

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

LARRY THOMPSON,)
) Petitioner,)
) v.) No. 20-659
PAGIEL CLARK, ET AL.,)
) Respondents.)

Pages: 1 through 101
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6 PAGIEL CLARK, ET AL.,)

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9

10 Washington, D.C.

11 Tuesday, October 12, 2021

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:16 a.m.

16

17 APPEARANCES:

18 AMIR H. ALI, ESQUIRE, Washington, D.C.; on behalf of
19 the Petitioner.

20 JONATHAN Y. ELLIS, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; for the
22 United States, as amicus curiae, supporting the
23 Petitioner.

24 JOHN D. MOORE, ESQUIRE, New York, New York; on behalf
25 of the Respondents.

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P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 20-659, Thompson against Clark.

Mr. Ali.

ORAL ARGUMENT OF AMIR H. ALI
ON BEHALF OF THE PETITIONER

MR. ALI: Thank you, Mr. Chief Justice, and may it please the Court:

The Second Circuit holds that a criminal proceeding terminates in the accused's favor only if it affirmatively indicated that the accused is innocent.

That is wrong. A criminal proceeding terminates in the accused's favor when it ends and the prosecution has failed to obtain a conviction.

As this Court has recognized, Section 1983's favorable termination rule protects against parallel proceedings, inconsistent judgments, and collateral attack. That explains why the plaintiff in Heck had to go off and get his conviction overturned on direct appeal, habeas, or through a pardon. And

1 it explains why the plaintiff in McDonough
2 satisfied the rule upon his acquittal.

3 It also explains why the dismissal of
4 charges terminates the proceeding in the
5 accused's favor. When charges have been
6 dismissed, a civil suit is not parallel to,
7 inconsistent with, or collaterally attacking
8 anything.

9 As the Eleventh Circuit observed,
10 every circuit to adopt the
11 indications-of-innocence approach has mistakenly
12 imported it from an unsubstantiated comment in
13 the Restatement.

14 With very able counsel, Respondent
15 could not come up with any plausible defense of
16 that added inquiry and focuses most of his --
17 his energy on record-specific arguments from the
18 certiorari stage that divert from the question
19 presented.

20 Respondent had a tall order. If he
21 wants to eject -- inject his additional
22 innocence inquiry into this federal statute, he
23 had to show it was so well settled in 1871 that
24 Congress would have taken it for granted.
25 Instead, Respondent openly admits that there was

1 no such well-settled principle.

2 This Court's opinion can end there.
3 Even pretending that Respondent could fight to a
4 draw, it would not be a basis for reading his
5 additional inquiry into the statute. And
6 Respondent is nowhere near a draw. As the
7 Eleventh Circuit detailed, all jurisdictions,
8 except for Rhode Island, adopted Petitioner's
9 rule and understood that the dismissal of
10 charges terminates the proceeding in the
11 accused's favor.

12 I welcome the Court's questions if
13 there are any.

14 JUSTICE THOMAS: Mr. Ali, before we
15 get to the termination issue, favorable
16 termination issue, don't we have to address
17 whether or not there actually can be a malicious
18 prosecution case or claim based upon a Fourth
19 Amendment seizure?

20 MR. ALI: So I don't --

21 JUSTICE THOMAS: Or is -- an
22 unreasonable seizure under the Fourth Amendment.

23 MR. ALI: So this Court held in Manuel
24 that there is a Fourth Amendment claim for
25 unreasonable seizure pursuant to legal process.

1 And that is the claim that is before this Court.
2 And I want to be very clear on this: Petitioner
3 is not asserting a standalone malicious
4 prosecution claim.

5 You know, Respondent, before this
6 Court, now at the merits stage, is asserting
7 some sort of confusion in that respect because
8 Respondent used the malicious prosecution label
9 that is used, you know, throughout all of the --
10 the circuits. As Chief Judge Pryor put it,
11 that's the shorthand for this Manuel claim.

12 So, you know, we think the Court has
13 already decided that the claim exists, Your
14 Honor, but it -- the -- the -- the -- the role
15 that the analogy to malicious prosecution plays
16 in this case is a particular one, and I'm happy
17 to address that, Your Honor.

18 JUSTICE THOMAS: Please.

19 MR. ALI: Yeah. So our position is
20 that the Fourth Amendment does not have a
21 favorable termination element. This is not an
22 argument that we import the elements of
23 malicious prosecution into the Fourth Amendment.

24 But Petitioner brought his Fourth
25 Amendment claim, his claim under Manuel,

1 pursuant -- using the vehicle of Section 1983.
2 And this Court has held that when Congress
3 enacted Section 1983, it is reasonable, because
4 it's a species of tort liability, to assume that
5 Congress would have taken for granted certain
6 well-settled common law tort principles when it
7 enacted the statute.

8 And so in -- the -- the favorable
9 termination rule or the analogy to malicious
10 prosecution in this case takes place for all of
11 the reasons that it took place in McDonough and
12 in Heck. What this Court said is that when you
13 are bringing a civil suit which challenges the
14 initiation of a state judicial proceeding, that
15 the relevant tort you analogize to is malicious
16 prosecution and, in particular, that the
17 favorable termination rule comes into play under
18 Section 1983.

19 JUSTICE THOMAS: What was the
20 initiation? Where was this initiated? The
21 state proceedings?

22 MR. ALI: This was initiated in -- in
23 -- in New York state court.

24 JUSTICE THOMAS: No, I mean -- so I'm
25 confused. Which seizure are you -- at what

1 point was your -- was Petitioner seized and that
2 -- that is the basis for this claim?

3 MR. ALI: Sure, Your Honor. So -- so
4 the -- I promise to answer your -- your
5 question, but let me just say the question
6 presented here presumes a seizure pursuant to --
7 to legal process. We don't think the Court
8 needs to get into the question of what the
9 particular --

10 JUSTICE THOMAS: And --

11 MR. ALI: -- seizure was.

12 JUSTICE THOMAS: -- the -- I think
13 you're conflating two things, and I just want
14 you to identify exactly where the seizure is and
15 exactly where the proceeding begins.

16 MR. ALI: Right. So, in this case,
17 Respondent never challenged this below, but
18 there are two seizures in the record here.

19 First, as the United States admits in
20 this case, the criminal complaint was filed
21 while Mr. Thompson -- while the Petitioner was
22 still in custody, and so process, legal process,
23 was initiated, and Petitioner was -- we will
24 have to show Petitioner -- you know, if
25 Respondent is allowed to raise it at this late

1 stage, the Petitioner's seizure -- for the
2 purposes of -- of -- of this particular seizure,
3 we'll have to show that Petitioner's seizure was
4 caused by the initiation of legal process,
5 meaning he would have been released had that
6 false criminal complaint not been filed.

7 The second seizure in this case, which
8 has also been unchallenged since it was
9 specifically ruled upon at the summary judgment
10 stage and deemed proven at trial, you know, we
11 heard nothing from Respondent on this seizure
12 either, is that this -- there's Second Circuit
13 precedent clearly holding that the restrictions
14 when being released on recognizance and the
15 compelled attendance in court hearings
16 constitutes a seizure within the meaning of the
17 Fourth Amendment.

18 You know, our position in this case,
19 though, and I think what's critical for this
20 Court to know is that the Second Circuit is
21 perfectly capable of resolving those kind of
22 late-breaking arguments that Respondent is
23 making before this Court on remand. The --

24 JUSTICE ALITO: Suppose the -- the
25 case had gone to trial, the criminal case had

1 gone to trial, and your client was actually
2 convicted based on evidence entirely having
3 nothing to do with the criminal complaint.

4 Would you have a claim?

5 MR. ALI: Well, if -- if he was
6 convicted, we wouldn't be able to satisfy the
7 favorable termination rule, so there would be no
8 claim.

9 JUSTICE ALITO: Even though he was
10 arrested without probable cause you claim?
11 Suppose he's arrested without probable cause,
12 he's held for trial without probable cause, but
13 then, at trial, the state comes up with
14 completely different evidence and irrefutable
15 evidence, and this individual is convicted. Is
16 there a claim, a Fourth Amendment claim?

17 MR. ALI: So there is a Fourth
18 Amendment violation in your hypothetical, but it
19 is not cognizable under Section 1983. And --
20 and I just -- this is an important point, so
21 just to explain a little bit more, I mean, so a
22 couple of responses.

23 It is always the case when the Court
24 reads a prerequisite into the statute, separate
25 and apart from the constitutional violation,

1 that certain constitutional violations will not
2 be actionable. So that was true in McDonough,
3 right. You could have had false evidence
4 introduced to instigate the criminal proceeding,
5 as your hypothetical just posited.

6 It could have been evidence that was
7 likely to have affected the jury's verdict, but
8 the plaintiff could have been convicted, and he
9 would not have a claim because of the favorable
10 termination rule, all the same in McDonough. I
11 could give the same hypothetical in the context
12 of Heck. So that is always true in these cases.

13 Now I think it's actually --

14 JUSTICE ALITO: Well, my question is,
15 why should there be any kind of a termination
16 element to this claim? It -- it's a claim that
17 -- that there was an unreasonable seizure.

18 MR. ALI: So we --

19 JUSTICE ALITO: What does that have to
20 do with whether -- why is that at all dependent
21 on the outcome of the trial?

22 MR. ALI: So I think the Court's
23 jurisprudence clearly distinguishes between
24 those Fourth Amendment claims which challenge
25 seizures without legal process, as the Court put

1 it in -- in Wallace and in subsequent cases like
2 McDonough -- or in subsequent cases, and
3 seizures pursuant to legal process.

4 And in McDonough, we think the Court
5 confronted this question, the exact same
6 question, and it said, when you have -- you
7 know, the gravamen of the claim necessarily
8 challenges the initiation of state criminal
9 proceedings, then the analogous tort is
10 malicious prosecution and the favorable
11 termination rule.

12 I don't want to fight too hard on this
13 because, if there's no favorable termination
14 rule at all, then the Second Circuit clearly
15 erred in requiring affirmative indications of
16 innocence, and I'd be glad to talk about the
17 problems with that rule, but --

18 JUSTICE GORSUCH: I -- I'd like to
19 jump in there if it's all right because that --
20 that's what I'm a bit mystified by. If -- if
21 the Fourth Amendment doesn't require termination
22 at all and -- or malice, why would you fight
23 those things? Wouldn't it be easier for your
24 client to say it's a false imprisonment claim,
25 starting whether by judicial process or by

1 arrest, as in this case, and it was unlawful
2 from the start?

3 MR. ALI: You know, we'll take the win
4 on the alternative grounds. We think the best
5 and, you know, really only plausible reading of
6 this case is that there's a favorable
7 termination rule. And we think that the
8 interests that the Court identified in McDonough
9 are actually significant, right? The Court --

10 JUSTICE GORSUCH: So you actually want
11 to have to prove favorable termination? You're
12 just quibbling over -- over what that
13 termination should look like, how favorable it
14 has to be? You say not so favorable. They say
15 very favorable.

16 MR. ALI: Right.

17 JUSTICE GORSUCH: But you -- you --
18 you're willing -- you want to prove that and you
19 want to prove malice too?

20 MR. ALI: Well, Your Honor, I think
21 that the inquiry would be different for malice,
22 right? But, you know, this is a -- is a -- and
23 let me come back to your first question as well,
24 but just because we're doing malice twice --

25 JUSTICE GORSUCH: You haven't fought

1 that, though. I mean, malicious prosecution,
2 you know, has always required proof of malice,
3 and you don't seem to dispute that. You seem to
4 be making it awful hard to prove a Fourth
5 Amendment claim.

6 MR. ALI: Well, Your Honor, I think we
7 have to remember that we're engaged in
8 interpretive inquiry here. And I think, really,
9 the -- this Court --

10 JUSTICE GORSUCH: I -- I -- I'm very
11 concerned about that too. And one of the things
12 I've noticed is this Court's never recognized a
13 malicious prosecution claim under the Fourth
14 Amendment, and it's reserved the question a
15 couple of times now at least.

