1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - - - - - - - - - - - - - - x
3 ELIJAH MANUEL, :
4 Petitioner : No. 14-9496
5 v. :
6 CITY OF JOLIET, ILLINOIS, ET AL., :
7 Respondents. :
8 - - - - - - - - - - - - - - - - - - x
9 Washington, D.C.
10 Wednesday, October 5, 2016
11
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:00 p.m.
15 APPEARANCES:
16 STANLEY B. EISENHAMMER, ESQ., Arlington Heights, Ill.;
17 on behalf of the Petitioner, as appointed by this
18 Court.
19 ILANA H. EISENSTEIN, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; for
21 United States, as amicus curiae, supporting the
22 Petitioner.
23 MICHAEL A. SCODRO, ESQ., Chicago, Ill.; on behalf of the
24 Respondents.
25

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 next in Case 14-9496, Manuel v. The City of Joliet.

5 Mr. Eisenhammer.

6 ORAL ARGUMENT OF STANLEY B. EISENHAMMER

7 ON BEHALF OF THE PETITIONER,

8 AS APPOINTED BY THIS COURT

9 MR. EISENHAMMER: Mr. Chief Justice, and may

10 it please the Court:

11 I would like to make three initial points.

12 First, what this case is about is whether

13 the Petitioner may bring a Fourth Amendment claim for

14 unlawful detention pursuant to legal process.

15 Second, this case is not about whether the

16 decision to prosecute is governed by due process, the

17 Fourth Amendment, or any other amendment.

18 And third, this case is not about whether

19 there's some constitutional tort named malicious

20 prosecution. All we ask the Court to do is to affirm

21 your numerous -- numerous suggestions made in Albright

22 that the Fourth Amendment supports this cause of action,

23 and bring the Seventh Circuit in line with all other --

24 with the Tenth Circuit ruling on this.

25 CHIEF JUSTICE ROBERTS: Well, but you need

1 to get past the statute of limitations problem and to do
2 that, you need to characterize it, as I understand it,
3 as a malicious prosecution claim. Otherwise, it's
4 time-barred.
5 MR. EISENHAMMER: What -- what I need --
6 what we need to do is determine the -- not the statute
7 of limitations, which is two years, set by State --
8 State -- by the State, but the accrual period. And in
9 Wallace, the Court has said that we -- you normally look
10 to, not the State law, but it's a Federal question, that
11 you normally look in reference to the common law.
12 And in Wallace, they did say that that would
13 be malicious prosecution that does have as an accrual
14 period favorable termination.
15 CHIEF JUSTICE ROBERTS: But favorable
16 termination has nothing to do with the Fourth Amendment
17 claim, right? And whether your prosecution is just
18 favorably terminated or not, the Fourth Amendment claim
19 and, it seems to me, the accrual begins when your Fourth
20 Amendment rights are violated with, say, an illegal
21 search.
22 Whether you eventually are convicted or
23 acquitted, really, you have a claim for an illegal
24 search if there's been an illegal search without regard
25 to favorable termination.

1 MR. EISENHAMMER: But our claim,
2 technically, here is it is detention without probable
3 cause, not the search that occurred when he's -- when he
4 was arrested.
5 CHIEF JUSTICE ROBERTS: Right. But I mean,
6 regardless, whatever the Fourth Amendment claim is.
7 MR. EISENHAMMER: Right. And that detention
8 went through for 48 days after he -- after he became
9 subject to legal process. I guess --
10 JUSTICE SOTOMAYOR: Was he subject to proper
11 legal process? If legal process is corrupted because
12 there isn't -- I always understood legal process as used
13 in Wallace and earlier of our cases as an independent
14 intermediary, generally a judge or a grand jury or
15 someone who looks at the facts as they exist and
16 independently makes a determination whether probable
17 cause has happened.
18 If you have a corrupted legal process where
19 what the independent adjudicator is looking at is not
20 true because it's based on false information, have you
21 received legal process -- proper legal process?
22 MR. EISENHAMMER: You haven't received
23 proper legal process. You're -- you're correct. It's
24 been corrupted because --
25 JUSTICE SOTOMAYOR: And so I thought if

1 you've never received it, then doesn't your time to
2 accrue for the improper detention occur when you're no
3 longer detained? Here, it was the not guilty; correct?
4 MR. EISENHAMMER: Correct.
5 JUSTICE SOTOMAYOR: So it's not a question
6 of whether -- when it starts. The question is: When
7 does the illegal detention finish?
8 MR. EISENHAMMER: Correct. Correct.
9 JUSTICE SOTOMAYOR: And because you have --
10 there's been no intermediate force, no intermediary
11 stepping in and breaking the chain of causation;
12 correct?
13 MR. EISENHAMMER: Correct. That's correct.
14 JUSTICE SOTOMAYOR: Am I understanding your
15 argument correctly?
16 MR. EISENHAMMER: Yes. You are, perfectly.
17 I wish I could take credit for that, but --
18 (Laughter.)
19 JUSTICE SOTOMAYOR: No, but I'm -- I -- I --
20 the only way I could think of it was thinking of it in
21 this way, because you're not claiming malicious
22 prosecution or not.
23 MR. EISENHAMMER: Right. Right. You know,
24 Wallace talked about malicious prosecution. And this is
25 a larger issue of 1983 jurisdiction, which is, you know,

1 what is a proper accrual period for a constitutional --
2 a constitutional violation. We don't -- we're not --
3 JUSTICE SOTOMAYOR: So detention without
4 probable --
5 MR. EISENHAMMER: -- cause. Right. And you
6 don't -- you're not -- you're not straightjacketed into
7 a particular common-law provision. You're -- you have
8 the right to fashion one that does justice, and this is
9 the one that does -- does justice.
10 CHIEF JUSTICE ROBERTS: I was confused. I
11 thought there was a malicious prosecution claim here,
12 mostly because the question presented says, "Whether an
13 individual's Fourth Amendment right to be free from
14 unreasonable seizure continues beyond legal process so
15 as to allow a malicious prosecution claim based upon the
16 Fourth Amendment."
17 MR. EISENHAMMER: Yes. But that's -- that's
18 just a label, and that's what -- what the court, at
19 least in Wallace, has used as a label for talking about
20 these type of claims, and in other -- in Gerstein, too.
21 It's just -- it's just a label to, in a sense,
22 distinguish this case from detention without legal
23 process.
24 JUSTICE KENNEDY: Let me give you a
25 hypothetical. This is actually close to this case.

1 Officer fabricates evidence in order to arrest and book
2 the defendant. Then there's a Gerstein hearing within
3 48 hours. Evidence is still fabricated; same fabricated
4 evidence is introduced. He's held for three months.
5 Then there's a pretrial suppression hearing. The
6 evidence is still fabricated, and he's still held for
7 two more months. Then there's a trial. Evidence is
8 still fabricated and he's convicted and he's held for
9 six more months. Then there's an appeal filed, and then
10 suddenly they find out the evidence was fabricated
11 and -- and the charges are dismissed.
12 Fourth Amendment violation for the entire
13 detention?
14 MR. EISENHAMMER: No. We would say the
15 Fourth Amendment -- at least based on your cases -- the
16 Fourth -- the Fourth Amendment claim ends at conviction.
17 JUSTICE KENNEDY: Okay.
18 MR. EISENHAMMER: And then the due process
19 claim or whatever.
20 JUSTICE KENNEDY: Why is the trial on
21 conviction any different than the Gerstein hearing?
22 They're -- they're both a legal process. There's an
23 inquiry. Why is it that the Fourth Amendment applies
24 after the Gerstein hearing but not after the conviction?
25 MR. EISENHAMMER: One reason is that the

1 Gerstein -- the Gerstein hearing is a nonadversarial
2 hearing, so it would be a -- a grand jury proceeding.
3 While a -- a conviction, in a sense, presumes that
4 you're -- you're -- you -- you are -- you are held with
5 probable cause, and then you really have a due process
6 claim after that.
7 JUSTICE KENNEDY: Under malicious
8 prosecution law in the States generally, just as a
9 general principle, would there be a malicious
10 prosecution claim for the fabricated evidence in the
11 Gerstein case or in the pretrial suppression?
12 MR. EISENHAMMER: I believe -- I believe so.
13 JUSTICE KENNEDY: So then they would be over
14 with, so at least there's a legal recognition that there
15 can be a malicious prosecution claim in the Gerstein
16 hearing.
17 MR. EISENHAMMER: No. It's really a
18 Fourth -- well, here, it's a Fourth Amendment claim.
19 We're not -- we're not raising --
20 JUSTICE KENNEDY: I'm asking if, under State
21 laws, the tort law generally, you can bring a malicious
22 prosecution claim if there's fabricated evidence
23 produced at the Gerstein hearing that results in --
24 MR. EISENHAMMER: In your release?
25 JUSTICE KENNEDY: -- that results in your

1 detention.

