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
2 do 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 -- what we
6 need to do is determine the -- not the statute of
7 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 favorably
18 terminated or not, the Fourth Amendment claim, and, it
19 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: Our claim, technically,
2 here is detention without probable cause, not the search
3 that occurred when he's -- when he was arrested.
4 CHIEF JUSTICE ROBERTS: Right. Regardless,
5 whatever the Fourth Amendment claim is.
6 MR. EISENHAMMER: Right. And that detention
7 went through for 48 days after he -- after he became
8 subject to legal process.
9 JUSTICE SOTOMAYOR: Was he subject to proper
10 legal process? If legal process is corrupted because
11 there isn't -- I mean, I always understood legal process
12 as used in Wallace and other of our cases as an
13 independent intermediary, generally a judge or a grand
14 jury or someone who looks at the facts as they exist and
15 independently makes a determination whether probable
16 cause has happened.
17 If you have a corrupted legal process where
18 what the independent adjudicator is looking at is not
19 true because it's based on false information, have you
20 received legal process -- proper legal process?
21 MR. EISENHAMMER: You haven't received
22 proper legal process. You're -- you're correct; it's
23 been corrupted, because --
24 JUSTICE SOTOMAYOR: And so I thought if
25 you've never received it, then doesn't your time to

1 accrue for the improper detention occur when you're no
2 longer detained? Here, it was the not guilty; correct?
3 MR. EISENHAMMER: Correct.
4 JUSTICE SOTOMAYOR: So it's not a question
5 of whether -- when it starts. The question is: When
6 does the illegal detention finish?
7 MR. EISENHAMMER: Correct. Correct.
8 JUSTICE SOTOMAYOR: And because you have --
9 because there's been no intermediate force, no
10 intermediary stepping in and breaking the chain of
11 causation; correct?
12 MR. EISENHAMMER: Right. Correct.
13 JUSTICE SOTOMAYOR: Am I understanding your
14 argument correctly?
15 MR. EISENHAMMER: Yes. You are, perfectly.
16 I wish I could take credit for that, but...
17 (Laughter.)
18 JUSTICE SOTOMAYOR: No, but I'm -- I -- I --
19 the only way I could think of it was thinking of it in
20 this way, because you're not claiming malicious
21 prosecution or not.
22 MR. EISENHAMMER: Right. Right. You know,
23 Wallace talked about malicious prosecution, and this is
24 a larger issue of 1983 jurisdiction, which is, you know,
25 what is a proper accrual period for a constitutional --

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

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

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

1 and you're suing.

2 MR. EISENHAMMER: Right. But you have to

3 be -- there has to be a favorable determination in order

4 for you -- it's an element of State court malicious

5 prosecution, so you need to be --

6 JUSTICE KENNEDY: Okay. It's terminated six

7 months or six weeks later.

8 MR. EISENHAMMER: That would be a malicious

9 prosecution claim under State law.

10 JUSTICE GINSBURG: Why do you make the

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

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

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

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

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

16 MR. EISENHAMMER: You could if you ruled

17 that way. Generally, this Court has ruled that after

18 conviction there is -- there's due process, the trial,

19 rights have been violated, so that has been a different

20 amendment that you've gone under. In this case --

21 JUSTICE GINSBURG: It's the same right.

22 It's the right you had from the very beginning.

23 MR. EISENHAMMER: It could -- it could be a

24 Fourth Amendment right. You could have more than one

25 amendment cover more than one -- the same set of facts.

1 CHIEF JUSTICE ROBERTS: Well, but there's
2 just a different consequence to whether you terminate a
3 Fourth Amendment right or a due process right against
4 Parratt against Taylor.
5 MR. EISENHAMMER: Well, we're claiming it's
6 a Fourth Amendment right.
7 CHIEF JUSTICE ROBERTS: I know. But you
8 answered in response to the question that one could be
9 both. But if it's both --
10 MR. EISENHAMMER: Yes, it could be both.
11 Usually, or at least reading Justice Kennedy's
12 concurrence, it appeared that the due process
13 provision -- the due process claim dealt with the issue
14 of whether to prosecute, as opposed to this issue, which
15 is the decision to hold somebody, detain somebody,
16 pending a decision to prosecute or a trial. So it's the
17 Fourth Amendment that really covers this rather than due
18 process.
19 JUSTICE SOTOMAYOR: What happens to the
20 person who is let out on bail? Are they out of luck,
21 under your theory?
22 MR. EISENHAMMER: No. No.
23 JUSTICE SOTOMAYOR: Are you defining
24 detention as broadly as Justice Ginsburg was?
25 MR. EISENHAMMER: Yes. And in Gerstein, the

1 Court did make recognition that detention could go
2 beyond being released, depending on the conditions of
3 the release. So it's not just -- I would say it's not
4 just Justice Ginsburg's concurrence. It was this
5 court's opinion in Gerstein that that was a possibility.
6 JUSTICE GINSBURG: Can you explain why, even
7 if we accept your theory that the unlawful detention
8 continues until he's released, why shouldn't the statute
9 of limitations trigger when he is initially arrested?
10 Why should the trigger for the statute of limitations be
11 different just because we label this Fourth Amendment --
12 MR. EISENHAMMER: I think there's some good
13 reasons for that. They were expressed in Heck, which
14 applies in this particular case too. You don't want to
15 have parallel -- parallel litigation. You don't want to
16 have conflicting decisions between the State and the
17 criminal court, and you don't want -- you don't want to
18 have a collateral attack. That collateral attack works
19 to the detriment of the prosecution and to the defense
20 in the case.
21 I think Justice Kagan's opinion in Kelly
22 illustrates the harm that could happen to the
23 prosecution if you allow someone to collaterally
24 attack -- use a sophisticated attorney to collaterally
25 attack the decision on probable cause, while the case --

1 while the criminal case is pending. But it works to the
2 detriment of the prosecution --
3 JUSTICE KAGAN: Mr. Eisenhammer, why should
4 we even get to these questions? As I understand this
5 case, the Seventh Circuit does something, says something
6 that no other circuit does, which is to say that they
7 say there's no Fourth Amendment claim under Section 1983
8 at all, full stop.
9 If we think that that's wrong, oughtn't we
10 to just send everything else back to the Seventh Circuit
11 to decide what they think the Fourth Amendment claim
12 looks like? In other words, what elements it has, what
13 accrual date it has, anything that they think about this
14 Fourth Amendment claim, send it back to them, having
15 told them that they are wrong about whether this Fourth
16 Amendment claim exists. Why isn't that -- I mean, all
17 this other stuff, the Seventh Circuit hasn't told us
18 what they think about it. The circuits are split on it.
19 It hasn't really been briefed because the principal
20 question has been whether there is a Fourth Amendment
21 claim. Why shouldn't we just send it back to them to
22 decide?
23 MR. EISENHAMMER: I would be in agreement
24 with that, because --
25 JUSTICE KAGAN: You would be in agreement?

