

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANDRE WALLACE, :

4 Petitioner :

5 v. : No. 05-1240

6 CHICAGO POLICE OFFICERS :

7 KRISTEN KATO AND EUGENE :

8 ROY. :

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10 Washington, D.C.

11 Monday, November 6, 2006

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:05 a.m.

15 APPEARANCES:

16 KENNETH N. FLAXMAN, ESQ., Chicago, Ill; on behalf of
17 the Petitioner.

18 BENNA RUTH SOLOMON, ESQ., Deputy Corporation Counsel;
19 Chicago, Ill.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Wallace versus Kato and Roy.

Mr. Flaxman.

ORAL ARGUMENT OF KENNETH N. FLAXMAN

ON BEHALF OF THE PETITIONER

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

This case presents the Court with the question it addressed in Heck versus Humphrey raised in a slightly different context.

The context in Heck was of a prisoner whose conviction had been affirmed who was in prison, who had filed a civil rights case that would have had the practical effect of collaterally challenging his criminal conviction. The context in this case is of a civil rights plaintiff who has prevailed in his criminal case, who was imprisoned for 8-1/2 years fighting the criminal case and comes to Federal court with a Section 1983 action saying, I now seek a remedy for my unconstitutional incarceration, and files his lawsuit.

The court in Heck held that this action, an action to recover damages for unconstitutional conviction or imprisonment, accrues when the conviction

1 is set aside. That's the principle that we asked the
2 court of appeals to apply and the court of appeals said:
3 We're not going to apply that because we will adopt a
4 categorical rule without any implied exceptions
5 whatsoever that says when you're arrested you have 2
6 years, which is the statute of limitations in 1983 cases
7 in Illinois, to file your claim for damages.

8 JUSTICE GINSBURG: Mr. Flaxman, one starting
9 point. You say that this case should be just like Heck,
10 but in Heck the core problem was the line between 1983
11 and habeas, right?

12 MR. FLAXMAN: Well, that was one view of the
13 core problem.

14 JUSTICE GINSBURG: But at least this case
15 involves no such concern about habeas.

16 MR. FLAXMAN: That's correct. In Heck the
17 Court solves the core problem by concluding -- by
18 denying the existence of a cause of action for damages
19 until the criminal case had been resolved in favor of
20 the civil rights claimant, which is the rule, the common
21 law rule for malicious prosecution. That's the solution
22 that the Court came up with in Heck, which is the
23 solution that the petitioner believes should be applied
24 in this case.

25 JUSTICE SCALIA: But only if, only if the

1 challenged evidence, the challenge to the evidence, if
2 sustained, would necessarily -- and this is the crucial
3 language -- invalidate the criminal conviction.

4 MR. FLAXMAN: That's what would have
5 happened in this case, as the dissenting judge in the
6 petition for rehearing --

7 JUSTICE SCALIA: Would necessarily have?
8 You could have said that ex ante?

9 MR. FLAXMAN: Absolutely. In criminal cases
10 there's discovery and the criminal defendant knows what
11 the prosecution --

12 JUSTICE SCALIA: You don't know what other
13 evidence there might have been in the criminal case. Ex
14 ante you can't tell.

15 MR. FLAXMAN: You do know because it's
16 disclosed in discovery. We don't do trial by ambush any
17 more in criminal cases. The defendant knew that all the
18 evidence against him was the alleged --

19 CHIEF JUSTICE ROBERTS: Well, but he did
20 not know that for years later. I mean, they don't have
21 to bring a prosecution immediately. They can wait until
22 the day before the statute of limitations runs.

23 MR. FLAXMAN: Well, there is no statute of
24 limitations for murder in Illinois.

25 CHIEF JUSTICE ROBERTS: Well, then they can

1 wait a long time.

2 (Laughter.)

3 MR. FLAXMAN: If he's incarcerated that
4 whole time awaiting the filing of charges, then his
5 cause of action would not have accrued. But the more
6 likely scenario is that he would be arrested --

7 JUSTICE SOUTER: Well, is that -- I mean,
8 your friend on the other side says that the cause of
9 action would have accrued at the moment at which he was
10 bound over by the decision of an independent magistrate.
11 At that point the false arrest and the incarceration
12 incident to the false arrest is over and if there is
13 ever going to be a claim for what happens next, I gather
14 it's going to be a common law action for false
15 imprisonment, and that, I guess, would not accrue until
16 the imprisonment is over. But so far as the arrest is
17 concerned, whatever whatever wrong is done, that wrong
18 is completed at the point at which an independent
19 magistrate takes over.

20 MR. FLAXMAN: If the claim was solely
21 directed at the arrest, then Your Honor would be
22 absolutely correct. The claim in this case, the cause
23 of action, is not that he was taken off the street
24 without probable cause. The core of the cause of action
25 is that the respondent police officers exploited that

1 arrest to get this untruthful confession that was used
2 to hold Mr. Wallace in custody for 8-1/2 years, to seize
3 him for 8-1/2 years. It's not just the arrest. It's
4 the arrest plus exploiting it.

5 JUSTICE SOUTER: But all of that occurred,
6 as I -- correct me if I'm wrong on the facts, but I
7 thought all of that occurred prior to -- I don't know
8 what they call it in Illinois, but prior to a bind-over
9 hearing or prior to the point at which the judiciary
10 steps in, breaking the, as it were, the chain of
11 causation between what the police do and the subsequent
12 incarceration.

13 MR. FLAXMAN: Under Malley versus Briggs, it
14 doesn't break the chain of causation if we adhere --

15 JUSTICE SOUTER: No, but just as a factual
16 matter is it correct -- is it correct as a factual
17 matter that the confession that was given was a
18 confession that was given before there was any judicial
19 intervention, before he was brought before a magistrate?

20 MR. FLAXMAN: That's correct.

21 JUSTICE SOUTER: Okay.

22 MR. FLAXMAN: There was no other evidence
23 presented to the magistrate or that could have been
24 presented to the magistrate other than the confession to
25 show --

1 JUSTICE ALITO: Well, Mr. Flaxman, is your
2 argument limited to that situation, where there is no
3 evidence whatsoever against the criminal defendant other
4 than the illegally seized evidence? Or would it apply
5 in some situations in which there is some additional
6 evidence?

7 MR. FLAXMAN: If there's some additional
8 evidence, we could not say was necessarily -- would
9 necessarily imply the invalidity of the conviction. And
10 would be -- that's not our situation.

11 JUSTICE ALITO: Any additional evidence,
12 even if it would be insufficient to support a
13 conviction, takes -- makes make this -- would make this
14 a different case.

15 MR. FLAXMAN: I would not say -- well, it
16 would make it a different case. But if I was arguing in
17 a case where there was a little bit of evidence, but not
18 enough to say there's probable cause to accuse him of a
19 crime, I would say that suppressing or eliminating the
20 confession would necessarily imply the invalidity of any
21 conviction.

22 JUSTICE ALITO: What, what does necessarily
23 mean? Does it mean no additional evidence? Does it
24 mean no additional evidence that is insufficient to
25 support a conviction? Does it mean no additional

1 evidence that would be likely to persuade a trier of
2 fact?