2 MR. EISENHAMMER: Well, yes --

3 JUSTICE KENNEDY: That's why there's damage

4 and you're suing.

5 MR. EISENHAMMER: Right. But you have to

6 be -- there has to be a favorable termination in order

7 for you -- it's an element of -- of State court

8 malicious prosecution, so you need to be --

9 JUSTICE KENNEDY: Okay. It's terminated six

10 months -- or six weeks later.

11 MR. EISENHAMMER: It would be a malicious --

12 that would be a malicious prosecution claim under State

13 law.

14 JUSTICE GINSBURG: Well, why do you make the

15 cutoff conviction? If it turns out, even on habeas,

16 that the police have lied all along and there was never

17 any basis for holding this person, why doesn't -- why

18 don't you have your Fourth Amendment claim until the

19 point where you're released from this unlawful custody?

20 MR. EISENHAMMER: You -- you could if you --

21 if you ruled that way. Generally, this Court has ruled

22 that after conviction, there is -- there is due process,

23 your trial rights have been violated, so that has been a

24 different amendment that you've gone under. In this

25 case --

1 JUSTICE GINSBURG: It's the same right.
2 It's the right you had from the very beginning.
3 MR. EISENHAMMER: It could be a -- it could
4 be a Fourth Amendment right. You could have more than
5 one amendment cover more than one -- the same set of
6 facts.
7 CHIEF JUSTICE ROBERTS: Well, but there's
8 just a different consequence to whether you terminate a
9 Fourth Amendment right or a due process right under
10 Parratt v. Taylor.
11 MR. EISENHAMMER: Well, we're claiming it's
12 a Fourth Amendment right.
13 CHIEF JUSTICE ROBERTS: Well, I know. But
14 you just answered in response to the question that one
15 could be both. But if it's both --
16 MR. EISENHAMMER: Yes, it could be both.
17 Usually -- or at least reading Justice Kennedy's
18 concurrence, it appeared that the due process
19 provision -- the due process claim dealt with the issue
20 of whether to prosecute, as opposed to this issue, which
21 is the decision to hold somebody, detain somebody,
22 pending a decision to prosecute or a trial. So it's the
23 Fourth Amendment that really covers this rather than due
24 process.
25 JUSTICE SOTOMAYOR: What happens to the

1 person who's let out on bail? Are they out of luck
2 under your theory?
3 MR. EISENHAMMER: No. No.
4 JUSTICE SOTOMAYOR: Are you defining
5 "detention" as broadly as Justice Ginsburg was?
6 MR. EISENHAMMER: Yes. And in Gerstein --
7 and in Gerstein, the Court did make recognition that --
8 that detention could go beyond being released, depending
9 on the conditions of the release. So it's not just -- I
10 would say it's not just Justice Ginsburg's concurrence.
11 It was this Court's opinion in Gerstein that that was a
12 possibility.
13 JUSTICE GINSBURG: Can you explain why, even
14 if we accept your theory that -- that the unlawful
15 detention continues until he's released, why shouldn't
16 the statute of limitations trigger the -- when he is
17 initially arrested? Why -- why should the trigger for
18 the statute of limitations be different just because we
19 label this Fourth Amendment --
20 MR. EISENHAMMER: I think there's -- there's
21 some good reasons for that. They were expressed in
22 Heck, which applies in this particular case, too. You
23 don't want to have parallel -- parallel litigation. You
24 don't want to have conflicting decisions between the
25 State and the criminal court, and you don't want to --

1 you don't want to have a collateral attack. That
2 collateral attack works to the detriment of -- of the
3 prosecution and to the defense in the case.
4 I think Justice Kagan's opinion in Kelly
5 illustrates the harm that could happen to the
6 prosecution if you allow someone to collaterally
7 attack -- use a sophisticated attorney to collaterally
8 attack the decision on probable cause while the case --
9 while the criminal case is pending. If it works to the
10 detriment of the prosecution --
11 JUSTICE GINSBURG: Mr. Eisenhammer, why
12 should we even get to these questions? As I understand
13 this case, the Seventh Circuit does something, says
14 something that no other circuit does, which is to say
15 that they say that there's no Fourth Amendment claim
16 under Section 1983 at all, full stop.
17 If we think that that's wrong, oughtn't we
18 to just send everything else back to the Seventh Circuit
19 to decide what they think the Fourth Amendment claim
20 looks like? In other words, what elements it has, what
21 accrual date it has, anything that they think about this
22 Fourth Amendment claim, send it back to them, having
23 told them that they're wrong about whether this Fourth
24 Amendment claim exists. Why isn't that -- I mean, all
25 this other stuff, the Seventh Circuit hasn't told us

1 what they think about it. Circuits are split on it. It
2 hasn't really been briefed because the principal
3 question has been whether there is a Fourth Amendment
4 claim. Why shouldn't we just send it back to them to
5 decide?
6 MR. EISENHAMMER: I would be in agreement
7 with that, because --
8 JUSTICE KAGAN: You would be in agreement?
9 MR. EISENHAMMER: I would be in agreement
10 with that.
11 JUSTICE KAGAN: I wasn't sure. I thought
12 that you were arguing.
13 MR. EISENHAMMER: I only -- only -- only in
14 response to the question. So I think the question we've
15 raised is solely the issue of does the Fourth Amendment
16 cover detentions pursuant to legal process?
17 JUSTICE ALITO: But don't we have to know --
18 I'm sorry.
19 JUSTICE SOTOMAYOR: Without legal process.
20 MR. EISENHAMMER: Without -- I'm sorry.
21 With -- no, with. With legal --
22 JUSTICE SOTOMAYOR: You're saying it's
23 improper legal process.
24 MR. EISENHAMMER: Yes. But it's still a
25 legal -- it's still a legal process. It was corrupted,

1 but it was still started with that.

2 JUSTICE ALITO: Don't we have to know what

3 kind of a claim it is to -- before we can say whether it

4 exists?

5 MR. EISENHAMMER: Yes. And the starting

6 point is the Fourth Amendment. If you answer the

7 question on the Fourth Amendment, because the

8 initial question --

9 JUSTICE ALITO: You want us to say there's

10 some kind of a Fourth Amendment claim, but we -- we're

11 not -- we don't know what it is, but there's some kind

12 of a claim. Now, you go back and tell us what kind of a

13 claim it is?

14 MR. EISENHAMMER: No. I'm saying the Court

15 can say that this is a Fourth Amendment claim. It's --

16 JUSTICE KAGAN: A claim for unconstitutional

17 detention.

18 MR. EISENHAMMER: There's no -- yeah. Just

19 as if -- if they had brought it up in Albright.