1 MR. EISENHAMMER: I would.

2 JUSTICE KAGAN: I wasn't sure. I thought

3 you were arguing.

4 MR. EISENHAMMER: I only -- I only -- it was

5 only in response to the question. I think the question

6 we raised is solely the issue of, does the Fourth

7 Amendment cover detentions pursuant to legal process.

8 JUSTICE ALITO: But don't we have to know --

9 I'm sorry.

10 JUSTICE SOTOMAYOR: Without legal process.

11 MR. EISENHAMMER: Without -- I'm sorry.

12 With -- no, with. With legal --

13 JUSTICE SOTOMAYOR: You're saying it's

14 improper legal process.

15 MR. EISENHAMMER: Yes, but it's still a

16 legal -- it's still a process. It was corrupted, but it

17 was still started with that.

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

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

20 exists?

21 MR. EISENHAMMER: Yes. And the starting

22 point is the Fourth Amendment. If you answer the

23 question on the Fourth Amendment, because the

24 initial question --

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

1 some kind of Fourth Amendment claim, but we -- we're
2 not -- we don't know what it is but there's some kind of
3 a claim. Now you go back and tell us what kind of a
4 claim it is?
5 MR. EISENHAMMER: No. I'm saying the Court
6 can say that this is a Fourth Amendment claim.
7 JUSTICE KAGAN: It's a claim for
8 unconstitutional detention.
9 MR. EISENHAMMER: There's no -- yeah. Just
10 as if -- if they had brought it up in Albright.
11 JUSTICE KAGAN: Now, what the statute of
12 limitations is on that claim or what the accrual period
13 is on that claim is something that we don't have to
14 decide in order to say, yes, you have a claim under the
15 Constitution for improper detention.
16 MR. EISENHAMMER: Correct.
17 CHIEF JUSTICE ROBERTS: Well, but -- I mean,
18 the alternative argued is that it's a due process claim.
19 And whether or not they coexist, or whether the
20 particular period that you're complaining about is
21 properly characterized as detention without due process
22 as opposed to a claim under the Fourth Amendment, would
23 certainly be pertinent in deciding whether or not to say
24 there is a Fourth Amendment claim.
25 MR. EISENHAMMER: No. I -- I think you can

1 decide whether there's a Fourth Amendment claim or a due
2 process without referencing the statute of limitations.
3 That issue is, in a sense, before you. You can answer
4 it.
5 We're not talking about -- as I said before,
6 we're not claiming that the decision to prosecute, which
7 might be a due process claim, has been violated. All
8 we're talking about is the detention -- the detention
9 subject to legal or corrupt legal process. That's the
10 only claim that we're asking for. The Court has
11 indicated --
12 JUSTICE SOTOMAYOR: If the detention --
13 you've described this in various ways. Is it a
14 detention without constitutional probable cause? Is it
15 a detention with -- with no proper legal process? Where
16 exactly is the Fourth Amendment violation? Because in
17 false arrest and false imprisonment claims, according to
18 Wallace, as soon as you get legal process, there's been
19 an intervening end to the false imprisonment because
20 someone else has imprisoned you.
21 So what remains in this case? How do we
22 define the constitutional violation so --
23 MR. EISENHAMMER: All right. May I reserve
24 time after just some more questions?
25 I think this is a Fourth Amendment claim

1 that you can -- you can describe as being corrupted
2 by -- you know, a corrupt Gerstein hearing. You can
3 claim it prolonged a detention beginning at -- at legal
4 process the way County of Riverside -- or Rodriguez,
5 where it was extended just for -- the traffic stop was
6 extended just for seven minutes to do a dog search, and
7 this Court found that there was -- it was a seizure, and
8 an improper -- improper seizure.
9 This is exactly what happened here. The --
10 the seizure was extended improperly because of the
11 fabrication by the police.
12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Ms. Eisenstein.
14 ORAL ARGUMENT OF ILANA H. EISENSTEIN
15 FOR UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE PETITIONER
17 MS. EISENSTEIN: Mr. Chief Justice, and may
18 it please the Court:
19 We think that this Court should locate the
20 constitutional right at issue in the Fourth Amendment
21 for the reason that the Fourth Amendment does apply to
22 pretrial detentions as this Court has long held. The
23 Fourth Amendment requires any prolonged period of
24 detention to be supported by, one, valid determination
25 of probable cause at the outset of that -- at that

1 period of detention.

2 The Seventh Circuit error here was to find

3 that the Fourth Amendment stops operation once criminal

4 charges are filed. And this Court has long recognized

5 as well that there's a variety of ways to make that

6 probable cause determination, including by the same

7 procedure used to bring the criminal charge itself.

8 JUSTICE KENNEDY: Suppose it's a close

9 question about probable cause. None of the fabricated

10 evidence, just, was the information available to the

11 police sufficient to -- to make the arrest, and the

12 court wrongly determines that there was probable cause

13 and he's held for six weeks. Fourth Amendment

14 violation?

15 MS. EISENSTEIN: Your Honor, there may be a

16 Fourth Amendment violation, but there may be no one to

17 sue under those circumstances, under Section 1983.

18 JUSTICE KENNEDY: Why is it a Fourth

19 Amendment violation? If it was close, then the decision

20 was reasonable.

21 MS. EISENSTEIN: Well, of course, Your

22 Honor. I think I took Justice Kennedy's hypothetical to

23 pursue it was wrong in the sense of wrong and

24 unreasonable. I think a wrong --

25 JUSTICE KENNEDY: No, it's wrong but

1 reasonable.

2 MS. EISENSTEIN: Well, then, Your Honor, no,

3 I don't think it would be a Fourth Amendment violation

4 at all.

5 (Laughter.)

6 JUSTICE KENNEDY: Why? He's -- he's being

7 detained.

8 MS. EISENSTEIN: Well, because, Your Honor,

9 I think that --

10 JUSTICE KENNEDY: Violation of the Fourth

11 Amendment.

12 MS. EISENSTEIN: Well, Your Honor, because I

13 think that --

14 JUSTICE KENNEDY: And that's why it seems to

15 me that there's a good argument that we should be

16 talking about malicious prosecution, not the Fourth

17 Amendment.

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

19 that the Fourth Amendment does afford reasonable

20 mistakes of fact, and law for that matter, in allowing

21 someone to be detained. So it's not that. In fact, the

22 probable cause standard itself allows for factual errors

23 in the determination.

