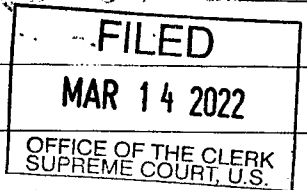
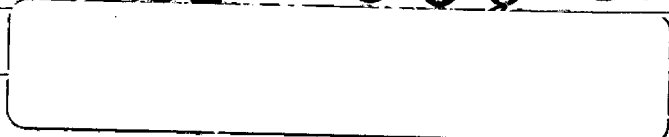


In The Supreme Court of the United States

21-7566 ORIGINAL



Andrew James Johnston,

Petitioner,

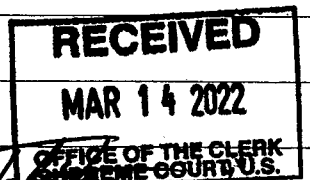
v

John DeVries, Harwood Heights Police Chief

Respondent.

Originating Case Information: UCA 7, 21-2079

PETITION FOR WRIT OF HABEAS

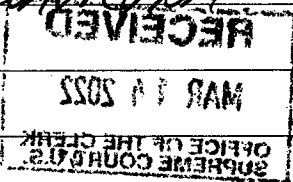


Date: February 25, 2022 Andrew Johnston

Mr. Andrew James Johnston

Questions Presented

1. Does *Heck v. Humphrey*'s favorable-termination requirement count as a dismissal for failure to state a claim, act as an affirmative defense subject to waiver "ambiguous to an exhaustion requirement," or is it both "jurisdictional" and act as an "element" of a claim for damages arising from a conviction or sentence under 42 U.S.C. § 1983?
2. Does *Heck*'s favorable-termination requirement preclude false arrest claims for damages predicated on newly discovered evidence obtained through the exercise of due diligence that was withheld in the underlying criminal case - in the same manner it precludes malicious prosecution claims under § 1983?
3. Did the court of appeals commit reversible error by affirming the district court's grant of summary judgment based on *Heck*'s favorable-termination requirement and/or implied invalidity of the criminal conviction?



Jurisdiction

The jurisdiction of the district court was founded upon 42 U.S.C. § 1983. The jurisdiction of the court of appeals was founded upon 28 U.S.C. § 1291.

The jurisdiction of this Court is founded upon 28 U.S.C. § 1254 (1) in light of the following:

- (a) USCA7 Judgment: February 16, 2022;
- (b) Denial of Rehearing En Banc: January 21, 2022 order in appeal no. 21-1221 imposed filing bar pending \$1,000.00 sanction, which petitioner doesn't have to pay.

Table Of Authorities

Organic

Amendment IV, Unreasonable search and seizure clause

Statutes

42 U.S.C. § 1983

Cases

- Colvin v. LeBland, 2 F.4th 494, 499 (CA5 2021)
- Figueroa v. Rivera, 147 F.3d 77, 81 (CA1 1998)
- Garrett v. Murphy, 17 F.4th 419, 427 (CA3 2021)
- Harrigan v. Metro Dade Police Dept Station, 977 F.3d 1185, 1187, 4 (CA11 2020)
- In re Jones, 652 F.3d 36, 38 (CA DC 2011)
- O'Brien v. Town of Bellingham, 933 F.3d 514, 529 (CA1 2019)

Potvin v. Gage, 636 F.3d 834, 838 (CA7 2011)
Smith v. Veterans's Admin, 636 F.3d 1306, 1311-1312 (CA10 2011)
Washington v. L.A. City Sheriff's Dept, 833 F.3d 1048, 1056 (CA9 2016)

Other

Federal Rule of Civil Procedure 45(a)(2)
Federal Rule of Evidence 1002
State Decisions

Statement of the Facts

On July 25, 2017, petitioner was arrested. Less than 30 days later, petitioner filed the false arrest claim below. In January 2018, the district court stayed the action pending disposition of the criminal case. That stay was lifted in May 2020 when the court of appeals affirmed the judgment in the criminal case, and the action went to discovery. In February 2021, petitioner received new dashboard camera video and audio recordings from respondent's attorneys, and prior to that petitioner filed a few subpoenas duces tecum that the district court prevented from issuing and/or ordering compliance with. Petitioner sought reconsideration of the subpoenas, the district court denied that motion, petitioner then sought a writ of prohibition from the court of appeals, but it denied relief as well.

