ORIGINAL

No. 23-100

IN THE SUPREME COURT OF THE UNITED STATES

Jeffrey L. Clemens,

Petitioner,

v.

Michael J. O'Hara,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Clemens
Petitioner
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QUESTIONS PRESENTED

Petitioner Jeffrey L. Clemens, a writer and activist, and former screenwriter, having found himself a longtime defendant in a state prosecution in the Commonwealth of Massachusetts, and having twice been vindicated of a charge of disorderly conduct initiated on May 12, 2005, filed claims of malicious prosecution on June 11, 2018 for said charge, one for which final disposition did not occur until June 16, 2015. However, given the vagaries of a court injunction proffered by Respondent O'Hara's defense counsel, plaintiff's claims remained stalled – under submission – until October 2020, at which time the district court, by self-styled order, pared the multi-party multi-claim case down to one defendant, Michael O'Hara, and one single claim. Upon timely service, the defendant filed a Rule 12 motion to dismiss, which was granted. The plaintiff took an appeal to the First Circuit but was denied relief. The questions presented in this case are as follows:

1. Whether the appellate court erred when it upheld, by and through an extremely terse and abbreviated judgment, the granting, by the district court, of a motion for dismissal on the pleadings wherein a so-called Heck bar was asserted although the subject prosecution had seen [a] a verdict set aside, [b] extensive allegations relating to the proffering and disguising of false testimony, and [c] a reintroduction of the subject charge of disorderly conduct and eventual final dismissal not by trial verdict but *by motion.*

2. Whether the appellate erred by ignoring or otherwise avoiding any meaningful Iqbal plausibility analysis by the district court, albeit hugely flawed,

[continued] when such court ruled upon a motion for reconsideration that clearly pointed out applicable Heck bar exceptions as elucidated by Broussard, a noted Massachusetts Supreme Judicial Court ruling dating to 1949.

3. Whether the appellate court erred when it upheld the district court's "bare assertion" analysis as it related to Iqbal and the issue of plausibility – doing so by complete and utter silence on the issue – this in light of forty-one [41] allegations in the subject complaint speaking to false testimony by respondent O'Hara and its cover-up for over ten years with the aid of numerous co-defendants.

LIST OF PARTIES AND CORPORATE DISCLURE STATEMENT
Rules 14.1 and 29.6

Petitioner is Jeffrey L. Clemens, an individual having no parent or subsidiary corporations or entities affiliated or associated with him in regards to his petition and underlying case.

Respondent is Michael J. O'Hara, a person having no parent or subsidiary corporations affiliated or associated with him, either wholly-owned or otherwise, that are known to the petitioner.

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The original judgment of the First Circuit Court of Appeals is reproduced as Appendix A. The order of the First Circuit denying a petition for rehearing is reproduced as Appendix B. The memorandum and order of the United States District Court for the District of Massachusetts is reproduced as Appendix C while its later order denying a petition for rehearing is reproduced as Appendix D.

JURISDICTION

The original judgment of the First Circuit Court of Appeals was entered on October 6, 2022. A petition for rehearing, after much delay, was denied on March 2, 2023. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS

Rules

Federal Rules of Civil Procedure Rule 8 provides, in relevant part[2]:

> (a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
>
> (2) A short and plain statement of the claim showing that the pleader is entitled to relief;
>
> (d) PLEADING TO BE CONCISE AND DIRECT;
>
> (1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

Pleadings

The Second Amended Complaint of petitioner dated November 2, 2020 – what is now subject to review[1] – provides, in part [Pp. 5-6, ¶¶ 10-14; P. 9, ¶ 28; P. 16, ¶¶ 58-60, Pp. 17-19, ¶¶ 61-64,71-74];

10. That several minutes later (after plaintiff stepped away, returned to his vehicle, and drove off), the plaintiff was pulled over by Defendant O'Hara and joined thereafter by Officer Tim Goyette who, as learned later, had, at the time, just come from an interview with Shelly following what came to be known as her phone call to 9-1-1 [such interview was never reported];

