No. 18-485

In The
Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, Individually and as Special District Attorney for the County of Rensselaer, New York, aka TREY SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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POINT I

THE SECOND CIRCUIT'S ANALYTICAL FRAMEWORK TO DETERMINE THE ACCRUAL OF PLAINTIFF'S DUE PROCESS FABRICATION OF EVIDENCE CLAIM WAS PROPER

The Petition for Certiorari asserts that the Second Circuit, in its August 3, 2018 Decision, failed to identify the right at issue, then compare that right to the most analogous tort at common law. (Pet. 23-24; 26). This is not the case. The Circuit Court pointedly identified the right, arising from the Fifth and Fourteenth Amendments' Due Process Clauses, "not to be deprived of liberty as a result of the fabrication of evidence by a government officer. . . ." (Pet. App. 10a). The Circuit Court also concluded that this due process claim "is different from a malicious prosecution claim." *Id*. at 8a, explaining:

> Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. **Indeed, the harm – and the due process violation – is in the use of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.** (Emphasis supplied).

> We thus conclude that under the circumstances here, the §1983 action based on fabrication of evidence occurred when McDonough (1) learned of the fabrication of the evidence and its use against him in criminal proceedings, and (2) was deprived of a liberty interest by his arrest and trial. For McDonough, this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecutor's evidence had been presented. **"[J]udicial verification that the defendants' acts were wrongful" is not required, and thus accrual did not have to await McDonough's acquittal.** (Emphasis supplied).
>
> In contrast, we have long held that malicious prosecution claims brought pursuant to §1983 do not accrue until the underlying criminal proceedings against the plaintiff terminate in his favor. *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010). **Favorable termination is an element of malicious prosecution under New York law and also for the Constitutional-based tort. *Id*. A plaintiff therefore cannot have a complete cause of action unless and until the criminal proceedings against him terminate favorably.** (Emphasis supplied).

Under the traditional federal rule of accrual, "the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not

then known or predictable." *Wallace v. Kato*, 549 U.S. 384, 391 (2007). See also *Clark v. Iowa City*, 87 U.S. 583, 859 (1897); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Bay Area Laundry and Dry-Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 201 (1997); *Singleton v. City of N.Y.*, 632 F.2d 185, 191 (2 Cir. 1980); *Veal v. Geraci*, 23 F.3d 722, 724-725 (2 Cir. 1994).

Thus, the Second Circuit properly concluded, in accordance with the traditional federal accrual rule, that the plaintiff's due process fabrication of evidence claim was not analogous to a §1983 malicious prosecution claim since "absence of probable cause" and "favorable determination," integral to the §1983 malicious prosecution claim, are not prerequisites to a due process fabrication of evidence claim. See *Garnett v. Undercover Officer C39*, 838 F.3d 265, 278-280 (2 Cir. 2016); *Ricciuti v. N.Y. City Trans. Auth.*, 124 F.3d 123, 130-131 (2 Cir. 1997); and *Rentas v. Ruffin*, 816 F.3d 214, 224-225 (2 Cir. 2016). The two are discrete claims and accrue at different times. *Id*.

POINT II

THE SECOND CIRCUIT'S ACCRUAL RULE WILL NOT PREJUDICE A CRIMINAL DEFENDANT

The petitioner expresses concern that the application of the traditional federal rule of accrual to discrete §1983 claims will burden and potentially prejudice the criminal defendant and create a potential for conflicting civil and criminal judgments. (Pet. 5-6). We submit

petitioner's concern is overstated. This issue has been uniformly addressed by the Supreme Court and the Second Circuit.

In *Wallace v. Kato*, 549 U.S. 384 (2007), the Supreme Court affirmed the Seventh Circuit's holding that where an arrest is followed by criminal proceedings, a §1983 claim for false arrest accrues when the claimant becomes detained pursuant to legal process. *Id*. at 389-390. The petitioner in *Wallace* contended that, under *Heck v. Humphrey*, 512 U.S. 477 (1994), his claim did not accrue until the state dropped the charges against him. *Id*. at 392. This Court rejected this argument, stating:

> What petitioner seeks . . . is an adoption of a principle that goes well beyond *Heck*: that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious.

