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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?

7 Now he's there. Day one. Can you bring a  
8 case? Yes. Why not?

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

10 And he's been held for 90 days. And I can  
11 say the same thing, but I won't, up to each of the 90  
12 days. 90th day, he's released. It's now the 91st day.  
13 Can he bring it? Yes. But now we only have two years.  
14 Why only two years? Because we're looking for an  
15 analogous statute of the State to give us a -- a limit,  
16 and the analogous one, though not perfectly fitting, is  
17 malicious prosecution, and that had two years, and  
18 that's why. Two years after the release date is the  
19 longest. You had better bring it before then, because  
20 that's two 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: Either he's being  
11 held under -- isn't he being held unlawfully on the 41st  
12 day?

13 And after all, we're not -- we're not  
14 copying the State law. All we're doing is trying to  
15 find an analogous period of time.

16 MR. SCODRO: But, Your Honor, by imposing  
17 the favorable termination element of the common law  
18 claim, it would run headlong into the Fourth Amendment  
19 aims; what the Fourth Amendment is geared to vindicate.

20 The Fourth Amendment, this Court has held,  
21 is there for the guilty and innocent alike. And in this  
22 case, what -- what -- the cost of borrowing that  
23 favorable termination element and importing it into a  
24 claim based solely on lies and an ex parte proceeding,  
25 which is what we're talking about with the Gerstein



1 hearing, doing so would mean that if you're the victim  
2 of lies at a Gerstein hearing and you're detained, but  
3 ultimately you are constitutionally convicted as  
4 evidence amasses against you, the need to show favorable  
5 termination, it will be impossible for that plaintiff.  
6 And so the Fourth Amendment right will not be something  
7 that that plaintiff can vindicate. That's the reason  
8 that Wallace didn't allow Heck to expand to instances  
9 like this where you're not challenging the wrongful  
10 conviction itself.

11           And what they have asked, their claim is  
12 narrow, and the way to resolve this case is -- is now  
13 equally narrow. The way to resolve the case is to  
14 conclude that whenever this -- your Fourth Amendment  
15 claim could run through the arraignment after indictment  
16 in this case, which still -- which was still out of the  
17 two-year limitations period. But it doesn't -- it is  
18 not entitled to that favorable termination element which  
19 would have the effect of closing off the courthouse  
20 doors to a universe of claims in order to buy extra time  
21 in this case. And that is what we urge the Court not to  
22 do. And that is the simplest way.

23           JUSTICE GINSBURG: What you're saying is if  
24 you're falsely arrested, you have a good claim for false  
25 arrest. It doesn't matter that you were properly

1 convicted. But if you are not only falsely arrested,  
2 but if your detention continues, then you have a claim  
3 for the continued detention.

4 MR. SCODRO: For violation of the Gerstein  
5 hearing, Your Honor. And -- and I do -- for lies, under  
6 Gerstein.

7 I do want to be clear in saying that the  
8 closest analogous tort is false arrest, that is treating  
9 it the way I think the Seventh Circuit has, which is  
10 that it runs up until what we call the first appearance  
11 where you have the initiation of adversarial process.  
12 By no means does the limitations period, or is there a  
13 tolling that runs from the period of the lie at the  
14 Gerstein hearing through the pretrial period.

15 As I said at the outset, that is subject to  
16 traditional tort common law principles of -- of  
17 proximate cause. And there may well be damages  
18 recoverable for that period, but it's based on the lie  
19 at the Gerstein hearing. And as Wallace held, Heck  
20 cannot be extended to apply to a claim that exists  
21 before you have an extant conviction.

22 JUSTICE KENNEDY: Just one more time.

23 Suppose you have arrest; Gerstein hearing --

24 MR. SCODRO: Yes, Your Honor.

25 JUSTICE KENNEDY: -- filing of formal

1 charges, either information or indictment; pretrial  
2 suppression hearing, at which both parties are  
3 represented --

4 MR. SCODRO: Yes.

5 JUSTICE KENNEDY: -- and the false evidence  
6 is -- is not -- its falsity has not been known and so  
7 you're detained. And then trial.

8 When does the Fourth Amendment violation  
9 end?

10 MR. SCODRO: Sure. You would have it --  
11 this returns to Justice Ginsburg's point. You would  
12 have a Fourth Amendment claim for the initial  
13 warrantless arrest. You would have a Fourth Amendment  
14 claim for misstatements at a Gerstein hearing that then  
15 led to ongoing pretrial seizure. And the damages from  
16 that claim may run throughout the period of pretrial  
17 seizure.

18 But with regard to the nature of the  
19 constitutional violation that occurs at subsequent  
20 processes, be they grand jury, bail hearings,  
21 preliminary hearings, those are traditional due process  
22 claims consistent with this Court's holding in Mooney --  
23 frankly, in Brady, which has applied due process to  
24 prosecutorial duties and police duties during that  
25 period.

1                   So I -- I hope that answers Your Honor's  
2 question. Whether or not those damages run throughout  
3 that period, or whether they're reduced by virtue of an  
4 intervening cause would be a question -- application of  
5 traditional proximate cause.

6                   JUSTICE KENNEDY: I understand. Opposing  
7 counsel or defendant's counsel ever present in a  
8 Gerstein hearing?

9                   MR. SCODRO: Generally, in this case, yes.  
10 Often they are because the Gerstein determination is  
11 frequently made as part of the first appearance, which  
12 is to say -- which is the moment in time which this  
13 Court held you have a Sixth Amendment -- your Sixth  
14 Amendment right attaches.