24 But here, the allegation that Mr. Manuel

25 claims is that he was detained on drug charges that

1 relied entirely on fabricated evidence. And we think
2 that that claim is a claim of detention without probable
3 cause under the Fourth Amendment.
4 JUSTICE ALITO: It's unreasonable. And
5 the -- the defendant wouldn't have qualified immunity,
6 but it's not corrupt. There's nothing malicious about
7 it. Would there be a claim?
8 MS. EISENSTEIN: Your Honor, I think it
9 depends on what the causation would be in terms of the
10 officer's role in bringing the charge.
11 So if the officer puts forth and has -- is
12 the one pressing to bring a charge that is not
13 reasonable, objectively unreasonable under the Fourth
14 Amendment, subject to qualified immunity and others bars
15 to suit, he may be liable. But to the extent to which
16 the error falls with the magistrate or the prosecutor,
17 those kinds of claims would be foreclosed by the
18 absolute immunity that those individuals --
19 JUSTICE ALITO: What if it's an F.B.I.
20 agent?
21 MS. EISENSTEIN: Well, Your Honor, I think
22 that the measure of liability for a Federal officer
23 follows the same sort of immunities and rules.
24 JUSTICE ALITO: I thought you said in your
25 brief the standard for State and local law enforcement

1 officers might be different from the standard for
2 Federal law enforcement officers.
3 MS. EISENSTEIN: If I did, Your Honor, I
4 don't -- I don't believe we were referring to -- if you
5 could clarify which standard you mean, the standard for
6 qualified immunity or -- or --
7 JUSTICE ALITO: On page 30 of your brief.
8 30 to 31 of your brief.
9 MS. EISENSTEIN: Well, Your Honor, I think
10 that in those particular instances, that relates to --
11 that piece of our brief relates to special factors that
12 could potentially counsel hesitation on a Bivens claim
13 that don't necessarily apply to Section 1983 --
14 JUSTICE ALITO: Yeah, and that's what I'm
15 saying. So you think that there should be a remedy for
16 violations by State and local police officers, but not
17 under identical circumstances, possibly, if it's a
18 Federal officer.
19 MS. EISENSTEIN: Not in this instance, Your
20 Honor. We wouldn't draw that distinction. And -- and
21 I'd also --
22 JUSTICE ALITO: Well, then what were you
23 saying in your brief? I don't understand it.
24 MS. EISENSTEIN: I think that there may be
25 other circumstances not presented by this case, not

1 presented by a -- a case of fabricated evidence or
2 unreasonable pursuit of a wrongful criminal charge that
3 may lead to a different result under 1983 under Bivens.
4 But I don't think we have to -- we just wanted to make
5 sure that the Court understood that the Bivens claim may
6 have different ramifications.
7 JUSTICE BREYER: That's right. I mean, I
8 may be missing something, although this is quite a
9 simple case. A policeman makes an unreasonable stop and
10 an unreasonable search, thereby violating the Fourth
11 Amendment. Now you can sue him, assuming you overcome
12 other hurdles.
13 Now he takes you off and puts you in prison,
14 either with a magistrate or without a magistrate, and
15 you are therefore being unreasonably detained. It's an
16 unreasonable search/seizure pursuant to the Fourth
17 Amendment; therefore, it's a violation.
18 Then you have a trial, and using the same
19 rotten evidence, you are convicted. There you don't,
20 though you could. But the reason that you don't is
21 because you are viewed as, by the law so far, being in
22 jail now as a result of your conviction. And the
23 reason, I guess, is practical. We don't want to look
24 into all those convictions and their different
25 standards. Now that's the -- the framework in my mind.

1 Is it right?

2 MS. EISENSTEIN: Absolutely, Your Honor.

3 That is exactly the framework that the government puts

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

5 in jail, but that the constitutional right depends on

6 what process was infringed.

7 JUSTICE SOTOMAYOR: All right. So let's

8 stop. I understand you so far.

9 The question presented was, I think -- I

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

11 So whether an individual's Fourth Amendment

12 right to be free from unreasonable seizure continues

13 beyond legal process so as to allow a malicious

14 prosecution claim based upon the Fourth Amendment.

15 The Chief Justice was right. The question

16 presented is, does the Fourth Amendment consonance house

17 a malicious prosecution claim, which is something very

18 different than what you're describing as a Fourth

19 Amendment seizure and detention without legal process.

20 MS. EISENSTEIN: That's correct, Your Honor,

21 because in our view, the constitutional inquiry is step

22 one, but step two is to determine the elements and

23 accrual date and other prerequisites to suit under our

24 Section 1983 tort, and in that instance, the accrual may

25 be governed by the closest common law analogy.

1 When the challenge at its core is arguing
2 that the wrongful prosecution and the wrongful
3 institutional process led to the detention without
4 probable cause, in our view, the closest analogy is a
5 malicious prosecution suit, and that that --
6 JUSTICE SOTOMAYOR: But are you suggesting
7 we have to take every element of the -- whatever the
8 elements are. Because from what I understand from the
9 briefing, malicious prosecution is defined differently
10 from State to State.
11 So if that's the case, what are the elements
12 that you see for a 1983 claim? Does it include malice?
13 MS. EISENSTEIN: Your Honor, we do not think
14 that a constitutional tort under 1983 simply adopts
15 common law or State tort elements of malicious
16 prosecution. Only the accrual rule is -- as based on
17 this Court's decision in Heck and Wallace are taken up
18 by the common law analogy.
19 In terms of malice, no, Your Honor, we don't
20 think malice, as it's known in common law or most State
21 courts, is an element of this kind of claim. We do
22 advocate that this Court treat a probable cause
23 determination underlying a criminal charge the same way
24 it treats a probable cause determination underlying a
25 search warrant, which includes the Franks standard. We

1 don't think of that as a malice standard of common law,
2 but rather, an extension of the Franks doctrine.
3 CHIEF JUSTICE ROBERTS: Well, I nearly said
4 that it inspired examples we take to flesh this out, but
5 it does seem to me to be just pretty result-oriented
6 cherry picking. If once you say, well, here's a claim,
7 now we'd like the statute of limitations part, so we
8 don't take that in. We -- we don't want to have to show
9 malice, so we take that. I mean, I don't know if we're
10 still holding true to the approach in Wallace, if you
11 just start picking things in and out depending upon the
12 demands of the particular case.
13 MS. EISENSTEIN: Well, Your Honor, I think
14 that Wallace did say that Federal accrual rules in
15 particular were governed by the common law analogy. We
16 think that that's as far as it goes in terms of choosing
17 from the common law. The statute of limitations, for
18 example, is barred from State law.
19 But here, the Seventh Circuit's view of
20 accrual flowed from its error as to the scope of the
21 Fourth Amendment. So to Justice Kagan's proposal that
22 this go back, in many ways we think that's absolutely
23 appropriate, because the Seventh Circuit erred by
24 holding that since the Fourth Amendment stops at the
25 time criminal process begins, it thought you can't have