20 JUSTICE KAGAN: Now, what the statute of

21 limitations is on that claim or what the accrual period

22 is on that claim is something that we don't have to

23 decide in order to say, yes, you have a claim under the

24 Constitution for improper detention.

25 MR. EISENHAMMER: Correct.

1 CHIEF JUSTICE ROBERTS: Well, but -- I mean,
2 the alternative that is argued is that it's a due
3 process claim. And whether or not they coexist or
4 whether the particular period that you're complaining
5 about is properly characterized as detention without due
6 process as opposed to a claim under the Fourth Amendment
7 would certainly be pertinent in deciding whether or not
8 to say there is a Fourth Amendment claim.
9 MR. EISENHAMMER: No. I -- I think you can
10 decide whether there's a Fourth Amendment claim or a due
11 process without referencing the statute of limitations.
12 That issue is, in a sense, before you. You can answer
13 it.
14 We're not talking about -- as I said before,
15 we're not claiming that the decision to prosecute, which
16 might be a due process claim, has been violated. All
17 we're talking about is the detention -- the detention
18 subject to legal or corrupt legal process. That's the
19 only claim that we're asking for. The Court has
20 indicated --
21 JUSTICE SOTOMAYOR: Is it a detention --
22 you've described this in various ways. Is it a
23 detention without constitutional probable cause? Is it
24 a detention with -- with no proper legal process? Where
25 exactly is the Fourth Amendment violation? Because in

1 false arrest and false imprisonment claims, according to
2 Wallace, as soon as you get legal process, there's been
3 an intervening end to the false imprisonment because
4 someone else has imprisoned you.
5 So what remains in this case? How do we
6 define the constitutional violation so --
7 MR. EISENHAMMER: All right. May I reserve
8 time after just some more questions?
9 I think this is a Fourth Amendment claim
10 that you can -- you can describe as being corrupted
11 by -- you know, a corrupt Gerstein hearing. You would
12 claim that it prolonged a detention beginning at -- at
13 legal process the way County of Riverside -- or
14 Rodriguez, where it was extended just for -- the traffic
15 stop was extended just for seven minutes to do a dog
16 search, and this Court found that there was -- it was a
17 seizure, an improper -- improper seizure.
18 This is exactly what happened here. The --
19 the seizure was extended improperly because of the
20 fabrication by the police.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Ms. Eisenstein.
23 ORAL ARGUMENT OF ILANA H. EISENSTEIN
24 FOR UNITED STATES, AS AMICUS CURIAE,
25 SUPPORTING THE PETITIONER

1 MS. EISENSTEIN: Mr. Chief Justice, and may
2 it please the Court:
3 We think that this Court should locate the
4 constitutional right at issue in the Fourth Amendment
5 for the reason that the Fourth Amendment does apply to
6 pretrial detentions as this Court has long held. The
7 Fourth Amendment requires any prolonged period of
8 detention to be supported by, one, valid determination
9 of probable cause at the outset of that -- at that
10 period of detention.
11 The Seventh Circuit error here was to find
12 that the Fourth Amendment stops operation once criminal
13 charges are filed. And this Court has long recognized
14 as well that there's a variety of ways to make that
15 probable cause determination, including by the same
16 procedure used to bring the criminal charge itself.
17 JUSTICE KENNEDY: Suppose it's a close
18 question about probable cause. None of the fabricated
19 evidence, just was the information available to the
20 police sufficient to -- to make the arrest, and the
21 court wrongly determines that there was probable cause
22 and he's held for six weeks. Fourth Amendment
23 violation?
24 MS. EISENSTEIN: Your Honor, there may be a
25 Fourth Amendment violation, but there may be no one to

1 sue under those circumstances under Section 1983.
2 JUSTICE KENNEDY: Why is it a Fourth
3 Amendment violation? If it was close, then the decision
4 was reasonable.
5 MS. EISENSTEIN: Well, of course, Your
6 Honor. I think I took Justice Kennedy's hypothetical to
7 pursue it was wrong in the sense of wrong and
8 unreasonable. I think a wrong --
9 JUSTICE KENNEDY: No, it's wrong but
10 reasonable.
11 MS. EISENSTEIN: Well, then, Your Honor, no,
12 I don't think it would be a Fourth Amendment violation
13 at all.
14 (Laughter.)
15 JUSTICE KENNEDY: Why? He's -- he's being
16 detained.
17 MS. EISENSTEIN: Well, because, Your Honor,
18 I think that --
19 JUSTICE KENNEDY: Violation of the Fourth
20 Amendment.
21 MS. EISENSTEIN: Well, Your Honor, because I
22 think that --
23 JUSTICE KENNEDY: And that's why it seems to
24 me that there's a good argument that we should be
25 talking about malicious prosecution, not the Fourth

1 Amendment.

2 MS. EISENSTEIN: Well, Your Honor, I think

3 that the Fourth Amendment does afford reasonable

4 mistakes of fact and law, for that matter, in -- in

5 allowing someone to be detained. So it's not that. In

6 fact, the probable cause standard itself allows for

7 factual errors in the determination.

8 But here, the allegation that Mr. Manuel

9 claims is that he's detained on drug charges that relied

10 entirely on fabricated evidence. And we think that that

11 claim is a claim of detention without probable cause

12 under the Fourth Amendment.

13 JUSTICE ALITO: It's unreasonable. And

14 the -- the defendant wouldn't have qualified immunity,

15 but it's not corrupt. There's nothing malicious about

16 it. Would there be a claim?

17 MS. EISENSTEIN: Your Honor, I think it

18 depends on what the causation would be in terms of the

19 officer's role in bringing the charge.

20 So if the officer puts forth and has -- is

21 the one pressing to bring a charge that is not

22 reasonable, objectively unreasonable under the Fourth

23 Amendment, subject to qualified immunity and other bars

24 to suit, he may be liable. But to the extent to which

25 the error falls with the magistrate or the prosecutor,

1 those kinds of claims would be foreclosed by the
2 absolute immunity that those individuals --
3 JUSTICE ALITO: What if it's an F.B.I.
4 agent?
5 MS. EISENSTEIN: Well, Your Honor, I think
6 that the measure of liability for a Federal officer
7 follows the same sort of immunities and rules.
8 JUSTICE ALITO: Well, I thought you said in
9 your brief that the standard for State and local law
10 enforcement officers might be different from the
11 standard for Federal law enforcement officers.
12 MS. EISENSTEIN: If I did, Your Honor, I
13 don't -- I don't believe we were referring to -- if you
14 could clarify which standard you mean, the standard for
15 qualified immunity or -- or --
16 JUSTICE ALITO: On page 30 of your brief.
17 30 to 31 of your brief.
18 MS. EISENSTEIN: Well, Your Honor, I think
19 that in those particular instances, that relates to --
20 that piece of our brief relates to special factors that
21 could potentially account for hesitation on a Bivens
22 claim that don't necessarily apply to Section 1983.
23 JUSTICE ALITO: Yeah, and that's what I'm
24 saying. So you think that there should be a remedy for
25 violations by State and local police officers, but not

1 under identical circumstances, possibly, if it's a
2 Federal officer.
3 MS. EISENSTEIN: Not in this instance, Your
4 Honor. We wouldn't draw that distinction. And -- and
5 I'd also --
6 JUSTICE ALITO: Well, then what were you
7 saying in your brief? I don't understand it.
8 MS. EISENSTEIN: I think that there may be
9 other circumstances not presented by this case, not
10 presented by a -- a case of fabricated evidence or
11 unreasonable pursuit of a wrongful criminal charge that
12 may lead to a different result under 1983 under Bivens.
13 But I don't think we have to -- we just wanted to make
14 sure that the Court understood that the Bivens claim may
15 have different ramifications.
16 JUSTICE BREYER: That's right. I mean, I
17 may be missing something, although this is quite a
18 simple case. A policeman makes an unreasonable stop and
19 an unreasonable search, thereby violating the Fourth
20 Amendment. Now, you can sue him, assuming you overcome
21 other hurdles.
22 Now he takes you off and puts you in prison,
23 either with a magistrate or without a magistrate, and
24 you are therefore being unreasonably detained. It's an
25 unreasonable search/seizure pursuant to the Fourth

1 Amendment; therefore, it's a violation.

2 Then you have a trial, and using the same

3 rotten evidence, you are convicted. There you don't,

4 though you could. But the reason that you don't is

5 because you are viewed as, by the law so far, being in

6 jail now as a result of your conviction. And the

7 reason, I guess, is practical. We don't want to look

8 into all those convictions and their different

9 standards. Now, that's the -- the framework in my mind.