3 MR. FLAXMAN: What I think it means is that
4 there's no conviction -- what I think it should mean --
5 and I'm not trying to debate the dictionary, what I
6 think it should mean is that if there is no evidence
7 other than after -- that is excluded, to base a
8 prosecution on, as in this case where the man is let go,
9 because there is no evidence to prosecute him, that that
10 does imply the invalidity of the conviction.

11 JUSTICE ALITO: Well, in this case, let me
12 just me more question on it. In this case, suppose
13 there had been a witness who said at about the time when
14 this murder took place, I saw somebody who was between,
15 I would judge as between the age of 15 and 25, average
16 height, average build, running away. And let's say that
17 your client fits that description. Now would that be
18 enough to take this case out of the rule that you're
19 arguing for?

20 MR. FLAXMAN: No. Unless that witness could
21 say and the man who I saw then is the defendant in
22 this -- is the criminal defendant, Mr. Wallace. There
23 was an eyewitness in this case. And he could not make
24 an in-court identification of Mr. Wallace. And the
25 prosecutor realized that that wasn't enough evidence on

1 which to base a criminal prosecution, and gave up.

2 JUSTICE SCALIA: Again, you didn't, you
3 didn't know that at the time the arrest was made, or at
4 the time the confession was extorted, or at the time he
5 was bound over. You really didn't know that until the
6 trial. For all you knew, they might have found in
7 addition to the confession, they might have found
8 eyewitnesss who would have identified your client. You
9 couldn't tell that until the trial.

10 MR. FLAXMAN: Well, that would have been
11 very unfair if they withheld -- they ambushed the
12 defendant with --

13 JUSTICE ALITO: No, well -- until the trial
14 --

15 JUSTICE SCALIA: Until the trial, until the
16 process of trial began.

17 MR. FLAXMAN: Well, we didn't know that
18 because there weren't any, because this man didn't
19 commit that crime. We are talking -- in the
20 hypothetical, I think we should set, start with
21 Mr. Wallace being an innocent man, who was arrested
22 unlawfully, who gives an involuntarily -- an involuntary
23 false confession. And on the basis of that is held for
24 eight and a half years, finally wins the case, is set
25 free, and then sues the --

1 JUSTICE KENNEDY: But, but you presume in
2 your last answer that other than that, there is an
3 absolutely fair prosecution.

4 MR. FLAXMAN: Other than the fact --

5 JUSTICE KENNEDY: I mean, why do we make
6 that assumption when we start out with the allegation of
7 a tort and a violation of the Constitution? I don't
8 understand.

9 MR. FLAXMAN: Well, the tort is against the
10 police officers who made an unlawful arrest and
11 exploited it to get the evidence that was used to hold
12 Mr. Wallace. The, the problem with saying that
13 Mr. Wallace has to sue, as soon as he files his motion
14 to suppress, he should have filed his Section 1983
15 action, would produce a multitude of 1983 actions.

16 JUSTICE KENNEDY: What about the fact --
17 suppose that there were even a more serious battery
18 here, a broken limb or something. Would you have to sue
19 for the damages for the battery right away? The police
20 officers injured --

21 MR. FLAXMAN: No. If excessive force was
22 used against somebody when they're being arrested,
23 that's a claim that everyone agrees accrues at the time
24 of the injury.

25 JUSTICE KENNEDY: Well, what about this

1 case?

2 MR. FLAXMAN: This case would necessarily
3 impair the validity of the conviction. If --

4 JUSTICE SCALIA: But the conviction in Heck
5 existed at the time of the alleged tort. And what Heck
6 said is where you have an outstanding conviction, and
7 you have a constitutional tort, you can't sue on that
8 constitutional -- and where -- you cannot sue on that
9 constitutional tort if the decision on the tort would
10 effectively contradict your conviction. Until the
11 conviction has been set aside.

12 Well, this is not that situation. There was
13 no outstanding conviction involved. So why did you have
14 to wait?

15 MR. FLAXMAN: Well, you had to wait because
16 it would -- it would be a fruitless act to file the case
17 while the case -- file a Federal case while the state
18 criminal case was pending. But --

19 JUSTICE KENNEDY: I'm still, I'm still
20 puzzled about my question. Suppose there's a battery
21 resulting in a serious injury to the defendant.

22 MR. FLAXMAN: That claim would --

23 JUSTICE KENNEDY: But there's other evidence
24 and so forth. Can you sue for the battery at once?

25 MR. FLAXMAN: You can sue and you have to

1 sue for the battery immediately.

2 JUSTICE KENNEDY: Why is that the situation?

3 MR. FLAXMAN: Why is that different?

4 Because this --

5 JUSTICE KENNEY: And -- or is it just
6 because of the assumption that the conviction might
7 stand anyway.

8 MR. FLAXMAN: Well the conviction generally
9 does stand with -- the battery generally has nothing to
10 with the conviction.

11 JUSTICE KENNEDY: But if does, then you
12 wait?

13 MR. FLAXMAN: If it is an element of the
14 offense, you wait. Or if it is an element of what could
15 be the defense in a criminal case.

16 But getting back to the Heck question, in
17 Heck the court looked to the common law for the
18 appropriate rule to apply to the cause of action that
19 Mr. Heck was applying.

20 If we look to the common law for the
21 appropriate rule for Mr. Wallace, we don't come up with
22 the Seventh Circuit's rule of immediate accrual. We
23 come up with the rule --

24 CHIEF JUSTICE ROBERTS: But the point, the
25 whole point of Heck was to avoid 1983 becoming an end

1 run around habeas. But here you don't have that problem
2 because you don't have any available relief under habeas
3 under Stone versus Powell.

4 MR. FLAXMAN: Well, we don't know before the
5 criminal case starts whether Mr. Wallace will receive a
6 full and fair hearing on his Fourth Amendment claim.
7 And until we know that we don't say Stone versus Powell
8 would bar a Fourth Amendment claim. We don't know that
9 the state will give Mr. Wallace an attorney who can stay
10 awake, who can file a motion, who knows that there is a
11 Fourth Amendment, and Mr. Wallace might end up not
12 getting a full and fair hearing and might have a valid
13 claim cognizable with Federal habeas corpus that --

14 JUSTICE KENNEDY: Are there many cases in
15 which the rule of Stone versus Powell is inapplicable
16 for that reason?

17 MR. FLAXMAN: No. But there are some. It
18 is not a non-existent occurrence in.

19 JUSTICE BREYER: What happens -- I'm trying
20 to think of what the problem is for you. On January 1,
21 your client's arrested unlawfully. Now suppose the rule
22 was you have two years to file it, starting now. What
23 is the problem for you? The problem is maybe in a year,
24 or maybe less, the police start to prosecute him. In
25 the meantime, your trial is going forward because you

1 filed it on time. So when they start to prosecute him,
2 you don't yet know what's going to happen. And it could
3 happen that he's convicted and you think it's illegal
4 because of the arrest and necessarily so.