The district court then required petitioner to enter summary judgment briefing with only the evidence provided by respondent. Despite respondent's waiver of the Heck bar as an affirmative defense in his Answer to the Complaint and petitioner's citation of that waiver in response to the motion for summary judgment, the district court excused the waiver, found the claim was Heck barred, and stated petitioner had to show prejudice to enforce the waiver. Petitioner sought reconsideration, but was referred back to the September 2, 2021 judgment.

On appeal, petitioner argued the district court misconstrued "waiver" by treating it as a "forfeiture" and drumming up excuses for respondent. The deprivation of subpoenas under Rule 45 (a)(2) was improper because Rule 45(a)(2) states "shall issue" not "may issue" subpoenas, and simultaneously violated the best evidence rule, Fed R Evid 1002, because petitioner could not otherwise obtain the best evidence. Petitioner also argued the district court's September 2, 2021 conclusion that there was probable cause in the alternative based on the criminal trial testimony, not the new dash cam recordings, was also in violation of the best evidence rule because the trial testimony was/is inferior to the August 16, 2021 videorecordings of the arrest.

The court of appeals did not address the best evidence rule, concluded that Rule 45(a)(2)'s text "shall issue" did not impose a ministerial duty on the district court to issue properly filed subpoenas - and thus prohibit the district court's sua sponte interference with petitioner's subpoenas, and affirmed the district court's conclusion the claim was Heck barred - without sharing the district court's finding of probable cause in the alternative. On January 21, 2022, the court of appeals imposed a partial filing bar that prevents petitioner from seeking rehearing en banc, and this petition follows.

REASONS WHY THE COURT SHOULD ISSUE

The Fifth, Tenth, Third, and DC circuits have held dismissals for failure to meet Heck's favorable-termination requirement count as dismissals for failure to state a claim. See, Colvin, *supra*; Smith, *supra*; Garrett, *supra*; and Jones, *supra*.

The Seventh and Ninth circuits have held Heck's favorable-termination requirement as an affirmative defense subject to "waiver," analogous to an exhaustion requirement. The Ninth circuit concludes Heck's bar is nowhere to be found in 42 U.S.C. § 1983's text. See, Peltz, *supra*; and Washington, *supra*.

The First and Eleventh circuits have described Heck's favorable-termination requirement as both "jurisdictional" and as an "element of a claim for damages arising from a conviction or sentence under § 1983. See, O'Brien, *supra*; Figueroa, *supra*; and Harrigan, *supra*.

Accordingly, there is no uniformity, and this Court should resolve this split in favor of the First and Eleventh circuits' position. This is true because the date petitioner's claim was filed August 24, 2017 would control the jurisdiction of the case. In other words, a April 5, 2019 criminal judgment would have no ex post facto or retroactive effect under Heck on a August 24, 2017 false arrest suit.

Second, Heck interpreted § 1983 in the context of a malicious prosecution claim, not a Fourth Amendment false arrest claim. So to the extent that there is no favorable-termination requirement written into the text of § 1983 by Congress, see Washington, *supra*, this Court should hold that Heck has no bearing on a directly filed Fourth Amendment false arrest claim and clarify or overrule it as much so those as diligent as petitioner will not have their claims shoe horned under the criminal judgment retroactively, and rights violated.

Lastly, petitioner has attached his Opening Brief and Reply Brief filed in the court of appeals, and respectfully contends here that this Court should hold the court of appeals committed reversible error for the reasons argued therein. Thus, the court of appeals' February 16, 2022 judgment should be vacated and/or reversed.

Conclusion

Wherefore petitioner prays the Court grants certiorari and vacates/reverses the February 16, 2022 judgment below for the foregoing reasons.

Respectfully Submitted,

02/25/22 

Mr Andrew James Johnston