10 Is it right?

11 MS. EISENSTEIN: Absolutely, Your Honor.

12 That is exactly the framework that the government puts

13 forward, that it's not just the mere fact of being held

14 in jail, but that the constitutional right depends on

15 what process was infringed.

16 JUSTICE SOTOMAYOR: All right. So let's

17 stop. I understand you so far.

18 The question presented was, I think -- I

19 don't have it -- I do have it here.

20 "So whether an individual's Fourth Amendment

21 right to be free from unreasonable seizure continues

22 beyond legal process so as to allow a malicious

23 prosecution claim based upon the Fourth Amendment."

24 The Chief Justice was right. The question

25 presented is, does the Fourth Amendment consonance house

1 a malicious prosecution claim, which is something very
2 different than what you're describing as a Fourth
3 Amendment seizure and detention without legal process.
4 MS. EISENSTEIN: That's correct, Your Honor.
5 Because in our view, the constitutional inquiry is step
6 one, but step two is to determine the elements and
7 accrual date and other prerequisites to suit under our
8 Section 1983 tort. And in that instance, the accrual
9 may be governed by the closest common law analogy.
10 When the challenge at its core is arguing
11 that the wrongful prosecution and the wrongful
12 institutional process led to the detention without
13 probable cause, in our view, the closest analogy is a
14 malicious prosecution suit, and that that --
15 JUSTICE SOTOMAYOR: But are you suggesting
16 we have to take every element of the -- whatever the
17 elements are? Because from what I understand from the
18 briefing, malicious prosecution is defined differently
19 from State to State.
20 So if that's the case, what are the elements
21 that you see for a 1983 claim? Does it include malice?
22 MS. EISENSTEIN: Your Honor, we do not think
23 that a constitutional tort under 1983 simply adopts
24 common law or State tort elements of malicious
25 prosecution. Only the accrual rule is -- as based on

1 this Court's decision in Heck and Wallace are taken up
2 by the common law analogy.
3 In terms of malice, no, Your Honor, we don't
4 think malice, as it's known in common law or most State
5 courts, is an element of this kind of claim. We do
6 advocate that this Court treat a probable cause
7 determination underlying a criminal charge the same way
8 it treats a probable cause determination underlying a
9 search warrant, which includes the Franks standard. We
10 don't think of that as a malice standard of common law,
11 but rather, an extension of the Franks doctrine.
12 CHIEF JUSTICE ROBERTS: Well, I nearly said
13 that it inspired examples we take to flesh this out, but
14 it does seem to me to be just pretty result-oriented
15 cherry picking. If once you say, well, here's a claim,
16 now we'd like the statute of limitations part, so we
17 don't take that in. We -- we don't want to have to show
18 malice, so we take that. I mean, I don't know if we're
19 still holding true to the approach in Wallace, if you
20 just start picking things in and out depending upon the
21 demands of the particular case.
22 MS. EISENSTEIN: Well, Your Honor, I think
23 that Wallace did say that Federal accrual rules in
24 particular were governed by the common law analogy. We
25 think that that's as far as it goes in terms of choosing

1 from the common law. The statute of limitations, for
2 example, is barred from State law.
3 But here, the Seventh Circuit's view of
4 accrual flowed from its error as to the scope of the
5 Fourth Amendment. So to Justice Kagan's proposal that
6 this go back, in many ways we think that's absolutely
7 appropriate, because the Seventh Circuit erred by
8 holding that since the Fourth Amendment stops at the
9 time criminal process begins, it thought you can't have
10 a malicious prosecution analogous claim, because there
11 is no such Fourth Amendment claim.
12 If you peel that error away, we think that,
13 even under Seventh Circuit jurisprudence, they would
14 agree that a favorable termination requirement would
15 apply in such circumstances.
16 JUSTICE GINSBURG: When does the Fourth
17 Amendment claim stop? I -- I think co-counsel said if
18 you're convicted, it stops. In -- in response to my
19 question, suppose none of this comes out until habeas,
20 and then we find out the police have lied from day one.
21 MS. EISENSTEIN: So, Your Honor, we do see
22 those as distinct phases, and that when you're held --
23 an individual is held pursuant -- before trial, pursuant
24 to a finding of probable cause by a magistrate or a
25 grand jury, that that is a Fourth Amendment claim. But

1 once the person is held pursuant to a finding beyond a
2 reasonable doubt at trial, that due process and other
3 constitutional protections take over.
4 JUSTICE KENNEDY: But suppose there's a
5 pretrial suppression hearing in which both parties are
6 represented, and the court reaches a wrong result with
7 reference to the admission of the evidence. Does a
8 Fourth Amendment violation still continue?
9 MS. EISENSTEIN: May I answer, Your Honor?
10 Your Honor, I think that it -- it may be a
11 Fourth Amendment violation, but whether a plaintiff
12 could bring those kinds of claims would be governed by
13 preclusion principles and other similar bars, once that
14 issue had been actually litigated in a State court.
15 JUSTICE SOTOMAYOR: In a State court
16 proceeding, the State analogue, what would be the rule
17 of accrual ending? You get convicted; you don't find
18 out about the false testimony until habeas, State or
19 Federal.
20 When, in that situation, would accrual
21 occur?
22 MS. EISENSTEIN: In our view, when the case
23 was dismissed or overturned, Your Honor.
24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Scodro.

1 ORAL ARGUMENT OF MICHAEL A. SCODRO
2 ON BEHALF OF THE RESPONDENTS
3 MR. SCODRO: Mr. Chief Justice, and may it
4 please the Court:
5 I think it's very important to frame what is
6 before the Court this afternoon. And to begin, I think
7 it's essential to note we are not disputing at any point
8 in this litigation that misstatements made that result
9 in a finding of probable cause at a Gerstein hearing is
10 a Fourth Amendment violation, nor does the Seventh
11 Circuit disagree.
12 The reason this came up to the Seventh
13 Circuit as it did -- and this may be important in
14 understanding the context -- this is on a motion to
15 dismiss for -- for violation of the statute of
16 limitations. All of the claims were dismissed but one,
17 the one that was appealed, and that one survived
18 momentarily in the district court because Petitioner
19 claimed that that one claim has a favorable termination
20 element because it is malicious prosecution.
21 He reiterated that claim before the Seventh
22 Circuit, and the Seventh Circuit reached two
23 conclusions.
24 One, you have a Fourth Amendment claim which
25 they discuss, and that the only claim before them was

1 based on the lie at the Gerstein hearing. You have a
2 Fourth Amendment claim, but it is already accrued; it
3 accrued too early; it is untimely.
4 Now you're asking us to recognize a
5 different breed of Fourth Amendment claim, namely, a
6 malicious prosecution Fourth Amendment claim, because
7 you'd like to overcome the time bar. We do not
8 recognize that Fourth Amendment malicious prosecution
9 claim.
10 JUSTICE KAGAN: Mr. Scodro, I -- I just have
11 to say I read this differently, so you can tell me why
12 I'm wrong.
13 But I'm -- in the last column of the Seventh
14 Circuit's opinion, so there are twice where the Seventh
15 Circuit says what it thinks. The first time it says,
16 when after the arrest a particular person is not let go
17 when he should be -- so it's after the initial seizure,
18 and then the person is not let go, the Fourth Amendment
19 gives way to the due process clause as a basis for
20 challenging his detention.
21 And then in the last paragraph it says,
22 "Once detention by reason of arrest turns into detention
23 by reason of arraignment, the Fourth Amendment falls out
24 of the picture."
25 So it seems to me that twice, the Seventh

