dismissed the claims against Delaware County because Plaintiff's Complaint did not contain any allegations plausibly suggesting the County's policy or custom was the moving force behind Petitioner's arrest and prosecution, and they dismissed the federal claims against Ms. Bogdan-Cumpston because the complaint did not plausibly allege she "took an active role" in the arrest or prosecution. The relevant

portion of the decision of the United States Court of Appeals for the Second Circuit reads:

> As for the claims against Bogdan-Cumpston and the County of Delaware, the district court did not err in dismissing them pursuant to Federal Rule 12(b)(6). The municipal claims fail because Gonzalez's complaint does not plausibly allege that a "policy or custom" was "the moving force behind" Gonzalez's arrest and prosecution. *Agosto v. N.Y.C. Dep't of Educ.,* 982 F.3d 86, 97-98 (2d Cir. 2020) (internal quotation marks omitted). The false arrest claim against Bogdan-Cumpston fails because the complaint does not plausibly allege that she "took an active role in the arrest of [Gonzalez], such as giving advice and encouragement or importuning the authorities to act, and that [she] intended to confine [Gonzalez]." *Lowmack v. Eckerd Corp.,* 303 A.D.2d 998, 757 N.Y.S.2d 406, 408 (4th Dep't 2003) (citation, brackets, and internal quotation marks omitted); *see also Raysor v. Port Auth. of N.Y. & N.J.,* 768 F.2d 34, 39 (2d Cir. 1985) (explaining that false arrest claims against non-police defendant require an "unequivocal complaint or request to arrest"). The malicious prosecution claim fails for similar reasons. The complaint does not plausibly allege that Bogdan-Cumpston "play[ed] an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act." *Manganiello v. City of New York,* 612 F.3d 149, 163 (2d Cir. 2010) (internal quotation marks omitted). She merely reported a

> possible crime to the authorities based on I.T.'s statement to her and played no role in the subsequent investigation or charging decision. This is insufficient to support a malicious prosecution claim. *See id.*

(Petition pp. 5a-6a.)

Thus, the matters challenged in the Petition have no bearing on the dismissals of Delaware County and Ms. Bogdan-Cumpston, and it is respectfully submitted that if certiorari is granted at all, it should be limited such that it does not include review of the dismissal of these Respondents.

POINT II

CERTIORARI SHOULD BE DENIED BECAUSE NO QUESTION SUITABLE FOR REVIEW BY THIS COURT HAS BEEN IDENTIFIED IN THE PETITION

The Petition should be denied in its entirety because no suitable question for consideration by the Court has been put forth, even as to the other Respondent in this case, Stephen Hahl. No dispute among the Circuits is presented regarding an issue of law. Petitioner argues the lower courts failed to consider all relevant information in determining probable cause for his arrest and prosecution existed, which was the basis upon which summary judgment was granted to Respondent Hahl. However, the lower courts did expressly take into account the precise factual matters Petitioner urges were ignored. They simply gave different weight to those

factors than Petitioner desired – certainly not an issue meriting this Court's review.

Thus, Petitioner contends:

> [New York State Police protocols] obligated Hahl as a trained Senior Investigator to *not* rely on a third party to conduct the interview like Cumpston who is untrained in child forensic interviewing or in using anatomical puppets; to instead conduct the interview of I.T. himself in order to obtain direct allegations of abuse; to make an audio or visual recording of the interview; to avoid simultaneous note taking; to accommodate the child's primary home language of Spanish; to rule out any alternate, non-sexual reasons for the touching, especially when family members are involved; and to seek proof that petitioner was acting in pursuit of his own sexual gratification, a necessary element of the offense of sexual abuse in the first degree . . .
>
> Hahl, however, employed *none* of these safeguards required by NYSP policy and procedure. After his own interview of I.T. produced negative results for touching . . . he allowed Cumpston who is untrained in the use of anatomical puppets to interview I.T. for the *third* time and then relied on its results to further investigate petitioner . . . .
>
> Hahl's ensuing interrogation of petitioner failed to produce the corroboration necessary to cause any "reasonable suspicion" he may have had based on Cumpston's unreliable

> interviews to mature into probable cause of wrongdoing . . . . He deceived petitioner about the reason . . . for the interview; he did not offer him an interpreter; and he conducted the "interview" in a windowless room while armed with a gun, sitting by the door. Petitioner repeatedly denied that he had ever "inappropriately" touched I.T. . . . or that he had ever done so for sexual gratification. Yet Hahl simply refused to believe him . . nd never considered the potentially exculpatory fact that there were alternate, non-sexual explanations for the touching . . . .
>
> * * *
>
> Without the required corroboration of I.T.'s inherently unreliable statements, without accommodating [sic] any of petitioner's exculpatory non-sexual explanations for the touching as well as his repeated denials of any wrongdoing at all, and without any proof that petitioner had touched I.T. for his own sexual gratification . . . a reasonable jury could find . . . that Hahl's arrest of petitioner was an egregious or "drastic" breach of NYSP's policies and procedures . . . which vitiates probable cause to justify the arrest.

(Petition pp. 21-24 (citations omitted).)

