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Fourth Amendment and Fourteenth Amendment-- Malicious Prosecution and 1983: Is There a Constitutional Violation Remediable under Section 1983

Eric J. Wunsch

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FOURTH AMENDMENT AND FOURTEENTH AMENDMENT—MALICIOUS PROSECUTION AND § 1983: IS THERE A CONSTITUTIONAL VIOLATION REMEDIAL UNDER SECTION 1983?

Albright v. Oliver, 114 S. Ct. 807 (1994)

I. INTRODUCTION

In *Albright v. Oliver*,¹ the United States Supreme Court addressed whether the claim of malicious prosecution is actionable under 42 U.S.C. § 1983.² The plurality concluded that “substantive due process may not furnish the constitutional peg on which to hang such a ‘tort.’”³ Therefore, it rejected petitioner’s Fourteenth Amendment substantive due process claim to be free from prosecution absent probable cause.⁴

This Note examines the development of the federal jurisprudence concerning claims for malicious prosecution under § 1983. This Note argues that, in *Albright*, the Court correctly disposed of petitioner’s Fourteenth Amendment substantive due process claim to be free from prosecution absent probable cause. However, this Note asserts that procedural due process is also implicated by an arrest and initiation of a criminal prosecution, and that application of the Fourth Amendment to a § 1983 claim based on malicious prosecution, while precluding substantive due process review, should not preclude procedural due process review.⁵ Ultimately, this Note concludes that alleged constitutional violations as a result of malicious prosecution are properly analyzed under both the procedural due process clause of the Fourteenth Amendment and the “objective reasonableness” standard of the Fourth Amendment, but not under the “open-ended” Due

¹ 114 S. Ct. 807 (1994).

² *Id.* at 813-14.

³ *Id.* at 811 n.4.

⁴ *Id.* 813-14 (1994).

⁵ Nevertheless, since petitioner brought only a substantive due process claim, the Court did not apply procedural due process analysis. *Id.* at 813-14. Such analysis would be perilously close to an advisory opinion in violation of the Case or Controversy requirement of Article III of the Constitution.

Process Clause of the Fourteenth Amendment.

II. BACKGROUND

42 U.S.C. § 1983⁶ provides a legal remedy for the violation of constitutional rights conferred in other areas of the Constitution.⁷ Under the statute, an individual must first "identify[] the specific constitutional right allegedly infringed."⁸ The Supreme Court has recognized that the statute was "meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position."⁹ However, the courts have not held that every common-law tort committed by an individual acting "under color of law"¹⁰ is actionable under § 1983. In the case of malicious prosecution, there has been an "embarrassing diversity of judicial opinion" as to whether it is actionable under the section.¹¹ Until *Albright*, the Court had never addressed whether malicious prosecution could be actionable under § 1983.

A. THE COMMON LAW TORT OF MALICIOUS PROSECUTION

The common law tort of malicious prosecution generally requires four elements: (1) the defendant must have initiated a criminal proceeding; (2) the proceeding must have ended in the plaintiff's favor; (3) the proceeding must have been initiated without probable cause; and (4) the defendant must have acted maliciously in the initiation of the prosecution.¹² Although the elements of the tort have been

⁶ The full text of 42 U.S.C. § 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

⁷ *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

⁸ *Graham v. Connor*, 490 U.S. 386, 394 (1989).

⁹ *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

¹⁰ "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). Furthermore, 42 U.S.C. § 1983 is implicated where an infringement of federal rights is "fairly attributable to the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Therefore, an individual acts "under color of law" if "clothed with the authority of the state and purporting to act thereunder." *Roberts v. Acres*, 495 F.2d 57, 59 (7th Cir. 1974).

¹¹ *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992).

¹² See, e.g., *Lee v. Mihalich*, 847 F.2d 66, 69-70 (3d Cir. 1988); *Usher v. City of L.A.*, 828 F.2d 556, 562 (9th Cir. 1987). See also RESTATEMENT (SECOND) OF TORTS § 653.

clearly established, courts have differed on whether a well-pleaded complaint based upon malicious prosecution by a government official "acting under color of law" provides a cause of action under § 1983.¹³ The debate entails not only whether malicious prosecution itself violates the federal Constitution, but also what particular provision the tort violates.¹⁴ The federal courts have split almost evenly on the issue of whether a plaintiff must allege more than the common law tort of malicious prosecution to state a claim under § 1983.

