2011 WL 3645381 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Zoltan SZAJER; Helene Szajer, Petitioners,
v.
CITY OF LOS ANGELES, et al, Respondents.

No. 10-1343.
August 17, 2011.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief

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*i TABLE OF CONTENTS

*ii TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

*1 INTRODUCTION

The circuit split identified in the Petition for Writ of Certiorari was explicitly acknowledged by the Ninth Circuit below. Accordingly, Respondents have a high hurdle to overcome in contending that there is no circuit split, and they have not done so.

Respondents' contention that the Petition is based on claims about the illegality of the pre-warrant search of business premises owned by Petitioners Zoltan and Helene Szajer ("the Szajers") that were never raised in or addressed by the courts below is both inaccurate and beside the point. The allegation of pre-warrant search violations was made in the Complaint and raised in both the District Court and the Ninth Circuit, as part of the overall claim that the searches and seizures violated Petitioners' Fourth Amendment rights. But more fundamentally, the gravamen of the Petition is that the Ninth Circuit dismissed Petitioners' Fourth Amendment claims because it believed them to be barred by this Court's decision in *Heck v. Humphrey,* 512 U.S. 477 (1994). Whether that included only the allegation that the warrant was illegal, as Respondents assert, or all of the allegations of illegal conduct raised by Petitioners, the fact remains that the Ninth Circuit's dismissal of the complaint was based on a reading of *Heck* that is "in direct conflict" with the Seventh Circuit's reading of *Heck.*

*2 ARGUMENT

I. The Circuit Split Is Quite Real.

Respondents contend that the circuit split identified in the Petition "is illusory." (Resp. Br. 14, 20, 22). But in this, Respondents are pushing uphill not only against the Petition but against the Ninth Circuit itself, which quite explicitly held that the way *Heck* is applied in the Ninth Circuit is "in direct conflict" with the way it is applied in the Seventh. (Pet. App. 10). Moreover, Respondents' characterization of the *Heck* rule, which parallels the view articulated by the Ninth Circuit below, highlights the circuit split and is irreconcilable with *Heck* itself. Certiorari is therefore warranted not only to resolve the circuit split, but to reject the view proffered by Respondents and adopted by the Ninth Circuit as inconsistent with *Heck.*

A. Respondents Misunderstand the Seventh Circuit's Decision in *Copus.*

Respondents completely misconstrue the Seventh Circuit's decision in *Copus v. City of Edgerton,* 151 F.3d 646 (7th Cir. 1998).

Copus involved a warrantless search conducted by police following a domestic dispute. During the search, several illegal firearms were discovered, Copus was later convicted for possessing them and then sued under § 1983. Addressing Footnote Seven from *Heck*, the Seventh Circuit described the issue as follows:

> At first blush this footnote in *Heck* is a bit unclear. On the one hand, it could mean that some Fourth Amendment claims brought under ***3** § 1983 would not necessarily be barred if the record revealed the tainted evidence used against the plaintiff at the criminal trial would have been admitted anyway (e.g., under a theory of inevitable discovery). In that case the district court presumably would have to determine whether the record supported such a theory. *On the other hand, the footnote might mean that Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid,* ***so in all cases these claims can go forward.*** We need not wrestle here with these two interpretations because *this circuit has chosen the second*[.]

Copus, 151 F.3d at 648 (emphasis added).

There is absolutely no ambiguity in the Seventh Circuit's view of *Heck*'s Footnote Seven. Nor is there any ambiguity in how the Ninth Circuit interpreted *Copus:* "The Seventh Circuit read footnote seven to mean that § 1983 claims based upon Fourth

Amendment violations may proceed because *Heck* simply does not bar such claims." (Pet. App. 11). That is the rule in the Seventh Circuit, and as the Ninth Circuit quite correctly noted, it is "in direct conflict" with the rule in the Ninth Circuit. [1]

***4** Respondents attempt to minimize the significance of *Copus* by asserting that the Seventh Circuit reached a different result "simply because" that case "involved different facts," which allowed the Seventh Circuit "to reconcile the defendant's civil claims with the admission of evidence that formed the basis of his criminal conviction" in a manner that was not possible on the facts in the Szajers' case. (Resp. Br. 20). But the "different facts" that Respondents claim drove the different outcome in *Copus* were simply offered by the Seventh Circuit as a demonstrative example of why it has adopted the absolute rule that Fourth Amendment claims can go forward "in all cases." *Copus,* 151 F.3d at 648, 649.

