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

Place: Washington, D.C.

Date: October 12, 2021

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

(202) 628-4888

www.hrccourtreporters.com

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

LARRY THOMPSON,)

Petitioner,)

v.) No. 20-659

PAGIEL CLARK, ET AL.,)

Respondents.)

- - - - - - - - - - - - - - - - - - - -

Washington, D.C.

Tuesday, October 12, 2021

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

APPEARANCES:

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

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

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

C O N T E N T S

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

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

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

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

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

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

no such well-settled principle.

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

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

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

MR. ALI: So I don't --

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

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

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

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

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

JUSTICE THOMAS: Please.

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

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

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

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

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

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

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

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

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

JUSTICE THOMAS: And --

MR. ALI: -- seizure was.

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

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

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

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

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

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

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

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

Would you have a claim?

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

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

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

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

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

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

Now I think it's actually --

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

MR. ALI: So we --

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

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

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

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

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

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

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

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

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

MR. ALI: Right.

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

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

JUSTICE GORSUCH: You haven't fought

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

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

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

MR. ALI: Right.

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

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

JUSTICE GORSUCH: Oh -- hold on.

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

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

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

JUSTICE GORSUCH: Okay.

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

JUSTICE GORSUCH: Okay, that -- now --

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

MR. ALI: Yes.

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

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

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

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

JUSTICE ALITO: Does it have any kind of --

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ALI: Well, Your --

JUSTICE KAVANAUGH: -- in this case.

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

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

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

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

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

MR. ALI: Well --

JUSTICE KAVANAUGH: -- suggesting?

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

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

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

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

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

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

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

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

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

MR. ALI: Right.

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

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

policy.

Now what do you say?

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

And that is the --

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

And you say?

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

So we think that, you know, the manner

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

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

MR. ALI: We do.

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

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

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

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

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

MR. ALI: Yes.

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

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

MR. ALI: Well, Your Honor --

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

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

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

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

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

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

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

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

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

MR. ALI: Well --

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

JUSTICE THOMAS: None for me, Chief.

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Well, who --

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: I have a quick --

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

MR. ALI: Yes.

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

MR. ALI: Right.

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

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

JUSTICE SOTOMAYOR: Right.

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

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

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

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

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

JUSTICE SOTOMAYOR: And --

MR. ALI: -- necessarily --

JUSTICE SOTOMAYOR: -- all of these --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

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

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

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

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

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

JUSTICE GORSUCH: Okay.

MR. ALI: Our --

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

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

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

JUSTICE GORSUCH: Okay.

MR. ALI: That is not the argument

Petitioner is making here. And the question presented --

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

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

JUSTICE GORSUCH: All right.

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

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

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

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

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

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

JUSTICE GORSUCH: Got it.

MR. ALI: -- never be charges.

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

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

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

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

MR. ALI: Your Honor --

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

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

JUSTICE GORSUCH: All right.

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

JUSTICE GORSUCH: Okay.

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

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

MR. ALI: Yeah.

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

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

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

JUSTICE GORSUCH: That's right.

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

JUSTICE GORSUCH: But would you agree --

MR. ALI: -- that itself made --

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

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

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

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

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

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

JUSTICE GORSUCH: Right, but if we buy

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

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

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

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

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

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

JUSTICE GORSUCH: Thank you.

MR. ALI: -- case took place.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

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

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

prosecution.

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Barrett?

JUSTICE BARRETT: No.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Ellis.

ORAL ARGUMENT OF JONATHAN Y. ELLIS

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

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

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

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

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

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

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

JUSTICE THOMAS: What exactly is that constitutional right?

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

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

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

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

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

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

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

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

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

presumptively okay? And, here, that happened.

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Yes, other than in this case.

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

JUSTICE SOTOMAYOR: I don't want this case.

MR. ELLIS: I know. I --

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

MR. ELLIS: Sure.

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

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

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

JUSTICE KAGAN: But, Mister --

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

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

complaint.

JUSTICE ALITO: Right. Okay.