16 MR. ALI: Right.

17 JUSTICE GORSUCH: Isn't it time that
18 we answer that before we decide what the
19 elements of that claim should look like?

20 MR. ALI: I think the Court can very
21 comfortably say all the parties agree there's no
22 standalone malicious prosecution claim under the
23 Fourth Amendment. I don't think that answers
24 the question before the Court --

25 JUSTICE GORSUCH: Oh -- hold on.

1 MR. ALI: -- and the analytical
2 framework --

3 JUSTICE GORSUCH: Whoa. Whoa. That
4 -- that was a big moment there, I think. So --
5 so -- so you agree that there is no standalone
6 malicious prosecution claim under the Fourth
7 Amendment?

8 MR. ALI: In which you just pull in
9 the torts of malicious prosecution into the
10 Fourth Amendment.

11 JUSTICE GORSUCH: Okay.

12 MR. ALI: We don't believe the origin
13 of this favorable termination rule is the Fourth
14 Amendment. It is the analytical framework that
15 the Court clearly set out in Manuel and that
16 Chief Judge Pryor adopted, right?

17 JUSTICE GORSUCH: Okay, that -- now --

18 JUSTICE ALITO: You have a Fourth --
19 your claim is a Fourth Amendment claim, right?

20 MR. ALI: Yes.

21 JUSTICE ALITO: And you want to import
22 into that an element from the tort of malicious
23 prosecution, right?

24 MR. ALI: The Fourth Amendment has no
25 favorable termination element, just like the Due

1 Process Clause has no favorable termination
2 element or no probable cause element, right?
3 That was McDonough.

4 The Court didn't say we're importing
5 the favorable termination rule into Section 1983
6 and that means you now have to prove an absence
7 of probable cause under the Due Process Clause.
8 It's the same --

9 JUSTICE ALITO: Does it have any kind
10 of --

11 MR. ALI: -- I think that's conflating
12 the inquiry.

13 JUSTICE ALITO: -- does it have any
14 kind of a termination element? Does termination
15 have anything to do with it?

16 MR. ALI: Well, okay, so the
17 interpretive inquiry that we're engaged in here
18 says that this is a species of tort liability
19 enacted by statute. So it makes sense at the
20 initial, the first step, to assume that Congress
21 would have assumed that certain prerequisites
22 that existed at common law would be read into
23 the statute.

24 Now this is where we get to the malice
25 question, which is a different question, because

1 the second stage with the Court -- which the
2 Court set forth in Manuel and which Chief Judge
3 Pryor also applies is that you have to look at
4 whether that well-settled principle is
5 consistent with the statute that Congress
6 actually enacted, meaning the purpose and values
7 of the Fourth Amendment.

8 The Court, I think, would come to the
9 different conclusion in the context of reading
10 malice into Section 1983 because the Fourth
11 Amendment itself says reasonable, objective
12 inquiry. And so there's -- it's pretty hard to
13 square a malice requirement --

14 JUSTICE GORSUCH: So -- so you don't
15 --

16 MR. ALI: -- in a way that --

17 JUSTICE GORSUCH: -- think we should
18 have malice and you don't think we should have a
19 favorable termination requirement. And so why
20 wouldn't we just have a Fourth Amendment as a
21 Manuel claim? The most analogous might be a
22 false arrest.

23 MR. ALI: So, Your Honor, I want to be
24 very clear here. I don't think there should be
25 malice or Fourth Amendment read into the Fourth

1 Amendment. I do believe that when one brings a
2 claim of unreasonable seizure pursuant to legal
3 process, just like when one necessarily
4 challenges the initiation of legal process under
5 the Due Process Clause, that Congress would have
6 assumed -- and I think this is just McDonough --
7 would have assumed a favorable termination rule
8 and that that rule is consistent with Section
9 1983.

10 So we do think that the best reading
11 of this Court's case law is that there's a
12 section -- that there's a favorable termination
13 rule. And if I could come back to just --

14 JUSTICE KAVANAUGH: You -- you don't
15 want it to be just false arrest, though, because
16 you lost the false arrest claim --

17 MR. ALI: Well, Your --

18 JUSTICE KAVANAUGH: -- in this case.

19 MR. ALI: -- Your Honor, I think it's
20 pretty hard at this point to get to false arrest
21 as the analogy. I mean, the Court said that at
22 bottom, the analogy -- the reason that the Due
23 Process Clause -- claim -- the assumed due
24 process claim in McDonough was analogized to
25 malicious prosecution was that it was undertaken

1 pursuant to legal process. That was the
2 language in McDonough.

3 And Heck said, I mean, it's pretty
4 clear, the common law cause of action for
5 malicious prosecution provides the closest
6 analogy of -- to claims of the type considered
7 here because, unlike the related cause of action
8 for false arrest or imprisonment, it permits
9 damages for confinement imposed pursuant to
10 legal process.

11 JUSTICE KAVANAUGH: But there's a
12 misfit, I think you're acknowledging, between
13 the Fourth Amendment and this kind of malicious
14 prosecution kind of claim that the courts of
15 appeals have generally recognized.

16 But I think you're telling us, well,
17 just muddle along with that and don't worry
18 about it because that's not the question
19 presented. Is that an accurate summary of what
20 you're --

21 MR. ALI: Well --

22 JUSTICE KAVANAUGH: -- suggesting?

23 MR. ALI: -- we think it's pretty
24 clear that for the reasons stated in McDonough
25 the favorable termination rule exists. We do

1 think -- and I think I -- I'd like to bring the
2 Court back to the question presented because I
3 do think that the common law adopted a very,
4 very clear rule here that is easy for courts to
5 apply, right? Two functions for the favorable
6 termination rule.

7 First function: Let's try to avoid
8 parallel litigation of probable cause and guilt.
9 How do they resolve that? The solution is
10 require that the proceeding be over.

11 Second function: Let's avoid
12 inconsistent judgments and collateral attack of
13 judgments. How do we ensure that that function
14 is met? Let's require that there have been no
15 conviction at the end of the proceeding.

16 A very straightforward rule. We don't
17 think that's an accidental thing, as Justice
18 Scalia pointed out in his Heck majority. The
19 reason the court turns to the common law is
20 because those rules were developed over the
21 centuries.

22 JUSTICE BREYER: Well, that's true.
23 But I'm now slightly confused because I -- I
24 usually read briefs, and I thought the question
25 presented -- I didn't know about all this 1983

1 business -- it's something they said in the
2 Second Circuit, a plaintiff asserting a
3 malicious prosecution claim under 1983 must show
4 that the underlying criminal proceeding ended in
5 a manner that affirmatively indicates his
6 innocence. And we're arguing about whether
7 that's so, is that right?

8 MR. ALI: Right, Your Honor. I had
9 stopped --

10 JUSTICE BREYER: Okay. If that's
11 right, what do you do if, as you want to say,
12 no, it doesn't?

13 MR. ALI: Right.

14 JUSTICE BREYER: Okay. So the
15 Assistant DA is there testifying. Why did you
16 not prosecute this guy? You dismissed it. To
17 tell you the truth, Your Honor, we have
18 hundreds, maybe thousands of cases. We have a
19 very big staff. We can't handle all this.

20 And so we, in fact, do dismiss quite a
21 few cases, an awful lot, because we just can't
22 handle them. We take the more serious ones.
23 Why did you dismiss this one? Honestly, Your
24 Honor, I can't find anybody in the office who
25 remembers. Okay? I can tell you our general

1 policy.

2 Now what do you say?

3 MR. ALI: Your Honor, in that case,
4 there's been no conviction and it sounds like
5 the proceeding is over if the charges were
6 dismissed, and nothing estops the plaintiff
7 there from bringing his Fourth Amendment claim
8 for unreasonable seizure pursuant to legal
9 process.

10 And that is the --

11 JUSTICE BREYER: And so what the DA
12 will say, I'll tell you what, Your Honor, go
13 ahead, hold it. We're going to have to triple
14 our staff or we're going to have to prosecute a
15 lot of people who have very, very appealing
16 personal conditions such that we feel we're
17 being -- going to be doing injustice if we go
18 bring a case against him in a criminal court.

19 And you say?

20 MR. ALI: Your Honor, the favorable
21 termination rule was never intended and never
22 served the function of filtering cases that
23 are -- you know, have foundation or don't have
24 foundation.

25 So we think that, you know, the manner

1 of dismissal can go to whether there was
2 probable cause or not. The example you gave to
3 me sounds like it would be pretty neutral as to
4 whether probable cause existed or not, but it
5 would not foreclose a civil suit.

6 CHIEF JUSTICE ROBERTS: Just one more
7 question, counsel. You do not embrace the
8 Laskar test, right? You don't --

9 MR. ALI: We do.

10 CHIEF JUSTICE ROBERTS: Well, but it
11 seems to me you're focused much more on finality
12 than assessing whether the -- that finality is
13 consistent with innocence.

14 MR. ALI: So, Your Honor, the Laskar
15 test was that there's no requirement of an
16 indication of innocent, and what you were
17 looking for was whether there was a judgment
18 that is inconsistent with innocence.

19 And this is important. It takes place
20 at a categorical level, and Chief Judge Pryor
21 says that. He several times says, you know,
22 inconsistent with innocence, that is, it ended
23 in a conviction or admission of guilt.

24 CHIEF JUSTICE ROBERTS: And you -- you
25 say in your brief that the best thing that can

1 happen for a defendant is to have the charges
2 dismissed, right?

3 MR. ALI: Yes.

4 CHIEF JUSTICE ROBERTS: Well, what if
5 they're dismissed pursuant to an agreement that
6 says, okay, you were -- you were the number two
7 person in this vicious gang and you've killed
8 five people and all that, but we want you to
9 testify against the number one person, and in
10 exchange, we're going to dismiss the charges?

11 Is -- is -- is that consistent with
12 innocence?

13 MR. ALI: Well, Your Honor --

14 CHIEF JUSTICE ROBERTS: It's a
15 dismissal and it's a pretty good thing for him,
16 I guess, but I don't think anybody would look at
17 that and say, you know, that's not inconsistent
18 with your innocence.

19 MR. ALI: Under our test, the
20 dismissal in that case would be a favorable
21 termination, but, as common law courts
22 recognized, the manner of dismissal, and so that
23 agreement, would all but doom the Fourth
24 Amendment claim. That person is never going to
25 be able to prove that there was no probable

1 cause or presumably at least there's going to be
2 a lot of evidence here, and if there's an
3 agreement, you know, all but estopped for
4 reasons completely separate and apart from the
5 favorable termination rule, which was, as common
6 law courts put it, a technical prerequisite
7 protecting against parallel litigation,
8 inconsistent judgments, and collateral attacks.

9 So what we're looking for is what
10 common law courts looked for, it's what the rule
11 in Heck and --

12 JUSTICE BREYER: So common law courts
13 really did a -- I stole this bread to feed my
14 starving children, and the DA says okay, okay, I
15 understand. Unlike -- et cetera, I won't
16 prosecute you.

17 Now you say, ah, good, wonderful. We
18 now have a -- a -- a -- a malicious prosecution
19 claim, right?

20 MR. ALI: So, Your Honor, common law
21 courts carefully guarded the technical favorable
22 termination prerequisite, and they understood
23 that what Your Honor just described very much
24 might do. I'll direct you to Clark v.
25 Cleveland, which is really kind of the canonical

1 case by the New York Court of Appeals. It
2 recognized that certain compromises or forms of
3 mercy may be, I think the word it used,
4 "insurmountable" when it comes time to actually
5 prove that there was an absence of probable
6 cause. But they did not conflate it --

7 JUSTICE BREYER: No, I stole the
8 bread. I mean, it's Jean Valjean. I stole it
9 and -- and -- and, yeah, to feed my starving
10 children. I'm just saying your -- your view is,
11 yep, there is a malicious prosecution claim,
12 this is great, and, well, I know four lawyers
13 who will bring it, and there we are.

14 MR. ALI: Well --

15 JUSTICE BREYER: And so next time,
16 that DA doesn't give in to that argument.

17 MR. ALI: Well, remember, Your Honor,
18 everyone here agrees that Petitioner's going to
19 have to prove his claim. He still has to prove
20 the absence of probable cause, he has to prove
21 causation, and he has to overcome, had it not
22 been asserted, the defense of qualified
23 immunity.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?