1. *Allegation of Malicious Prosecution Violates the Constitution: The Expansive Approach*

The most liberal approach taken with respect to an allegation of malicious prosecution under § 1983 has been clearly articulated by the Third Circuit, which held that an allegation of the elements of the common law tort, by itself, states a claim under § 1983 for violation of a constitutional right.¹⁵ In *Lee v. Mihalich*,¹⁶ plaintiffs brought an action against investigators in the Medicaid Fraud Control Office Unit of the Office of the Pennsylvania Attorney General alleging abuse of process and malicious prosecution against them pursuant to a Medicaid fraud suit that was dismissed as time-barred.¹⁷ While the court held that the defendants were entitled to a defense based upon qualified immunity,¹⁸ the court determined that a successful allegation of

¹³ Indeed, some circuits have reversed their own decisions as to whether malicious prosecution can provide a basis for relief under § 1983. See *Brummet v. Camble*, 946 F.2d 1178, 1180-81 n.2 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2323 (1992) (noting that the First, Fifth, and Sixth Circuits have "flip-flopped" on the constitutional tort status of malicious prosecution).

¹⁴ Of course, the debate over the particular constitutional provision violated is only an issue for those circuit courts that hold that malicious prosecution, by itself, violates a provision of the Constitution.

¹⁵ *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). Other circuit courts have expressed this view as well, see *Brummett*, 946 F.2d at 1180-81 n.2 ("Our most recent cases have assumed that malicious prosecution violates section 1983."); *NAACP v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (citing *Strength v. Hubert*, 854 F.2d 421, 425 (11th Cir. 1988) as citing *Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972) for proposition that "[t]here is a federal right to be free from malicious prosecutions"); *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) (concluding that abuse of process, of which malicious prosecution is a subset, by definition denies an individual procedural due process); *White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988) ("There can be no question that malicious prosecution can form the basis for imposition of liability under section 1983.").

¹⁶ 847 F.2d 66 (3d Cir. 1988).

¹⁷ *Id.* at 67.

¹⁸ *Id.* at 72. The Supreme Court has previously addressed the issue of a government official's immunity from a § 1983 suit based upon malicious prosecution. See, e.g., *Malley v. Briggs*, 475 U.S. 335 (1986). In *Briggs*, the Court addressed whether a police officer "who present[ed] a judge with a complaint and a supporting affidavit which failed to establish probable cause" is afforded absolute immunity from a malicious prosecution claim. *Id.* at 337. The Court held that "qualified immunity" is available to the government agent, with

malicious prosecution against an individual acting under color of law violates § 1983.¹⁹ Nevertheless, the court intimated no view with respect to what provision or provisions of the Constitution the common law malicious prosecution claim violates.²⁰

Similarly, other circuits have applied the *Lee* rationale to an allegation of malicious prosecution against a sheriff and investigating officer pursuant to a grand larceny arrest;²¹ an allegation against police officers pursuant to a vacated narcotics conviction;²² an allegation against prosecuting attorneys pursuant to an unpaid bank loan;²³ and an allegation against an investigator in the Office of the Attorney General for the State of Alabama pursuant to a forgery indictment.²⁴ The expansion of the rationale into these areas indicates that the only requirement for bringing a claim of malicious prosecution under § 1983 is an allegation of "action under color of law."²⁵

2. *Malicious Prosecution, Without More, Does Not Violate the Constitution: The "Malicious Prosecution Plus" Approach*

Other circuit courts of appeals, however, have held that an allegation of common law malicious prosecution does not violate a provision of the Constitution unless it is "intended to subject a person to denial of constitutional rights."²⁶ These courts recognize that mali-

an "objective reasonableness" standard to be applied to each claim. *Id.* at 344. Since *Briggs*, various circuit courts addressing § 1983 claims have dealt with the issue of prosecutorial immunity, *see, e.g.*, *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994); *O'Neill v. Town of Babylon*, 986 F.2d 646 (2d Cir. 1993); *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992); *Fernandez v. Perez*, 937 F.2d 368 (7th Cir. 1991). However, the issue was not before the Court in *Albright v. Oliver*, so it is not addressed here.