The irreconcilability of the two decisions is also starkly evident if one looks at the district court's holding in *Copus.* That holding is nearly identical to the Ninth Circuit's decision *sub judice*, and yet it was *reversed* by the Seventh Circuit.

The district court in *Copus* held that *Heck* barred a § 1983 claim seeking a ruling that the search was illegal. "Such a ruling necessarily draws into question ***5** the validity of his conviction," held the district court, because the "search resulted in the seizure of [the weapons] that were the basis for [Copus's] subsequent possession convictions." *Copus,* 151 F.3d at 647.

The parallel with the Ninth Circuit's decision below is uncanny. Accepting *arguendo* Respondents' characterization of the Ninth Circuit's ruling as addressing only the claim that the search warrant was illegal, [2] the Szajers challenged the validity of the search warrant that resulted in the discovery of the illegal handgun that was the basis of their possession conviction. "[I]f the Szajers prevailed on their Section 1983 claim," held the Ninth Circuit, "it would necessarily imply the invalidity of their state court convictions. Their civil claims necessarily challenge the validity of the undercover operation and in doing so imply that there was no probable cause to search for weapons." (Pet. App. 11). The Ninth Circuit even buttressed its conclusion that the Szajers' § 1983 claims were barred by *Heck* by noting "the fact that the Szajers have not set forth, either on appeal or to the district court below, any other basis for the discovery of the assault weapon found in their home" (*id.* at 12), just as the district court in *Copus* had done, *see Copus,* 151 F.3d at 648-49 ("Plaintiff has not argued that the [weapons] would have been admissible regardless of the alleged Fourth Amendment violation").

***6** Yet the *Copus* district court's holding, the language of which the Ninth Circuit's decision below so closely tracks, was *reversed* by the Seventh Circuit, placing the two circuits "in direct conflict."

B. Respondents Misconstrue *Heck* in the Same Way That the Ninth Circuit Did Below, Highlighting the Circuit Split.

Respondents' characterization of the *Heck* rule, which parallels the view of *Heck* articulated by the Ninth Circuit below, highlights the circuit split and is irreconcilable with *Heck* itself.

According to Respondents, "*Heck* bars all Fourth Amendment civil claims that would necessarily mean that a criminal conviction was based on evidence that should not have been obtained and was therefore unlawful." (Resp. Br. 15). In other words, a § 1983 challenge to any of the evidence on which an underlying criminal conviction was *based* is barred by *Heck.* We agree with Respondents that such an absolutist view is reflected by the Ninth Circuit decision below, holding that all of the Szajers' Fourth Amendment claims were barred by *Heck.* But that view is assuredly not shared by the Seventh Circuit, which holds that *Heck does not* bar any Fourth Amendment unlawful search claims.

Nor do the Ninth Circuit's decision and Respondents' characterization of it give sufficient credence to the *Heck* Footnote Seven caveat. This Court has noted that it was "careful in *Heck* to stress the importance of the term 'necessarily.' " *Nelson v. Campbell,* 541 U.S. 637, 647 (2004). "[A]n inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the ***7** search revealed evidence used to convict the inmate at trial, because success on the merits would not 'necessarily imply that the plaintiff's conviction was unlawful." *Id.* (citing *Heck,* 512 U.S., at 487, n.7). As we explained

in our Petition, the Ninth Circuit did not stress the term "necessarily" in its holding at all, much less with the importance this Court has required.

II. The Szajers' Pre-Warrant Allegation is Not "Newly Minted," But Formed Part of the Overall Claim Regarding Respondents' Unconstitutional Conduct.

