How This High Court Case Could Affect Police Abuse Suits

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Attorneys all seem to agree: When a prosecutor dismisses charges against a defendant, that's an ultimate win. The defendant can heave a sigh of relief, and walk free without the burden of a trial and the potential costs associated with it.

But to criminal defendants who allege police misconduct and plan to file civil lawsuits, a dismissal could mean doom.

A case involving a Brooklyn man who sued the New York Police Department on misconduct allegations in 2014 presents a compelling case in point: the man, Larry Thompson, was arrested and charged with misdemeanors.

Prosecutors later dropped the charges. When Thompson sued his arresting officers for damages claiming his civil rights had been violated, a federal district court said the simple dismissal of his criminal charges did not give him a right to bring a malicious prosecution claim. What he lacked was a disposition affirming he was innocent, the judge said.

In June, the Second Circuit upheld the district court's decision.

The U.S. Supreme Court will hear the case, Thompson v. Clark, in the fall, and its decision has the potential for restricting — or broadening — the accessibility of malicious prosecution cases around the country for the foreseeable future.

The Petition

In a petition for certiorari filed in November on behalf of Thompson, Amir Ali, an attorney with the MacArthur Justice Center, a Chicago-based public interest law firm, asked the Supreme Court to clarify when plaintiffs who were never convicted could be allowed to bring lawsuits against law enforcement on the basis of malicious prosecution.

In the petition, Ali said the doctrine adopted by the Second Circuit and a majority of federal appellate courts is creating absurd scenarios in which defendants would have to object to dismissals of charges and go to trial in hopes of getting dispositions that allow them to sue law

enforcement for misconduct.

"The court should address that question now," the petition said. "The majority rule enables abuse of the legal process with virtual impunity, and leads to the perverse result in which a person who is wrongfully and maliciously prosecuted must insist on being tried for a crime he did not commit in order to be able to hold government actors accountable for misconduct."

Ali declined to comment on the case to Law360.

The New York City Law Department, also known as the Office of the Corporation Counsel, representing the police officers, declined to comment.

The problem with that rule, of course, is that the American criminal proceedings never adjudicate innocence.

STEVE ART

Loevy & Loevy

Steve Art of Loevy & Loevy, who in January filed an amicus brief supporting Thompson on behalf of criminal defense, civil rights, and public policy organizations, said the case pinpoints a central conundrum: how does a rule requiring that a defendant demonstrate his innocence fit in a system designed only to prove guilt beyond a reasonable doubt.

"The problem with that rule, of course, is that the American criminal proceedings never adjudicate innocence," Art told Law360.

Several other organizations have filed amicus briefs addressing the case's underlying questions.

On Jan. 4, current and former prosecutors, judges and U.S. Department of Justice officials urged the high court to consider how the favorable termination doctrine affects the discretion of prosecutors.

"The majority rule violates these principles by attaching a consequence to prosecutorial decisions that creates a perverse incentive to the exercise of prosecutorial discretion," said the brief, which had 57 signatories.

Mary B. McCord, a former federal prosecutor and assistant U.S. attorney general who filed the brief, told Law360 that jurists who support the majority rule argue that lowering the standards for bringing lawsuits under Section 1983 would swamp the courts with litigation.

"Some people expressed concerns about whether this would open the floodgates," McCord said. "I think that's overblown."

Civil litigation is costly, and even well-funded public interest groups only take up cases when they're strong, she said.

The Underlying Criminal Case

In January 2014, Larry Thompson, a U.S. Navy veteran, was arrested in his home after his sister-in-law called 911 saying he had been abusing his week-old daughter. The claims made by the sister-in-law, who had a history of mental illness, would later turn out to be false.

NYPD officers forced their way into Thompson's home after he refused to let them in because they didn't have a warrant. They arrested him and put him in jail for two days. He was charged with obstructing governmental administration and resisting arrest.

Three months later, and after Thompson rejected an offer to accept an adjournment in contemplation of dismissal, prosecutors dropped the charges "in the interests of justice."

In December the same year, Thompson sued the city of New York and the arresting officers seeking damages for what he said were violations of his constitutional rights.

U.S. District Judge Jack. B. Weinstein ruled he couldn't allow Thompson's malicious prosecution claim to go forward, saying he was bound by the Second Circuit's ruling in Lanning v. Glens Falls. Judge Weinstein, however, allowed Thompson's other claims — including unlawful entry, false arrest and fabricated evidence — to go to the jury, which ultimately absolved the officers.