15                   May I complete the answer, Your Honor?

16                   CHIEF JUSTICE ROBERTS: I'm sorry?

17                   MR. SCODRO: May I complete the answer?

18                   CHIEF JUSTICE ROBERTS: You have more? Go  
19 ahead.

20                   MR. SCODRO: Thank you.

21                   (Laughter.)

22                   MR. SCODRO: Thank you.

23                   So I want to return to the point I was  
24 making, which now -- I apologize. I don't know if I've  
25 answered Your Honor's --

1 CHIEF JUSTICE ROBERTS: You were talking  
2 about that the --

3 MR. SCODRO: Yes.

4 CHIEF JUSTICE ROBERTS: -- Gerstein hearing  
5 is often combined --

6 MR. SCODRO: Yeah. It's often combined with  
7 the first appearance. And the reason -- actually, this  
8 Court has contemplated that in Rothgery and Gerstein  
9 itself. It's often a matter of convenience that at that  
10 point, it's when the individual's informed of the  
11 charges, their Sixth Amendment right attaches and bail  
12 is set as well.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. SCODRO: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Eisenhammer, you  
17 have three minutes remaining.

18 REBUTTAL ARGUMENT OF STANLEY B. EISENHAMMER

19 ON BEHALF OF THE PETITIONER,

20 AS APPOINTED BY THIS COURT

21 MR. EISENHAMMER: Thank you.

22 Just to answer Justice Kennedy's question  
23 about reasonable error on a detention, in that  
24 situation, the officer would have the qualified immunity  
25 defense that would, assuming it was objectively

1 reasonable, he would -- he would be protected in that  
2 situation.

3 With respect to the Seventh Circuit's  
4 decision --

5 JUSTICE KENNEDY: But there's still a Fourth  
6 Amendment violation?

7 MR. EISENHAMMER: There's still a Fourth  
8 Amendment violation, but he would have qualified  
9 immunity if it -- if he acted with objective  
10 reasonableness. Because it's a Fourth -- Fourth  
11 Amendment doesn't have any intent. You either violate  
12 it or not violate it. There's either probable cause or  
13 not. And then you could superimpose qualified immunity.

14 The Seventh Circuit would have said that  
15 there is -- there's no Fourth Amendment right, whether  
16 or not the Petitioner filed his claim three years, four  
17 years, a million years ago, or the day after he was  
18 released. That's -- that's their position. So that's  
19 why we're here on the question, whether this is a Fourth  
20 Amendment violation. We reject the -- the Seventh  
21 Circuit's view that it's a due -- due process.

22 JUSTICE SOTOMAYOR: So you -- you don't care  
23 that we don't reach the statute of limitations.

24 MR. EISENHAMMER: Correct. But I do want to  
25 note that the Seventh Circuit, with respect to the

1 statute of limitations to the accrual point -- point,  
2 uses favorable termination in their due process cases.

3 JUSTICE ALITO: What happens in this  
4 situation? The person is -- is initially arrested and  
5 held for a period of time based on fabricated evidence,  
6 but then before trial, shortly before -- before trial,  
7 other valid evidence is gathered and the person is  
8 convicted at the trial. Now, does that person have the  
9 kind of claim that you are asserting? And if so, when  
10 would -- when would the claim accrue? Would the  
11 favorable termination defeat the claim?

12 MR. EISENHAMMER: The -- he would -- at that  
13 point, if you use Heck as the case that covers this  
14 particular issue, he would not -- since he was convicted  
15 under Heck, he would not be able to bring the claim if  
16 that claim attacks the conviction.

17 If it doesn't attack the conviction, as the  
18 Court sort of pointed out in, I think it was in Footnote  
19 7 on suppression hearings or on evidence --

20 JUSTICE ALITO: I'll say it attacks -- it  
21 attacks the unlawful detention.

22 MR. EISENHAMMER: So it wouldn't have the --

23 JUSTICE ALITO: It's not the conviction. It  
24 would not be defeated by --

25 MR. EISENHAMMER: Then -- then I would say

1 under Heck, the Heck exception, they could bring -- they  
2 could bring then suit.

3 JUSTICE ALITO: Then when would the claim  
4 accrue?

5 MR. EISENHAMMER: I think it would accrue at  
6 that point, at the conviction, as I read Heck. Because  
7 I think it would be -- it would be -- in this particular  
8 case, it would be unfair to the -- to the individual to  
9 speculate on whether -- what evidence comes out at the  
10 -- at the trial to determine whether or not that  
11 really -- that probable cause determination may or may  
12 not attack the -- the --

13 JUSTICE ALITO: Well, if the outcome of  
14 the -- of the trial is irrelevant to the Fourth  
15 Amendment claim, as it would seem to be in the case of  
16 an unlawful detention, then why should the claim not --  
17 why should the accrual of the claim be tied to the  
18 termination of the prosecution?

19 MR. EISENHAMMER: Because at the -- at the  
20 time it -- it has occurred, you -- well, two reasons.  
21 You don't know at that time whether or not it does  
22 attack the conviction.

23 And second, you don't -- you don't want --  
24 because you don't know whether that evidence heard at  
25 the -- at the -- at the -- at the Gerstein hearing may



1 or may not -- some of it may come in; some of it may  
2 not.

3 And then the other issue -- the other issue  
4 is that you don't want parallel litigation going on,  
5 or -- or collateral attack for many of the reasons  
6 that -- that was stated in Kaley.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 2:03 p.m., the case in the  
10 above-entitled matter was submitted.)

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