1 Circuit says very clearly that you have this Fourth
2 Amendment claim until arraignment or legal process, and
3 after that, the Fourth Amendment falls out of the
4 picture.
5 And at the very basic level, before you get
6 into these questions of what's the accrual date or
7 anything else, it seems that that's the thing that the
8 Petitioner is saying is wrong, that the Fourth Amendment
9 claim continues after arraignment or after legal
10 process. Now, when it accrues, when it doesn't accrue
11 is a different question, but it's still a Fourth
12 Amendment claim, and -- and -- and that's what the
13 Seventh Circuit rejected.
14 MR. SCODRO: Your Honor, I think I would
15 direct the Court to the top of J.A. 103 as well, where
16 the Court also notice -- notes the fact that they have
17 found Fourth Amendment claims, even in terms of false
18 information in an incident report, even at a preliminary
19 hearing, which comes long after the initiation of
20 process.
21 What the Court in context has read -- and by
22 the way, this is consistent with past statements by the
23 Seventh Circuit, the -- the fundamental statement the
24 Court has made -- and this comes from Newsome, the 2001
25 decision from which this jurisprudence has blossomed in

1 the Seventh Circuit -- relabeling a Fourth Amendment
2 claim as malicious prosecution would not extend the
3 statute of limitations.
4 This has been the nature of the battle. And
5 on page 21 of the cert petition in this case, Petitioner
6 makes clear why a question presented doesn't end halfway
7 through. It doesn't ask merely whether there's a Fourth
8 Amendment right that survives the initiation of process.
9 If, by "process" they mean Gerstein hearing,
10 we agree. And I think the Seventh Circuit would agree
11 as well. But it goes on to say, "so as to allow for a
12 malicious prosecution claim." And on page 21 of their
13 cert petition, they explain to the Court what they mean
14 by that when they say that, "The fate of this appeal to
15 this Court turns on whether the Court does or does not
16 adopt a favorable termination element," and that that's
17 why this makes an ideal vehicle, to answer Justice
18 Alito's earlier question, which is: What are the
19 elements of this claim?
20 JUSTICE BREYER: I didn't think that was a
21 difficult question. I thought that everyone agrees that
22 if a policeman wrongly arrests you -- you know,
23 maliciously arrests you, et cetera -- and there you are
24 in his custody and he brings you over to the jail, puts
25 you in jail, up until the point you see the magistrate,

1 you have a claim for false arrest.

2 MR. SCODRO: Correct.

3 JUSTICE BREYER: And we said that that claim

4 for false arrest is a constitutional claim.

5 MR. SCODRO: Yes.

6 JUSTICE BREYER: It violates the Fourth

7 Amendment. What time limit applies? The false arrest

8 time limit, because that's the most analogous.

9 MR. SCODRO: Yes, Your Honor.

10 JUSTICE BREYER: Then we get into the next

11 stage. Now you're in front of a magistrate, and the

12 magistrate says, stay in jail for two more months. Does

13 that violate the Fourth Amendment? Not malicious

14 prosecution. Does it violate the Fourth Amendment?

15 The reason that we tend to think it does is

16 because all the circuits have said it does; that is,

17 Judge Higginbotham said that in the Fifth Circuit. A

18 lot of the circuits picked that up. I'm not saying

19 every one. But they said that, too, violates the Fourth

20 Amendment. Now we have a problem.

21 What statute of limitations do we use for

22 that one? And there, the circuits seemed to have picked

23 malicious prosecution not because they're going to

24 follow every element, but because it's the State law

25 that provides the closest analogy.

1 And that seems to me where we are in this
2 case. You don't have to go much further than that.
3 Am I right so far?
4 MR. SCODRO: You are correct. The issue
5 before the Court is which accrual date for limitations
6 periods should the courts be --
7 JUSTICE BREYER: So you will accept -- or
8 will you accept for purposes of this argument that once
9 this individual is brought by the policeman to jail and
10 they go before a magistrate, and the magistrate using
11 the same bad evidence says, stay here in jail for
12 several -- for a while -- for a week, anyway, until we
13 get to trial, that that period is a violation of the
14 Fourth Amendment, assuming that they were all lying, et
15 cetera.
16 MR. SCODRO: Your Honor, yes.
17 JUSTICE BREYER: Yes. Then the question is:
18 Do we use the malicious prosecution as an analogy, not
19 all the elements? And so now the question, great, this
20 is fabulous, I get to the narrower question I have, why
21 isn't it a good analogy?
22 MR. SCODRO: Your Honor, let -- let me
23 answer it why it's not a good analogy, and I'll also
24 answer -- I think flesh out just slightly whether or not
25 this remains -- the moment in time when the police

1 officers lie to -- to submit an affidavit with
2 falsehoods to a magistrate at a Gerstein hearing, and
3 the magistrate finds probable cause, what we do not
4 dispute, and what we do not think the Seventh Circuit
5 would dispute, is that that is a violation of the Fourth
6 Amendment.
7 Now, the question of whether or not
8 malicious prosecution is the proper analogy, the answer
9 is absolutely not, and Wallace tells us why not.
10 Wallace tells us -- now, the Petitioner has shifted just
11 slightly from a reliance on common law favorable
12 termination, which is what most of the circuits on their
13 side of the split have done. This also goes, I think,
14 to Your Honor's question and to your point.
15 Most of the circuits on the other side of
16 the split have used favorable termination, but they've
17 done so by adopting it as part of the underlying
18 four-element common law tort, and they think if that's
19 what we're calling it, then it's going to have favorable
20 termination.
21 A smaller number have relied on an
22 extension, a drastic extension, of this Court's decision
23 in Heck. And that's the request now made by the
24 Petitioner in the reply brief, that Heck ought to be
25 expanded to apply here.

1 But Wallace was very clear. Heck only
2 applies -- the delayed accrual principle and the
3 favorable termination element that comes with it apply
4 only where you have an extant conviction. And that
5 doesn't exist here.
6 The court went through a mental exercise.
7 They said, look, if you can realize that you have a
8 Fourth Amendment claim before you're convicted, if the
9 elements can be in mind, you know you've been wronged in
10 a Fourth Amendment way before you are convicted, then
11 that is not a claim that is entitled to the delayed
12 accrual principle of Heck.
13 And the reason was very simple. Because as
14 this Court said in Gerstein, Fourth Amendment
15 contemplates that you can have bad arrests and good
16 convictions. And nevertheless, the Fourth Amendment
17 protects the innocent as well as the guilty. And
18 expanding Heck to apply the circumstance where all you
19 have is an ex parte requirement, or finding rather, of
20 probable cause, requiring that civil plaintiff to then
21 prove vindication at the end of the day would close the
22 door on a potential universe of Fourth Amendment claims
23 and instances.
24 JUSTICE GINSBURG: I think you can have
25 discrete claims. One wrong is you never should have

1 been arrested, so you have a Fourth Amendment claim for
2 that. Another wrong is they kept you in detention.
3 They extended that arrest. So I don't see why you have
4 one wrong which ends on arrest, but then if you are
5 continuing to be held based on trumped-up false
6 information, why isn't that like a continuing tort? And
7 it continues until it ends.
8 MR. SCODRO: Well, Your Honor, just to make
9 sure that I've been clear, again, we do agree that the
10 lie -- the second lie Your Honor has described, the lie
11 before the magistrate, is actionable under the Fourth
12 Amendment. If the question is why then doesn't the
13 accrual period run from when one is ultimately released,
14 I would make a couple of points in response to Your
15 Honor's question.
16 First, Petitioner has been very careful not
17 to make that argument. Indeed, the continuing seizure
18 idea would be inconsistent facially with the cert
19 petition, which claimed they need the benefit of
20 favorable termination to prevail. They, of course,
21 wouldn't need it if they were instead arguing for a
22 period of a continuing seizure.
23 Lower courts have rejected the notion of a
24 continuing seizure, and they're not raising it here.
25 And I think the reason may be twofold.