In a memorandum after the trial, Judge Weinstein criticized the Second Circuit favorable termination rule, saying it "should be changed," but that he ultimately had to follow it.

The Second Circuit later upheld the district's court order on the malicious prosecution claim, setting up the Supreme Court petition.

What 'Favorable Termination' Means: A 7-1 Circuit Split

In a 1994 decision in Heck v. Humphrey, the Supreme Court upheld a Seventh Circuit ruling that a defendant cannot bring a lawsuit under Section 1983 of Title 42 of the U.S. Code, which gives individuals the right to sue state government employees for damages over civil rights violations, until there has been a "termination of the prior criminal proceeding in [the individual's] favor."

Since Heck v. Humphrey, federal courts of appeals have disagreed on how to apply that standard for defendants whose charges get dismissed before trial. Seven circuits emerged with the most stringent requirement that criminal proceedings against a defendant must end in ways that assert his innocence in order for him to bring a malicious prosecution suit.

The Second Circuit endorsed the rule in a 2018 case, Lanning v. Glens Falls, holding that malicious prosecution claims require "affirmative indications of innocence to establish favorable termination."

The court backed the rule again in June in Thompson v. Clark, citing its previous decision.

Andrew G. Celli, Jr., a founding partner at Emery Celli Brinckerhoff Abady Ward & Maazel LLP, which specializes in police misconduct litigation, said the rule has been used for decades and has its roots in common law, but that federal courts recently have been scrutinizing the issue with greater care.

"Things are tightening up in this area," Celli said.

The Second Circuit has adopted the rule at least since 1980, in Singleton v. New York, where it held that "proceedings are 'terminated in favor of the accused' only when their final disposition is such as to indicate the accused is not guilty."

In the 1992 case Hygh v. Jacobs, the Second Circuit held that "as a matter of law" a dismissal in the interests of justice "cannot provide the favorable termination required as the basis for a claim of malicious prosecution."

The Second Circuit upheld the doctrine in 1997 in Murphy v. Lynn, holding that for malicious prosecution purposes, "where the prosecution did not result in an acquittal, it is deemed to have ended in favor of the accused [...] only when its final disposition is such as to indicate the innocence of the accused."

Subsequent rulings by the First, Third, Fourth, Sixth and Tenth circuits all established a requirement that plaintiffs demonstrate innocence.

Only the Eleventh Circuit rejected the rule. In a decision in Laskar v. Hurd last August, that court ruled that the favorable termination requirement demands only that criminal proceedings resolve "in a manner not inconsistent with" the defendant's innocence.

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ARTHUR LARKIN

Hale & Monico

Arthur Larkin, a civil rights attorney at Hale & Monico LLC and former attorney at the New York City Law Department, where he defended police and correctional officers, said the standard set by the Second Circuit is too hard to meet.

"When I worked for the city, I always liked that strict rule, because it made it harder for plaintiffs. Now, frankly, I can see the other side," said Larkin, who is a member of the New York City Bar Association's civil rights committee.

The Eleventh Circuit's rule is less ambiguous, easier to apply and fairer to plaintiffs, he said.

Larkin said he is not concerned that if adopted by the Supreme Court, the lower bar would give

way to frivolous lawsuits.

"Even if you get into the courthouse door, you don't automatically win. You still have to prove your case. You still have to prove liability," he said.

An Issue of Federalism

Malicious prosecution is a state law tort claim that arises from events following a defendant's criminal court arraignment. A separate type of tort claim, false arrest, is covered by a different law and has different standards.

A malicious prosecution claim is harder to bring because it requires proving that a judge decided to move forward with criminal charges brought without probable cause by a district attorney's office.

In addition to being a state law tort, malicious prosecution also violates the U.S. Constitution as a deprivation of liberty without due process. When done by a state or local official, it is the basis for a suit under Section 1983, which provides a cause of action in federal court.

The purpose of Heck v. Humphrey, the case where the high court adopted the favorable termination doctrine, was to avoid a collision between federal and state justice proceedings — a civil case in federal court involving a criminal defendant with a conviction in state court.

"Heck was a case that tried to, on the federalist principle, minimize interference by the federal courts with the results of state criminal prosecutions," said Joel B. Rudin, a prominent New York-based criminal defense and civil rights attorney.

Traditionally, federal courts have left it to state courts to determine what constitutes a favorable termination. The New York Court of Appeals has long held that the favorable termination requirement spelled out in Heck v. Humphrey is satisfied as long as "the final termination of the criminal proceeding is not inconsistent with the plaintiff's innocence," which is the standard used by the Eleventh Circuit.