5 And therefore you have to stop the trial, I
6 guess, because of Heck.

7 MR. FLAXMAN: The civil trial will be stayed
8 pending the --

9 JUSTICE BREYER: That would work, I guess.
10 They'd stop it and then they'd have to bring it -- you'd
11 have to stop it and then you'd have to go through these
12 other remedies and then you'd have to go back to it.

13 MR. FLAXMAN: It would be on the district
14 court's docket for ten years waiting the final --

15 JUSTICE BREYER: But that would work.

16 MR. FLAXMAN: It would, well, it would be a
17 horrible --

18 JUSTICE BREYER: A mess.

19 MR. FLAXMAN: -- a horrible mess for the
20 district court. It would not work because --

21 JUSTICE BREYER: Suppose I modify it.

22 JUSTICE SOUTER: Why would it be a mess? I
23 mean, it seems to me that the district court, once it is
24 filed -- something is filed within the two year statute,
25 the district court can tell virtually immediately

1 whether there are criminal proceedings that are yet to
2 be held, and the district court can simply, it can
3 simply stay further proceedings until those criminal
4 proceedings are over. If there's a possibility of
5 collateral attacks, the district court can simply say
6 hey, are you going to file a collateral attack? And if
7 the answer is yes, stay it further. If the answer is
8 no, go ahead with it then. What's tough about that?

9 MR. FLAXMAN: Well, the district judge will
10 not allow a civil case to go forward because it would
11 allow the criminal defendant --

12 JUSTICE SOUTER: That's the premise of my
13 question. But I mean it seems to me to be fairly easily
14 administered.

15 MR. FLAXMAN: Well, I mean, I, I shudder to
16 think of 20,000 cases on district court dockets being
17 stayed while criminal cases are being resolved.

18 JUSTICE SOUTER: 20,000 might make me
19 shudder. But we got one.

20 (Laughter.)

21 MR. FLAXMAN: We have one. The criminal
22 defendant will be disinclined to file his civil rights
23 case on time because it will be used against him in his
24 criminal case to impeach his bias.

25 JUSTICE SOUTER: Well -- explain that.

1 MR. FLAXMAN: It will impeach his bias. If
2 he, when he testifies in the criminal case, he will be
3 cross-examined, aren't you seeking money damage from the
4 police officers? Don't you want to make money from this
5 case? And the jury will consider that when they weigh
6 the truthfulness of the --

7 JUSTICE SOUTER: And don't you think that a
8 civil action which necessarily has to be stayed, might
9 be a basis for, for the court in the criminal case to
10 limit that kind of cross-examination?

11 MR. FLAXMAN: Not in the Circuit Court of
12 Cook County. That cross-examination will occur every
13 time a civil --

14 JUSTICE SOUTER: Are there appeals from the
15 Circuit Court of Cook County?

16 MR. FLAXMAN: There are appeals and.

17 JUSTICE SOUTER: Okay, don't you -- don't
18 you think ultimately you could get that issue resolved?

19 MR. FLAXMAN: No. I am absolutely confident
20 the Illinois courts at the highest level will say that
21 is proper cross-examination.

22 JUSTICE SOUTER: Come -- come back here.

23 (Laughter.)

24 JUSTICE BREYER: Suppose it is complicated.
25 I want to suggest a modification with this suit here.

1 You say you have to file within two years. But wait,
2 you have -- we tolled the statute. If the person is
3 arrested and charged, and convicted, for all the time
4 that is going on, it is just tolled, equitably. And
5 after the conviction, if he's acquitted, by the way, or
6 he isn't arrested, the statute starts to run again.

7 Now if he's convicted, as long as you have
8 filed, proceeding to challenge the conviction, it is
9 tolled.

10 Now, would that -- that it seems to me would
11 help every problem you have, and it would be called
12 equitable tolling. And that's been suggested by judges
13 in different forums and many states have it.

14 And what's the problem? That just solves
15 the problem, doesn't it?

16 MR. FLAXMAN: Well, I have four answers. I
17 hope I can get them out.

18 If Heck instead of adopting a rule of
19 accrual and denying existence of a cause of action had
20 established the Federal tolling rule, saying that these
21 causes of action are tolled while you're in custody,
22 that would have solved the problem.

23 JUSTICE BREYER: All right, well, we could
24 do it in this case.

25 MR. FLAXMAN: Well, I, I -- the Court

1 certainly can do it. It would require carving a hole
2 into, into Tomiano with this --

3 CHIEF JUSTICE ROBERTS: Yeah, it would
4 require overruling our cases that say for tolling, your
5 borrow state law --

6 JUSTICE BREYER: What cases require
7 overruling?

8 MR. FLAXMAN: Unless state law is
9 inconsistent with Federal Board of Regents versus
10 Tomiano, I think the Court could say that. The other
11 thing that the Court should be aware of is that the
12 Seventh Circuit, and I think four other circuits follow
13 the common law rule that you can't have a 1983 action
14 about a false arrest if you have been convicted of the
15 charge on which you were arrested. So these cases would
16 not be brought in the Seventh Circuit and the --

17 JUSTICE BREYER: Well, it seems to me
18 identical to the rule you are advocating but with one
19 difference. The difference with the rule you are
20 advocating is a judge who is going to be judge at time A
21 with your first case, is going to have to guess whether
22 it is in this case or not in this case necessarily
23 related to some kind of challenge to conviction you're
24 going to bring later if you happen to get convicted.

25 MR. FLAXMAN: I think --

1 JUSTICE BREYER: There is no way to guess
2 that.

3 MR. FLAXMAN: I think tolling, a Federal
4 tolling rule for this cause of action, while someone in
5 custody although a criminal conviction is, has not been
6 resolved in favor of the defendant, criminal defendant,
7 would be an excellent solution.

8 JUSTICE BREYER: And is there anything that
9 you are aware of that it would be contrary to? I know
10 there are cases that say you look to states but you only
11 look to states where the state law is, in fact,
12 consistent with the Federal right.

13 MR. FLAXMAN: No, I think the Court could
14 say without overruling anything that there, in this the
15 state law does not fully reflect or protect the Federal
16 rights at stake here.

17 CHIEF JUSTICE ROBERTS: So then you deny the
18 officers the purpose you have for the reason you have
19 statutes of limitation, which is repose. They are going
20 to wait ten years instead of the two years to find out
21 if they are going to have to answer any claim for
22 damages.

23 MR. FLAXMAN: Well, but the officers will
24 also get the benefit of not being sued if there is a
25 conviction based on the charge for which the person was

1 arrested. That case would not be brought, especially in
2 the Seventh Circuit where there is no cause of action --
3 and it wouldn't be brought anywhere because there's no
4 damages if you are arrested and properly convicted and
5 serving sentence. Those cases just are not going to
6 exist; the officers would have that benefit.

7 JUSTICE GINSBURG: I thought the Seventh
8 Circuit said in -- quickly in passing that the damages
9 would run only from the time of the allegedly unlawful
10 arrest until the time of arraignment. That would, that
11 would be the -- be all of your damages. If there wasn't
12 an arraignment, whatever happens is not attributed to
13 the seizure.