2 JUSTICE THOMAS: None for me, Chief.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: As I understand what
5 happened, your client was arrested without
6 probable cause, and, eventually -- he was held
7 for 39 hours and then released on his own
8 recognizance, and sometime during that period
9 the criminal complaint was filed.

10 Would he have been released any sooner
11 had the criminal complaint not been filed?

12 MR. ALI: Your Honor, what we'll have
13 to prove -- and at least one of the seizure
14 theories -- we, of course, have the Second
15 Circuit precedent that compelled attendance and
16 the -- the conditions are a seizure. But
17 setting that aside for a moment, Your Honor,
18 what we would have to prove for that first
19 seizure is that he would have been released had
20 that false criminal complaint not been filed.

21 In other words, had -- had Respondent
22 told the truth of what had happened to the
23 prosecutor, he would have been released then
24 because he had done nothing criminal. There
25 would have been nothing to hold him for.

1 The reason he was held was because and
2 -- and solely because -- and that's the
3 causation piece -- solely because of fabricated
4 evidence that was produced by Respondent.

5 JUSTICE ALITO: You would have to
6 prove what went on in the DA's office? So the
7 -- the assistant DA who was handling this would
8 say, well, you know, I expected this police
9 officer to come tell me what actually happened
10 before the initial appearance, and if I wasn't
11 satisfied at that point, I would have -- we
12 would have released him?

13 MR. ALI: So, Your Honor, on the
14 causation point, these multiple actor cases,
15 causation's really hard to prove, and that's why
16 we don't see a lot of these claims unless
17 there's really serious misconduct being alleged.

18 And -- and what you typically have to
19 prove is either a deliberate or reckless
20 disregard for the truth, and it's precisely
21 because of what Your Honor just said, if you
22 don't have -- when you have that, that's when
23 you can say that it effectively, you know,
24 prevents the prosecutor from making an
25 independent judgment as to probable cause.

1 And on top of that, you typically have
2 to prove that it was the sole basis for
3 initiating the proceeding because, if there's
4 independent probable cause, well, then you can't
5 satisfy the causation requirement.

6 JUSTICE ALITO: And your claim is that
7 your client was continuously seized after that
8 point even though he was released on his own
9 recognizance because he was required to come
10 back to court? Is that it?

11 MR. ALI: So, Your Honor, there was a
12 seizure at the time that the legal process was
13 initiated. I don't think the way the Court has
14 looked at it is that it's a continuing seizure.
15 I think it's just that it -- it -- that claim
16 doesn't accrue until favorable termination, is
17 how we would look at it.

18 And under the Second Circuit precedent
19 that Respondent never challenged below, there
20 were additional seizures by virtue of the
21 restrictions when he was released on
22 recognizance --

23 JUSTICE ALITO: Well, who --

24 MR. ALI: -- and on the compelled
25 attendance.

1 JUSTICE ALITO: -- who effected -- who
2 effected these -- these subsequent seizures?
3 The judge?

4 MR. ALI: Under the Second Circuit
5 case law, what's the theory? Is that -- is that
6 Your Honor's question?

7 JUSTICE ALITO: Under the correct
8 understanding of the law as you are explaining
9 it to us, who effected the seizures that
10 occurred after the initial appearance?

11 MR. ALI: So, Your Honor, I think that
12 the -- the best authority this Court has on that
13 is Justice Ginsburg's concurrence in Albright.
14 We don't think the Court should get into any of
15 this.

16 Remember, like just last term, the
17 Court decided a question about what seizures
18 meant, and it took 50 pages of historical
19 analysis to get to that result with a divided
20 opinion. This is an issue that Respondent just
21 injected into the case in the first instance in
22 its brief in opposition.

23 We think what we need from this Court
24 is a resolution of the question that was decided
25 by the court of appeals, whether there is an

1 affirmative indications-of-innocence requirement
2 under Section 1983, so that we can move on and
3 litigate these questions about the merits.

4 JUSTICE SOTOMAYOR: I have a quick --

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

7 JUSTICE SOTOMAYOR: Am I to understand
8 you correctly that what you're claiming is a
9 Manuel-type fabrication of evidence to initiate
10 the charges?

11 MR. ALI: Yes.

12 JUSTICE SOTOMAYOR: And how are you
13 not doomed by your adversary's fair trial claim
14 where the jury found probable cause to arrest?
15 Pardon my ignorance, but I thought that the jury
16 there was charged that any probable cause to
17 arrest on any charge was enough, and the jury
18 voted for respondents.

19 MR. ALI: Right.

20 JUSTICE SOTOMAYOR: So why doesn't
21 that doom you here?

22 MR. ALI: So, Your Honor, I just want
23 to be precise because there are two claims. So
24 you first mentioned the fair trial claim, which
25 is the due process claim.

1 JUSTICE SOTOMAYOR: Right.

2 MR. ALI: And that claim doesn't turn
3 on probable cause at all. There was no
4 instructions related to probable cause with
5 respect to the fair trial claim. That arises on
6 a due process standard, which turns on things
7 like materiality at trial, which have nothing to
8 do with a Manuel claim, right?

9 So, if the jury concluded that the
10 fabricated evidence would not have likely
11 affected a jury's verdict at the criminal trial,
12 that would be a basis for rejecting the fair
13 trial claim. It would not at all be a basis for
14 concluding there was probable cause at the time
15 that Petitioner was seized. So they're just two
16 different constitutional claims addressing two
17 different things.

18 Where probable cause came in, Your
19 Honor, was with respect to the false arrest
20 verdict. And, you know, both the false arrest
21 verdict -- and I'll note these are, again, all
22 arguments that are being raised at kind of a
23 last -- a late-breaking stage here that we think
24 the Second Circuit is perfectly capable of
25 dealing with.

1 But the false arrest and the unlawful
2 entry claims that Respondent refers to, all of
3 those were assessed from before the officers
4 even entered Mr. Thompson's apartment, when you
5 have officers responding to, on Respondent's own
6 terms, what was kind of an ongoing child abuse
7 claim.

8 The fact that the jury might have
9 found probable cause at time one with that
10 information does not at all establish that there
11 was probable cause, you know, many hours later
12 when the false criminal complaint was filed and
13 doesn't even --

14 JUSTICE SOTOMAYOR: And --

15 MR. ALI: -- necessarily --

16 JUSTICE SOTOMAYOR: -- all of these --

17 MR. ALI: -- relate to the same crime.

18 JUSTICE SOTOMAYOR: -- side claims
19 that Justice Gorsuch and Justice Alito have
20 asked you about, whether there is a Fourth
21 Amendment claim, all of those issues, those have
22 not been addressed by the Second circuit? They
23 were not raised below, correct?

24 MR. ALI: That's right. Respondents'
25 theory has kind of shifted throughout this. It

1 was Respondent in the Second Circuit who
2 actually grounded all of these requirements in
3 the Fourth Amendment below. And we were
4 arguing, no, they don't come from the Fourth
5 Amendment; there's no favorable termination rule
6 or malicious prosecution tort in the Fourth
7 Amendment.

8 So we were advocating Justice Gorsuch
9 and Justice Alito's points below, and we've
10 stuck to the clear line of kind of this Court's
11 jurisprudence which finds that when a claim
12 necessarily challenges for good reason, right,
13 we're talking about challenging an ongoing state
14 judicial proceeding, that you analogize to the
15 tort of malicious prosecution and require a
16 favorable termination.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: Mr. Ali, you said --
19 you said in your brief and then you repeated it
20 here in your opening statement that if the
21 common law courts were divided on the nature of
22 the favorable termination rule, you win.

23 And I'm just wondering why that's so.
24 Why is it that if there's a draw as to the
25 common law, we don't look to -- we don't -- we

1 don't say, okay, the common law doesn't tell us
2 much. We have to think about the Fourth
3 Amendment and its purposes and our precedent
4 respecting it. Why -- why do you win if there's
5 a draw on the common law?

6 MR. ALI: So, Your Honor, I think it
7 depends precisely on what the draw is about. I
8 made that in -- in context of the question
9 presented, where what Respondent, what the
10 Second Circuit has -- has put forward is that
11 there's additional -- an additional inquiry,
12 right? It's not just that it's got to be
13 terminated and that it kind of terminates in
14 favor of the accused in our sense, right, that
15 the -- that there was no conviction. Everybody
16 agrees that at a minimum those are required.

17 But what they're saying is there's
18 also this additional inquiry into innocence. So
19 this is where the mini-trials come into play.
20 This is where, you know, we're digging into a
21 criminal record to see whether there have been
22 indications of innocence through --

23 JUSTICE KAGAN: Yeah, yeah, I get
24 that. But, like, if half the courts do that and
25 half the courts don't, why do you win?

1 MR. ALI: Well, because what we're
2 doing here is interpreting a federal statute,
3 and if Respondent wants to come forward and say,
4 well, this federal statute has this additional
5 requirement, I think he's got to have a
6 statutory hook. And one of those statutory
7 hooks, the only one we could think of, the one
8 the Second Circuit thought was there, but it
9 mistakenly relied on the Restatement, was that
10 that was well settled at common law.

11 And so, you know, Congress -- another
12 way to put it is Congress would have only taken
13 for granted that initial -- that additional
14 inquiry if it were somehow pervasive at the
15 time. And to read it into an otherwise silent
16 statute, I think that's what Respondent's got to
17 show.

18 It doesn't really matter at the end of
19 the day because, as Chief Judge Pryor put it,
20 we've got the well-settled principle, the vast
21 majority of courts at common law applied our
22 rule, and only Rhode Island applied Respondents'
23 rule.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 JUSTICE GORSUCH: How are we supposed
2 to decide what the elements of a malicious
3 prosecution claim are under the Fourth Amendment
4 if we're not sure such a thing exists?

5 MR. ALI: We are not asking the Court
6 to decide what the elements of a standalone
7 Fourth Amendment due process --

8 JUSTICE GORSUCH: You're asking us to
9 decide what this element of favorable
10 termination looks like in a malicious
11 prosecution claim, and -- and yet, as we
12 discussed, counsel, we're not sure -- you're not
13 sure it should be under the Fourth Amendment.
14 Maybe it should be under procedural due process.
15 Maybe the Fourth Amendment claim should look
16 very different than a malicious prosecution
17 claim because we're interpreting a statute and
18 the Fourth Amendment.

19 What do we do about that fact? What
20 do we do about the fact that you're asking us to
21 define an element of a claim that may not exist?
22 How many cases should this Court continue down
23 the road of assuming that which may not exist?

24 MR. ALI: So I worry I haven't been
25 clear, so let me try one more time to -- to do

1 this. Our claim exists. It is the claim that
2 the Court recognized in Manuel.

3 JUSTICE GORSUCH: Okay.

4 MR. ALI: Our --

5 JUSTICE GORSUCH: Put that aside
6 because, as I read the record, lots has shifted
7 between -- on both sides in this case. As I
8 read the record, you -- you raised a malicious
9 prosecution claim below. And just work on this
10 assumption, okay? And now you're trying to
11 slide it under Manuel, all right?

12 Let's just stick with a malicious
13 prosecution claim. If that's what's before us,
14 assume that's before us, what should we do about
15 the fact -- and if you could just answer the
16 question -- what should we do about the fact
17 that we're not sure it exists? Shouldn't we
18 answer that predicate question at some point?

19 MR. ALI: Your Honor, we think the
20 Court could start its opinion by saying
21 Respondent is alleging that we -- we asserted a
22 standalone malicious prosecution claim, and no
23 such claim exists under the Fourth Amendment.

24 JUSTICE GORSUCH: Okay.

25 MR. ALI: That is not the argument

1 Petitioner is making here. And the question
2 presented --

3 JUSTICE GORSUCH: Okay. Okay. So
4 then you'd say yes, there is no such claim, but
5 we still win anyway.

6 MR. ALI: Well, the question presented
7 presumes the claim is unreasonable seizure
8 pursuant to legal process, which is the claim of
9 Manuel.