1 The first is that it runs into -- it runs in
2 the face of traditional accrual principles that this
3 Court has said, cases like Ricks and others, that it's
4 not the period of harm that matters for accrual
5 purposes. It's when one first experiences the harm and
6 thereby has all the elements needed to proceed.
7 And a case like Morgan, which was a hostile
8 work environment case, is really the exception that
9 proves the rule. In many ways it tells us why or how
10 narrowly the Court has -- has construed the exceptions
11 to this typical accrual principle. Hostile work
12 environment does require precisely what Your Honor
13 describes because it's impossible to know precisely when
14 a hostile work environment begins. Is it the second
15 comment or the fifth or the tenth that someone has to
16 endure in the workplace, and therefore, the Court is
17 willing to consider it as a monolithic whole and treat
18 it that way for accrual purposes.
19 But again, that's the exception that proves
20 the rule. As Wallace itself concluded, there can be a
21 cutoff, which Wallace imposed between the initial arrest
22 and the post-process arrest, and Wallace itself in that
23 regard, I think, breaks through the notion of a
24 continuing seizure.
25 The final point I would make -- and I think

1 this comes out in one of their amicus briefs; namely,
2 the brief by Professor Alexandra -- taken to its logical
3 conclusion, the logic of continuing seizure may lead one
4 to conclude that the seizure doesn't end until the
5 ultimate period of incarceration concludes. And what
6 that means is now you have potential civil plaintiffs
7 bringing claims 10, 15, 20 years down the road without
8 any prior notice to the would-be defendants, no ability
9 to maintain evidence and so forth.
10 JUSTICE SOTOMAYOR: Why do you need to give
11 evidence to somebody who's fabricated the reasons why
12 you're in jail? And -- and I don't know why you would
13 think that it's important to cut off recovery against
14 the police officer who bases an arrest solely on
15 fabrication. It doesn't seem so horrible to me. Years
16 later or immediately, if you've done something as
17 untoward as that, as unconstitutional as that, why
18 should it matter?
19 MR. SCODRO: Your Honor, two points. The
20 first is, and this is a point of clarification, we're
21 not suggesting that damages arising from lies at a
22 Gerstein hearing, for lack of a better term for it,
23 would not run subject to traditional common law
24 proximate causation principles through part or all of
25 the pretrial period. There may well be interrupting

1 events, but that I just want to make clear. We're not
2 suggesting that those damages may not be available, in
3 this case, had the claim been brought timely for the
4 full 48 days, depending on how those common law
5 proximate cause principles would shake out.
6 The other point -- and this is one that the
7 States made in their amicus brief in Wallace. They've
8 made it again as have the municipalities as amici.
9 They've made the point that early notice to the State as
10 employer of agents who are engaged in bad acts is
11 extraordinarily important. Government is intent upon
12 learning sooner rather than later that they have
13 individuals in their ranks that are violating the
14 Constitution.
15 And this Court in Wallace, in turning aside
16 basically the same extension of Heck that is recommended
17 for the Court, or the Court's invited to take in this
18 very case, when they turned it away, they said one of
19 the reasons is we need notice to the would-be defendants
20 in those cases. They can preserve evidence to ensure --
21 JUSTICE SOTOMAYOR: You know, counselor,
22 it's not as if most States don't receive that kind of
23 notice in these situations. The defendants are just not
24 believed in most, until some independent evidence is
25 discovered long after the conviction. In my

1 experience -- and you can point to one that's
2 different -- I've never come across any of these cases
3 where any defendant falsely accused of a crime hasn't
4 vigorously announced his or her innocence and vigorously
5 tried to tell the authorities this police officer is
6 corrupt.
7 So I'm not -- I don't know what extra notice
8 you need other than that. The situation is unique.
9 We're talking about total fabrication. You have so many
10 other ways out of liability, qualified immunity, Franks.
11 There are so many other protections against the State
12 and individual officers for -- for errors.
13 But why should we worry about you not
14 receiving notice?
15 MR. SCODRO: The reason, Your Honor, is that
16 in this case, when the later accrual principle that
17 Petitioner requests under Heck or as a matter of a
18 common law element, is purchased not only at the price
19 of delayed notice to the would-be defendant, it's
20 purchased at the price of closing the courthouse door on
21 a number of potential Fourth Amendment claimants, those
22 who are subject to unlawful arrest, but are later
23 validly convicted.
24 JUSTICE KAGAN: Mr. Scodro, can I ask -- I
25 might be misunderstanding this, so you'll tell me if I

1 am. But it seems as though the position that you're
2 taking now is diametrically opposed to the position that
3 you took in the Seventh Circuit. So I'll just read you
4 something, and this is from oral argument, but my clerk
5 tells me that this is what happened. I think it is not
6 a transcript, but maybe there is. But at least this is
7 what my clerk tells me happened at oral argument.
8 Judge Rovner says there are ten other
9 circuits that have now recognized this kind of claim,
10 this kind of Fourth Amendment claim. And she said,
11 let's just assume that we do what those ten other
12 circuits have done, which, of course, they didn't do,
13 but she says let's just assume it.
14 At what point would you think the statute of
15 limitations would begin to run? And then you -- or
16 maybe not you, but you --
17 (Laughter.)
18 JUSTICE KAGAN: You say, well, if you were
19 to recognize such a claim --
20 MR. SCODRO: Yes.
21 JUSTICE KAGAN: -- the accrual is the time
22 at which the proceedings are terminated in favor of that
23 individual.
24 So in this case it would be -- I think the
25 date would have been May 4, 2011.

1 And then Chief Judge Woods says, so you're
2 assuming that the constitutional tort would follow the
3 same pattern that State law does and require the
4 favorable termination, because if there's no favorable
5 termination for all the policy reasons the States have
6 considered, there's no injury.
7 And again, whoever the lawyer was said,
8 that's correct.
9 So am I misunderstanding this, or are you
10 saying that's not correct; that's wrong?
11 MR. SCODRO: I think that that is correct
12 insofar as what the lawyer was being asked, as I
13 understand it, having also listened to the argument,
14 Your Honor, is that --
15 JUSTICE KAGAN: Is there no transcript for
16 this?
17 MR. SCODRO: I am not aware of a transcript.
18 The Seventh Circuit may especially -- part of that quote
19 appeared in the reply brief in support of the cert
20 petition. And what that quote makes clear, it seems to
21 me what the lawyer is being asked is, if we are to
22 follow suit, what -- again, taking it back to what
23 was -- this was on a motion to dismiss on limitations
24 grounds. The -- if -- if they're not able to establish
25 that they have an accrued claim or a claim with a