[1] As is explained in the petitioner's Statement of the Case [Page 7], the subject complaint first saw a filing on June 11, 2018. However, given an injunction imposed on July 20, 2016, the case experienced two screenings by a magistrate judge in a period of over two years – without pleadings of any kind from any party – that essentially, in an all-encompassing and insisting way, and in painfully slow fashion, mandated that petitioner amend his complaint. As such, the plaintiff-petitioner seeks review of his *second* amended complaint. Ironically, in those two screenings, the court never once made a plausibility argument nor, for that matter, did the court cite Heck. Such "double standard", or whatever you want to call it, is now a clarion call for the present court to censure the First Circuit for its grossly deficient review of those proceedings and to send a clear message to all district court judges not to abuse Heck and Iqbal. *See* Case No. 18-mc-91252-IT, Document 12.

11. That O'Hara, after some questioning, left to go see Shelly [presumably] while Goyette remained with plaintiff who had earlier been instructed, by O'Hara, to meanwhile stand in front of his vehicle, which he did;

12. That after 20-25 minutes, O'Hara returned, approached and said to the plaintiff, "You are free to go." As the plaintiff was getting back in his vehicle, O'Hara, as he returned to his vehicle, paused, turned around and said, "By the way, you'll be getting a summons in the mail. You're being charged with impersonating a private investigator";

13. That as a result of O'Hara's last comment, the plaintiff paused and asked several questions as for what Shelly or others [presumably] said to him [O'Hara]. O'Hara said repeatedly, "I don't have to tell you anything." Just as plaintiff said, "Well, you're telling me I'm going to get a summons. What did these people [Shelly or others] say to you?", O'Hara said softly but firmly, "That's it."

14. That upon hearing, "That's it", Goyette shouted, "Fucker!" and lunged at the plaintiff. O'Hara put handcuffs on the plaintiff and drove him, without explanation, to the police station, later reporting that the plaintiff "got enraged", shouted, "I want to settle this fucking now" and "lunged" at O'Hara, all not true;

28. That at no time [did] plaintiff ever identify himself as "a private investigator"; he at all times said his name, "Jeffrey Clemens", and that he was "inquiring" about a "matter in Los Angeles" or a "dark blue minivan";

58. That on September 18, 2008, the Commonwealth commenced a trial against the plaintiff for disorderly conduct with the only witness available being Defendant O'Hara. Goyette, despite his participation in a deposition the day before, was not present nor made available;

59. That O'Hara's testimony at said trial was almost entirely a fabrication;

60. That Pfaff, by inviting O'Hara to sit in on the Goyette deposition the day before, effectively suborned perjury.

61. That O'Hara's testimony was the only evidence presented by the Commonwealth at the plaintiff's trial;

62. That the O'Hara testimony resulted in a verdict of guilty.

63. That Judge Moynahan immediately sentenced the plaintiff to a term of six months incarceration [the statutory maximum];

71. That the plaintiff never said to anyone on May 12, 2005, nor at any time before or after, that he was a private investigator;

72. That if Shelly, on May 12, 2005, informed O'Hara that the plaintiff said he was a private investigator then she lied.

73. That if Shelly Laveroni, on May 12, 2005, did *not* inform O'Hara that the plaintiff had said to her he was a private investigator then O'Hara lied;

74. That, either way, whether Shelly lied to O'Hara or O'Hara lied in his charging papers [May 13, 2005], a lie was told to a jury [September 18, 2008];

STATEMENT OF THE CASE

This case presents the question whether a Heck bar was properly applied or regarded and whether a so-called Iqbal plausibility analysis was properly or adequately conducted. Given the situation, as outlined below, the petitioner respectfully petitions for a writ of certiorari to review the judgment of the First Circuit Court of Appeals in this case.