14 MR. FLAXMAN: That's the Seventh Circuit's
15 view about what the cause of action is, which goes back
16 to what is the cause of action and when does it accrue?
17 In the Seventh Circuit the cause of action starts when
18 you're arrested and -- either at the time of arraignment
19 of, as they said in a subsequent case, when there's a
20 Gerstein probable cause hearing. In I think every other
21 circuit, the cause of action doesn't end at the time of
22 arraignment. It continues until the time that you're
23 released from being in custody.

24 JUSTICE GINSBURG: You asked us to take that
25 case and we didn't.

1 MR. FLAXMAN: Well, I asked you to consider
2 damages but I think -- as a question of damages, and
3 there are many issues related to damages that would have
4 been presented in question to --

5 JUSTICE GINSBURG: But if that's the
6 boundaries of the false arrest claim, then why does one
7 happen later matter?

8 MR. FLAXMAN: Well, the common law false
9 arrest claim would allow damages up until the time you
10 were released from the imprisonment, which is not at the
11 time of --

12 JUSTICE SOUTER: Even on the basis of
13 innocence?

14 MR. FLAXMAN: Not for a false arrest. As
15 long as you're not convicted. So malicious prosecution,
16 you would --

17 JUSTICE SOUTER: The common law would give
18 damages in a case like this in which the release was
19 basically governed by a suppression which has nothing to
20 do one way or the other with the innocence of that
21 person?

22 MR. FLAXMAN: That's correct. The common
23 law element -- malicious prosecution requires that the
24 innocence or grounds not consistent with guilt, but
25 there's no such element in the common law false

1 imprisonment, which would accrue when you are released
2 from being in prison, which would benefit Mr. Wallace in
3 this case. When the Seventh Circuit talked about there
4 are three alternatives that we have to choose from, the
5 proof immediately, the case by case of when it accrues,
6 or it only accrues at the end of the case, they didn't
7 consider the fourth possibility of the common law rule
8 that it occurs when the imprisonment ends.

9 JUSTICE ALITO: What does somebody like
10 Mr. Wallace do under your rule if he's in a jurisdiction
11 where there's not a lot of discovery in criminal cases.
12 He isn't going to know until trial whether his cause of
13 action accrued sometime earlier or whether it waited.

14 MR. FLAXMAN: But he's not going to file his
15 civil rights claim until his criminal case is over,
16 because he knows and his lawyer will tell him, that's
17 going to hurt you in winning the criminal case, and you
18 should be concerned about that.

19 CHIEF JUSTICE ROBERTS: But he's never going
20 to know, in the case where there's no statute of
21 limitations, he's never going to know when his criminal
22 case is going to be over because he may never know when
23 it's going to start.

24 MR. FLAXMAN: Well, if Mr. Wallace had been
25 arrested and released, he would have had two years from

1 when he was released to bring a civil rights action,
2 that being false imprisonment

3 CHIEF JUSTICE ROBERTS: So what happens if
4 he files a suit after one year and then after one year
5 and 350 days he's prosecuted? His action accrued but
6 then it didn't accrue?

7 MR. FLAXMAN: Well, I would suggest that it
8 would be the same as when someone is convicted of
9 battery, and then 10 years later, the victim of the
10 battery dies from the injury caused by the battery.
11 There would be a second prosecution for murder that
12 would not be barred from double jeopardy. I think
13 that's Diaz versus United States. I think --

14 CHIEF JUSTICE ROBERTS: So his action
15 accrued and maybe it's even over, but then it turns out
16 when they bring the prosecution, it should have never
17 have been brought because it never accrued.

18 MR. FLAXMAN: No, I think he would have two
19 actions. He'd have the action for being arrested and
20 then he'd have the action later when the -- when he was
21 seized because of the unlawful -- the fruits of the
22 unlawful arrest.

23 As a practical matter, though, those cases
24 are going to arise even less frequently than the Stone
25 versus Powell cases that are brought properly in Federal

1 habeas corpus.

2 JUSTICE BREYER: That problem is solved too
3 if you simply say bring it, day one, you are arrested,
4 and if in fact before the statute of limitations
5 expires, your client is brought to the court and is
6 going to be prosecuted. Tolloed. They don't need two
7 actions.

8 MR. FLAXMAN: A Federal tolling rule would
9 solve these problems.

10 JUSTICE BREYER: I want to be sure I
11 understood your position with regard to Justice
12 Kennedy's hypothetical where the defendant is arrested
13 and excessive force is used by the police, they beat him
14 up or something like that. When does that cause of
15 action accrue?

16 MR. FLAXMAN: At the time they beat him up,
17 unless the beating up relates to an element of the
18 offense.

19 JUSTICE STEVENS: Suppose that they had beat
20 him up two or three times. The first time it didn't
21 relate to it, but then they took him into the
22 interrogation room and they beat him up again. What
23 about that case?

24 MR. FLAXMAN: If the beating up is -- if the
25 beating up is related to, used to extort a confession

1 and the confession is used against him, then there would
2 be a cause of action when the confession is used.

3 JUSTICE STEVENS: So there would be two
4 causes of action?

5 MR. FLAXMAN: Multiple causes, yes. There
6 could be at least two.

7 JUSTICE SCALIA: Would he have to sue on the
8 first one right away?

9 MR. FLAXMAN: If you want to get damages for
10 being beaten up, I would tell my client to sue right
11 away. I would also tell my client if he's being charged
12 with a serious criminal crime offense, to wait until the
13 criminal case is over, because it will hurt you.

14 JUSTICE SCALIA: Mr. Flaxman, before you
15 save your time, I didn't understand why you're content
16 with Justice Breyer's tolling situation, bearing in mind
17 that the way he put it is, so long as the -- as the
18 criminal case is commenced within the two-year statute
19 of limitations, how does that help you when the statute
20 of limitations has passed? Then there's no tolling.

21 MR. FLAXMAN: But criminal cases are not
22 commenced many, many years after the unlawful arrest, as
23 a practical matter.

24 JUSTICE SCALIA: And two years doesn't seem
25 to be unheard of.

1 MR. FLAXMAN: Well, if we're talking about
2 complicated financial crimes, that's not unusual.

3 JUSTICE SCALIA: You're willing to let those
4 people go?

5 MR. FLAXMAN: If we're talking about the
6 kinds of crimes that are involved with this kind of,
7 with street crime, with murder, armed robbery, rape, the
8 defendant is not allowed to let them run over two years.

9 JUSTICE SCALIA: Those are the only
10 defendants you are concerned about?

11 MR. FLAXMAN: Those are the defendants who
12 get unlawfully arrested and are forced to give
13 confessions.

14 If I may reserve my time?

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Flaxman. Ms. Solomon.

17 ORAL ARGUMENT OF BENNA RUTH SOLOMON

18 ON BEHALF OF THE RESPONDENTS

19 MS. SOLOMON: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 Our submission this morning rests on the
22 proposition that the victim of an unreasonable search or
23 seizure has the right to sue as soon as that Fourth
24 Amendment violation occurs. For purposes of accrual of
25 that claim, it does not matter whether the victim is

1 subsequently prosecuted or whether he is subsequently
2 convicted. Accordingly, petitioner's Fourth Amendment
3 claim accrued for purposes of the two-year statute of
4 limitations as soon as his unlawful arrest and detention
5 occurred, and his lawsuit filed some nine years later is
6 time barred. The claim accrued --

7 JUSTICE STEVENS: May I ask, just to get it
8 straight at the beginning, what if the claim includes a
9 Fifth Amendment claim for extorting a conviction and
10 it's mixed up with a Fourth Amendment claim? What about
11 that claim?