10 JUSTICE GORSUCH: All right.

11 MR. ALI: And there was no confusion
12 at the cert stage when we used that language.

13 JUSTICE GORSUCH: I got that. I got
14 that. Is part of this about the accrual rule
15 for statute-of-limitations purposes, that a
16 malicious prosecution claim doesn't accrue until
17 dismissal? And that's advantageous?

18 MR. ALI: Well, Your Honor, I think
19 it's -- I -- I think that there is -- it does
20 defer the claim. I mean, the favorable
21 termination rule is a deferral of accrual. It's
22 more just than that it's advantageous. It's
23 avoiding the problems that were identified in
24 McDonough about forcing a defendant to sue the
25 people who have made the decision to prosecute

1 him and then potentially waive his Fifth
2 Amendment right of incrimination and give in to
3 discovery. All of those same interests come
4 into play in this claim as in --

5 JUSTICE GORSUCH: You could stay a
6 case, though, too, right?

7 MR. ALI: Well, and that's what --
8 exactly what the Court rejected in McDonough,
9 right? So the respondent in McDonough said just
10 stay it like in Wallace. And what the Court
11 said very specifically was, well, in Wallace,
12 you were dealing with false arrest, where there
13 may --

14 JUSTICE GORSUCH: Got it.

15 MR. ALI: -- never be charges.

16 JUSTICE GORSUCH: Got it. I do -- I
17 do have a few more questions and I hate to
18 occupy so much time, but I got that one.

19 Why didn't your client bring a -- a
20 malicious prosecution claim under New York law
21 in state court, where the favorable termination
22 requirement is just exactly as you describe it?

23 MR. ALI: Well, Your Honor, because
24 Section 1983 permitted him to sue under the
25 Fourth Amendment and --

1 JUSTICE GORSUCH: No, I understand,
2 but we all have choices in pleading. And I'm
3 just curious, is there a reason why he -- he
4 didn't pursue it in -- in state court?

5 MR. ALI: Your Honor --

6 JUSTICE GORSUCH: -- with a more
7 advantageous legal rule?

8 MR. ALI: I actually don't know. I
9 wasn't involved in --

10 JUSTICE GORSUCH: All right.

11 MR. ALI: -- at the trial stage. I'm
12 not sure why the decision was made. Sometimes
13 --

14 JUSTICE GORSUCH: Okay.

15 MR. ALI: -- plaintiffs do assert the
16 --

17 JUSTICE GORSUCH: No, that -- that's
18 fair enough.

19 MR. ALI: Yeah.

20 JUSTICE GORSUCH: And then Manuel, why
21 -- why isn't this different than Manuel?
22 Because, here, your client was seized by an
23 arrest at -- in the first instance, whereas, in
24 Manuel, that question was reserved, and the
25 Court decided where the seizure took place in

1 the first instance by judicial process. There's
2 a footnote reserving just this case.

3 MR. ALI: Yeah, that's right, Your
4 Honor. I think, in Footnote 3 --

5 JUSTICE GORSUCH: That's right.

6 MR. ALI: -- Manuel says that it's not
7 going to decide precisely when legal process
8 started. And -- and we don't think the Court
9 should decide it here because Respondent never
10 raised the issue until its briefing to this
11 Court. And, you know, as I noted, that --

12 JUSTICE GORSUCH: But would you agree
13 --

14 MR. ALI: -- that itself made --

15 JUSTICE GORSUCH: -- but would you
16 agree he was seized by an arrest in the first
17 instance?

18 MR. ALI: He was seized by an arrest
19 in the first instance and then seized pursuant
20 to the initiation of legal process when the
21 false criminal complaint was what held him over.

22 JUSTICE GORSUCH: Well, the -- a
23 complaint can be filed whether or not someone is
24 seized, right? You can file a complaint against
25 a free person?

1 MR. ALI: Right. I guess, Your Honor,
2 what I'm saying is that for us to succeed on our
3 Manuel claim, we're going to have to show that
4 it was a seizure pursuant to legal process. We
5 accept that. We, of course, also have, like I
6 said, the Second Circuit's precedent that was
7 also on challenge by that point.

8 JUSTICE GORSUCH: And then the
9 continuing seizure theory that we'd have to
10 purchase if we're also buying the -- the
11 malicious prosecution tort of the Second
12 Circuit? The theory is, as I understand it,
13 that your client was seized even when he was
14 released on his own recognizance and for the
15 entire period until the completion of trial? Is
16 that right?

17 MR. ALI: The Second Circuit precedent
18 on that that Respondent never challenged says
19 that the travel restrictions that automatically
20 apply upon release upon recognizance and also
21 consistent with Justice Ginsburg's concurrence
22 in Albright -- again, we don't think the Court
23 should get into any of this. It's a hard
24 question --

25 JUSTICE GORSUCH: Right, but if we buy

1 malicious prosecution, if we endorse this tort,
2 part of it, at least in the Second Circuit and
3 some others is that you're seized even when
4 you're released on your own recognizance, right?

5 MR. ALI: Well, I don't mean to fight
6 the premise, Your Honor, but I don't think the
7 Court has to buy into any of that. The Court
8 can simply accept, as Respondents did throughout
9 this entire proceeding, that there was a
10 cognizable seizure here, and the Second Circuit
11 can decide whether Respondent waived that
12 argument or has stated something persuasive
13 below.

14 JUSTICE GORSUCH: But your -- your
15 position is going to be that he was continually
16 seized through trial, right?

17 MR. ALI: Yes. We believe Respondent
18 forfeited -- with respect to those seizures, he
19 -- he forfeited any challenge to those seizures.

20 JUSTICE GORSUCH: And -- and just to
21 finish up, are -- are -- on that theory, are
22 people also seized even when they're given a
23 citation but free to go, released on bail, who
24 receive a civil process for a -- a subpoena to
25 appear at trial? Are those persons seized?

1 MR. ALI: Your Honor, I think the
2 reason the bounds of that rule hasn't been
3 litigated in this case and I can't answer your
4 question is that Respondent never raised it
5 below. And so we're proceeding under the
6 unchallenged Second Circuit precedent. We, of
7 course, also have the seizure that undisputedly
8 took place between the time that the criminal
9 complaint was filed and that the hearing in this
10 --

11 JUSTICE GORSUCH: Thank you.

12 MR. ALI: -- case took place.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 JUSTICE KAVANAUGH: Mr. Ali, the tort
16 of unreasonable seizure pursuant to legal
17 process, do you accept that that requires the
18 plaintiff to prove the elements or some of the
19 elements of malicious prosecution, including
20 absence of probable cause?

21 MR. ALI: So the Fourth Amendment --
22 to prove his Fourth Amendment violation, yes, we
23 agree that Petitioner would have to prove the
24 absence of probable cause, but it comes from the
25 Fourth Amendment, not from any tort of malicious

1 prosecution.

2 JUSTICE KAVANAUGH: Okay. And then,
3 to follow up on answers you gave to the Chief
4 Justice and Justice Breyer -- I just want to
5 make sure I have this clear -- your answer to
6 the floodgates argument on the other side is
7 that there really won't be a floodgates problem
8 if we don't stick with the Second Circuit and
9 the other circuits' rule because of two things:
10 one, the absence of probable cause requirement
11 and, two, qualified immunity. Is that an
12 accurate summary?

13 MR. ALI: And also, as I discussed
14 with Justice Alito, the causation requirement,
15 which actually does a lot of work in these
16 multiple actor cases when you're suing a police
17 officer.

18 We also, just -- just to be very
19 clear, we think the favorable termination rule
20 is not a filtering rule. And so we, you know,
21 like Chief Justice -- Chief Judge Pryor, find it
22 hard to figure out how that even factors into
23 this case.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Ellis.

6 ORAL ARGUMENT OF JONATHAN Y. ELLIS
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING THE PETITIONER

9 MR. ELLIS: Mr. Chief Justice, and may
10 it please the Court:

11 At common law, the favorable
12 termination element served three purposes,
13 namely, avoiding collateral tax on criminal
14 proceedings through civil suits, avoiding
15 parallel proceedings over guilt and probable
16 cause, and avoiding inconsistent criminal and
17 civil judgments.

18 Because Petitioner's Section 1983
19 claim, like a malicious prosecution claim,
20 though not exactly a malicious prosecution
21 claim, challenges the validity of a criminal
22 proceeding against him, incorporating a
23 favorable termination element would well serve
24 those purposes, and in the government's view,
25 the court of appeals was right to require

1 Petitioner to show that the criminal proceeding
2 against him terminated in his favor.

3 The Court erred, however, in requiring
4 that that termination itself indicate innocence.
5 That additional requirement finds virtually no
6 support in the common law of 1871. It does not
7 serve the purposes of the favorable termination
8 element. And it would be inconsistent with the
9 purposes and values of Section 1983 and the
10 constitutional right that Petitioner asserts.

11 The court of appeals' decision should,
12 therefore, be reversed. I welcome the Court's
13 questions.

14 JUSTICE THOMAS: What exactly is that
15 constitutional right?

16 MR. ELLIS: We understand the
17 constitutional right the same way Petitioner
18 does. It's the one that was recognized by this
19 Court, an unreasonable seizure pursuant -- in
20 Manuel -- an unreasonable seizure pursuant to
21 legal process.

22 JUSTICE THOMAS: Okay. What does that
23 mean? What seizure and what process?

24 MR. ELLIS: So Petitioner discussed
25 the two different seizures. We endorse the

1 first but not the second at least in theory. We
2 think a detention on the basis of legal process
3 -- can be a seizure, is a seizure, within the
4 Fourth Amendment.

5 We don't endorse the -- the second
6 theory, the broader one that he's advanced, that
7 the ordinary burdens of facing trial are also a
8 seizure under the Fourth Amendment.

9 JUSTICE THOMAS: So what is the
10 detention based on legal process here?

11 MR. ELLIS: So we think it's actually
12 unclear from this record if that's, in fact,
13 what happened. He has alleged in -- in his
14 complaint and -- and has reasserted here that
15 the detention post the filing of the criminal
16 complaint in this case was caused by that
17 criminal complaint.

18 If he can make that out, we think that
19 qualifies as a seizure pursuant to legal process
20 under Manuel and one that would be analogous to
21 a malicious prosecution claim.

22 JUSTICE GORSUCH: How can that -- how
23 can that be, counsel, given that McDonough said
24 that if you -- if you bring someone to
25 arraignment within 48 hours of arrest, you're

1 presumptively okay? And, here, that happened.

2 And, also, the plaintiff was in the
3 hospital for a good portion of that, not -- not
4 actually in detention. And the complaint didn't
5 -- it was filed during that 48-hour period and
6 he -- he wasn't arrested pursuant to any legal
7 process. He was arrested in a warrantless, you
8 know, arrest. So -- so how does that -- how
9 does that work?

10 MR. ELLIS: So those are great
11 arguments that I think could be advanced to why
12 on remand, if this case is -- as claimed is
13 reserved or defense is reserved, why, in fact,
14 he wasn't seized, he wasn't detained because of
15 that criminal complaint.

16 You may well be right, Your Honor. I
17 think the -- the -- in this case, it's not
18 presented because Respondent hasn't forfeited
19 that claim below, and we don't think that the
20 Court needs to answer that question to resolve
21 the question presented, just as it didn't do in
22 McDonough.

23 If you look in the Footnote 4 of
24 McDonough, it assumed in that case that there
25 was sufficient deprivation of liberty to trigger

1 the Due Process Clause because it hadn't been
2 challenged below, and so it could reach and
3 resolve the question presented on which there
4 was a circuit split, and it's the same situation
5 you face here.