1 a malicious prosecution analogous claim, because there
2 is no such Fourth Amendment claim.
3 If you peel that error away, we think that,
4 even under Seventh Circuit jurisprudence, they would
5 agree that a favorable termination requirement would
6 apply in such circumstances.
7 JUSTICE GINSBURG: When does the Fourth
8 Amendment claim stop? I -- I think co-counsel said if
9 you're convicted, it stops. In -- in response to my
10 question, suppose none of this comes out until habeas,
11 and then we find out the police have lied from day one.
12 MS. EISENSTEIN: So, Your Honor, we do see
13 those as distinct phases, and that when you're held, an
14 individual is held pursuant -- before trial, pursuant to
15 a finding of probable cause by a magistrate or a grand
16 jury, that that is a Fourth Amendment claim. But once
17 the person is held pursuant to a finding beyond a
18 reasonable doubt at trial, that due process and other
19 constitutional protections take over.
20 JUSTICE KENNEDY: But suppose there's a
21 pretrial suppression hearing in which both parties are
22 represented, and the court reaches a wrong result with
23 reference to the admission of the evidence. Does a
24 Fourth Amendment violation still continue?
25 MS. EISENSTEIN: May I answer, Your Honor?

1 Your Honor, I think that it -- it may be a
2 Fourth Amendment violation, but whether a plaintiff
3 could bring those kinds of claims would be governed by
4 preclusion principles and other similar bars, once that
5 issue had been actually litigated in a State court.
6 JUSTICE SOTOMAYOR: In a State court
7 proceeding, the State analogue, what would be the rule
8 of accrual ending? You get convicted; you don't find
9 out about the false testimony until habeas, State or
10 Federal.
11 When, in that situation would accrual occur?
12 MS. EISENSTEIN: In our view, when the case
13 was dismissed or overturned, Your Honor.
14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Scodro.
16 ORAL ARGUMENT OF MICHAEL A. SCODRO
17 ON BEHALF OF THE RESPONDENTS
18 MR. SCODRO: Mr. Chief Justice, and may it
19 please the Court:
20 I think it's very important to frame what is
21 before the Court this afternoon. And to begin, I think
22 it's essential to note we are not disputing at any point
23 in this litigation that misstatements made that result
24 in a finding of probable cause at a Gerstein hearing is
25 a Fourth Amendment violation, nor does the Seventh

1 Circuit disagree.

2 The reason this came up to the Seventh

3 Circuit as it did -- and this may be important in

4 understanding the context -- this is on a motion to

5 dismiss for statute -- for violation of the statute of

6 limitations. All of the claims were dismissed but one,

7 the one that was appealed, and that one survived

8 momentarily in the district court because Petitioner

9 claimed that that one claim has a favorable termination

10 element because it is malicious prosecution.

11 He reiterated that claim before the Seventh

12 Circuit, and the Seventh Circuit reached two

13 conclusions.

14 One, you have a Fourth Amendment claim which

15 they discuss, and that the only claim before them was

16 based on the lie at the Gerstein hearing. You have a

17 Fourth Amendment claim, but it is already accrued; it

18 accrued too early; it is untimely.

19 Now you're asking us to recognize a

20 different breed of Fourth Amendment claim, namely, a

21 malicious prosecution Fourth Amendment claim, because

22 you'd like to overcome the time bar. We do not

23 recognize that Fourth Amendment malicious prosecution

24 claim.

25 JUSTICE KAGAN: Mr. Scodro, I -- I just have

1 to say I read this differently, so you can tell me why
2 I'm wrong.
3 But I'm -- in the last column of the Seventh
4 Circuit's opinion, so there are twice where the Seventh
5 Circuit says what it thinks. The first time, it says,
6 when after the arrest a person is not let go when he
7 should be -- so it's after the initial seizure, and then
8 the person is not let go, the Fourth Amendment gives way
9 to the due process clause as a basis for challenging his
10 detention.
11 And then in the last paragraph it says, once
12 detention by reason of arrest turns into detention by
13 reason of arraignment, the Fourth Amendment falls out of
14 the picture.
15 So it seems to me that twice, the Seventh
16 Circuit says very clearly that you have this Fourth
17 Amendment claim until arraignment or legal process, and
18 after that, the Fourth Amendment falls out of the
19 picture.
20 And at the very basic level, before you get
21 into these questions of what's the accrual date or
22 anything else, it seems that that's the thing that the
23 Petitioner is saying is wrong, that the Fourth Amendment
24 claim continues after arraignment or after legal
25 process. Now, when it accrues, when it doesn't accrue

1 is a different question, but it's still a Fourth
2 Amendment claim, and -- and -- and that's what the
3 Seventh Circuit rejected.
4 MR. SCODRO: Your Honor, I think I would
5 direct the Court to the top of JA103 as well, where the
6 Court also notice -- notes the fact that they have found
7 Fourth Amendment claims, even in terms of false
8 information in an incident report, even at a preliminary
9 hearing which comes long after the initiation of
10 process.
11 What the Court in context has read -- and by
12 the way, this is consistent with past statements by the
13 Seventh Circuit, the -- the fundamental statement the
14 Court has made -- and this comes from Newsome, the 2001
15 decision from which this jurisprudence has blossomed in
16 the Seventh Circuit -- relabeling a Fourth Amendment
17 claim as malicious prosecution would not extend the
18 statute of limitations.
19 This has been the nature of the battle, and
20 on page 21 of the cert petition in this case, Petitioner
21 makes clear why a question presented doesn't end halfway
22 through. It doesn't ask merely whether there's a Fourth
23 Amendment right that survives the initiation of process.
24 If, by "process," they mean Gerstein
25 hearing, we agree. And I think the Seventh Circuit

1 would agree as well. But it goes on to say "so as to
2 allow for a malicious prosecution claim." And on
3 page 21 of their cert petition, they explain to the
4 Court what they mean by that, when they say that the
5 fate of this appeal to this Court turns on whether the
6 Court does or does not adopt a favorable termination
7 element, and that that's why this makes an ideal
8 vehicle, to answer Justice Alito's earlier question,
9 which is: What are the elements of this claim?
10 JUSTICE BREYER: I didn't think that was a
11 difficult question. I thought that everyone agrees that
12 if a policeman wrongly arrests you -- you know,
13 maliciously arrests you, et cetera -- and there you are
14 in his custody and he brings you over to the jail, puts
15 you in jail, up until the point you see the magistrate,
16 you have a claim for false arrest.
17 MR. SCODRO: Correct.
18 JUSTICE BREYER: And we said that that claim
19 for false arrest is a constitutional claim.
20 MR. SCODRO: Yes.
21 JUSTICE BREYER: It violates the Fourth
22 Amendment. What time limit applies? The false arrest
23 time limit, because that's the most analogous.
24 Then we get into the next stage. Now you're
25 in front of a magistrate, and the magistrate says, stay

