























































































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.)

19

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