6 JUSTICE SOTOMAYOR: Is there a value
7 for us answering this question outside of this
8 individual case?

9 MR. ELLIS: Absolutely, Your Honor,
10 although we --

11 JUSTICE SOTOMAYOR: And in what other
12 claims would having an answer to this be
13 helpful?

14 MR. ELLIS: You -- you -- I'm sorry,
15 you mean the question presented, Your Honor?

16 JUSTICE SOTOMAYOR: Yes, other than in
17 this case.

18 MR. ELLIS: Sure. So it's not clear
19 on this record, as I've said -- that --

20 JUSTICE SOTOMAYOR: I don't want this
21 case.

22 MR. ELLIS: I know. I --

23 JUSTICE SOTOMAYOR: I want to know
24 what other areas --

25 MR. ELLIS: Sure.

1 JUSTICE SOTOMAYOR: -- of law invoke
2 malicious prosecution or what other claims
3 evoke.

4 MR. ELLIS: So we think the answer in
5 this case would -- would govern any claim under
6 1983 of a unreasonable seizure pursuant to legal
7 process. We think you can assume that that was
8 established here and then go on to resolve that
9 question, and it will govern in lots of cases,
10 like Manuel, where there is no dispute anymore,
11 obviously, that there was a seizure pursuant to
12 -- to reasonable legal process there.

13 This is the question that the Court
14 left open at the end of Manuel. That's the
15 Court -- the answer -- the question that the
16 Court would be answering in this case, and we
17 think it does have salience and meaning outside
18 the context of this particular case.

19 JUSTICE KAGAN: But, Mister --

20 JUSTICE ALITO: What was the -- what
21 was the seizure pursuant to legal process here?

22 MR. ELLIS: So I think there are two
23 alleged seizures pursuant to legal process. The
24 one is -- we've discussed, the detention, if it,
25 indeed, was caused by the filing of the criminal

1 complaint.

2 JUSTICE ALITO: Right. Okay.

3 MR. ELLIS: And the second is the
4 burdens of trial.

5 Now we don't agree with that. We
6 haven't endorsed that theory. We have serious
7 doubts that the Fourth Amendment should be read
8 to govern that you're seized if you're just
9 required to show up at trial.

10 Our point is only that Respondent
11 didn't challenge that below. The Court can
12 assume it, just as it assumed it in McDonough,
13 and reach and resolve the question presented in
14 this case.

15 JUSTICE ALITO: Well, this is going to
16 be a serious question, although it's going to
17 sound fanciful.

18 Let's say someone is questioning a
19 medical expert, an expert on lung cancer, and
20 the question is -- Doctor, I'm going to ask you
21 a question about a centaur, which is a creature
22 that has the upper body of a human being and the
23 lower body and the legs of a horse. And what I
24 want to know is, if a centaur smokes five packs
25 of cigarettes every day for 30 years, does the

1 centaur run the risk of getting lung cancer?

2 What would the medical expert say to
3 that?

4 MR. ELLIS: I think he'd say that's a
5 fanciful question that I -- I can't answer. I
6 think that's not this case for a couple reasons,
7 Your Honor.

8 JUSTICE ALITO: But why --

9 MR. ELLISS: I think that that's --

10 JUSTICE ALITO: -- well, what -- what
11 should I do if I think there is no such thing as
12 a Fourth Amendment malicious prosecution claim?

13 MR. ELLIS: I --

14 JUSTICE ALITO: Well, assume that it
15 exists. Assume that there is a centaur and the
16 centaur is out in the woods smoking cigarettes
17 like crazy.

18 MR. ELLIS: So I don't think
19 Petitioner is asserting -- we don't read
20 Petitioner to be asserting in this Court a
21 malicious -- a standalone right against
22 malicious prosecution.

23 We understand, and it's baked into the
24 question presented, Petitioner to be asserting
25 unreasonable seizure pursuant to legal process,

1 just as the Court recognized in Manuel.

2 The malicious prosecution, the
3 relevance of the tort here, is not in defining
4 the constitutional violation but in -- looking
5 to as the starting point for defining this claim
6 for damages under Section 1983.

7 I actually think the -- the Court in
8 Manuel laid out the -- the -- this process very
9 well from pages 920 to 922. The first step is
10 identifying the constitutional right at issue.
11 Manuel did that.

12 The second is to identify, what are
13 the contours of the 1983 claim for damages? And
14 that turn -- looks to the most analogous common
15 law tort. And we think, here --

16 JUSTICE ALITO: Well, let me just ask
17 one more question and then I'll stop with this
18 because it may be of no interest to anybody but
19 me.

20 But the part of -- of the -- of the
21 claim here that you think is legitimate is a
22 claim that -- that the Respondent was -- I'm
23 sorry, that the Petitioner was seized pursuant
24 to legal process for the period of time between
25 the filing of the criminal complaint and his

1 release on his own recognizance.

2 That's -- that's what's at issue, and
3 you want us to say that for that claim that he
4 should have been released after, let's say, 30
5 hours instead of 39 hours, there must be a
6 favorable termination to the subsequent criminal
7 prosecution? That's what your position is?

8 MR. ELLIS: Yes, Your Honor. And the
9 reason that is is because that claim is premised
10 on a claim that the criminal prosecution was
11 unfounded and unwarranted.

12 And that kind of claim brings into --
13 up into the case all the concerns that the
14 favorable termination element was intended to
15 serve -- to serve and to -- and to prevent. We
16 think that the Congress of 1871, when it enacted
17 1983, would have expected a claim that
18 challenges, directly challenges, the validity of
19 an ongoing criminal proceeding, would have had
20 to show, would have included a favorable
21 termination element to avoid collateral attack
22 on that proceeding, to avoid parallel
23 proceedings on guilt and probable cause, and to
24 avoid inconsistent judgments.

25 We think all of those reasons apply

1 here, just as they applied in Heck, just as they
2 applied in McDonough, and we think the Court
3 should incorporate that element into this claim.

4 JUSTICE KAGAN: Mr. Ellis, one way to
5 resolve this case is to assume a couple of
6 questions that your brief suggests that we
7 should resolve, and I want to ask you why it is
8 that we should resolve them rather than assume
9 them.

10 I mean, as you said, Manuel identifies
11 the constitutional claim and then Manuel says,
12 look, our standard practice when we have a 1983
13 suit raising that claim is to ask what the most
14 analogous claim at the common law was. And as
15 to that question, Manuel says we're not
16 deciding, we're going to kick it back down,
17 nobody's really addressed that.

18 Now it turns out almost all the
19 circuit courts have answered that question by
20 saying, you know, the most analogous claim is
21 the malicious prosecution, the old malicious
22 prosecution claim, and that comes with a
23 favorable termination rule, and then you have a
24 split growing out of that, which is like what is
25 that favorable termination rule.

1 So one way we could decide this is
2 just to say: We're still not deciding what the
3 most analogous common law tort is. We're just
4 sort of going to assume what basically every
5 circuit court has held, which is that it's the
6 malicious prosecution tort which is -- is the
7 most analogous and that that comes with a
8 favorable termination element. And now we'll
9 tell you, given that everybody is doing the
10 case -- the cases in this way, what that
11 favorable termination route is -- rule is.

12 We could decide it that way. But you
13 seem to want us to say the most analogous tort
14 is the malicious prosecution tort. Why would we
15 do that?

16 MR. ELLIS: So a couple reasons, Your
17 Honor. I think the first reason is the one that
18 Justice Alito identified. Answering what the
19 contours of the favorable termination element in
20 this particular context for this particular
21 constitutional claim without deciding it exists
22 is -- does risk sort of answering how many
23 packets of cigarettes --

24 JUSTICE KAGAN: Oh, we do that all the
25 time.

1 MR. ELLIS: Fair enough. But the
2 second reason, Your Honor, is because there --
3 it is the subject of a circuit split, as you
4 note, although a lopsided one, and the parties
5 have joined issue on this question. We -- we --
6 we briefed it in our case. It was briefed in
7 the Respondents' case. It was briefed in the
8 other amici's case. We think the Court has the
9 arguments before it on that question, and I
10 think the lower courts would benefit from
11 guidance.

12 JUSTICE KAGAN: I actually don't think
13 that this is briefed at all in this case.
14 What's briefed in this case is the question of
15 what the favorable termination rule is, whether
16 -- you know, whether it's Petitioner's version
17 or Respondents' version.

18 What's not briefed in this case is
19 whether the most analogous tort under common law
20 was malicious prosecution or something else.

21 MR. ELLIS: So I think, if you look to
22 our brief, we briefed it. If you look to the
23 DA's brief -- the Chicago brief, they -- they
24 have joined issue, and I think Respondent has
25 also joined issue on that in their brief.

1 I -- I think -- we also think that
2 just the case -- the question is pretty easy.
3 And we think a claim like this, where a
4 petitioner is, JA 33 to 34, directly
5 challenging, saying that there was a
6 unreasonable seizure on the basis of an
7 unfounded prosecution, that's the essence of
8 malicious prosecution. We think the Court
9 should answer that question, and I think the
10 courts of appeals would -- would benefit from
11 the Court's guidance on that question.

12 JUSTICE KAVANAUGH: At common law,
13 malicious prosecution did not require a seizure,
14 correct?

15 MR. ELLIS: That's right. So the
16 Fourth Amendment requires the seizure.

17 JUSTICE KAVANAUGH: Okay.

18 MR. ELLIS: Now that's the first step.
19 And then the second step is, when you're
20 challenging a seizure on the basis of a criminal
21 prosecution, is that analogous to a malicious
22 prosecution?

23 Although the common law didn't require
24 a seizure, it certainly did address it. The
25 Court recognized that in Heck, and -- and the --

1 and the treatises are clear that detention is --
2 can be part of the damages of a malicious
3 prosecution claim.

4 JUSTICE KAVANAUGH: And a malicious
5 prosecution without a seizure is not cognizable
6 under 1983? Is that your position?

7 MR. ELLIS: It's certainly not
8 cognizable under the Fourth Amendment. The
9 Court rejected it as being cognizable under
10 substantive due process. In *Albright*, I guess
11 it's open technically under the due --
12 procedural due process. And we haven't taken a
13 view, although we're skeptical that would be --

14 JUSTICE GORSUCH: Well, why --

15 MR. ELLIS: -- a standalone right.

16 JUSTICE GORSUCH: -- why wouldn't that
17 be the more natural home for a claim called
18 malicious prosecution aimed at addressing the
19 misuse of judicial process?

20 MR. ELLIS: If that were the right
21 that Petitioner was asserting, I think that
22 might be --

23 JUSTICE GORSUCH: No, no, no.

24 MR. ELLIS: -- more natural.

25 JUSTICE GORSUCH: No, I'm not asking

1 what Petitioner asserted in this case. Why
2 wouldn't that just be the more natural home for
3 any tort called malicious prosecution?

4 MR. ELLIS: It -- it -- it may well
5 be, Your Honor. We don't take this Court and --
6 this case to present and we're not asking this
7 Court to hold that there is a standalone
8 constitutional right against malicious
9 prosecution. We're following the Court's
10 analysis in Manuel and in Heck and in Wallace
11 and in McDonough.

12 JUSTICE GORSUCH: I -- I got -- okay.
13 And then you -- you'd agree that if someone's
14 arrested, they can bring a Fourth Amendment
15 claim without proving malice or abuse of the
16 judicial process or favorable termination?

17 MR. ELLIS: I think, if he -- if there
18 hasn't been -- if the -- a seizure is not
19 pursuant to legal process, that's Wallace. And
20 that -- and in that case, you're analogous to a
21 false imprisonment.

22 JUSTICE GORSUCH: None of those
23 elements are required. It's only when there's
24 judicial process?

25 MR. ELLIS: I think, when there's

1 judicial process -- I think Wallace all but
2 answers this question, that once a seizure is
3 pursuant to legal process, that's a malicious
4 prosecution or that's analogous, excuse me, to a
5 malicious prosecution claim, and we think the
6 favorable termination elements and the reasons
7 for it apply.