1 in jail for two more months. Does that violate the
2 Fourth Amendment? Not malicious prosecution. Does it
3 violate the Fourth Amendment?
4 The reason that we tend to think it does is
5 because all the circuits have said it does; that is,
6 Judge /H*EUG said that in the Fifth Circuit. A lot of
7 the circuits picked that up. I'm not saying every one.
8 But they said that, too, violates the Fourth Amendment.
9 Now we have a problem.
10 What statute of limitations do we use for
11 that one? And there, the circuits seemed to have picked
12 malicious prosecution not because they are going to
13 follow every element, but because it's the State law
14 that provides the closest analogy.
15 And that seems to me where we are in this
16 case. We don't have to go much further than that.
17 Am I right so far?
18 MR. SCODRO: You are correct. The issue
19 before the Court is which accrual date for limitations
20 periods should the courts be --
21 JUSTICE BREYER: So you will accept -- or
22 will you accept for purposes of this argument that once
23 this individual is brought by the policeman to jail and
24 they go before a magistrate, and the magistrate using
25 the same bad evidence says, stay here in jail for

1 several -- for a while -- for a week, anyway, until we
2 get to trial -- that that period is a violation of the
3 Fourth Amendment, assuming that they were all lying, et
4 cetera.
5 MR. SCODRO: Your Honor, yes.
6 JUSTICE BREYER: Yes. Then the question is:
7 Do we use the malicious prosecution as an analogy, not
8 all the elements? And so now the question, great, this
9 is fabulous, I get to the narrower question I have, why
10 isn't it a good analogy?
11 MR. SCODRO: Your Honor, let me answer why
12 it's not a good analogy, and I'll also answer -- I think
13 flesh out just slightly whether or not this remains --
14 the moment in time when the police officers lie to -- to
15 submit an affidavit with falsehoods to a magistrate at a
16 Gerstein hearing, and the magistrate finds probable
17 cause, what we do not dispute, and what we do not think
18 the Seventh Circuit would dispute, is that that is a
19 violation of the Fourth Amendment.
20 Now, the question of whether or not
21 malicious prosecution is the proper analogy, the answer
22 is absolutely not, and Wallace tells us why not.
23 Wallace tells us -- the Petitioner has shifted just
24 slightly from a reliance on common law favorable
25 termination, which is what most of the circuits on their

1 side of the split have done. This also goes, I think,
2 to Your Honor's questions and to your point.
3 Most of the circuits on the other side of
4 the split have used favorable termination, but they've
5 done so by adopting it as part of the underlying
6 four-element common law tort, and they think if that's
7 what we're calling it, then it's going to have favorable
8 termination.
9 A smaller number have relied on an
10 extension, a drastic extension, of this Court's decision
11 in Heck. And that's the request now made by the
12 Petitioner in the reply brief, that Heck ought to be
13 expanded to apply here.
14 But Wallace was very clear. Heck only
15 applies -- the delayed accrual principle and the
16 favorable termination element that comes with it apply
17 only where you have an extant conviction. And that
18 doesn't exist here.
19 The court went through a mental exercise.
20 They said, look, if you can realize that you have a
21 Fourth Amendment claim before you're convicted, if the
22 elements can be in mind, you know you've been wronged in
23 a Fourth Amendment way before you are convicted, then
24 that is not a claim that is entitled to the delayed
25 accrual principle of Heck.

1 And the reason was very simple, because as
2 this Court said in Gerstein, Fourth Amendment
3 contemplates that you can have bad arrests and good
4 convictions. And nevertheless, the Fourth Amendment
5 protects the innocent as well as the guilty. And
6 expanding Heck to apply in a circumstance where all you
7 have is an ex parte requirement, or finding rather, of
8 probable cause, requiring that civil plaintiff to then
9 prove vindication at the end of the day would close the
10 door on a potential universe of Fourth Amendment claims
11 and instances.
12 JUSTICE GINSBURG: I think you can have
13 discrete claims. One wrong is you never should have
14 been arrested, so you have a Fourth Amendment claim for
15 that. Another wrong is they kept you in detention.
16 They extended that arrest. So I don't see why you have
17 one wrong which ends on arrest, but then if you are
18 continuing to be held based on trumped up false
19 information, why isn't that like a continuing tort? And
20 it continues until it ends.
21 MR. SCODRO: Well, Your Honor, just to make
22 sure that I've been clear, again, we do agree that the
23 lie -- the second lie Your Honor has described, the lie
24 before the magistrate, is actionable under the Fourth
25 Amendment. If the question is why then doesn't the

1 accrual period run from when one is ultimately released,
2 I would make a couple of points in response to Your
3 Honor's question.
4 First, Petitioner has been very careful not
5 to make that argument. Indeed, the continuing seizure
6 idea would be inconsistent facially with the cert
7 petition, which claimed they need the benefit of
8 favorable termination to prevail. They of course
9 wouldn't need it if they were instead arguing for a
10 period of a continuing seizure.
11 Lower courts have rejected the notion of a
12 continuing seizure, and they're not raising it here.
13 And I think the reason may be twofold.
14 The first is that it runs into -- it runs in
15 the face of traditional accrual principles that this
16 Court has said, cases like Ricks and others, that it's
17 not the period of harm that matters for accrual
18 purposes. It's when one first experiences the harm and
19 thereby has all the elements needed to proceed.
20 And a case like Morgan, which was a hostile
21 work environment case, is really the exception that
22 proves the rule. In many ways it tells us why or how
23 narrowly the Court has construed the exceptions to this
24 typical accrual principle. Hostile work environment
25 does require precisely what Your Honor describes because

1 it's impossible to know precisely when a hostile work
2 environment begins. Is it the second comment or the
3 fifth or the tenth that someone has to endure in the
4 workplace, and therefore, the Court is willing to
5 consider it as a monolithic whole and treat it that way
6 for accrual purposes?
7 But again, that's the exception that proves
8 the rule. As Wallace itself concluded, there can be a
9 cutoff, which Wallace imposed between the initial arrest
10 and the post process arrest, and Wallace itself in that
11 regard, I think, breaks through the notion of a
12 continuing seizure.
13 The final point I would make -- and I think
14 this comes out in one of their amicus briefs; namely,
15 the brief by Professor Alexandra -- taken to its logical
16 conclusion, the logic of continuing seizure may lead one
17 to conclude that the seizure doesn't end until the
18 ultimate period of incarceration concludes. What that
19 means is now you have potential civil plaintiffs
20 bringing claims 10, 15, 20 years down the road without
21 any prior notice to the would-be defendants, no ability
22 to maintain evidence and so forth.
23 JUSTICE SOTOMAYOR: Why do you need to give
24 evidence to somebody who's fabricated the reasons why
25 you're in jail? And I don't know why you would think