But in a departure from the past, the Second Circuit has made clear in its rulings that it's up to federal courts to decide what a favorable termination means.

"That's sort of the power issue at bottom of this," Celli said.

Why the Case Is Important

Rudin said the Supreme Court's ruling in Thompson v. Clark will be the first one to tackle the favorable termination question on a national level.

"Given the number of malicious prosecution claims throughout the country, that are brought or should be brought, it's a very important case in the field," Rudin said. "If the Supreme Court says that there is no requirement of favorable termination at all, that's going to be a huge change of

how most federal courts have looked at malicious prosecution."

But if the high court embraces the majority rule, prosecutors will have too much power in crushing the ability of individuals who have been arrested and prosecuted without any real basis to bring lawsuits to seek damages, Rudin said.

Nancy Gertner, a retired federal judge and professor at Harvard Law School, agreed.

[Embracing the majority rule] would mean that prosecutors essentially are the gatekeepers.

NANCY GERTNER

Harvard Law School

"That would mean that prosecutors essentially are the gatekeepers. All they have to do is dismiss the charges," said Gertner, who served in the District of Massachusetts between 1991 and 2011.

Gertner said civil rights law has been "gutted" by judicial interpretations, particularly on qualified immunity. For that reason, it's significant that the high court is stepping in to provide guidance.

"The underlying issue is terribly important," she said.

The Eleventh Circuit rule would be a middle ground between an absence of a favorable termination requirement and the most stringent ones adopted by the seven circuit courts.

Erwin Chemerinsky, a prominent expert in constitutional law and federal courts and the dean of University of California, Berkeley School of Law, said that if the most stringent rule becomes the law of the land, it will drastically cut down the situations where plaintiffs can bring malicious prosecution suits across the country.

"There would be no remedy ever for arrests in violation of the Fourth Amendment when prosecutors bring no charges, or drop charges," he said.

Affirming Innocence: A Stringent Requirement

Should the Supreme Court agree with the Second Circuit, only cases that go to trial and end up with acquittals, or convictions that are overturned on appeal, would put defendants in a position to sue for malicious prosecution.

But of all the judicial proceedings in the United States, only about 3% end up in jury trials, according to government figures.

The overwhelming majority of convictions come from plea agreements. On the other hand, prosecutors who don't have enough evidence to prove a defendant guilty beyond reasonable doubt can choose to dismiss charges.

Often, the bases for dismissal are ambiguous. Excluding cases when DNA evidence absolves a defendant from guilt, prosecutors almost never go as far as saying on the record that a defendant is innocent, in part because new incriminating evidence can emerge later on, in part because they might not be sure that defendants didn't commit the crimes they are charged with.

In some cases, prosecutors might think a defendant is guilty but don't have enough evidence to prove it. In other cases, key witnesses in a case might be unwilling to cooperate with investigators, or might have died before they became relevant. Sometimes, charges are dropped due to jurisdictional problems, or when the wrong statute is charged.

"Criminal cases end for all kinds of reasons, and they're not always set forth on the record," Celli said. "Except when a jury comes back and says 'not guilty,' it is quite unusual for there to be a statement anywhere in a public record that a person is innocent of a crime. Even not guilty doesn't necessarily mean innocent."

Still, in the context of malicious prosecution claims, federal courts consider a non-guilty verdict a favorable termination. Much more ambiguous are situations where prosecutors drop charges against a defendant "in the interest of justice," as it happened in the Thompson case, where there is little or no explanation.

"It can be really murky whether the criminal case was terminated in the plaintiff's favor in a way that was consistent with innocence," Celli said.

(A)political Considerations

McCord, who's now the legal director of the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center, said the issue is not strictly politicized, saying the Supreme Court won't likely decide the case along the usual liberal-conservative divide.

"This is a case that is not political," McCord said. "This is about logic and fairness."

The brief filed by Loevy & Loevy was signed by The Bronx Defenders, Brooklyn Defender Services and The Legal Aid Society, several attorney groups and a liberal advocacy group, National Police Accountability Project. A conservative think tank, the Cato Institute, also endorsed it.

But despite some appearance of bipartisanship, Thompson v. Clark does present political ramifications.

Supreme Court justices who are generally more favorable to plaintiffs who challenge the fairness of the justice process are likely to be more receptive to the argument that the threshold to bring civil rights suits alleging police misconduct should be lower, Rudin said.

Celli said the federalism undertones in the dispute could entice conservative justices, who tend to defer to states on legal questions.

"I'm not sure there's a clear, ideological breakdown when you get into the nitty-gritty," he said.