8 JUSTICE GORSUCH: Where else in the
9 Fourth Amendment do we require proof of
10 subjective malice?

11 MR. ELLIS: We actually think it's
12 pretty unlikely that the malice is part of this
13 element --

14 JUSTICE GORSUCH: So that goes too?

15 MR. ELLIS: -- of this claim. Excuse
16 me?

17 JUSTICE GORSUCH: That goes along with
18 favorable termination?

19 MR. ELLIS: And so we think favorable
20 termination is an element --

21 JUSTICE GORSUCH: That stays?

22 MR. ELLIS: -- of the claim for
23 damages.

24 JUSTICE GORSUCH: But --

25 MR. ELLIS: We think malice is likely

1 not --

2 JUSTICE GORSUCH: Not.

3 MR. ELLIS: -- for exactly the reason
4 you identify. Now, if you look to this Court's
5 case in Nieves, for example --

6 JUSTICE GORSUCH: Why shouldn't we get
7 rid of favorable termination too?

8 MR. ELLIS: Because the purposes of
9 the favorable termination element at common law
10 are equally well served in a case like this,
11 just like they were in McDonough, even though it
12 wasn't a requirement of the constitutional
13 claim.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas, anything further?

16 JUSTICE THOMAS: Nothing for me,
17 Chief.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer?

20 Justice Alito? No?

21 Justice Kagan?

22 Justice Kavanaugh?

23 Justice --

24 JUSTICE BARRETT: I just have one
25 question. I just have one question.

1 So we look to analogous common law
2 torts in deciding what's cognizable under 1983,
3 and you just told Justice Gorsuch essentially
4 that you just want to pluck out favorable
5 termination because it makes sense once process
6 is started for all the reasons we have said in
7 -- in this line of cases.

8 Where does that come from then? If
9 we're saying that this tort isn't really
10 analogous to malicious prosecution as it existed
11 when 1983 was enacted, where -- why would we
12 just pluck out that one element because it made
13 sense?

14 MR. ELLIS: So we do think it is
15 analogous. We think it's analogous because the
16 gravamen of the claim, that Petitioner's claim
17 is -- is precisely the gravamen of a malicious
18 prosecution claim. We think that would
19 presumptively bring in the rules for a malicious
20 prosecution claim, but there's a second step.
21 And that second step is asking whether a
22 particular element or rule is consistent with
23 the values and purposes of Section 1983 and the
24 constitutional right that he asserts.

25 If you reject the malice requirement

1 at that stage, and I think you likely would, it
2 would because -- it would be because that
3 element is inconsistent. It is fundamentally
4 inconsistent with the Fourth Amendment in a way
5 that we don't think the 1871 Congress would have
6 anticipated that element to be a part of the
7 damages claim.

8 But the fundamental -- the favorable
9 termination element, by contrast, serves all the
10 same purposes and -- and -- and presents no
11 fundamental inconsistency. Indeed, it serves
12 other valuable constitutional purposes. And so
13 we think that it's in for that reason, and
14 malice is likely out for the other.

15 JUSTICE BARRETT: Thank you.

16 JUSTICE BREYER: A quick question. Do
17 you -- do you or the government have any idea of
18 how many, approximate, malicious prosecution
19 claims against states or the subdivisions are
20 brought in the United States every year?

21 MR. ELLIS: I don't have the numbers,
22 Your Honor. I -- I -- I think, if you're -- if
23 you're talking about the -- the floodgates
24 argument, though, Your Honor, I would just point
25 to that there are other elements, and we think

1 that the qualified immunity and probable cause
2 are the things that stop frivolous claims.

3 We -- we aren't -- we are -- you know,
4 we think there's reasonable concerns for obvious
5 reasons. We just don't think the favorable
6 termination element is intended to serve that
7 purpose.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Moore.

11 ORAL ARGUMENT OF JOHN D. MOORE

12 ON BEHALF OF THE RESPONDENTS

13 MR. MOORE: Mr. Chief Justice, and may
14 it please the Court:

15 The Second Circuit correctly
16 interpreted the favorable termination
17 requirement of Petitioner's malicious
18 prosecution claim. The circuit's rule requires
19 that a petitioner -- that a plaintiff bringing a
20 malicious prosecution claim demonstrate that the
21 underlying criminal charges ended in a manner
22 indicative of innocence, meaning that the
23 charges terminated in favor of the criminal
24 defendant in a way that reflected on the merits
25 of those claims -- those charges rather. There

1 -- that rule is supported -- finds strong
2 support in the common law, and it exists for
3 good reason.

4 The more foundational issue here,
5 however, is that from the beginning, Petitioner
6 has asserted a malicious prosecution claim that
7 is fundamentally not cognizable under the Fourth
8 Amendment. The -- the allegations that he
9 brought were directly tied to malicious
10 prosecution, and the claim that exists as
11 recognized in the Second Circuit is a malicious
12 prosecution claim. It is not an unreasonable
13 seizure pursuant to the legal process claim.
14 That was not raised at trial at all.

15 Even turning to the merits -- and,
16 rather -- so the Court can and should resolve
17 the case on that basis, alleviating confusion
18 and discord among the circuits.

19 Even turning to the merits, however,
20 Petitioner cannot prevail. His reliance on Heck
21 and McDonough is misplaced. Both of those cases
22 were due process claims brought against
23 prosecutors, not a Fourth Amendment seizure
24 claim brought against a police officer.

25 The rationale for the rule articulated

1 in those cases is -- doesn't carry as much
2 weight when applied to the constitutional right
3 and factual circumstances alleged here.

4 Moreover, the -- his reliance -- his
5 attempt to rely on the common law of 1871 fares
6 no better. The common law of 1871 does not
7 reveal any well-settled rule. Petitioner cannot
8 claim, when his own cases indicate that there
9 was a conflict of the authorities, that Congress
10 necessarily intended to incorporate his proposed
11 rule into the Section 1983.

12 Modern courts, considering current law
13 enforcement practices, have increasingly adopted
14 the indications-of-innocence standard, and we
15 believe that this Court should do so as well to
16 the extent that it recognizes a malicious
17 prosecution claim at all.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Thank you. You seem
20 to suggest that the -- below that the false
21 arrest and unfair trial verdicts would preclude
22 the -- any recovery on remand. Could you walk
23 us through that just briefly?

24 MR. MOORE: So I -- I think the -- the
25 clearest argument on that point comes from the

1 so-called fair trial claim, the evidence
2 fabrication claim.

3 The jury's verdict there necessarily
4 found that Petitioner was -- suffered no
5 deprivation of liberty, no impairment of his
6 liberty based on fabricated evidence.

7 If -- if we're bringing a -- a claim
8 that is in the same ballpark as Manuel, in which
9 the -- any seizure pursuant to legal process can
10 be attributed to the police officer as opposed
11 to the prosecutor and magistrate who ended up
12 ordering that -- that seizure, then there has to
13 be some indication of misconduct and
14 falsification.

15 And the jury has squarely rejected
16 that, saying that there was no deprivation of
17 any liberty, let alone something rising to the
18 level of a seizure, pursuant to any falsified
19 evidence.

20 JUSTICE KAGAN: Why isn't that exactly
21 the kind of question that we usually allow
22 courts to figure out on remand, assuming you
23 haven't forfeited it?

24 MR. MOORE: Justice Kagan, we -- we
25 would actually welcome -- to -- to the extent

1 that the Court is willing to say the malicious
2 prosecution claim that Petitioner brought that
3 was litigated at trial and even through the
4 circuit litigation isn't actually a claim, and
5 we're going -- you know, we will vacate on that
6 basis, send the case back to the Second Circuit
7 to ground --

8 JUSTICE KAGAN: No, that -- that was
9 not what I was suggesting. I was suggesting
10 deciding the question presented here and sending
11 it back to deal with your arguments about how
12 that in the end won't do the Petitioner any
13 good.

14 MR. MOORE: If -- if Your Honor does
15 -- if we assume that there's a malicious
16 prosecution claim and the Court assumes its way
17 to the question presented, then we would raise
18 those arguments on -- on remand.

19 I think, however, that addressing the
20 fundamental questions is part and parcel of
21 answering the question presented here, because
22 what the elements of this claim look like, what
23 favorable termination actually -- what form that
24 actually takes is dependent to a large extent on
25 what claim is actually being brought.

1 And so Petitioner's claim that the
2 Heck and McDonough rule settles this question, I
3 think, is not right. Again, both of those were
4 due process claims addressing -- that would
5 necessarily call into question the ongoing
6 criminal proceeding or an outstanding criminal
7 judgment.

8 If he's truly challenging the seizure
9 in this case, then it's hard to see how that
10 necessarily calls into question any subsequent
11 conviction that may follow at the end of
12 proceedings.

13 Just as in Wallace, the Court said
14 that a challenge to a seizure, admittedly
15 preprocess there, doesn't -- doesn't implicate
16 Heck, that we would argue that that rationale
17 doesn't justify the rule here.

18 It's hard to see --

19 JUSTICE KAVANAUGH: If --

20 MR. MOORE: -- it's hard to see -- I
21 apologize.

22 JUSTICE KAVANAUGH: No, keep going.

23 MR. MOORE: It's hard to see why
24 finding -- why the initiation of legal process
25 by -- why -- why the seizure pursuant to legal

1 process at that early stage would -- in every
2 instance would require a different result and
3 why the Court would assume that it did.

4 JUSTICE KAVANAUGH: If we just focus
5 on the question presented for a moment and just
6 isolate that, your proposed rule requiring
7 indications of innocence would seem to have the
8 perverse consequence of ensuring that some of
9 the most deserving plaintiffs, those who were
10 falsely accused and whose cases were dismissed
11 early on, could not sue unless they could show,
12 dig into the prosecutor's mindset, whereas those
13 who went to trial could sue.

14 And what -- what would be the sense of
15 having kind of an upside-down rule like that, or
16 do you disagree with the premise of that?

17 MR. MOORE: To a large extent, I
18 disagree with the premise. There was
19 questioning earlier in the argument that
20 prosecutors dismiss cases for -- for all sorts
21 of reasons at all stages of proceedings that
22 have very little to do with the merits.

23 Amici on both sides and the government
24 agree on this.

25 JUSTICE KAVANAUGH: But they also

1 disagree -- dismiss cases often because the
2 evidence doesn't hold up.

3 MR. MOORE: I can put some numbers to
4 this, Your Honor. The NAACP, in Footnote 18 of
5 their brief, cites a study from the Vera
6 Institute of Justice which looked to why
7 prosecutors dismiss cases. And so, after we get
8 past the -- the screening stage, the police
9 officer comes in and says, here's what happened,
10 can we press charges?

11 After we get past that stage, the
12 insufficiency of the evidence leads to -- is --
13 is the motivating factor for a prosecutor to
14 dismiss cases in about 10 to 15 percent of
15 cases, which leaves 85 to 90 percent of cases
16 dismissed for reasons --

17 JUSTICE KAVANAUGH: Wouldn't --

18 MR. MOORE: -- wholly independent of
19 the merits of the case.

20 JUSTICE KAVANAUGH: -- wouldn't that
21 be picked up under the tort as it's been
22 articulated by the Second Circuit and other
23 circuits by the absence of probable cause
24 requirement and by qualified immunity?

25 In other words, what extra work is

1 this indications-of-innocence requirement really
2 doing that's -- that's necessary to have these
3 kind of mini-trials ahead of time, I guess?

4 MR. MOORE: Well, it depends somewhat
5 on -- on what claim we're actually talking about
6 here. If we're talking about a malicious
7 prosecution claim, the work that it does is it
8 connects the element of the claim to the party
9 who's actually being sued.

10 So if we're talking about a -- a --
11 it's ultimately the prosecutor, not the officer,
12 who decides how to terminate that claim. And it
13 would be an unusual element to have -- to place
14 an element in the volitional control of an actor
15 who is not the actual defendant in the case, and
16 the prosecutor's immune.

17 So requiring that there be some
18 reflection on the merits in that favorable
19 termination element indicates -- it provides
20 some connection between the element of the claim
21 and the party who's actually being for the
22 court.

23 If we're looking to a more -- more
24 broadly to a Fourth Amendment claim, the -- the
25 advantage that it provides is a more

1 administrable link on -- on the cause -- on
2 causation issues.

3 JUSTICE KAVANAUGH: What about the
4 point that Chief Judge Pryor made that there
5 really wasn't such a requirement at common law
6 and so the courts that have maybe mistakenly
7 relied on the Restatement Second have just been
8 mistaken in importing this requirement into the
9 tort?