I. The Facts

Although it appears our situation is unique, nearly all persons who have encountered or might encounter police or private citizen accusers can potentially experience the same or similar circumstances as the petitioner has. On May 12, 2005, Petitioner Clemens made a brief and simple inquiry to a certain resident of Scituate, Massachusetts, "Shelly", in regard to [then] current and ongoing civil litigation in Los Angeles. But having encountered an adverse party, the petitioner was asked to leave, and he did. However, the person with whom the inquiry was made called 9-1-1 and minutes later the petitioner was, without cause, pulled over, in his car, by Defendant Michael O'Hara, told to wait [upon arrival of a second officer] and, following an "investigation" by O'Hara [namely, after questioning our 9-1-1 caller], the petitioner was told that "[he] was free to go". But our story does not end there by any means.

O'Hara, however, took it upon himself to advise the petitioner that he was going to receive a summons in the mail for the charge of so-called Impersonating a Private Investigator [in actuality, no such charge exists; it is called Unlicensed Private Detective (UPI)]. Upon the petitioner asking Officer O'Hara about what

information was conveyed to him during his so-called "investigation", O'Hara cued the second officer, saying "That's it!", and the two officers immediately placed the petitioner under arrest, only later telling him he was being charged with Disorderly Conduct.

Following years of forestalled proceedings, Clemens filed suit in federal court on May 5, 2007, claiming false arrest and other violations. Following further forestalled proceedings, including discovery issues and an open motion for dismissal of the UPI, on September 18, 2008, Clemens was cast into a surprise trial for disorderly conduct [a hearing date was otherwise expected to address the UPI]. Even though there existed five [5] total witnesses [the 9-1-1 caller, her three neighbors and the second officer], Officer O'Hara was the only person to provide testimony based upon allegations, as argued by the petitioner in his 2007 civil action, nearly all of which were false.

Following such two-hour "surprise" trial, Clemens was found guilty by a jury of six and immediately and summarily sentenced to six months incarceration and taken into custody. Nine months later, upon motion by O'Hara, the petitioner's May 2007 civil action was dismissed under Heck. On July 8, 2010, the Massachusetts Court of Appeals vacated the September 18, 2008 verdict. On October 26, 2010 the Commonwealth of Massachusetts reintroduced the Disorderly Conduct charge [DO]. However, the prosecutor for the Commonwealth neither rescheduled nor conducted a retrial. On or about February 7, 2012, the petitioner motioned for dismissal of the DO and, finally, after years of "sitting" on the motion, the Hingham District Court [where the subject September 18, 2008 trial occurred] dismissed the DO on June 16, 2015. On June 11, 2018, the petitioner filed the subject lawsuit.

II. The Proceedings

As spoken to above, the petitioner's May 5, 2007 suit, filed in the U.S. District Court, District of Massachusetts, in Boston, was dismissed on May 22, 2009, Judge Richard Stearns presiding, upon a Rule 56 motion [by counsel to O'Hara] filed on January 9, 2009, literally as Petitioner Clemens sat in the Plymouth County [MA] jail for the September 18, 2008 DO trial verdict. On July 8, 2013, the petitioner filed a *second* action, in Boston, for malicious prosecution in regard to the DO charge. This action was later dismissed, on June 16, 2014, Judge F. Dennis Saylor presiding, for supposed lack of "favorable termination" [of the DO], with a further addition of an injunction [by Saylor] barring Petitioner Clemens from filing further actions without leave of the court. Clemens appealed the dismissal, and injunction, and on November 3, 2015, the First Circuit Court of Appeals upheld the dismissal [but leaving open the "favorable termination" aspect for a future filing] and furthermore overturned the subject injunction, originally sought by counsel to O'Hara, Attorney Stephen C. Pfaff, when he, in March 2014, sought dismissal of the petitioner's July 8, 2013 action. Pfaff again sought an injunction, on March 8, 2016, and, on July 20, 2016, Judge Saylor again granted the injunction. The petitioner again appealed, to the First Circuit, but the injunction was later upheld on June 19, 2017 despite the petitioner actually having received the requisite "favorable termination [of the DO] on June 16, 2015.