12 MS. SOLOMON: I believe that the rule for
13 the Fifth Amendment claim, I believe the Court's view in
14 Chavez is that a coerced confession claim has as an
15 element of the claim, the use of that claim at trial.
16 So it would be our view if that is an element of the
17 claim, that that claim would not accrue until trial.

18 A claim --

19 JUSTICE KENNEDY: What about the beating of
20 the defendant?

21 MS. SOLOMON: Exactly. A claim for
22 conscience shocking techniques to obtain the confession
23 or the excessive force to obtain the confession, both of
24 those claims, and use of the confession at trial is not
25 an element of those claims, and those claims would

1 accrue at the time of those acts, just like the Fourth
2 Amendment rule that we urge in this case.

3 Only where there is a trial right and use of
4 some evidence at trial, suppression of evidence at
5 trial, something of that order, if the trial right is
6 implicated, that claim would not accrue until at trial.
7 That is different from the Fourth Amendment claim, of
8 course, because --

9 JUSTICE GINSBURG: Miss Solomon, do I gather
10 from your response to Justice Stevens about the Fifth
11 Amendment claim, that under Chavez it wouldn't accrue
12 until it is used at trial, is this case therefore a
13 pleading slip on petitioner's part? That is, if he had
14 alleged a Fifth Amendment claim based on the coerced
15 confession, then he wouldn't have a statute of
16 limitations problem?

17 MS. SOLOMON: He brought two claims in his
18 criminal case. He lost them both in the Illinois
19 Circuit Court at the time of his suppression motion. He
20 pursued only one of those on appeal to the Illinois
21 Appellate Court, and the circuit court made findings
22 that the confession was voluntary. So at the outset,
23 there were problems with that claim going into Federal
24 court.

25 JUSTICE GINSBURG: That's a puzzling feature

1 of it, too, because I thought at the end the second time
2 around, the Court of Appeals held that the confession
3 was no good.

4 MS. SOLOMON: The Illinois Appellate Court
5 overturned the conviction on the basis that it was
6 obtained through use of a confession in violation of the
7 Fourth Amendment only. The only findings that have ever
8 been made regarding Mr. Wallace's confession, the
9 voluntariness of the confession, were made in the
10 Illinois Circuit Court, and the finding was that the
11 confession was voluntary, that it was not coerced. That
12 finding has never been reviewed. Petitioner did file
13 both Fourth and Fifth Amendment claims in this civil
14 case, but we did not assert statute of limitations to
15 the Fifth Amendment claim for precisely the reasons that
16 I indicated to Justice Stevens.

17 And for that reason, although the question
18 was presented in the petition, we did not acquiesce in
19 the Fifth Amendment portion of question 1 of the
20 petition, and the court did not grant the Fifth
21 Amendment claim. So I do not believe -- a short answer,
22 sorry -- I do not believe it was a pleading error. It
23 is simply that that claim as the litigation developed is
24 not before this Court now, but not through a simple
25 pleading error. It is a far more weighty problem than

1 that.

2 JUSTICE SOUTER: But if the Fifth Amendment
3 claim were before us, do I understand you to have said
4 before that the Fourth Amendment claim of false arrest
5 would also be subject to litigation as part of the Fifth
6 Amendment claim or under the umbrella of the Fifth
7 Amendment claim, so that the statute would not have run
8 on that?

9 MS. SOLOMON: I'm sorry. If I indicated
10 that, I definitely misspoke. In our view, all Fourth
11 Amendment claims except for those that do negate an
12 element of the offense, and those are described in
13 footnote 6 of Heck, with that exception, all Fourth
14 Amendment claims should be regarded as accruing at the
15 time that the act that actually violates the Fourth
16 Amendment occurs.

17 JUSTICE KENNEDY: Well then, my question is
18 going to be along the same lines. Suppose -- I assume
19 this is a rather frequent case -- the confession is
20 alleged to be the product of a beating. The two are
21 merged. If we have to wait for the Fifth Amendment
22 claim anyway, then as a matter of policy, matter of
23 convenience, why don't we wait for the Fourth Amendment
24 as well?

25 MS. SOLOMON: Because the rule of accrual is

1 that the act -- the claim accrues when the plaintiff
2 experiences an injury.

3 JUSTICE KENNEDY: Well, we're making up the
4 rule of accrual, Ms. Solomon. I'm asking, if we have to
5 wait for one, why not wait for the other?

6 MS. SOLOMON: Well, with respect, Justice
7 Kennedy, I don't believe the Court is making up a rule
8 of accrual. I think those rules are quite well settled.
9 Cases like Ricks and Chardon make clear, and the Fourth
10 Amendment cases make clear that a Fourth Amendment
11 violation, unlike the Fifth, where evidence is used at
12 trial, the Fourth Amendment claim violation is fully
13 accomplished at the time of the illegal search or
14 seizure. Anything --

15 JUSTICE SCALIA: Who is the defendant in a
16 Fifth Amendment claim? Is it the policemen who
17 extracted the confession or is it the prosecutor who
18 introduced it at trial, since that is the offense?

19 MS. SOLOMON: Well, the prosecutor would be
20 absolutely immune, of course.

21 JUSTICE SCALIA: Right.

22 MS. SOLOMON: And some of those cases are
23 brought against the police officers. But, the reasons
24 that would suggest a certain accrual date for the Fifth
25 Amendment claim are very different from the reasons that

1 dictate the accrual of the Fourth Amendment claim at the
2 time -- the only action the petitioner alleges violated
3 the Fourth Amendment in this case was when his detention
4 at the police station, which was consensual at the
5 outset, became unconsensual, became involuntary at some
6 point before he confessed.

7 JUSTICE SOUTER: But if he had also brought
8 a Fifth Amendment claim, your view as I take it would be
9 as follows:

10 Number one, his Fourth Amendment claim, the
11 running of the statute, the Fourth Amendment claim would
12 be unaffected by that, so that would have to have been
13 brought within the two-year period.

14 MS. SOLOMON: That's correct.

15 JUSTICE SOUTER: Number two, I'm assuming,
16 and this is what I want you to tell me whether my
17 assumption is right -- I am assuming that if a Fifth
18 Amendment claim were brought by -- no, strike the
19 assumption.

20 You, I take it, would -- let me ask a
21 different question. I take it you would agree that so
22 long as a criminal case was pending, that it would be
23 sensible and maybe required for the court simply to
24 abstain from any proceedings on the Fourth Amendment
25 claim.

1 MS. SOLOMON: We do -- our position is that
2 they do occur when they happen and they must be filed
3 within the limitations, yes.

4 JUSTICE SOUTER: But you would agree that
5 the court, if there's a criminal case going on, I take
6 it you would agree that the court should not proceed to
7 trial in the 1983 action.