Id. at 393.

The Court also addressed the petitioner's concern for prejudice and/or conflicting civil and criminal judgments:

> If a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil

> action until the criminal case or the likelihood of a criminal case has ended.

Id. at 393-394.

Significantly, the Second Circuit adopted this approach prior to *Wallace*. See *Singleton v. City of N.Y.*, 632 F.2d 185, 193 (2 Cir. 1980) and *Mack v. Varelas*, 835 F.2d 995, 999-1000 (2 Cir. 1987); see also *Smith v. Campbell*, 782 F.3d 393, 394-396 (2 Cir. 2015). There is, in short, no evidence of any untoward effects from the prudential approach to this issue.

POINT III

PLAINTIFF'S §1983 DUE PROCESS CLAIM IS NOT A CONTINUING TORT

The Second Circuit rejected petitioner's argument that his prosecution constituted a "continuing violation." (Pet. App. 16a-17a). Petitioner contends this was error, citing Justice Ginsberg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 280 (1994); and the Seventh Circuit's decision in *Manuel v. City of Joliet*, 903 F.3d 667, 669 (7 Cir. 2018) (Pet. 22). We respectfully submit that the Second Circuit's determination of this issue is correct and conforms with this Court's jurisprudence. As the Court observed, through Justice Scalia, in *Wallace v. Kato*, 549 U.S. 384, 391 (2007):

> Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitation commences to run, when the wrongful act or omission results in damages. **The cause of action accrues even though**

> **the full extent of the injury is not then known or predictable")** (Interior quotes and citations omitted) (Emphasis supplied).

In *Manuel v. City of Joliet*, 137 S.Ct. 911, 923 (2017), Justice Alito, joined by Justice Thomas in dissent, also addressed this issue:

> The protection provided by the Fourth Amendment continues to apply after "the start of legal process" . . . if legal process is understood to mean the issuance of the arrest warrant or what is called a "first appearance" under Illinois law and an "initial appearance" under federal law . . . **But if the Court means more – specifically that new Fourth Amendment claims continue to accrue as long as pretrial detention lasts – the Court stretches the concept of a seizure much too far.** (Emphasis supplied).

The Second Circuit's treatment of this issue is in accord with these observations by Justices Scalia and Alito in *Wallace* and *Manuel*; *Singleton v. City of N.Y.*, 632 F.2d 185, 191-192 (2 Cir. 1980) ("Nothing prevented Singleton from bringing suit during the period when the criminal prosecution against him was pending.").

POINT IV

THE SECOND CIRCUIT APPLIES THE TRADITIONAL ACCRUAL RULE WITH RESPECT TO §1983 "*BRADY*" CLAIMS

With respect to §1983 "*Brady* claims," the petitioner comments:

> Although the courts of appeals are divided over the precise statute of limitations rule to apply in Brady cases, *none* of those courts has held that the statute of limitations begins to run as soon as the criminal defendant discovers that exculpatory evidence has been withheld.

Pet. 21.

Nor does the Second Circuit. It is the rule in the Second Circuit that a §1983 claim based upon a *Brady* violation, by the prosecutor's failure to disclose exculpatory or impeaching evidence, does not mature *unless* there is a conviction. *Poventud v. City of N.Y.*, 750 F.3d 121, 132-134, 156 n.4 (2 Cir. 2014); *Amaker v. Weiner*, 179 F.3d 48, 51-52 (2 Cir. 1999). In other words, if the underlying criminal prosecution has terminated in a criminal defendant's favor, a §1983 *Brady* claim will not have matured because an essential element of the §1983 claim, a conviction, is missing. *Id*.