On June 11, 2018, the petitioner filed his third related action in regards to the DO, the subject case now before this court. However, the action fell victim to the injunction [which allowed for the court to review claims without any pleadings from the parties] and

languished for several years. Finally, on November 18, 2020, the U.S. District Court/Boston, by ruling of a magistrate judge on October 7, 2020, allowed for the DO case to proceed but it meanwhile dismissed all parties and all claims [which included a 42 U.S.C. § 1983 claim] except a malicious prosecution claim against Defendant-Respondent O'Hara. O'Hara was served process in early 2021 and his counsel, Stephen Pfaff, motioned for Rule 12 dismissal on February 25, 2021. The U.S. District Court, on June 10, 2021, Judge F. Dennis Saylor presiding, granted the Pfaff motion citing a Heck bar.

With regards to the [second] Saylor dismissal, the petitioner motioned for reconsideration on June 21, 2021, calling to the court's attention *Broussard* and its Heck bar exception in the case of false testimony. Such motion was denied on June 22, 2021, with Saylor further claiming that the petitioner's allegations, against O'Hara, were mere "bare assertion[s]" and not plausible, going so far as to cite Iqbal. The petitioner again motioned for reconsideration, a second time, on June 30, 2021, citing not *one* [as Saylor asserted was the case] but **forty-one [41] facts** in the subject complaint that spoke to O'Hara's false testimony and its longtime cover-up. Saylor denied the motion on August 3, 2021. The petitioner meanwhile filed a timely appeal on July 8, 2021.

On October 7, 2022, the First Circuit upheld the June 10, 2021 dismissal by Saylor. On October 25, 2022, Clemens petitioned the appellate court for a rehearing. Such petition was denied on March 2, 2023. On or about May 4, 2023, Petitioner Clemens requested an extension of time to file his appeal to this court. Justice Ketanji Jackson granted extension on May 31, 2023, providing for a July 31, 2023 deadline. This petition follows.

REASONS FOR GRANTING CERTIORARI

I. The First Circuit Offends Heck.

This argument is a simple one. The subject prosecution saw no (lasting) conviction nor was the subject complaint filed while petitioner was in custody. There exists no habeas corpus issue nor 42 U.S.C. § 1983 claim. Heck, when it comes down to it, is about as relevant to this case as Roe v. Wade [except that a seemingly intentional and virtual abortion of the petitioner's claim[s] by the lower court(s) ought not to have been legal or permitted]. It is just as important to *not* apply Heck where it does not apply as it is to properly apply Heck. This means, of course, that our argument today undoubtedly falls squarely upon a Broussard discussion. Ironically, the district court almost gleefully cites Broussard, yet wholly ignores its letter and intent.

As one can surely see in Appendix C [Saylor Memorandum and Order Dated June 10, 2021], Broussard clearly and indisputably allows for the pursuit of claims if a verdict – subject to set aside – is alleged to have solely been the result of false testimony. As Saylor indeed cites [yet ignores], Broussard states, in relevant part: "[A] conviction of the accused by a tribunal to which the complaint was made, although reversed on appeal, conclusively establishes the existence of probable cause ***unless the conviction 'was obtained solely by false testimony of the defendant [charged with malicious prosecution]*** or is impeached on the grounds of fraud, conspiracy or subordination in its procurement.'" Broussard v. Great Atlantic & Pacific Tea Co., 324 Mass 323, at 324 (quoting Dunn v. E.E. Gray Co., 254 Mass 202, 202-204 (1926) [Emphasis added]