¹⁹ *Lee*, 847 F.2d at 69-70 (quoting 42 U.S.C. § 1983). The court held that the claim for malicious prosecution under § 1983 requires the same elements required for the common law tort: "(1) the defendant initiate[s] a criminal proceeding; (2) which ends in plaintiff's favor; (3) [the proceeding] was initiated without probable cause; and (4) the defendant acts maliciously or for a purpose other than bringing the defendant to justice." *Id.* (citing *Bell v. Brennan*, 570 F. Supp. 1116, 1118 (E.D. Pa. 1983) (footnotes omitted)).

²⁰ *Lee*, 847 F.2d at 69-72. The Court relied on *Jennings v. Shuman*, 567 F.2d 1213, 1219-20 (3d Cir. 1977) for holding that a claim of malicious prosecution violates § 1983. *Jennings* states that "[a]n abuse of process is by definition a denial of procedural due process." *Id.* at 1220. Therefore, while it claimed to intimate no view as to what provision of the Constitution malicious prosecution violates, its reliance on *Jennings* indicates the court's view that malicious prosecution violates an individual's Fourteenth Amendment procedural due process rights.

²¹ *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989).

²² *White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988).

²³ *Brummett v. Camble*, 946 F.2d 1178, 1180-81 n.2 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2323 (1992).

²⁴ *Strength v. Hubert*, 854 F.2d 421, 425 (11th Cir. 1988).

²⁵ All claims under § 1983 must allege an action by the defendant "under color of law." 42 U.S.C. § 1983.

²⁶ *Usher v. City of L.A.*, 828 F.2d 556, 562 (9th Cir. 1987) (quoting *Bretz v. Kelman*, 773

cious prosecution may be part of a cognizable § 1983 claim, but "only if the defendants' conduct also infringes some provision of the Constitution or federal law."²⁷ Therefore, their decisions require a plaintiff to allege not only malicious prosecution, but also that the abuse of the legal process was "so egregious as to subject the aggrieved individual to a deprivation of constitutional dimension."²⁸

In *Torres v. Superintendent of Police of Puerto Rico*,²⁹ the First Circuit, after recognizing the split among the other circuits,³⁰ adopted the standard that to establish liability in a § 1983 claim based upon malicious prosecution, a plaintiff must show that the defendant "subject[ed] the plaintiff to a deprivation of constitutional magnitude."³¹ Specifically, the court held that a complaint based on malicious prosecution must allege a violation of procedural or substantive due process rights under the Fourteenth Amendment.³² Applying this standard, the court found that the plaintiff's claim³³ "show[ed] neither 'conscience-shocking' conduct nor met the requisites of a procedural due process claim."³⁴ Nevertheless, by analyzing petitioner's claim under a Fourteenth Amendment rubric, the First Circuit recognized that, at some level, a complaint based upon malicious prosecution may violate § 1983.³⁵

Similarly, applying the standard that a § 1983 claim based upon malicious prosecution must allege a specific constitutional violation, the Ninth Circuit held that a complaint alleging "that the defendants illegally arrested [the plaintiff], submitted false reports and initiated his criminal prosecution in bad faith" successfully stated a cause of action under § 1983 because the defendants "intended to deprive a

F.2d 1026, 1031 (9th Cir. 1985) (en banc)). See also *Kohl v. Casson*, 5 F.3d 1141, 1145 (8th Cir. 1993) ("[M]alicious prosecution, without more, does not state a claim under 42 U.S.C. § 1983."); *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) ("[M]alicious prosecution by itself is not punishable under section 1983 because it does not allege a constitutional injury."); *Torres v. Superintendent of Police of P.R.*, 893 F.2d 404, 409 (1st Cir. 1990) (requiring that misuse of legal proceedings be "egregious" to violate an individual's constitutional rights); *Coogan v. Wixom*, 820 F.2d 170, 174 (6th Cir. 1987) (same); *Lusby v. T. G. & Y. Stores, Inc.*, 749 F.2d 1423, 1431 (10th Cir. 1984), cert. denied, 474 U.S. 818 (1985) ("Malicious prosecution does not automatically constitute a denial of due process.").

²⁷ *Gunderson*, 904 F.2d at 409.