8 MS. SOLOMON: If there is a Fourth Amendment
9 claim being raised in the criminal case, and of course,
10 it might not be, but that is a very easy --

11 JUSTICE BREYER: But that's the problem. I
12 don't know if it is easy. It seems to me if you take
13 your point of view, now, on January 1, some, let's call
14 it an unconstitutional action allegedly. So, I don't
15 want to distinguish for the moment between Fourth and
16 Fifth. On January 1 the event occurs.

17 Then you say you have two years to file your
18 claim in the Federal court of a violation of 1983, for
19 example.

20 Then that happens. Let's say two months
21 later they file it. The defendant files it. A month
22 after that, there is a state criminal proceeding. Now,
23 you're the Federal judge. What's supposed to happen?
24 It sounds to me as if the judge sitting there, under
25 your theory, is going to have to make a decision. He's

1 going to have to say now, is the kind of claim that's
2 being argued in my court that the policemen did
3 something unconstitutional, if I say that's correct,
4 that the plaintiff wins, I have to go on to say does the
5 correctness of that, there was a violation, mean that
6 the conviction if there is a conviction in the state
7 court later, will necessarily be vitiated. If the
8 answer to that question is yes, he shouldn't go ahead;
9 is that right?

10 MS. SOLOMON: Justice Breyer, that is
11 correct.

12 JUSTICE BREYER: All right. If that's
13 correct, we're getting to exactly the same problem,
14 whether we do it through a set of abstention rules,
15 which we have to have Federal abstention rules or it
16 won't be worked out properly, or we have to have Federal
17 tolling rules.

18 I don't see any way to get to a sensible
19 result here without either having clear abstention
20 rules, just as you say, having clear tolling rules, as I
21 suggested before. Am I right? If I'm wrong, let me
22 know why; and if I'm right, which do you prefer?

23 MS. SOLOMON: I think those are essentially
24 the two choices, with one caveat. We would call it an
25 accrual rule as opposed to a tolling rule, for the

1 reason that this court has always respected the tolling
2 rules that states have whereas accrual is a Federal
3 question.

4 But with that slight caveat, I do believe
5 that those are the two main options. But I don't
6 believe the Court should be indifferent as between them.
7 There are very serious practical reasons weighing down
8 on our rule, which is a rule of immediate accrual and
9 filing not immediately, of course -- the case need only
10 be filed within the period of the statute of
11 limitations.

12 Thereafter it might well be that some cases,
13 maybe many cases, maybe nearly all cases, would need a
14 stay of some sort while the Federal -- excuse me --
15 while the criminal case is ongoing.

16 But that question, figuring out whether a
17 stay is warranted in order to avoid interference with a
18 ongoing state prosecution, is far easier to figure out
19 than whether the evidence is the only evidence, whether
20 it's critical evidence, whether there was other
21 evidence.

22 JUSTICE KENNEDY: I suppose -- correct me if
23 I'm wrong -- when the district court wants to determine
24 if he should hold something in abeyance, this is not
25 necessarily abstention; this is what courts always do

1 when there are multiple actions. Other action pending
2 is a general ground for a court to stay its hand.

3 MS. SOLOMON: That's exactly right, Justice
4 Kennedy, and it's also --

5 CHIEF JUSTICE ROBERTS: I suppose it would
6 make a difference to the officers, a principle of
7 equitable tolling. They don't know if they're going to
8 be sued for 10 years, 12 years, however long. Under an
9 accrual rule with a stay, they know whether they're
10 going to be facing a civil action or not.

11 MS. SOLOMON: That is the second major
12 advantage that we see to our rule, Chief Justice
13 Roberts.

14 JUSTICE BREYER: If you do it with a stay, I
15 mean, I see that disadvantage. If you do it with a
16 stay, the Federal judge is going to have to sit there
17 with the papers in front of him, look at that evidence,
18 think what's going to happen in the trial at the
19 criminal case which I'm not quite certain yet, and then
20 make a determination. It sounds like a very difficult
21 decision and it sounds like sometimes they'll get it
22 wrong, sometimes they'll get it right. The defendant
23 might be arguing two different things, you know, one in
24 the state court to try to get them to go ahead, and the
25 other to try to get them to go ahead in the Federal

1 court.

2 What do you --

3 MS. SOLOMON: Accepting your earlier
4 construct where there really are essentially two rules,
5 we either delay accrual or we --

6 JUSTICE BREYER: If you delay accrual by
7 tolling, you do have the disadvantage that in some
8 instances the policemen won't know for quite a while
9 whether the case is being brought. That's true; and in
10 the other instance, he won't know for quite a while how
11 the case is going to come out, which may be worse. But
12 you don't have any uncertainty. You have no
13 uncertainty. You would know once the man is released.
14 It's no tolling. Once he's convicted, it's tolled.
15 Then the conviction comes in. Not tolled until they
16 bring a proceeding.

17 MS. SOLOMON: The rule that we propose,
18 which is immediate accrual coupled with a stay of some
19 sort if the Fourth Amendment claim is being actively
20 litigated in the state court at that time, has two
21 advantages.

22 The first is that it does serve the purposes
23 that all statutes of limitations serve, which is it puts
24 the defendant on notice you are now the defendant in a
25 lawsuit, you should be marshalling your evidence, you

1 should be preserving your records, and you are not in
2 repose.

3 This Court has respected those as very
4 important interests. They are absolutely not served by
5 a rule of delayed accrual. At the same time, the rule
6 to allow a stay where necessary - as I indicated, it's
7 not going to be all of the cases, and it's far easier to
8 figure it out. The Federal district court figures it
9 out by having the defendant, the criminal defendant, who
10 is a plaintiff in his court, come in and is asked a
11 question: Are you currently --

12 CHIEF JUSTICE ROBERTS: They're not going to
13 waste a lot of time figuring out whether to grant a stay
14 or not when you have a criminal prosecution pending in
15 state court. I think in most cases -- I mean, it's not
16 like they're looking for cases. They're going to say in
17 most cases: Stay granted, come back when this is over.
18 They don't have to be -- unlike perhaps the situation
19 with an equitable tolling rule, it doesn't matter
20 whether they're precisely right or wrong. I mean, if
21 it's close enough just stay it, and it doesn't seem to
22 me there's much prejudice from that.

23 MS. SOLOMON: Well, that's correct, Your
24 Honor, and we wouldn't have any objection to a rule
25 that --

1 JUSTICE STEVENS: But isn't there this
2 practical problem? I think what you say fits together
3 beautifully with regard to the law, but isn't it true
4 that this will give an incentive in every criminal case
5 for the defendant to file a 1983 action. So we may
6 multiply the number of Federal cases that are filed and
7 then sit there while a criminal case proceeds.

8 MS. SOLOMON: I think the assumption, Your
9 Honor, should be that the number of cases is going to be
10 the same either way. It's just a question of when are
11 they filed and, moreover --

12 JUSTICE STEVENS: Well, if your opponent's
13 rule is adopted, they wouldn't file unless -- if they
14 get convicted and the conviction stands up, the case
15 would never be filed.