But to throw a nut in the mixer, Judge Saylor – with the First Circuit later affirming – decides to bring it upon himself to assert a lack of plausibility with the petitioner's claim of false testimony [no party actually opposed on plausibility grounds]. Judge Saylor, it is important to observe, does not attack plausibility until his *second* order dated June 22, 2021 [Appendix D], that is, only in response to a petitioner's motion for reconsideration, an act that essentially sandbagged the petitioner, requiring him to eventually file a ***second*** motion for reconsideration on June 30, 2021 citing forty-one facts from his complaint in support of a false testimony theory, which Saylor ceremoniously denied *without* a memorandum on August 3, 2021 [*See* Document 18, Case No. 20-cv-12083], that is, without explaining how he [Saylor] could ever possibly conclude that Clemens makes a "bare assertion" [as for false testimony] amounting to "nothing more than a formulaic recitation of the elements of a...tort..." [*See* Appendix D] We are now left to examine Saylor's use of or otherwise reference to the Iqbal case upon which the First Circuit then indirectly relies.

II. The First Circuit Offends Iqbal.

What we must keep in mind is that the subject September 18, 2008 trial, on which the Saylor court wrongly focuses, represents only the ***first half*** of the subject malicious prosecution. The subject charge of malicious prosecution was not ultimately disposed of by *verdict* but, upon reintroduction, was dismissed by *motion*, the implication being there existed no probable cause to try the charge *again* [else, of course, we are looking at an unstated fear, by the prosecution, for the detection of O'Hara's prior false testimony if, say, other witnesses were given opportunity to testify].

And so, we must now examine the Saylor court's Iqbal analysis [or, rather, lack of it]. To start, we must cite FRCP Rule 8, wherein nowhere does it state the word "plausible". Such a requirement is purely a theoretical and analytical construction of the courts, not Congress. Plausibility is all fine and dandy, but it must not offend Rule 8 which states, in relevant part:

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(2) A short and plain statement of the claim showing that the pleader is entitled to relief;

(d)(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

To remind our beloved reader, petitioner has provided a listing of sixteen [16] allegations, from his complaint [*See* Pleadings, Pp. 2-8], that speak to the general context of his situation with the Scituate Police, mainly, Defendant-Respondent O'Hara. It is readily apparent, by reading Appendices A-D, that the lower court[s] did not regard any of these sixteen [16] allegations much less the other roughly 25 or so allegations in the subject complaint, otherwise listed in Document 18, Case No. 20-cv-12083 [the subject case].

Obviously, the First Circuit fails miserably to debunk a false testimony theory. That court reveals its hand when, in its October 6, 2022 Judgment [Appendix A], it states – and this is all it states: "After *careful* review of the record and the submissions of the parties, we affirm the judgment of dismissal substantially for

the reasons set forth in the district court's thorough June 10, 2021 order of dismissal and June 22, 2021 order denying reconsideration" [emphasis added], forgetting, of course, Saylor's August 3, 2021 order supposedly addressing the 41 allegations. The question we must ask: What would Iqbal say about the forty-one allegations that the petitioner cites in his second motion for reconsideration that speak to false reporting, false testimony and a cover up of such falsity, or simply the sixteen stated herein? [*See* Document 18, Case No. 20-cv-12083] Any reasonable person would agree that it was "plausible" that Defendant-Respondent O'Hara, with the aid of others, particularly their omissive acts, falsely reported the probable cause for the charge of disorderly conduct levied against the petitioner, yes, again, for over ten years. Not only was the petitioner harmed, but the public-at-large. Remedy is due.