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

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

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

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

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

centaur run the risk of getting lung cancer?

What would the medical expert say to that?

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

JUSTICE ALITO: But why --

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

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

MR. ELLIS: I --

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

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

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

just as the Court recognized in Manuel.

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

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

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

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

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

release on his own recognizance.

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

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

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

We think all of those reasons apply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Okay.

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

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

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

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

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

JUSTICE GORSUCH: Well, why --

MR. ELLIS: -- a standalone right.

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

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

JUSTICE GORSUCH: No, no, no.

MR. ELLIS: -- more natural.

JUSTICE GORSUCH: No, I'm not asking

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

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

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

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

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

MR. ELLIS: I think, when there's

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

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

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

JUSTICE GORSUCH: So that goes too?

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

JUSTICE GORSUCH: That goes along with favorable termination?

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

JUSTICE GORSUCH: That stays?

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

JUSTICE GORSUCH: But --

MR. ELLIS: We think malice is likely

not --

JUSTICE GORSUCH: Not.

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

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

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

CHIEF JUSTICE ROBERTS: Justice Thomas, anything further?

JUSTICE THOMAS: Nothing for me, Chief.

CHIEF JUSTICE ROBERTS: Justice Breyer?

Justice Alito? No?

Justice Kagan?

Justice Kavanaugh?

Justice --

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

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

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

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

If you reject the malice requirement

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

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

JUSTICE BARRETT: Thank you.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Moore.

ORAL ARGUMENT OF JOHN D. MOORE

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

The rationale for the rule articulated

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

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

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

I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It's hard to see --

JUSTICE KAVANAUGH: If --

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

JUSTICE KAVANAUGH: No, keep going.

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

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

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

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

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

Amici on both sides and the government agree on this.

JUSTICE KAVANAUGH: But they also

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

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

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

JUSTICE KAVANAUGH: Wouldn't --

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

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

In other words, what extra work is

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

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Well, if we think

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

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

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

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

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

there was a conflict in authorities at the time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Is there such

a cause of action?

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

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

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

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

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

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

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

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

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

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

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

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

But the --

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

which case the Petitioner definitely wins.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

left open. Am I wrong about that?

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

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

MR. MOORE: Yes, it did.

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: How?

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

JUSTICE SOTOMAYOR: Why?

MR. MOORE: The Court -- the --

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

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

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

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

exonerated or completely led to the conviction.

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

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

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

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

MR. MOORE: Yes.

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

answer that question?

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

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

JUSTICE SOTOMAYOR: All right. Thank you.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

JUSTICE THOMAS: None for me, Chief.

CHIEF JUSTICE ROBERTS: Justice Breyer?

Justice Alito?

Justice Sotomayor? Nothing further?

Justice Kagan?

Justice Gorsuch?

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

MR. MOORE: Yes, Your Honor.

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

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

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

JUSTICE GORSUCH: That wasn't my question.

MR. MOORE: I apologize.

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

MR. MOORE: The answer is --

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Barrett?

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

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

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

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

JUSTICE BARRETT: Which is your stronger argument?

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

JUSTICE BARRETT: The upstream argument?

MR. MOORE: The upstream argument.

JUSTICE BARRETT: Yes.

MR. MOORE: That that is not a claim

that -- that exists under the Fourth Amendment.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. MOORE: Thank you.

CHIEF JUSTICE ROBERTS: Rebuttal, Mr. Ali?

REBUTTAL ARGUMENT OF AMIR H. ALI

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

courts don't even know what it means.

It's quite extraordinary, right? Federal courts, circuit courts, lower courts, usually just understand their task to be to apply the precedent. In this instance, we've pointed to a number of panels of federal judges and district court judges who have said we have no idea what this thing means. We're actually just going to skip the question entirely. In the Southern District of New York case we cite, the -- the court says we're actually just going to go straight to trial because I don't want to decide this question and get into the sticky issues unless I really have to.

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

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

CHIEF JUSTICE ROBERTS: Thank you,

counsel. The case is submitted.

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

G

H

I

Y