Respondents also contend that the Szajers did not raise the pre-warrant search and seizure issue as a part of their Fourth Amendment search and seizure claims in the courts below. Contrary to Respondents' contentions, the issue was raised repeatedly, from the very beginning of this litigation. [3]

In paragraph 20 of the first claim of their First Amended Complaint ("Complaint"), for example, Petitioners directly alleged "harm, injuries and financial damages" as to the "illegal seizure" of their property. ***8** This was done "pending the arrival" of the search warrant. (Resp. App. 69-70). Elaborating and broadening the scope to include all the illegal searches and seizures (both pre- and post-warrant), the next paragraph of the Szajers' complaint alleged:

> 21. As a further, direct and proximate result of the illegal, unlawful, wrongful, and unconstitutional conduct of the defendants, and each of them, Plaintiffs were subject to the illegal seizure of their property, to-wit properly obtained and fully, legal handguns, rifles, shotguns, firearm accessories, and office equipment, none of which could constitute evidence against them, against their will and over their protest, all to their general damage in the amount of Fifty Million dollars ($50,000,000.00.).

(*Id.* at 70).

The Szajers continued to raise the same pre-warrant factual allegations as a part of their overall illegal search and seizure claims in their briefing both before the District Court and the Ninth Circuit Court of Appeals.

In the District Court the Szajers claimed "[b]oth plaintiffs were handcuffed and made to sit in chairs and 'detained' until approximately 7:30 P.M. when they were 'arrested.' During that time, they watched officers conduct a search of the premises (cabinets, drawers and shelves) *without a search warrant.*" (Resp. App. 8 (emphasis added)).

The allegation was repeated by Helene Szajer during her deposition (testimony which was relied on by the Szajers in their reply brief before the Ninth ***9** Circuit): " 'A. Police came in. They unarm us, make us sit down, *start removing stuff from the store*, made us sit there for hours and then eventually arrested us.' " (Pet. App. 118). And the issue was expressly argued by the Szajers' counsel during the District Court's hearing on Respondents' motion to dismiss: "We have alleged certain additional constitutional violations that both preceded and followed the issuance of the warrant," including that "Defendants planted evidence which was used against the Szajers as a criminal - as a count in the criminal case." (Pet. App. 65-66; *see also* Resp. App. 21 ("plaintiffs contend that the planting of evidence violates the constitution"); *id.* at 24 ("The defense confuses the plaintiffs claim that the police planted evidence with their claim that the search warrant was improperly issued")).

In their Ninth Circuit opening brief, the Szajers also explicitly described the pre-warrant search:

> Both Appellants were handcuffed and made to sit in chairs and detained until approximately 7:30 p.m., when they were arrested. During that time, they watched officers conduct a search of the premises (cabinets, drawers, and shelves), *without a search warrant.*

(Pet. App. 73-74 (emphasis added)). The Szajers reiterated this point in their reply brief:

> [t]he evidence was clear that there was a four hour hiatus between the police entering Appellants store and the obtaining of the search warrant …. The evidence presented … indicates that *the officers commenced the search and taking of the items before any search war* ***10** *rant arrived.* This issue was also raised in the district court …. The officers conducted a search of L.A. Guns far in excess of the protective sweep of the premises prior to the arrival of the search warrant.

(Pet. App. 118-19 (emphasis added)).

This was not a separate argument, and certainly not a newly-minted one, but part of the overall conduct which formed the basis for the Szajers' § 1983 action. The Szajers alleged in their complaint that Respondents illegally entered their premises and planted evidence, seized legally registered assault weapons, and tore off and discarded the registration slips that had been affixed to them. (Resp. App. 70, 72). As elaborated in their brief before the Ninth Circuit, those allegations consisted of the following: 1) A confidential informant, cooperating with police in a sting operation, sold the Szajers a semi-automatic pistol that was illegal under California because it had a threaded muzzle (which theoretically allows an illegal silencer to be attached), though the threads were hidden by a nut, (Pet. App. 72);

2) The information attempted to sell an MIA rifle with a flash suppressor with would have rendered it illegal, (*id.*) (the Szajers removed the flash suppressor before purchasing the firearm);

3) The informant tried to sell and then left with the Szajers an illegal Reising submachine gun (which the Szajers promptly attempted to turn in to the local sheriffs office), (*id.* at 72-73);

***11** 4) Tracer ammunition was planted during the warrantless search, (*id.* at 74-75);

5) Registration tags were torn from lawfully-possessed firearms, (*id.* at 74).

All of this was done in order to add counts to the criminal complaint and thereby pressure the Szajers into a plea bargain that would force them out of business. (*Id.*) In addition, the Szajers alleged that lawfully possessed firearms were confiscated by Respondents and not returned to them. (Resp. App. 70).

