

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 Rothberry, 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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