10 MR. MOORE: So I -- I think that the
11 law was unsettled certainly in 1871 on this
12 question. And I don't think that the more
13 modern courts that have looked to that question
14 have -- have been mistaken. I think that there
15 was good reason for the rule that they have
16 adopted.

17 And so -- and -- and that -- that
18 does, again, serve that purpose of providing a
19 link between the officer conduct and the actual
20 elements of the claim, the conduct at issue, and
21 that sort of early and more easily discoverable
22 filter.

23 Addressing the common law question --
24 and I apologize if you have a question?

25 JUSTICE KAVANAUGH: Well, if we think

1 it's thin or -- or maybe a draw on the common
2 law, do you want to answer the -- Justice Kagan
3 had articulated that question, in other words,
4 what showing needs to be there and who has the
5 burden of making that show -- showing? Burden
6 might be the wrong word, but --

7 MR. MOORE: Right. So the question
8 presented poses two alternative rules, and the
9 fact that one may not have been well settled
10 under the common law of 1871 doesn't necessarily
11 mean that the other rule was well settled.

12 So, at that point, the Court is not
13 looking to determine what the common law of 1871
14 requires but is rather looking to the -- the
15 tort law as a source of inspired examples to
16 inform the Court's own decision as to what the
17 contours of that element should look like.

18 And in that case, the -- the increase
19 in acceptance among federal circuits and state
20 courts is -- is in place for good reason. And
21 that -- that good reason are -- are those that I
22 -- that I've expressed to Your Honor.

23 And to -- to bolster the point just a
24 little bit about the common law being unsettled
25 in 1871, Petitioner's own cases acknowledge that

1 there was a conflict in authorities at the time.

2 He cites to the Cassavere decision.

3 He cites to the Woodman decision. He cites to
4 the Kennedy decision. He cites to the Stanton
5 decision. All four of those courts indicate
6 that the common law was not well settled at the
7 time.

8 That's not a basis to conclude that,
9 in fact, the rule was well settled in his favor.

10 JUSTICE BREYER: No, but assuming
11 that's a wash, look, the actual practices, I
12 think, don't they suggest the contrary of your
13 position?

14 I mean, you have to show that there
15 was no probable cause for the arrest. That's
16 what he alleges. So there's no probable cause.

17 And then you have to show that it was
18 terminated, the proceeding, in his favor, the
19 question is here, I guess, and you also have to
20 show that the way in which it was terminated
21 affirmatively indicates his innocence. There
22 are hardly any cases like that. What they do is
23 they just say dismissed.

24 Hey, defendant, you object to the case
25 being dismissed? No. Okay, end of the matter.

1 Now I don't know if I'm right. Am I
2 right about how -- what normally happens?

3 MR. MOORE: Normally happens, I --
4 it's not often, though.

5 JUSTICE BREYER: All right. If that
6 normally happens that way, then what's this
7 affirmative -- affirmative indications of
8 innocence doing there? After all, it seems as
9 if almost all the states and everybody else in
10 many of the states, they've gotten along for
11 years without it, and it hasn't -- in my
12 wonderful example of Jean Valjean, just hasn't
13 turned up once.

14 So -- so -- so what are we doing with
15 this extra requirement here that can never be
16 met? I -- overstated -- hardly ever and et
17 cetera, and what Justice Kavanaugh said was --
18 what's the answer to that?

19 MR. MOORE: So the answer is that the
20 rule exists in the context of malicious
21 prosecution claims and that those claims present
22 a mismatch between the conduct of the
23 prosecution, which is out of the hands of the
24 police officer, and the defendant in the civil
25 case, who is the police officer.

1 And so courts have been -- given that
2 division, which was not in place in 1871, courts
3 have increasingly adopted this standard as a
4 means -- in a way that reflects the need to tie
5 the claim at issue to the defendant who is
6 actually before the court.

7 And requiring that there be a merits
8 indication in the termination does tie it to the
9 officer conduct in a way that the -- simply
10 requiring the prosecution have ended does not.
11 The mere decision to end the case is in the
12 hands of the prosecutor. And the officer
13 seldom, if any, has -- if any time, has actual
14 authority to make that determination.

15 CHIEF JUSTICE ROBERTS: Counsel, there
16 -- as you can tell from the questioning, there's
17 a real issue in this case about whether we
18 should be deciding essentially a downstream
19 question when we haven't resolved an upstream
20 question, and that's one of your arguments in
21 favor of dismissing, I guess.

22 But it's kind of a feature of our
23 jurisdiction that we sometimes will do that. I
24 mean, if you have a particular question of
25 whether there's a claim, and then -- a

1 downstream question like what the elements are,
2 well, it may be a serious issue that has divided
3 the courts of appeals, you know, what the
4 elements should be. And we may look at the
5 prior question, the upstream question, and
6 decide that that may not be ripe for our
7 consideration at this time. It may be ripe
8 later on. You know, the two questions might
9 have had different treatment in the -- in the
10 different circuits so that one conflict is ripe
11 and the other is not.

12 I mean, do we have to wait until that
13 upstream question is suitable for our
14 jurisdiction before direct -- addressing, say, a
15 sharp conflict in the circuits? We don't have
16 quite that here, but, you know, the circuits are
17 divided five to five on the elements. But we
18 think the upstream question would benefit from
19 further percolation before we grab it? Is there
20 anything wrong with that?

21 MR. MOORE: Well, I think that the
22 problem with doing so is that the -- I believe
23 it's the upstream question, the more
24 foundational question --

25 CHIEF JUSTICE ROBERTS: Is there such

1 a cause of action?

2 MR. MOORE: Right. And -- and what it
3 looks like and -- and what the basis of that
4 claim is affects the ultimate resolution of the
5 downstream question. And merely slapping a
6 label, this is unreasonable seizure pursuant to
7 legal process, ultimately papers over
8 distinctions that continue to exist.

9 And so, to take a clear example, the
10 Court recognized in Manuel that such a claim
11 existed, and on remand, the Seventh Circuit
12 said, well, there is no malicious prosecution
13 claim at all. That's not even helpful as an
14 analogy.

15 The Second Circuit, also applying
16 Manuel -- and this is in the -- in Footnote 1 of
17 the Spak decision -- in Footnote 1, the court
18 says we're considering what amounts to a Manuel
19 claim for unreasonable seizure pursuant to legal
20 process, and in this circuit, that means what --
21 what amounts to a state law malicious
22 prosecution claim with a seizure element tacked
23 on at the end basically as a form of damages.

24 So the Court, by not addressing that
25 upstream question, allows confusion even among

1 courts that are purporting to apply the exact
2 same claim. And that's harmful -- and to return
3 to the -- the point of a moment ago, that's
4 harmful because, when the courts are then
5 determining what basis -- what those elements
6 look like, they are assuming the -- what the
7 claim is giving rise to that element. And if
8 they are assuming differently or incorrectly,
9 that leads to different shapes of the -- of the
10 rule here.

11 And, again, if this is a malicious
12 prosecution claim, the rule can't -- is based in
13 different considerations than if we're talking
14 about a Fourth Amendment claim.

15 JUSTICE KAGAN: But I -- I -- I -- I
16 think, Mr. Moore, that that just sort of ignores
17 what the Chief Justice was putting to you.

18 We have eight circuits that are now
19 applying a favorable termination rule in
20 Manuel-type claims, and seven of them are
21 applying one variant of that rule, and an eighth
22 comes along and says we ought to be applying
23 another variant of that rule. And then, when
24 you look at the opinion of that eighth court,
25 you know, it looks pretty good, and -- and

1 that's a pretty serious position. It might be
2 the right position.

3 So eight circuits are applying a
4 favorable termination rule. Seven of them might
5 be doing it the wrong way. That seems like a
6 case we should resolve.

7 MR. MOORE: Well, just a
8 foundational -- and I know this isn't the key
9 point of your question, but I disagree that the
10 Laskar decision does provide a -- a compelling
11 view of the historical law.

12 To address the core of your question,
13 though, the -- the -- addressing that upstream
14 question, the -- the actual foundational
15 question, in many ways can help resolve the
16 downstream effects that follow. And so the
17 Court is certainly free to assume its way to
18 that question presented. We agree -- we believe
19 that we prevail even under that standard.

20 But the --

21 JUSTICE KAGAN: I -- I don't really
22 see how it does. I mean, the upstream question,
23 the only possible way that it could affect the
24 downstream question is if we decided that there
25 was no favorable termination rule at all, in

1 which case the Petitioner definitely wins.

2 So I don't see why it's a problem to
3 ignore the upstream question.

4 And, by the way, wasn't this all
5 addressed at the certiorari stage, where you
6 came in and said exactly this, and, you know, to
7 be frank, we ignored you.

8 MR. MOORE: You did grant cert in this
9 case. Hopefully, now you have the opportunity
10 to address the issues that -- I -- I don't take
11 the grant of cert to mean that those issues are
12 entirely off the table.

13 And to address the original question
14 as to why -- how we could prevail on the merits
15 of the question, if we are -- if we are talking
16 about a malicious prosecution -- the reason that
17 it matters what the answer to that upstream
18 question is, which is that Petitioner bases his
19 explanation for the rule entirely on Heck and
20 McDonough. But, again, if we're actually
21 challenging the seizure point, that doesn't
22 really hold true.

23 And to highlight that point, the Court
24 should consider the instance of an arrest made
25 pursuant to a warrant. As the Court noted in

1 Manuel, that would constitute arrest pursuant to
2 legal process. But an arrest pursuant to a
3 warrant, it's hard to see how that necessarily
4 calls into question a conviction that occurs
5 down the line.

6 And so the basis for his rule that
7 only the finality and consistency and collateral
8 attacks are at issue doesn't hold if we're
9 actually challenging a Fourth Amendment -- if
10 we're actually talking about a Fourth Amendment
11 issue.

12 It only applies if we're talking about
13 a common law malicious prosecution claim, a
14 standalone malicious prosecution claim, that he
15 agrees doesn't exist. He says everybody agrees
16 that doesn't exist. And so, if that's the --

17 JUSTICE KAVANAUGH: Well, is that
18 really true? If we resolve the upstream
19 question -- Justice Kennedy, 27 years ago, said
20 it should find a home in the Due Process Clause.
21 Wouldn't that be open to us to so hold, as
22 Justice Gorsuch also mentioned? Standalone
23 malicious prosecution?

24 MR. MOORE: Yes. So I -- I -- I may
25 have gotten carried away with my -- my rhetoric.

1 There's the possibility that -- that a
2 standalone malicious prosecution claim could
3 potentially exist, potentially under procedural
4 due process, but that's certainly not the claim
5 that was brought here.

6 And this is where the -- the issue of
7 the due process claim that Petitioner lost at
8 trial on becomes particularly salient because
9 that claim wholly encompasses any conduct that
10 could be at issue in a reformulated plea.

11 JUSTICE KAVANAUGH: Yeah, well, you're
12 back now to the facts of this case, and I take
13 that, but -- but, on the upstream question, it's
14 not clear you'll be better off if we -- if we
15 resolve that in terms of the -- the law. In
16 other words, there might be more avenues
17 available for someone to sue, namely, a
18 standalone malicious prosecution that does not
19 require you to also establish a seizure, just a
20 malicious prosecution under the Due Process
21 Clause.

22 MR. MOORE: So that -- that may result
23 and -- and, frankly, under the Second Circuit's
24 precedents, many of the -- the due process
25 claims overlap so significantly that I -- I

1 don't know that we'd be worse off. I do
2 appreciate Your Honor's concern for us on that
3 point.

4 I -- the, I think, best route for the
5 Court to take in this case would be to clarify
6 that the standalone malicious prosecution claim
7 that the Second Circuit recognizes is not, in
8 fact, a claim and that the claim, properly
9 understood, has to be grounded in Fourth
10 Amendment concerns. And that requires an actual
11 seizure that requires causation that's directly
12 linked to the officer's conduct, akin to what
13 was set forth in Franks versus Delaware.