1 that it's important to cut off recovery against a police
2 officer who bases an arrest solely on fabrication. It
3 doesn't seem so horrible to me. Years later or
4 immediately, if you've done something as untoward as
5 that, as unconstitutional as that, why should it matter?
6 MR. SCODRO: Your Honor, two points. The
7 first is, and this is a point of clarification, we're
8 not suggesting that damages arising from lies at a
9 Gerstein hearing, for lack of a better term for it,
10 would not run subject to traditional common law
11 proximate causation principles through part or all of
12 the pretrial period. There may well be interrupting
13 events, but that I just want to make clear. We're not
14 suggesting that those damages may not be available, in
15 this case, had the claim been brought timely for the
16 full 48 days, depending on how those common law
17 proximate cause principles would shake out.
18 The other point -- and this is one the
19 States made in their amicus brief in Wallace. They've
20 made it again as half the municipalities as amici.
21 They've made the point that early notice to the State as
22 employer of agents who are engaged in bad acts is
23 extraordinarily important. Government is intent upon
24 learning sooner rather than later that they have
25 individuals in their ranks that are violating the

1 constitution.

2 And this Court in Wallace, in turning aside

3 basically the same extension of Heck that is recommended

4 for the Court, or the Court's invited to take in this

5 very case, when they turned it away, they said, one of

6 the reasons is we need notice to the would-be defendants

7 in those cases. They can preserve evidence to ensure --

8 JUSTICE SOTOMAYOR: You know, counselor,

9 it's not as if most States don't receive that kind of

10 notice in these situations. The defendants are just not

11 believed in most, until some independent evidence is

12 discovered long after the conviction. In my

13 experience -- and you can point to one that's

14 different -- I've never come across any of these cases

15 where any defendant falsely accused of a crime hasn't

16 vigorously announced his or her innocence and vigorously

17 tried to tell the authorities this police officer is

18 corrupt.

19 So I'm not -- I don't know what extra notice

20 you need other than that. The situation is unique.

21 We're talking about total fabrication. You have so many

22 other ways out of liability, qualified immunity, francs.

23 There's so many other protections against the State and

24 individual officers for -- for errors.

25 But why should we worry about you not

1 receiving notice?

2 MR. SCODRO: The reason, Your Honor, is that

3 in this case, when the later accrual principle that

4 Petitioner requests under Heck or as a matter of a

5 common law element, is purchased not only at the price

6 of delayed notice to the would-be defendant, it's

7 purchased at the price of closing the courthouse door on

8 a number of potential Fourth Amendment claimants, those

9 who are subject to unlawful arrest but are later validly

10 convicted.

11 JUSTICE KAGAN: Mr. Scodro, can I ask -- I

12 might be misunderstanding this, so you'll tell me if I

13 am. But it seems as though the position that you're

14 taking now is diametrically opposed to the position that

15 you took in the Seventh Circuit. So I'll just read you

16 something, and this is from oral argument, but my clerk

17 tells me that this is what happened. I think that

18 there's not a transcript, but there maybe is. But at

19 least, this is what my clerk tells me happened at oral

20 argument. Judge Rovner says there are ten other

21 circuits that have now recognized this kind of claim,

22 this kind of Fourth Amendment claim. And she said,

23 let's just assume that we do what those ten other

24 circuits have done, which, of course, they didn't do,

25 but she says. Let's just assume it.

1 At what point would you think the statute of
2 limitations would begin to run? And then you -- or
3 maybe not you, but you --
4 (Laughter.)
5 JUSTICE KAGAN: You say, well, if you were
6 to recognize such a claim --
7 MR. SCODRO: Yes.
8 JUSTICE KAGAN: -- the accrual is the time
9 at which the proceedings are terminated in favor of that
10 individual.
11 So in this case it would be, I think, the
12 date would have been May 4, 2011.
13 And then Chief Judge Woods says, so you're
14 assuming that the constitutional tort would follow the
15 same pattern that State law does and require the
16 favorable termination, because if there's no favorable
17 termination for all the policy reasons the States have
18 considered, there's no injury.
19 And again, whoever the lawyer was said,
20 that's correct.
21 So am I misunderstanding this, or are you
22 saying that's not correct; that's wrong?
23 MR. SCODRO: I think that that is correct
24 insofar as what the lawyer was being asked, as I
25 understand it, having also listened to the argument,

1 Your Honor, is that --

2 JUSTICE KAGAN: Is there no transcript for

3 this?

4 MR. SCODRO: I am not aware of a transcript.

5 The Seventh Circuit may especially -- part of that quote

6 appeared in the reply brief in support of the cert

7 petition. And what that quote makes clear, it seems to

8 me what the lawyer is being asked is, if we are to

9 follow suit, what -- again, taking it back to what

10 was -- this was on a motion to dismiss on limitations

11 grounds. If they are not able to establish that they

12 have an accrued claim or a claim with a delayed accrual

13 sufficient to satisfy the limitations period or under a

14 traditional Fourth Amendment theory, can we overcome

15 this limitations period by virtue of these common law

16 elements. And what the attorney was being asked, as

17 I -- as I heard that argument, what the attorney was

18 being asked is, isn't -- do you agree that what they are

19 trying to do here is join what every other circuit has

20 done. And if we join what every other circuit has done,

21 they would have a favorable termination element. Or --

22 JUSTICE KAGAN: Oh, I don't think that

23 that's -- I mean, maybe, I guess. I mean, it seems to

24 me that the much more natural way of understanding this

25 is to say, look, if we do what every other circuit has

1 done in the sense that we acknowledge that there is a
2 Fourth Amendment claim here, post-legal process,
3 something which you yourself have now acknowledged
4 today, that if we acknowledge that, what would the
5 accrual date be? And then the lawyer says the accrual
6 date would be the date of termination.
7 MR. SCODRO: Sure.
8 JUSTICE KAGAN: And now you're saying it
9 wouldn't be. And I actually don't know whether it
10 should be or it shouldn't be. I don't think the Seventh
11 Circuit for a moment considered that question. And I
12 guess it's -- it's another reason why I think we should
13 just send the whole thing back. The Seventh Circuit can
14 figure out whether you forfeited this claim. The
15 Seventh Circuit can figure out, if you didn't forfeit
16 this claim, what the right answer is. But to me, this
17 language -- and I have not listened to the tape myself,
18 so I have to admit that. But to me, this language
19 suggests that you forfeited this.
20 MR. SCODRO: Yeah. Your Honor, as I --
21 again, in context, I think what the lawyer was being
22 asked is, if they get the benefit -- and I believe the
23 quote in the reply in support of the -- the part of the
24 quote that appears in the reply in support of the cert
25 petition includes a reference to, well, along with the