The District Court, however, recited the facts Petitioner focuses on, and evidently took them into account in reaching its decision to grant summary judgment to Respondent Hahl based on the existence of probable cause. (See Petition pp. 38a-40a, 46a-

47a, 48a-49a, 56a, and 57a-59a.) Although the Second Circuit did not recite the facts of the case in detail, in reaching its decision that (at a minimum) arguable probable cause was present, it stated that "Hahl knew that I.T. told Bogdan-Cumpston over the course of two interviews that Gonzalez had touched her crotch while they were alone at home together; and that Gonzalez told Hahl that he had probably incidentally touched I.T. in inappropriate areas a few times, although he repeatedly denied having sexual or improper intent," and that in those circumstances, *"whatever other concerns might be raised as to actual probable cause,* we cannot conclude that no reasonable police officer could think probable cause supported arrest." (Petition p. 4a (emphasis added).) The phrase "whatever other concerns might be raised as to actual probable cause" was plainly intended to refer to the various purported issues and facts relied upon by Petitioner above as undermining probable cause. The Second Circuit was not required to discuss them in exhaustive detail before rendering its decision.

Petitioner's claim that the Second Circuit's decision was "at odds with this Court's arguable probable cause jurisprudence," because the Second Circuit "ignored" the totality of the circumstances, is thus meritless and does not present a suitable question for review by this Court. *See* Rule 10 of the Supreme Court Rules.

POINT III

THE LOWER COURTS PROPERLY DECLINED TO EXERCISE JURISDICTION OVER THE PENDENT STATE-LAW CLAIMS AGAINST RESPONDENT HAHL

Petitioner also contests the lower courts' refusal to exercise jurisdiction over the pendent state-law claims against Respondent Hahl. Again, this argument does not appear to concern the dismissal of the claims against Respondents Delaware County and Cynthia Bogdan-Cumpston, but it will be briefly addressed here for the sake of completeness.

Petitioner contends that "by refusing to exercise its pendent jurisdiction to address whether under New York law *Hahl's* egregious deviation from NYSP's protocol and procedures in conducting the child forensic interview . . . , the Panel's decision is at odds with . . . the Panel's own obligation to exercise its pendent jurisdiction to address and resolve petitioner's claims under New York law which his amended complaint rightly invoked." (Petition p. 26 (emphasis added).) Petitioner recognizes, as he must, that "[a] federal court may decline to decide issues which are neither 'inextricably intertwined' nor 'necessary to ensure meaningful review' of the qualified immunity question." (Petition p. 32.) Nevertheless, he insists that "when the issue of Hahl's immunity 'derive[s] from a common nucleus of operative fact' so that review of the State law claims is necessary to insure meaningful review of the federal claims for false arrest and malicious

prosecution, the federal court is bound to exercise its pendent jurisdiction in order to do so." (*Id.*)

However, the cases cited by Petitioner for this proposition do not actually support their argument. *Swint v. Chambers County Commission,* 514 U.S. 35, 115 S.Ct. 1203 (1995), for example, concerned the circumstances justifying an appellate court in reviewing nonfinal decisions of a lower court along with a final (or otherwise appealable) decision of the lower court because they are "inextricably intertwined" with each other. *See id.,* 514 U.S. at 50-51. Even in the context of appellate review of lower court decisions, the focus of the decision was on whether the federal court had the *power* to review a nonfinal decision, not whether it was *obligated* to exercise so-called "pendent appellate jurisdiction." The decision did not even address – much less impose any restriction on – a federal court's discretion to decline to exercise pendent jurisdiction over a state-law claim, "intertwined" with federal claims or otherwise.

Similarly, in *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130 (1966), the question was not whether the federal court was *compelled* to entertain state-law claims, but whether it even had the *power* to do so. This Court affirmatively stated in *Gibbs* that "It has consistently been recognized that pendent jurisdiction is a doctrine of *discretion,* not plaintiff's right." *Id.,* 383 U.S. at 726 (emphasis added). Far from holding the trial court in that case had been required to exercise pendent jurisdiction over the state-law claim at issue, this Court's holding was expressed in restrained language indicating the tendency was

very much in the other direction: "We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim." *Id.,* 383 U.S. at 728.

Nor does the Southern District of New York decision referenced by Petitioner, *Vasquez v. City of New York,* 2014 WL 5810111 (S.D.N.Y. 2014), add anything to Petitioner's argument. In that case, the district court declined to exercise supplemental jurisdiction over state-law claims after it dismissed all the federal claims in the case. *Id.* at *13. Nothing in the decision bears on the issue whether a district court "should" exercise pendent jurisdiction over state-law claims where they are "intertwined" with federal claims.

To the contrary, as *Gibbs* indicated, whether to exercise pendent jurisdiction over state-law claims is a matter committed to the sound discretion of a district court, except that it is nearly mandatory that when all federal claims are dismissed, jurisdiction over any pendent state-law claims should be declined. *Gibbs,* 383 U.S. at 726. Here, the lower courts exercised their discretion not to assume pendent jurisdiction over the purported state-law claims against Respondent Hahl, and that exercise is not assailable as an abuse of such discretion.

CONCLUSION

For all the foregoing reasons, and upon the above-cited authorities, the Petition for Writ of Certiorari should be denied in its entirety, or at least certiorari should be denied as to the claims against Respondents Delaware County and Cynthia Bogdan-Cumpston.

Dated: December 6, 2021
East Syracuse, New York

Respectfully submitted,

THE LAW FIRM OF FRANK W. MILLER, PLLC

Frank W. Miller, Esq.
Bar Roll No. 102203
Attorneys for Respondents
Delaware County, Delaware County Commissioner of Social Services and Cynthia Bogdan-Cumpston

6575 Kirkville Road
East Syracuse, New York 13057
Telephone: 315-234-9900
Facsimile: 315-234-9908
fmiller@fwmillerlawfirm.com