14 JUSTICE SOTOMAYOR: That's been
15 conceded by your adversary. So assuming that
16 there's no malicious prosecution case -- claim
17 because they're not claiming there is one,
18 assuming they say their claim is just a Manuel
19 claim, an unreasonable seizure pursuant to legal
20 process, where do you want to be, assuming --
21 and I don't assume it because that's what Manuel
22 said, that there was such a claim. We didn't
23 know what to analogize it to, whether false
24 arrest, malicious prosecution, or something
25 else. I thought that was the issue that Manuel

1 left open. Am I wrong about that?

2 MR. MOORE: No. So Manuel did leave
3 open whether malicious prosecution is the best
4 analogy for that kind of claim.

5 JUSTICE SOTOMAYOR: It did. But it
6 assumed that there was a cause of action for
7 unreasonable -- not assumed. It held there was
8 an unreasonable seizure pursuant to legal
9 process, correct?

10 MR. MOORE: Yes, it did.

11 JUSTICE SOTOMAYOR: All right. So now
12 the question is, what do we analogize it to?
13 What do you want to analogize it to? Because,
14 if there is such a claim, doesn't it favor you
15 to analogize it to malicious prosecution that
16 has so many more prerequisites for success than
17 a fault -- forget about this case, okay, because
18 you want to win this case.

19 I assume you have a lot of other such
20 cases. Doesn't it favor you to want to
21 analogize it to malicious prosecution?

22 MR. MOORE: It -- it very well may. I
23 -- I think that it is a difficult question.
24 It's one that the parties have -- have not
25 briefed. The various amici have touched on it.

1 The City of Chicago is the most in-depth
2 treatment of that subject.

3 JUSTICE SOTOMAYOR: You haven't
4 addressed it because you've addressed the
5 question presented, which is what are the
6 elements of a malicious prosecution claim.

7 MR. MOORE: That -- that's right, Your
8 Honor, which is the claim --

9 JUSTICE SOTOMAYOR: That's what's been
10 addressed here. So why don't we answer what's
11 been addressed.

12 MR. MOORE: Because the -- to return
13 to a point that I was making earlier, what that
14 element looks like depends on what right is
15 actually being asserted. And if we're --

16 JUSTICE SOTOMAYOR: How?

17 MR. MOORE: If -- if the assertion is
18 that there was an unreasonable seizure, then the
19 rationale -- the Heck and McDonough rationale
20 carries far less weight, and it would be a
21 mistake to assume that this -- or -- or we would
22 urge the Court not to assume that the same
23 rationale necessarily applies to an --

24 JUSTICE SOTOMAYOR: Why?

25 MR. MOORE: The Court -- the --

1 JUSTICE SOTOMAYOR: Wouldn't --
2 wouldn't -- isn't the Heck thinking that if
3 you're seized pursuant to legal process, that we
4 should wait until that legal process ends before
5 you can bring a claim and we should bring -- and
6 we should not bring a case -- and we only should
7 bring a case if it's been terminated?

8 MR. MOORE: I think I'd -- I would add
9 a little bit to that explanation. It's not
10 merely the existence of legal process, but it's
11 the fact that challenging the -- that bringing
12 the civil suit, the 1983 claim, would
13 necessarily impugn in Heck an outstanding
14 conviction. In McDonough, that was expanded to
15 include also ongoing proceedings.

16 But a challenge to a seizure, and,
17 again, particularly if we're talking an arrest
18 pursuant to a warrant, does not necessarily
19 challenge that aspect. It does not challenge
20 and necessarily impugn the ongoing proceeding.
21 It doesn't necessarily impugn any outstanding
22 criminal conviction.

23 I believe Justice Alito raised the
24 point earlier that you could imagine a situation
25 in which evidence came along later that either

1 exonerated or completely led to the conviction.

2 JUSTICE SOTOMAYOR: But that's true of
3 any case. In every case, there are different
4 grounds to defend. The issue is whether or not
5 what do you analogize this to, not because on
6 your particular case you have a better argument
7 on seizure, but on whether or not the case below
8 has finished so that an action now makes sense?

9 MR. MOORE: So to -- I take Your Honor
10 to be saying that it would be a almost
11 case-by-case inquiry as opposed to looking to --

12 JUSTICE SOTOMAYOR: No, it's not a
13 case-by-case inquiry. The point is case by case
14 there are different defenses. In some, you
15 might defend the seizure prong. In others, you
16 might defend the probable cause. In others, you
17 might defend on qualified immunity.

18 On this one, you chose to defend on
19 favorable termination. So the question here
20 that you're choosing to defend on is what is a
21 favorable termination, correct?

22 MR. MOORE: Yes.

23 JUSTICE SOTOMAYOR: And so, if that
24 question is common to all, maybe not in dispute
25 in some but common to all, why don't we just

1 answer that question?

2 MR. MOORE: I don't think that the
3 element would necessarily be common to all. And
4 I think that a due process claim where the
5 ongoing proceedings were necessarily impugned
6 might implicate Heck concerns and -- and, thus,
7 bring that rationale in, whereas a seizure claim
8 would not.

9 And if -- if those are different -- if
10 there are different claims implicating different
11 rights, then I -- I -- I think that we can't
12 safely assume that in all of those cases, any
13 case where there is legal process, it's
14 necessarily going to require the exact same
15 treatment of the elements.

16 JUSTICE SOTOMAYOR: All right. Thank
17 you.

18 MR. MOORE: Given that the rationale
19 for Petitioner's rule doesn't necessarily apply
20 to the claim that he is now claiming to bring,
21 given that the common law is at best unsettled
22 in 1871 and in the modern era is trending
23 increasingly toward favoring a merits-based
24 determination, we urge the Court to affirm the
25 Second Circuit's rule of the malicious -- of the

1 malicious prosecution elements to the extent
2 that the Court does not determine, does not
3 decide, to rule on the basis that the malicious
4 prosecution claim Plaintiff -- Petitioner
5 brought simply does not exist under the -- under
6 the -- under the constitutional provision that
7 he claims.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 JUSTICE THOMAS: None for me, Chief.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer?

14 Justice Alito?

15 Justice Sotomayor? Nothing further?

16 Justice Kagan?

17 Justice Gorsuch?

18 JUSTICE GORSUCH: Thank you. Two
19 quick questions, I hope. First, whether I
20 answer the upstream question or the downstream
21 question, I have to be interpreting the Fourth
22 Amendment here, right?

23 MR. MOORE: Yes, Your Honor.

24 JUSTICE GORSUCH: Okay. And if -- if
25 I don't think the Fourth Amendment speaks to any

1 of this -- second question -- because it doesn't
2 speak to process, it doesn't speak to malice,
3 and it doesn't speak to favorable termination,
4 isn't that potentially, as you were discussing
5 with Justice Sotomayor, a much more favorable
6 set of rules for plaintiffs in the mine-run of
7 cases?

8 MR. MOORE: So we -- we think that --
9 so in -- in that -- in the instance that Your --
10 Your Honor is positing, we think the best course
11 would be to not specify whether there's malice,
12 whether there's favorable termination, but to --
13 to answer your question more directly, we think
14 that a -- a true Fourth Amendment claim, not one
15 that has been twisted into what is essentially a
16 state law -- what is, in effect, a state law
17 malicious prosecution claim, we think that that
18 does favor us because, unlike the current Second
19 Circuit law --

20 JUSTICE GORSUCH: That wasn't my
21 question.

22 MR. MOORE: I apologize.

23 JUSTICE GORSUCH: My question was,
24 isn't that more favorable to plaintiffs in the
25 mine-run of cases --

1 MR. MOORE: The answer is --

2 JUSTICE GORSUCH: -- not to have to
3 prove these things?

4 MR. MOORE: -- I -- I -- I don't -- I
5 don't think so. And if -- if I -- if I may
6 explain. The reason I -- I don't think so is
7 that a true Fourth Amendment claim is not going
8 to have many of the malicious prosecution --
9 much of the malicious prosecution underbrush
10 that currently plagues the Second Circuit's case
11 law on the subject.

12 And so we're confident that a true
13 Fourth Amendment claim with an actual seizure
14 requirement, with actual causation, that we will
15 prevail certainly in this case and in the
16 mine-run of cases when the analysis is properly
17 understood.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 Justice Barrett?

21 JUSTICE BARRETT: I have one. So I'm
22 following up on Justices Kagan and Sotomayor
23 asking you about our choices in how to resolve
24 this case. And one is to focus on the question
25 presented, which really just focuses on what

1 does it mean for a termination to be favorable
2 and does a dismissal count. Or we can, you
3 know, talk about the upstream -- the upstream
4 issue that you've devoted most of your brief and
5 most of your argument.

6 So I wonder if it's fair to infer that
7 you think that your assessment of the case is
8 that you're on relatively weaker ground on the
9 question presented about what counts as a
10 favorable termination and that you think your
11 stronger argument is the upstream argument?

12 MR. MOORE: We -- we think that we
13 prevail on either ground. We think that the
14 more helpful --

15 JUSTICE BARRETT: Which is your
16 stronger argument?

17 MR. MOORE: We think the stronger
18 argument is that there -- that the claim
19 Petitioner brought, which is a -- as pled and as
20 argued a malicious prosecution claim --

21 JUSTICE BARRETT: The upstream
22 argument?

23 MR. MOORE: The upstream argument.

24 JUSTICE BARRETT: Yes.

25 MR. MOORE: That that is not a claim

1 that -- that exists under the Fourth Amendment.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. MOORE: Thank you.

6 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
7 Ali?

8 REBUTTAL ARGUMENT OF AMIR H. ALI
9 ON BEHALF OF THE PETITIONER

10 MR. ALI: Thank you, Mr. Chief
11 Justice.

12 Just two quick points. First, I
13 think, given that I answered questions from a
14 lot of directions, initially it would be helpful
15 to just be clear about what we think the Court
16 needs to hold.

17 We think the Court granted this case
18 to decide a deep and pointed conflict between
19 the federal circuits, and all the Court needs to
20 say is something like this: The Second Circuit
21 decided this case on the basis that the
22 favorable termination rule we have applied to
23 certain Section 1983 claims requires indications
24 of innocence. It does not. A criminal
25 proceeding terminates in favor of the accused

1 when it ends and the prosecution has failed to
2 obtain a conviction. That's the thrust of it.
3 That's three sentences, two if you like
4 semicolons.

5 And just coming to the actual merits
6 of the QP and kind of the second point I just
7 mentioned in stating what the Court should hold,
8 we agree with Chief Judge Pryor that the common
9 law is very clearly on our side, virtually
10 unanimous -- unanimous outside of Rhode Island.

11 And we are left still wondering what
12 the statutory hook for reading the
13 indications-of-innocence standard into the
14 statute is. I heard policy arguments from my
15 friend on the other side. I heard arguments
16 about kind of nose-counting state courts, which,
17 by the way, in their briefing, they only still
18 get to a minority. We think it's far fewer than
19 20, but even on their own terms, they only get
20 to 20.

21 And the choice is between a clear rule
22 that was developed over centuries at common law
23 and is categorical or a rule that requires
24 federal courts to hold these civil mini-trials
25 in which they are looking for something that

1 courts don't even know what it means.

2 It's quite extraordinary, right?

3 Federal courts, circuit courts, lower courts,
4 usually just understand their task to be to
5 apply the precedent. In this instance, we've
6 pointed to a number of panels of federal judges
7 and district court judges who have said we have
8 no idea what this thing means. We're actually
9 just going to skip the question entirely. In
10 the Southern District of New York case we cite,
11 the -- the court says we're actually just going
12 to go straight to trial because I don't want to
13 decide this question and get into the sticky
14 issues unless I really have to.

15 We think that's pretty extraordinary.
16 We think the Court should adopt common sense,
17 that the -- a criminal proceeding terminates in
18 favor of the prosecution when it gets the
19 conviction that it sought; a criminal proceeding
20 terminates in favor of the accused when it
21 doesn't.

22 If there are no further questions, we
23 ask that the Court reverse and remand for
24 further proceedings.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, 12:46 p.m., the case was
3 submitted.)

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