POINT V

PETITIONER'S §1983 DUE PROCESS FABRICATION OF EVIDENCE CLAIM WAS SUBSUMED IN HIS §1983 MALICIOUS PROSECUTION CLAIM WHICH WAS DISMISSED BY THE DISTRICT COURT FROM WHICH NO APPEAL WAS TAKEN

It is petitioner's position that a §1983 due process fabrication of evidence claim takes two discrete forms, with differing accrual rules: one where there is untainted evidence establishing probable cause; another, where the fabricated evidence forms the basis for probable cause. Petitioner has acknowledged that the former is subject to the traditional federal accrual rule, maturing when a criminal defendant learns the evidence was fabricated and that evidence causes some injury; and the latter, accruing only upon a favorable termination of the underlying criminal proceeding. Petitioner has pointedly alleged in this litigation that his §1983 due process fabrication of evidence claim "is a quintessential malicious prosecution claim based on false evidence, i.e., one without probable cause for nefarious purpose." Consequently, the due process claim is merely a duplication of his §1983 malicious prosecution claim.

However, petitioner's §1983 malicious prosecution claim was dismissed by the district court (Pet. App. 109a-114a) and no appeal was taken by petitioner from that determination. Accordingly, the issue of the accrual of petitioner's §1983 due process fabrication of evidence claim, cast congruently in the form of a

"quintessential malicious prosecution claim," was subsumed in plaintiff's §1983 malicious prosecution claim and effectively abandoned when petitioner failed to appeal the dismissal of that claim to the circuit court. *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Rehnquist, C.J.) (plurality opinion); 280 (Ginsberg, J.) (concurring opinion).

In *Albright*, an arrest warrant was issued charging Albright with sale of a substance that "looked like" an illegal drug. Albright surrendered himself to Officer Oliver and was released after posting bond. At a preliminary hearing, Officer Oliver testified Albright sold a look-alike substance to a third party. The court found probable cause to hold Albright for trial but later dismissed the prosecution on the ground that the charge did not state a crime.

Albright filed a §1983 action alleging that Oliver deprived him of substantive due process under the Fourteenth Amendment to be free from criminal prosecution except upon probable cause. District Court granted Oliver's motion for dismissal on the ground that the complaint did not state a claim.

The Seventh Circuit affirmed relying on *Paul v. Davis*, 424 U.S. 693 (1976) holding that a prosecution without probable cause is actionable only if accompanied by incarceration, loss of employment or some other "palpable consequences." *Albright v. Oliver*, 975 F.2d 343, 346-347 (7 Cir. 1992) (" . . . state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest."). The Supreme Court affirmed on different grounds, stating:

> We hold that it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged.

Id. at 271.

* * *

> Where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (Citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).
>
> We think this principle is likewise applicable here. The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.

Id. at 273-274.

* * *

> We have in the past noted the Fourth Amendment's relevance to the deprivation of liberty that go hand in hand with criminal prosecutions. See *Gerstein v. Pugh*, 420 U.S. 103 . . . (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest.

Id. at 274.

Justice Ginsberg, in a concurring opinion, agreed with the plurality opinion that Albright's claim "is properly analyzed under the Fourth Amendment rather than under the heading of substantive due process." *Id*. at 276.

Justice Souter, in a separate concurring opinion, also agreed that Albright "has not justified recognition of a substantive due process violation in his prosecution without probable cause," *id*. at 296, stating further:

> Justice Harlan [in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion)] could not infer that the due process guarantee was meant to protect against insubstantial burdens, and **we are not free to infer that it was meant to be applied without thereby adding a substantial increment to protection otherwise available. The importance of recognizing the latter limitation is underscored by pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct and needlessly imposing on trial courts the unenviable burden of reconciling well-established jurisprudence under the Fourth and Eighth Amendments** with the ill-defined contours of some novel due process right. (Emphasis supplied).
>
> This rule of reserving due process for otherwise homeless substantial claims no doubt informs those decisions, see *Graham v. Connor*, 490 U.S. 386 (1989); *Gerstein v. Pugh*, 420 U.S.

> 103 (1975); and *Whitley v. Albers*, 475 U.S. 312, 327 (1986), in which **the Court has resisted relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed.** This case calls for just such restraint, in presenting no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already. (Emphasis supplied).

Id. at 287-288.

This rationale of the Court fortifies our contention that, based on petitioner's allegations, the §1983 claim asserted is a Fourth Amendment malicious prosecution claim whose dismissal has not been appealed and the sufficiency of which, including its accrual, is not before the Court.

CONCLUSION

For all of the above reasons, separately and together, this case is not an appropriate vehicle for reviewing the question presented. The Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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