16 MS. SOLOMON: Well, it's curious that they
17 make that argument, because of course every victim of a
18 Fourth Amendment violation has the right to damages for
19 at least the invasion of their privacy, for the
20 antecedent conduct between the time of arrest and
21 charging. At a minimum, Mr. Wallace had that coming to
22 him because he was, according to the Illinois appellate
23 court, illegally seized.

24 JUSTICE STEVENS: The thing I just want you
25 to comment on is, my thought is every person arrested

1 has a potential, and something follows and so forth, has
2 a potential Fourth Amendment claim, even though he may
3 not have one on the merits. It just seems to me that
4 there's a potential here of an awful lot of what may
5 turn out to be frivolous claims filed, but it would seem
6 to be routine procedure for defense lawyers who want to
7 make a suppression motion to say, well, I better file my
8 1983 case at the same time. So you might get literally
9 hundreds and hundreds of cases.

10 MS. SOLOMON: With respect, Your Honor,
11 we'll take that chance for the benefits that the statute
12 of limitations does bring to the officer. And as far as
13 the burden on the court, whether all cases are stayed or
14 some cases are stayed, of course, we're content to have
15 this Court or the district court handling the case
16 figure that out.

17 But the main point that I would make is that
18 a rule of delayed accrual wholly undermines the purposes
19 of the statute of limitations, and where the plaintiff's
20 interest, the claimant's interests, can be served, as I
21 indicated, at a minimum every victim of a Fourth
22 Amendment violation has the right to some damages. That
23 is actually precisely why we say that Fourth Amendment
24 claims do not necessarily imply the invalidity of the
25 conviction.

1 JUSTICE KENNEDY: I had missed Mr. Flaxman's
2 point that this would an advantage to the prosecutor to
3 say, aren't you going to make a lot of money about this
4 case? My initial reaction as the defense counsel, I
5 would love that comment. I would tell the jury: Of
6 course, it's our duty as counsel to point out that my
7 client was beaten, he was terrified, he was beaten
8 again, he had a false confession, and the damages we're
9 not interested in; we'll get much more damages if you
10 convict and we show this 15 years later because the
11 policemen lied as they always do. You know, you hear
12 it.

13 MS. SOLOMON: It may be not in a --

14 JUSTICE KENNEDY: But he has tried more of
15 these cases than I have and he indicates this is a
16 serious concern.

17 MS. SOLOMON: He has tried way more of them
18 than I have as well, and I can't speak to that
19 specifically. It's not an argument that was ever made
20 in the briefs. But again, I have no reason to believe
21 that the Federal district court can't take account of
22 whatever it needs to take account of in order to
23 avoid --

24 JUSTICE KENNEDY: No, no. This is the Cook
25 County. This is the Cook County court.

1 MS. SOLOMON: Yes. Yes, I understand. But
2 all that has to happen, of course, is that the complaint
3 be put on file in the Federal court. It's notice
4 pleading. It can be a very, very long complaint.

5 JUSTICE KENNEDY: No, but he says the fact
6 of the complaint the prosecutor's going to use in order
7 to show that they're trying to profit from a false claim
8 of a beating.

9 MS. SOLOMON: Well, but as I indicated,
10 every victim of a Fourth Amendment rights, even those
11 who are guilty, even those who are convicted -- that's
12 the Herring case. Herring exactly shows --

13 JUSTICE KENNEDY: No, but the point is if
14 the complaint is filed then the prosecution can makes
15 that point.

16 MS. SOLOMON: I would imagine that it would
17 cut both ways in many cases, Your Honor. I'm sorry, I
18 can't speak to it more specifically than that.

19 JUSTICE GINSBURG: Does your position in
20 this case leave any reason at all for equitable tolling?

21 MS. SOLOMON: It does, Your Honor,
22 absolutely. Equitable tolling is always available in an
23 extraordinary case when the plaintiff could not put a
24 complaint on file within the period of the statute of
25 limitations. And unlike the accrual question, as

1 indicated a moment ago, the tolling is governed by the
2 states. In this case, for example, because Mr. Wallace
3 was only 15 years old at the time of the arrest, his
4 claim was tolled. He actually had nearly four years
5 beyond the two-year statute of limitations to put a
6 complaint on file and it still would have been toll --
7 would have been timely. He filed outside even that
8 time.

9 Illinois does not toll for prisoners, but
10 many states do, as the Court indicated in the Hardin
11 case. So there's all sorts of tolling available, or
12 could be under state law. Mr. Wallace has actually
13 never urged tolling in this case and I assume that
14 that's because there is no basis for that under state
15 law. He did get the advantage already of the time when
16 he was a minor and there is no other basis under
17 Illinois law that would allow him any basis for tolling.

18 But of course, tolling is proper when the
19 plaintiff does not know and could not know that his
20 rights were violated. If Mr. Wallace was illegally
21 seized, he was right there when it happened. He might
22 not have known that a court would ultimately accept his
23 argument on that, but of course the plaintiff never has
24 a right to be told that he has a successful claim before
25 he brings that claim.

1 JUSTICE GINSBURG: Is there any remedy that
2 Illinois law provides for a case like this where a
3 person spends, what was it, eight years in prison and is
4 ultimately released because the state never had enough
5 evidence to try him in the first place?

6 MS. SOLOMON: In many cases, the state law
7 of malicious prosecution will provide a remedy. Of
8 course, in Illinois and in all states, it requires
9 favorable termination. In this case, of course,
10 petitioner conceded long ago that he cannot show
11 favorable termination because the circumstances under
12 which the criminal case ended did not -- were not
13 consistent with a favorable termination.

14 But, of course, he would have had a Fourth
15 Amendment claim if he had filed it timely. He would
16 have had a state law malicious prosecution claim if he
17 had been able to show favorable termination. In states
18 that don't have malicious prosecution, perhaps there
19 would be a due process claim as well.

20 The result that there are no damages
21 available to somebody when the conviction is overturned
22 solely by operation of the exclusionary rule, however,
23 should not be troubling because the conviction itself,
24 of course, was not an independent violation of the
25 Constitution. Petitioner did receive the benefit of the

1 exclusionary rule. His conviction was overturned.
2 We're not aware of any case indicating that deterrence
3 purposes would require both the exclusion of evidence
4 and a damages claim.

5 JUSTICE KENNEDY: Would it ever be proper
6 for a district court to insist on proceeding to the
7 merits of the claim, to dispose of the merits of the
8 claim, while the prosecution was pending? Suppose the
9 district court thought that it was seeing too many of
10 these claims and it wanted to get to the bottom of them?

11 MS. SOLOMON: Well, in our experience the
12 district courts don't tend to want to go ahead. But I
13 would suppose that if the -- if the court did, rules of
14 comity are sufficient to allow the state courts to have
15 the first crack at issues that are arising in the
16 criminal cases, to be the ones that --

17 JUSTICE KENNEDY: We haven't written about
18 that other than in Heck explicitly and implicitly, and
19 in Younger? That's about it?