1 delayed accrual sufficient to satisfy the limitations
2 period or under a traditional Fourth Amendment theory,
3 can we overcome this limitations period by virtue of
4 these common law elements. What the attorney was being
5 asked, as I -- as I heard that argument, what the
6 attorney was being asked is, isn't -- do you agree that
7 what they are trying to do here is join what every other
8 circuit has done. And if we join what every other
9 circuit has done, they would have a favorable
10 termination element. Or --
11 JUSTICE KAGAN: Oh, I don't think that
12 that's -- I mean, maybe, I guess. I mean, it seems to
13 me that the much more natural way of understanding this
14 is to say, look, if we do what every other circuit has
15 done in the sense that we acknowledge that there is a
16 Fourth Amendment claim here, post-legal process,
17 something which you yourself have now acknowledged
18 today, that if we acknowledge that, what would the
19 accrual date be? And then the lawyer says the accrual
20 date would be the date of termination.
21 MR. SCODRO: Sure.
22 JUSTICE KAGAN: And -- and now you're saying
23 it wouldn't be. And I actually don't know whether it
24 should be or it shouldn't be. I don't think the Seventh
25 Circuit for a moment considered that question. And I

1 guess it's -- it's another reason why I think we should
2 just send the whole thing back. The Seventh Circuit can
3 figure out whether you forfeited this claim. The
4 Seventh Circuit can figure out, if you didn't forfeit
5 this claim, what the right answer is. But to me, this
6 language -- and I have not listened to the tape myself,
7 so I have to admit that -- but to me, this language
8 suggests that you forfeited this.
9 MR. SCODRO: Yeah. Your Honor, as I --
10 again, in context, I think what the lawyer was being
11 asked is, if they get the benefit -- and I believe the
12 quote in the reply in support of the -- the part of the
13 quote that appears in the reply in support of the cert
14 petition includes a reference to, well, along with the
15 common law elements, the lawyer is saying, yes, if they
16 were to get the benefit -- this is what they're trying
17 to do. I mean, no one denied it. What they were saying
18 in the briefs was we want the benefit of the
19 four-element tort recognized in other circuits, most
20 because they're just adopting wholesale the tort; a few,
21 because they seem -- they cite Heck in lieu of the
22 common law element. And the question was, if we give
23 them what they're asking for, that is, if this Court
24 follows those other courts, would they have a May 4th
25 accrual date? And the answer is yes. Because that's

1 what they've been seeking all along.

2 JUSTICE BREYER: Why not?

3 Look, the person is being held because the

4 magistrate listening to the policeman detained him, and

5 the magistrate and everybody was very unreasonable, da,

6 da, da. Okay? Now he's there.

7 Day one. Can you bring a case? Yes. Why

8 not?

9 He's been under -- day two. Yes. And he's

10 been held for 90 days. And I can say the same thing,

11 but I won't, up to each of the 90 days. 90th day, he's

12 released. It's now the 91st day. Can he bring it?

13 Yes. But now we only have two years. Why only two

14 years? Because we're looking for an analogous statute

15 of the State to give us a -- a limit, and the analogous

16 one, though not perfectly fitting, is malicious

17 prosecution, and that had two years, and that's why.

18 Two years after the release date is the longest. You

19 had better bring it before then, because that's two

20 years since you were unlawfully held.

21 Now, what's wrong with what I just said?

22 MR. SCODRO: Well, Your Honor, two points in

23 response to that.

24 The first would be Wallace says or holds

25 that if you have the claim on day one, then that -- it

1 is -- it's accruing on day one. We're not going to give
2 you -- there's no extant conviction.
3 JUSTICE GINSBURG: But it's a different
4 claim. One claim is for arrest, and the other is for
5 prolonged detention. Two different claims. That's why
6 I took issue with you when you said if you hold for this
7 Petitioner, then people who are falsely arrested but
8 properly convicted will have no claim. I don't -- I
9 don't see that. They have a false arrest claim. They
10 don't have a prolonged detention claim.
11 MR. SCODRO: Well, Your Honor, I think what
12 would happen, they wouldn't have a claim based on
13 misstatements at the Gerstein hearing if, in order to
14 make out that claim as Petitioners contend, they would
15 have to show that ultimately their criminal litigation
16 terminated in their favor. That's the request. If Heck
17 is extended or the common law element is extended -- and
18 this is why it's not the best analogue, Your Honor. And
19 if it -- if it would be helpful to have a common law
20 point of guidance on this, in Footnote 12 of our brief,
21 we provide a list of common law cases, an example of
22 common law cases in which the Court addressed a question
23 like this.
24 We have an ex parte proceeding in which a
25 magistrate has issued -- I'll take the Stewart case,

1 which is the third of the three cited. The person
2 serves six months in jail on the warrant, but there's
3 never a prosecution. It never blossoms. He's released,
4 and he sues for malicious prosecution. And the
5 defendant in the malicious prosecution contends that
6 they're not -- that they're unable to show successful
7 outcome --
8 JUSTICE BREYER: What's your -- what's the
9 best one? What's the best analogy?
10 MR. SCODRO: That it's -- this form of
11 malicious prosecution where you didn't have to prove
12 favorable termination, because all that was against you
13 at that point was an ex parte determination with State
14 law like that. This was --
15 JUSTICE BREYER: What is your opinion? What
16 is the State law that does apply the best analogy?
17 MR. SCODRO: I think the closest analogy
18 is -- is false arrest.
19 JUSTICE BREYER: False arrest. Okay.
20 So now, what is this -- what is the -- what
21 is the statute of limitations for false arrest?
22 MR. SCODRO: The State law, it's still the
23 personal injury limitations period of two years.
24 JUSTICE BREYER: Okay. Fine. So he was
25 being detained for up to, let's say, the 90th -- 90th

1 day. He's still being detained. So now we'll count the
2 90th day as the beginning of the two-year running. And
3 so now we run it for two years, and it's still May 12th
4 or whatever.
5 MR. SCODRO: But, Your Honor, a false arrest
6 claim under Wallace accrues once process begins. So
7 it's not running for that 90 days. It would include --
8 JUSTICE BREYER: Why not?
9 MR. SCODRO: Well, as we --
10 JUSTICE BREYER: Isn't he being held? And
11 isn't he being held unlawfully on the 41st day? And
12 after all, we're not -- we're not copying the State law.
13 All we're doing is trying to find an analogous period of
14 time.
15 MR. SCODRO: But, Your Honor, by imposing
16 the favorable termination element of the common law
17 claim, it would run headlong into the Fourth Amendment
18 aims; what the Fourth Amendment is geared to vindicate.
19 The Fourth Amendment, this Court has held,
20 is there for the guilty and innocent alike. And in this
21 case, what -- what -- the cost of borrowing that
22 favorable termination element and importing it into a
23 claim based solely on lies and an ex parte proceeding,
24 which is what we're talking about with the Gerstein
25 hearing, doing so would mean that if you're the victim

1 of lies at a Gerstein hearing and you're detained, but
2 ultimately you are constitutionally convicted as
3 evidence amasses against you, the need to show favorable
4 termination, it will be impossible for that plaintiff.
5 And so the Fourth Amendment right will not be something
6 that that plaintiff can vindicate. That's the reason
7 that Wallace didn't allow Heck to expand to instances
8 like this where you're not challenging the wrongful
9 conviction itself.
10 And what they have asked, their claim is
11 narrow, and the way to resolve this case is -- is now
12 equally narrow. The way to resolve the case is to
13 conclude that whenever this -- your Fourth Amendment
14 claim could run through the arraignment after indictment
15 in this case, which still -- which was still out of the
16 two-year limitations period. But it doesn't -- it is
17 not entitled to that favorable termination element which
18 would have the effect of closing off the courthouse
19 doors to a universe of claims in order to buy extra time
20 in this case. And that is what we urge the Court not to
21 do. And that is the simplest way.
22 JUSTICE GINSBURG: What you're saying is if
23 you're falsely arrested, you have a good claim for false
24 arrest. It doesn't matter that you were properly
25 convicted. But if you are not only falsely arrested,