Contrary to Respondents' contention that "neither the Ninth Circuit nor the District Court was ever presented with this argument," (Resp. Br. 7), the Ninth Circuit expressly recognized that the Szajers "alleg[ed] that the City and LAPD officers violated the Szajers' civil rights by conducting illegal searches, and by seizing their personal property." (Pet. App. 5). Although the Ninth Circuit did not further elaborate on every aspect of the Szajers' allegations, it held that *all* of the Fourth Amendment violations alleged by the Szajers were barred from redress under § 1983 because of *Heck.* (*Id.* at 11-12 (holding that the Szajers' "civil claims" - plural - are barred by *Heck*)).

The issue was thus presented to the courts below, and fully litigated. The holdings in *Yee v. City of Escondido,* 503 U.S. 519 (1992), *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157 (2004), *Austin v. United States,* 509 U.S. 602 (1993), *NCAA v. Smith,* 525 U.S. 459 (1999), and *Lytle v. Household Manufacturing, Inc.,* 494 U.S. 545 (1990), that this Court does not normally decide issues "in the first instance," are therefore all inapposite.

***12** More fundamentally, the dispute raised by Respondents about whether the Szajers included pre-warrant conduct in their allegations and whether the Ninth Circuit understood that to have been the case is beside the point. The Petition is based on the fact that the Ninth Circuit effectively bars all § 1983 claims asserting Fourth Amendment illegal search and seizure violations that are related to a still extant conviction. Whether the Ninth Circuit intended to address only the allegations that the search warrant was illegal, as Respondents assert, or more broadly considered the allegations that lawful firearms were seized pursuant to that warrant and never returned, or most broadly considered the allegations that the pre-warrant search was also illegal, the Ninth Circuit made clear that at least the claim that the search warrant was illegal was barred by *Heck.* In the Seventh Circuit and elsewhere, such a claim is not barred.

Thus, even if Respondents were correct in their contention that the Ninth Circuit did not consider all of Petitioners' allegations, that would not pose a vehicle problem. The *Heck* issue remains either way. The circuit split is both well-defined and explicitly acknowledged. And the issue is important and ready for this Court's consideration.

*13 CONCLUSION

For the reasons stated above and previously, the Szajers urge that the Petition for Writ of Certiorari be granted.

Footnotes

* Counsel of Record

1 Also contrary to Respondents' assertions, the Eighth Circuit adopted a similar rule in *Simmons v. O'Brien,* 77 F.3d 1093, 1095 (8th Cir. 1996), rather than just applying different facts, to hold that coerced confession claims under the Fifth Amendment were not barred by *Heck.* The Eleventh Circuit held in *Datz v. Kilgore,* 51 F.3d 252, 253 n. 1 (11th Cir. 1995), that *Heck* is not a bar to Fourth Amendment claims because the conviction "might" still be valid considering the doctrines mentioned in *Heck*'s Footnote Seven. The possibility was enough; the court did not assess whether any of the doctrines actually applied in the case. The district court decision addressed in *Beck v. City of Muskogee Police Dep't,* 195 F.3d 553, 557 (10th Cir. 1999), had held, like the Ninth Circuit below, that *Heck* amounted to a blanket ban on all related Fourth Amendment claims, but the Tenth Circuit reversed that holding, limiting *Heck*'s reach "only to those claims that would necessarily imply the invalidity of any conviction that might have resulted from prosecution of the dismissed rape charge or the invalidity of his probation revocation."

2 We address Respondents' contention that the ruling is *limited* to that challenge in Section II below, but that is a subsidiary issue not relevant to the principal basis for the petition.

3 Respondents' claim that the Szajers' complaint "did not allege any violation of their Fourth Amendment rights," (Resp. Br. 3 (citing Resp. App. 69-71)), is bizarre. The very pages of the complaint cited by Respondents include claim 1, denominated as "illegal seizure"; paragraph 21, which alleges the "illegal seizure" of fully legal firearms; and paragraph 22, which alleges that Respondents were acting pursuant to a policy of, *inter alia,* "illegally entering the premises of gun stores and planting evidence." (*Id.* 69-70). Perhaps Respondents simply meant that the Szajers did not include the phrase, "in violation of the Fourth Amendment," in their description of what are obviously allegations of violations of the Fourth Amendment.