20 MS. SOLOMON: In Heck and in Younger.
21 There's the concurrence in Deacons against Monahan
22 indicates that a claim for damages should be stayed and
23 not dismissed or gone forward with. Justice White's
24 concurrence specifically addressed the difference
25 between dismissing and going forward with the claim. Of

1 course, the footnotes 8 and 9 in the Heck opinion are
2 very powerful indications of the weighty reasons. We
3 have no reason to think that the district court would
4 want to charge ahead with a claim that would -- with a
5 case that will only get simpler if it waits for the
6 state court proceedings to conclude, as well as of
7 course the comity and respect for the state courts.

8 In this case, of course, as I mentioned,
9 the -- Mr. Wallace always had a claim available to him
10 for his initial seizure regardless of the outcome of his
11 criminal prosecution. If he wanted to seek damages for
12 that prosecution and our primary submission, part one of
13 our brief is even assuming those damage might be
14 available on a Fourth Amendment claim, he was
15 nevertheless obligated to bring that claim within the
16 period of the statute of limitations, because otherwise
17 it would be time barred.

18 In our view, petitioner does not have
19 one claim for that arrest and another claim for his
20 trial and prosecution. He has one claim for a Fourth
21 Amendment violation with two elements of damages. But
22 mounting future or delayed damages do not delay accrual.
23 Even where the plaintiff does not know the full extent
24 of his injuries, he still must sue within the period of
25 the statute of limitations.

1 In fact, petitioner does not cite a
2 single case including the ones newly arrived in the
3 reply brief that uses either his accrual rule or his
4 damages rule to award damages for the entire time of a
5 lengthy period of incarceration. And as I indicated
6 petitioner conceded long ago that he cannot show
7 favorable termination. And although he could have
8 obtained some damages had he brought his claim timely,
9 his claim did accrue he was seized and not when the
10 charges --

11 JUSTICE GINSBURG: Do you agree with Judge
12 Wood that the limitation on damages would be from the
13 period, from the time of the arrest until the
14 arraignment? That would be the measure and nothing
15 after?

16 MS. SOLOMON: A number of courts have
17 reached that result, Your Honor. Footnote 25 recites
18 five court of appeals decisions to that effect. But our
19 primary submission in this Court is that regardless of
20 the damages that are available on a Fourth Amendment
21 claim, that the mounting of damages did not delay
22 accrual, and without a timely claim, it doesn't matter
23 what damages the plaintiff is seeking.

24 The reference in Heck to a claim for damages
25 for unconstitutional conviction, we take to be a

1 shorthand for a claim of some sort of constitutional
2 violation that can be brought through the vehicle of
3 Section 1983 that would enable the plaintiff to recover
4 damages for the incarceration. 1983 of course itself
5 does not create any substantive rights. The plaintiff
6 needs an underlying claim and in this case of course the
7 plaintiff only has the Fourth Amendment claim.

8 We do have, in our brief and argument why
9 the Fourth Amendment should not be regarded as allowing
10 those damages, but our primary submission and we do
11 think the Court can decide the case without -- without
12 reaching that issue.

13 The only date to delay an accrual in this
14 case was the date that the charges were nol prossed.
15 But that date is meaningless for the Fourth Amendment
16 and it is therefore meaningless for accrual. We would
17 the judgment be affirmed.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Ms. Solomon.

20 Mr. Flaxman, you have four minutes
21 remaining.

22 REBUTTAL ARGUMENT OF KENNETH N. FLAXMAN
23 ON BEHALF OF PETITIONER

24 MR. FLAXMAN: The issue that has been
25 sitting in this case like the elephant in the room is

1 what is Mr. Wallace's cause of action? Is it a cause of
2 action for being seized until he was arraigned? Or is
3 it a cause of action for being seized for the eight and
4 a half years that he was locked up until he was, the
5 criminal case was resolved in his favor?

6 My sister argues that it was just, the
7 Federal remedy is only until you're being arraigned, and
8 that the state remedy for malicious prosecution doesn't
9 exist if the Seventh Circuit has construed Illinois law
10 to say that there is no malicious prosecution when you
11 win the Federal case, when you win the criminal case,
12 because the evidence has been suppressed. The false
13 imprisonment, state false imprisonment was dismissed by
14 the district court, under his reading of Illinois law
15 that the cause of action accrued at the time of the
16 arrest. Not at the time he was released. And the
17 Seventh Circuit when that issue was raised on appeal to
18 them in a brief by both sides chose to reject it without
19 discussion.

20 What, the cause of action that respondent
21 proposes is none, for the eight and a half year seizure.
22 There is no state cause of action in Illinois. And
23 there is no Federal cause of action. It is just tough.
24 You are seized for eight and a half years, and you can't
25 go to state court, you can't go to Federal court. You

1 should have sued immediately after you were arrested to
2 get a little bit of damages, but that's all you can get.
3 And have a nice day; we're sorry.

4 That, I don't think is consistent with Heck.
5 I don't think it is consistent with this Court's
6 jurisprudence about the meaning of Section 1983. I
7 don't think it is consistent with the Fourth Amendment
8 and it should not be the rule that the Court adopts.

9 The statute of limitations problem isn't
10 really a problem because all of the evidence that's
11 material to the legality of the arrest, to the legality
12 and the -- whether the confession was the proximate --
13 was proximately caused by the arrest or proximately
14 caused by the incarceration, has been developed in the
15 criminal case. When there's very strong interest in
16 seeing that the facts are fully determined and fairly
17 determined for both sides. It is not that the police
18 officer who sued eight -- eight and a half years later
19 is much less is much less prejudiced than Mr. Wallace
20 is, who comes out of prison after eight and a half years
21 with no remedy.

22 The questions about the multiple causes of
23 action that can arise: if you're beaten, you have to
24 sue immediately after you're beaten; if you're beaten
25 but a confession is extorted from you, your right to sue

1 starts with the confession is used against you at
2 trial -- and if there's some constitutional violation
3 which necessarily impairs the conviction, then you can
4 sue after you successfully defended a criminal case --
5 is really an administrative nightmare that really could
6 be solved by a Federal tolling rule that all Section
7 1983 cases are tolled; the statute does not start to run
8 until the criminal case has been resolved.

9 In most cases, then, instead of being filed
10 in district court --

11 JUSTICE KENNEDY: That in effect is saying
12 we can't have a statute of limitations rule; we're just
13 going to laches, we're just going to an equitable rule.

14 MR. FLAXMAN: Well --

15 JUSTICE KENNEDY: We're just throwing up our
16 hands and saying there is statute of limitations statute
17 of limitations.

18 MR. FLAXMAN: No, there is a statute of
19 limitations. It starts to run when the criminal case is
20 over. That will weed out all of the really nonsensical
21 cases that would otherwise be filed under respondent's
22 rule, when you file the 1983 action the same day you
23 file the motion to suppress and the district judge says
24 well, this goes on my state calendar of 5,000 cases and
25 the clerk's office is troubled with collecting the \$350

1 filing fee in installments, and the jails are troubled
2 by paying those installments every time there's \$10 in
3 the prisoner's account. It's -- it would -- there are
4 more important things for the courts, the prisons to do.
5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
7 The case is submitted.

8 (Whereupon, at 12:03 p.m., the case in the
9 above-entitled matter was submitted.)

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