1 but if your detention continues, then you have a claim
2 for the continued detention.
3 MR. SCODRO: For violation of the Gerstein
4 hearing, Your Honor. And -- and I do -- for lies, under
5 Gerstein.
6 I do want to be clear in saying that the
7 closest analogous tort is false arrest, that is treating
8 it the way I think the Seventh Circuit has, which is
9 that it runs up until what we call the first appearance
10 where you have the initiation of adversarial process.
11 By no means does the limitations period, or is there a
12 tolling that runs from the period of the lie at the
13 Gerstein hearing through the pretrial period.
14 As I said at the outset, that is subject to
15 traditional tort common law principles of -- of
16 proximate cause. And there may well be damages
17 recoverable for that period, but it's based on the lie
18 at the Gerstein hearing. And as Wallace held, Heck
19 cannot be extended to apply to a claim that exists
20 before you have an extant conviction.
21 JUSTICE KENNEDY: Just one more time.
22 Suppose you have arrest; Gerstein hearing --
23 MR. SCODRO: Yes, Your Honor.
24 JUSTICE KENNEDY: -- filing of formal
25 charges, either information or indictment; pretrial

1 suppression hearing, at which both parties are
2 represented --
3 MR. SCODRO: Yes.
4 JUSTICE KENNEDY: -- and the false evidence
5 is -- is not -- its falsity has not been known and so
6 you're detained. And then trial.
7 When does the Fourth Amendment violation
8 end?
9 MR. SCODRO: Sure. You would have it --
10 this returns to Justice Ginsburg's point. You would
11 have a Fourth Amendment claim for the initial
12 warrantless arrest. You would have a Fourth Amendment
13 claim for misstatements at a Gerstein hearing that then
14 led to ongoing pretrial seizure. And the damages from
15 that claim may run throughout the period of pretrial
16 seizure.
17 But with regard to the nature of the
18 constitutional violation that occurs at subsequent
19 processes, be they grand jury, bail hearings,
20 preliminary hearings, those are traditional due process
21 claims consistent with this Court's holding in Mooney --
22 frankly, in Brady, which has applied due process to
23 prosecutorial duties and police duties during that
24 period.
25 So I -- I hope that answers Your Honor's

1 question. Whether or not those damages run throughout
2 that period, or whether they're reduced by virtue of an
3 intervening cause would be a question -- application of
4 traditional proximate cause.
5 JUSTICE KENNEDY: I understand. Opposing
6 counsel or defendant's counsel ever present in a
7 Gerstein hearing?
8 MR. SCODRO: Generally, in this case, yes.
9 Often they are because the Gerstein determination is
10 frequently made as part of the first appearance, which
11 is to say -- which is the moment in time which this
12 Court held you have a Sixth Amendment -- your Sixth
13 Amendment right attaches.
14 May I complete the answer, Your Honor?
15 CHIEF JUSTICE ROBERTS: I'm sorry?
16 MR. SCODRO: May I complete the answer?
17 CHIEF JUSTICE ROBERTS: You have more? Go
18 ahead.
19 MR. SCODRO: Thank you.
20 (Laughter.)
21 MR. SCODRO: Thank you.
22 So I want to return to the point I was
23 making, which now -- I apologize. I don't know if I've
24 answered Your Honor's --
25 CHIEF JUSTICE ROBERTS: You were talking

1 about that the --

2 MR. SCODRO: Yes.

3 CHIEF JUSTICE ROBERTS: -- Gerstein hearing

4 is often combined --

5 MR. SCODRO: Yeah. It's often combined with

6 the first appearance. And the reason -- actually, this

7 Court has contemplated that in Rothberry and Gerstein

8 itself. It's often a matter of convenience that at that

9 point, it's when the individual's informed of the

10 charges, their Sixth Amendment right attaches and bail

11 is set as well.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MR. SCODRO: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Eisenhammer, you

16 have three minutes remaining.

17 REBUTTAL ARGUMENT OF STANLEY B. EISENHAMMER

18 ON BEHALF OF THE PETITIONER,

19 AS APPOINTED BY THIS COURT

20 MR. EISENHAMMER: Thank you.

21 Just to answer Justice Kennedy's question

22 about reasonable error on a detention, in that

23 situation, the officer would have the qualified immunity

24 defense that would, assuming it was objectively

25 reasonable, he would -- he would be protected in that

1 situation.

2 With respect to the Seventh Circuit's

3 decision --

4 JUSTICE KENNEDY: But there's still a Fourth

5 Amendment violation?

6 MR. EISENHAMMER: There's still a Fourth

7 Amendment violation, but he would have qualified

8 immunity if it -- if he acted with objective

9 reasonableness. Because it's a Fourth -- Fourth

10 Amendment doesn't have any intent. You either violate

11 it or not violate it. There's either probable cause or

12 not. And then you could superimpose qualified immunity.

13 The Seventh Circuit would have said that

14 there is -- there's no Fourth Amendment right, whether

15 or not the Petitioner filed his claim three years, four

16 years, a million years ago, or the day after he was

17 released. That's -- that's their position. So that's

18 why we're here on the question, whether this is a Fourth

19 Amendment violation. We reject the -- the Seventh

20 Circuit's view that it's a due -- due process.

21 JUSTICE SOTOMAYOR: So you -- you don't care

22 that we don't reach the statute of limitations.

23 MR. EISENHAMMER: Correct. But I do want to

24 note that the Seventh Circuit, with respect to the

25 statute of limitations to the accrual point -- point,

1 uses favorable termination in their due process cases.
2 JUSTICE ALITO: What happens in this
3 situation? The person is -- is initially arrested and
4 held for a period of time based on fabricated evidence,
5 but then before trial, shortly before -- before trial,
6 other valid evidence is gathered and the person is
7 convicted at the trial. Now, does that person have the
8 kind of claim that you are asserting? And if so, when
9 would -- when would the claim accrue? Would the
10 favorable termination defeat the claim?
11 MR. EISENHAMMER: The -- he would -- at that
12 point, if you use Heck as the case that covers this
13 particular issue, he would not -- since he was convicted
14 under Heck, he would not be able to bring the claim if
15 that claim attacks the conviction.
16 If it doesn't attack the conviction, as the
17 Court sort of pointed out in, I think it was in Footnote
18 7 on suppression hearings or on evidence --
19 JUSTICE ALITO: I'll say it attacks -- it
20 attacks the unlawful detention.
21 MR. EISENHAMMER: So it wouldn't have the --
22 JUSTICE ALITO: It's not the conviction. It
23 would not be defeated by --
24 MR. EISENHAMMER: Then -- then I would say
25 under Heck, the Heck exception, they could bring -- they

1 could bring then suit.

2 JUSTICE ALITO: Then when would the claim

3 accrue?

4 MR. EISENHAMMER: I think it would accrue at

5 that point, at the conviction, as I read Heck. Because

6 I think it would be -- it would be -- in this particular

7 case, it would be unfair to the -- to the individual to

8 speculate on whether -- what evidence comes out at the

9 -- at the trial to determine whether or not that

10 really -- that probable cause determination may or may

11 not attack the -- the --

12 JUSTICE ALITO: Well, if the outcome of

13 the -- of the trial is irrelevant to the Fourth

14 Amendment claim, as it would seem to be in the case of

15 an unlawful detention, then why should the claim not --

16 why should the accrual of the claim be tied to the

17 termination of the prosecution?

18 MR. EISENHAMMER: Because at the -- at the

19 time it -- it has occurred, you -- well, two reasons.

20 You don't know at that time whether or not it does

21 attack the conviction.

22 And second, you don't -- you don't want --

23 because you don't know whether that evidence heard at

24 the -- at the -- at the -- at the Gerstein hearing may

25 or may not -- some of it may come in; some of it may

1 not.

2 And then the other issue -- the other issue

3 is that you don't want parallel litigation going on,

4 or -- or collateral attack for many of the reasons

5 that -- that was stated in Kaley.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 2:03 p.m., the case in the

9 above-entitled matter was submitted.)

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