III. The First Circuit Offends Public Trust

Forty-one allegations does not a bare assertion make. Shakespeare could not have said it any better. Although too numerous to list and discuss in this petition – but perhaps in future briefing – these forty-one allegations are, for the most part, wholly indisputable. One simply needs to consult or otherwise review, again, Document 18 on the lower court record, filed June 30, 2021 and entirely ignored by the lower court[s]. The petitioner will not burden the court with a full recitation of said exhaustive list – again, perhaps better left for another day – but, rather, advises the reader, on his or her own time, to give Document 18 a quick look and see for him or herself the absurdity of Judge Saylor's assertion, as for plausibility, of a "bare assertion" and "formulaic recitation of the elements of

a [tort]", going so far as to say the facts pled in the subject complaint does not "possess enough *heft* to show that plaintiff is entitled to relief" [emphasis added] [*See* Appendix D], otherwise pure hogwash on part of the district court, a reckless conclusion which the Supreme Court must now condemn and censure since the lower court[s] had the gumption to cite Iqbal – and, too, cases cited within Iqbal, like Maldonado – in a vain attempt to declare the subject complaint as "insufficient". Rule 8 simply does not require the petitioner to plead any more or better than he has.

In all fairness, the Saylor court did one thing right: citing Nieves and the four [4] elements of a malicious prosecution claim. As Saylor so dutifully reports:

> To establish a claim of common-law malicious prosecution , a plaintiff must show (1) the commencement or continuation of a criminal proceeding against the eventual plaintiff at the behest of the eventual defendant; (2) the termination of the proceeding in favor of the accused; (3) ***an absence of probable cause for the charges***; and (4) actual malice. *Nieves* v. *McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) [emphasis added].

As it appears, in the pleadings of O'Hara, that elements (1), (2) and (4) have not been challenged – and they have otherwise been met – then that leaves only (3) [lack of probable cause] as for this petition's focus. And with 41 allegations speaking to falsity, the picture is quite clear. Petitioner is entitled to the malicious prosecution claim. Remedy is due.

SUMMARY

This petition presents three [3] principal arguments, that: [1] the lower court(s) wrongly applied the Heck bar to the petitioner's claim of malicious prosecution, [2] the lower court(s) failed to present a full, fair, clear or complete Iqbal plausibility analysis, and [3] the lower court(s) wrongly concluded – and this is an absolute travesty of justice – that the petitioner's forty-one [41] allegations supporting a false testimony theory was but a "bare assertion".

First and foremost, the lower court(s) were wholly incorrect in stating or implying that the petitioner failed to state a plausible claim for malicious prosecution, one that saw a 10-plus year history and no (lasting) conviction. Remedy is due the petitioner who has otherwise, in the subject complaint, firmly established that false reporting, false testimony and acts to cover up such falsity were all at the root of such 10-plus year odyssey.

The actions of the lower court(s) – whose short and mostly conclusory declarations were brazen at best – were themselves "bare assertions", grossly deficient, reckless and utterly embarrasses the federal judiciary. The Supreme Court must not join what we can only call the Bury-Clemens-At-All-Costs party [at the public's expense] as is what has occurred in Clemens v. O'Hara. The Supreme Court must act now to prevent a travesty.

CONCLUSION

The decisions of the lower court(s) hugely offend both Heck and Iqbal whose intents, we might reasonably assert, do not preclude bringing an action for malicious prosecution when, for one, no conviction exists, and, two, allegations abound as for the falsity of

the subject charge. We cannot stress these two [2] realities enough. The Supreme Court should and must reverse the orders of the First Circuit and, in turn, clarify, with respect and regard to Broussard v. Great Atlantic & Pacific Tea Co., when, where and how its Heck and Iqbal cases are properly applied. As the subject case demonstrates, a clear and specific analytical framework – call it an elements test – is much needed to avoid wrongful dismissal of not only the subject case but the multitude of cases that are sure to follow. This court, with Clemens v. O'Hara, now has a prime opportunity to formulate such a framework, to set in stone a new plausibility standard so that petitioners like Clemens, who has had to endure numerous prior appeals, do not have to spend years litigating and not ever, in those years, be given opportunity, through court process, to cross-exam his accusers nor have a speedy and fair trial in a state court nor address grievances in a court of law, violations of which Clemens has long suffered. Reversal is not only sensible, fair and proper, but is wholly mandated. Future litigants who face police and private party accusers deserve no less.

Respectfully Submitted,

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July 2023