1 common law elements, the lawyer is saying, yes, if they
2 were to get the benefit -- this is what they are trying
3 to do. I mean, no one denied it. What they were saying
4 in the briefs was, we want the benefit of the
5 four-element tort recognized in other circuits, most
6 because they are just adopting wholesale, the tort; a
7 few, because they seem -- they cite Heck in lieu of the
8 common law element. And the question was, if we give
9 them what they are asking for, that is, if this Court
10 follows those other courts, would they have a May 4th
11 accrual date? And the answer is yes. Because that's
12 what they've been seeking all along.
13 JUSTICE BREYER: Why not?
14 Look, the person is being held because the
15 magistrate listening to the policeman detained him, and
16 the magistrate and everybody was very unreasonable, da,
17 da, da. Okay? Now he's there.
18 Day one. Can you bring a case? Yes. Why
19 not?
20 He's been under -- day two. Yes. And he's
21 been held for 90 days. And I can say the same thing,
22 but I won't, up to each of the 90 days. 90th day, he's
23 released. It's now the 91st day. Can he bring it?
24 Yes. But now we only have two years. Why only two
25 years? Because we're looking for an analogous statute

1 of the State to give us a limit, and the analogous one,
2 though not perfectly fitting, is malicious prosecution,
3 and that had two years, and that's why. Two years after
4 the release date is the longest. You had better bring
5 it before then, because that's two years since you were
6 unlawfully held.
7 Now, what's wrong with what I just said?
8 MR. SCODRO: Well, Your Honor, two points in
9 response to that.
10 The first would be Wallace says or holds
11 that if you have the claim on day one, then that -- it's
12 accruing on day one. We're not going to give you --
13 there's no extant conviction.
14 JUSTICE GINSBURG: But it's a different
15 claim. One claim is for arrest, and the other is for
16 prolonged detention. Two different claims. That's why
17 I took issue with you when you said if you hold for this
18 Petitioner, then people who are falsely arrested but
19 properly convicted will have no claim. I don't -- I
20 don't see that. They have a false arrest claim. They
21 don't have a prolonged detention claim.
22 MR. SCODRO: Well, Your Honor, I think what
23 would happen, they wouldn't have a claim based on
24 misstatements at the Gerstein hearing if, in order to
25 make out that claim as Petitioners contend, they would

1 have to show that ultimately their criminal litigation
2 terminated in their favor. That's the request. If Heck
3 is extended or the common law element is extended -- and
4 this is why it's not the best analogue, Your Honor. And
5 if it would be helpful to have a common law point of
6 guidance on this, in Footnote 12 of our brief, we
7 provide a list of common law cases, an example of common
8 law cases in which the Court addressed a question like
9 this.
10 We have an ex parte proceeding in which a
11 magistrate issued -- I'll take the Stewart case, which
12 is the third of the three cited. The person serves six
13 months in jail on the warrant, but there's never a
14 prosecution. It never blossoms. He's released, and he
15 sues for malicious prosecution. And the defendant in
16 the malicious prosecution contends that they are not --
17 that they are unable to show successful outcome --
18 JUSTICE BREYER: What's your -- what's the
19 best one? What's the best analogy?
20 MR. SCODRO: That it's -- this form of
21 malicious prosecution where you didn't have to prove
22 favorable termination, because all that was against you
23 at that point was an ex parte determination with State
24 law like that. This is --
25 JUSTICE BREYER: What is your opinion? What

1 is the State law that does apply the best analogy?
2 MR. SCODRO: I think the closest analogy is
3 false arrest.
4 JUSTICE BREYER: False arrest. Okay.
5 Now, what is the statute of limitations for
6 false arrest?
7 MR. SCODRO: The State law, it's still the
8 personal injury limitations period of two years.
9 JUSTICE BREYER: Okay. Fine. So he was
10 being detained for up to, let's say, the 90th -- 90th
11 day. He's still being detained. So now we'll count the
12 90th day as the beginning of the two-year running. And
13 so now we run it for two years, and it's still May 12th
14 or whatever.
15 MR. SCODRO: But, Your Honor, a false arrest
16 claim under Wallace accrues once process begins. So
17 it's not running for that 90 days. It would include --
18 JUSTICE BREYER: Why not?
19 MR. SCODRO: Well, as we --
20 JUSTICE BREYER: Isn't he being held? And
21 isn't he being held unlawfully on the 41st day? And
22 after all, we're not -- we're not copying the State law.
23 All we're doing is trying to find an analogous period of
24 time.
25 MR. SCODRO: But, Your Honor, by imposing

1 the favorable termination element of the common law
2 claim, it would run headlong into the Fourth Amendment
3 aims; what the Fourth Amendment is geared to vindicate.
4 The Fourth Amendment, this Court has held,
5 is there for the guilty and innocent alike. And in this
6 case, what -- what -- the cost of borrowing that
7 favorable termination element and importing it into a
8 claim based solely on lies and an ex parte proceeding,
9 which is what we're talking about with the Gerstein
10 hearing, doing so would mean that if you're the victim
11 of lies at a Gerstein hearing, and you're detained, but
12 ultimately you are constitutionally convicted as
13 evidence amasses against you, the need to show favorable
14 termination, it will be impossible for that plaintiff.
15 And so the Fourth Amendment right will not be something
16 that that plaintiff can vindicate. That's the reason
17 that Wallace didn't allow Heck to expand to instances
18 like this where you're not challenging the wrongful
19 conviction itself.
20 And what they have asked, their claim is
21 narrow, and the way to resolve this case is -- is now
22 equally narrow. The way to resolve the case is to
23 conclude that whenever this -- your Fourth Amendment
24 claim could run through the arraignment after indictment
25 in this case, which still -- which was still out of the

1 two-year limitations period. But it is not entitled to
2 that favorable termination element which would have the
3 effect of closing off the courthouse doors to a universe
4 of claims in order to buy extra time in this case. And
5 that is what we urge the Court not to do. And that is
6 the simplest way.
7 JUSTICE GINSBURG: What you're saying is if
8 you're falsely arrested, you have a good claim for false
9 arrest. It doesn't matter that you were properly
10 convicted. But if you are not only falsely arrested,
11 but if your detention continues, then you have a claim
12 for the continued detention.
13 MR. SCODRO: For violation of the Gerstein
14 hearing, Your Honor. And -- and I do -- for lies, under
15 Gerstein.
16 I do want to be clear in saying that the
17 closest analogous tort is false arrest. That is
18 treating it the way I think the Seventh Circuit has,
19 which is that it runs up until what we call the first
20 appearance where you have the initiation of adversarial
21 process. By no means does the limitations period, or is
22 there a tolling that runs from the period of the lie at
23 the Gerstein hearing through the pretrial period.
24 As I said at the outset, that is subject to
25 traditional tort common law principles of -- of

1 proximate cause. And there may well be damages
2 recoverable for that period, but it's based on the lie
3 at the Gerstein hearing. And as Wallace held, Heck
4 cannot be extended to apply to a claim that it exists
5 before you have an extant conviction.
6 JUSTICE KENNEDY: Just one more time.
7 Suppose you have arrest; Gerstein hearing --
8 MR. SCODRO: Yes, Your Honor.
9 JUSTICE KENNEDY: -- filing of formal
10 charges, either information or indictment; pretrial
11 suppression hearing, at which both parties are
12 represented --
13 MR. SCODRO: Yes.
14 JUSTICE KENNEDY: -- and the false evidence
15 is -- is not -- its falsity has not been known. And so
16 you're detained. And then trial.
17 When does the Fourth Amendment violation
18 end?
19 MR. SCODRO: Sure. You would have it --
20 this returns to Justice Ginsburg's point. You would
21 have a Fourth Amendment claim for the initial
22 warrantless arrest. You would have a Fourth Amendment
23 claim for misstatements at a Gerstein hearing that then
24 led to ongoing pretrial seizure. And the damages from
25 that claim may run throughout the period of pretrial

1 seizure.

2 But with regard to the nature of the

3 constitutional violation that occurs at subsequent

4 processes, be they grand jury, bail hearings,

5 preliminary hearings, those are traditional due process

6 claims consistent with this Court's holding in Mooney --

7 frankly, in Brady, which has applied due process to

8 prosecutorial duties and police duties during that

9 period.

10 So I -- I hope that answers Your Honor's

11 question. Whether or not those damages run throughout

12 that period, or whether they are reduced by virtue of an

13 intervening cause would be a question, application of

14 traditional proximate cause.

15 JUSTICE KENNEDY: I understand. Opposing

16 counsel or defendant's counsel ever present on a

17 Gerstein hearing?

18 MR. SCODRO: Generally, in this case, yes.

19 Often they are because the Gerstein determination is

20 frequently made as part of the first appearance, which

21 is to say -- which is the moment in time which this

22 Court held you have a Sixth Amendment -- your Sixth

23 Amendment right attaches.

24 May I complete the answer, Your Honor?

25 CHIEF JUSTICE ROBERTS: I'm sorry?

1 MR. SCODRO: May I complete the answer?
2 CHIEF JUSTICE ROBERTS: You have more? Go
3 ahead.
4 MR. SCODRO: Thank you.
5 (Laughter.)
6 MR. SCODRO: Thank you.
7 So I want to return to the point I was
8 making, which now -- I apologize. I don't know if I've
9 answered Your Honor's --
10 CHIEF JUSTICE ROBERTS: You were talking
11 about that the --
12 MR. SCODRO: Yes.
13 CHIEF JUSTICE ROBERTS: -- Gerstein hearing
14 is often combined --
15 MR. SCODRO: Yeah. It's often combined with
16 the first appearance. And the reason -- actually, this
17 Court has contemplated that in Rothgery, and Gerstein
18 itself. It's often a matter of convenience that at that
19 point, it's when the individual's informed of the
20 charges, their Sixth Amendment right attaches and bail
21 is set as well.
22 Thank you.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 MR. SCODRO: Thank you.
25 CHIEF JUSTICE ROBERTS: Mr. Eisenhammer, you

1 have three minutes remaining.

2 REBUTTAL ARGUMENT OF STANLEY B. EISENHAMMER

3 ON BEHALF OF THE PETITIONER,

4 AS APPOINTED BY THIS COURT

5 MR. EISENHAMMER: Thank you.

6 Just to answer Justice Kennedy's question

7 about reasonable error on a detention, in that situation

8 the officer would have the qualified immunity defense

9 that would, assuming it was objectively reasonable, he

10 would -- he would be protected in that situation.

11 With respect to the Seventh Circuit's

12 decision --

13 JUSTICE KENNEDY: But there's still the

14 Fourth Amendment violation?

15 MR. EISENHAMMER: There's still a Fourth

16 Amendment violation, but he would have qualified

17 immunity if it -- if he acted with objective

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

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

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

21 not. And then you could superimpose qualified immunity.

22 The Seventh Circuit would have said that

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

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

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

1 released. That's -- that's their position. So that's
2 why we're here on the question, whether this is a Fourth
3 Amendment violation. We reject the -- the Seventh
4 Circuit's view that it's a due -- due process.
5 JUSTICE SOTOMAYOR: So you -- you don't care
6 that we don't reach the statute of limitations?
7 MR. EISENHAMMER: Correct. But I do want to
8 note that the Seventh Circuit, with respect to the
9 statute of limitations to the accrual point -- point,
10 uses favorable termination in their due process cases.
11 JUSTICE ALITO: What happens in this
12 situation? The person is -- is initially arrested and
13 held for a period of time based on fabricated evidence,
14 but then before trial, shortly before -- before trial,
15 other valid evidence is gathered and person is convicted
16 at the trial. Now, does that person have the kind of
17 claim that you are asserting? And if so, when would --
18 when would the claim accrue? Would the favorable
19 termination defeat the claim?
20 MR. EISENHAMMER: The -- he would -- at that
21 point, if you use Heck as the case that covers this
22 particular issue, he would not -- since he was convicted
23 under Heck, he would not be able to bring the claim if
24 that claim attacks the conviction.
25 If it doesn't attack the conviction, as the

1 Court sort of pointed out in, I think it was in Footnote
2 7 on suppression hearings or on evidence --
3 JUSTICE ALITO: I'll say it attacks -- it
4 attacks the unlawful detention.
5 MR. EISENHAMMER: So it wouldn't have the --
6 JUSTICE ALITO: It's not the conviction. It
7 would not be defeated by --
8 MR. EISENHAMMER: Then -- then I would say
9 under Heck, the Heck exception, they could bring -- they
10 could bring -- bring suit.
11 JUSTICE ALITO: Then when would the claim
12 accrue?
13 MR. EISENHAMMER: I think it would accrue at
14 that point, at the conviction, as I read Heck. Because
15 I think it would be -- it would be -- in this particular
16 case, it would be unfair to the -- to the individual to
17 speculate on whether -- what evidence comes out at the
18 -- at the trial to determine whether or not that
19 really -- that probable cause determination may or may
20 not attack the --
21 JUSTICE ALITO: The -- the -- well, if the
22 outcome of the -- of the trial is irrelevant to the
23 Fourth Amendment claim, as it would seem to be in the
24 case of an unlawful detention, then why should the claim
25 not -- why should the accrual of the claim be tied to

1 the termination of the prosecution?

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

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

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

5 attack the conviction.

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

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

8 the -- at the -- at the pretrial -- at the Gerstein

9 hearing may or may not -- some of it may come in; some

10 of it may not.

11 And then the other issue -- the other issue

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

13 or -- or collateral attacks for many of the reasons

14 that -- that was stated in Kaley.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

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

18 above-entitled matter was submitted.)

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