²⁸ *Coogan*, 820 F.2d at 175.

²⁹ 893 F.2d 404 (1st Cir. 1990).

³⁰ *Id.* at 409.

³¹ *Id.*

³² *Id.*

³³ Plaintiffs alleged that their dismissal from the San Juan Vice Squad and prosecution under felony weapons law violations were done maliciously. *Id.* at 406.

³⁴ *Id.* at 410.

³⁵ *Id.* at 410-11

person of the equal protection of the laws.”³⁶ Therefore, while several circuit courts of appeals have held that malicious prosecution, itself, does not state a claim under § 1983,³⁷ all have recognized that, at some level, “malicious prosecution can form the basis for a section 1983 action.”³⁸

3. *The Constitutional Provision Violated*

In addition to the split on whether malicious prosecution states a claim under § 1983, the circuit courts of appeals have differed as to what provision[s] of the Constitution a § 1983 claim based upon malicious prosecution violates. Section 1983 requires, as a prerequisite to a claim brought under the constitutional provision, an allegation of infringement upon a specific constitutional right.³⁹ Applying this requirement to “constitutional tort” cases based upon malicious prosecution, circuit courts of appeals have held that the § 1983 claim can violate Fourteenth Amendment procedural due process rights,⁴⁰ Fourteenth Amendment substantive due process rights,⁴¹ Fourteenth Amendment equal protection rights,⁴² Fourth Amendment rights incorporated against the States through the Fourteenth Amendment,⁴³ and a combination of both Fourth and Fourteenth Amendment rights.⁴⁴ This broad disparity between the circuit courts of appeals has

³⁶ *Usher v. City of L.A.*, 828 F.2d 556, 562 (9th Cir. 1987).

³⁷ See *supra* note 26.

³⁸ See *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990).

³⁹ *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

⁴⁰ *Gunderson*, 904 F.2d at 409 (“[Plaintiff’s] malicious prosecution claim may be taken to argue a procedural due process violation.”) See also *Torres v. Superintendent of Police of P.R.*, 893 F.2d 404, 409 (1st Cir. 1990) (“[W]e now hold that to state a claim under Section 1983, the complaint must assert that the malicious conduct was so egregious that it violated substantive or procedural due process rights under the Fourteenth Amendment.”); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1431 (10th Cir. 1984), *cert. denied*, 474 U.S. 818 (1985) (stating that egregious malicious prosecution violates procedures inherent in the Due Process Clause).

⁴¹ *Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992) (recognizing that malicious prosecution can result in incarceration, which is a deprivation of liberty within the meaning of the due process clause). See also *Torres*, 893 F.2d at 410.

⁴² *Usher v. City of L.A.*, 828 F.2d 556, 562 (9th Cir. 1987) (holding that malicious prosecution by defendants must be done “with the intent to deprive a person of equal protection of the laws”) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc)).

⁴³ *Strength v. Hubert*, 854 F.2d 421, 425 (11th Cir. 1988) (“[A] safeguard so fundamental to criminal due process—one against capricious prosecutions—is . . . incorporated by the fourteenth amendment”) (quoting *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 260 (5th Cir.), *amended*, 744 F.2d 1134 (5th Cir. 1984)).

⁴⁴ *Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir. 1992) (“[Malicious prosecution] implicate[s] the constitutional ‘guarantees of the fourth and fourteenth amendments.’”) (quoting *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988)).

provided little guidance for a plaintiff attempting to allege a constitutional violation based upon § 1983.

4. *The State Tort Remedy*

Although all circuit courts of appeals have held that a § 1983 claim based upon malicious prosecution can violate the Constitution, many circuit courts have nevertheless denied relief for a plaintiff "where state law affords an adequate remedy."⁴⁵ Stating the rationale for this limitation on recovery under § 1983, the Seventh Circuit noted that "[t]he multiplication of remedies for identical wrongs, while gratifying for plaintiffs and their lawyers, is not always in the best interest of the legal system or the nation."⁴⁶ Furthermore, this limitation has been applied pursuant to past Supreme Court decisions holding that an adequate state postdeprivation remedy denies relief under § 1983.⁴⁷

In *Parratt v. Taylor*,⁴⁸ the Court held that unauthorized conduct by state officials resulting in a loss of property did not constitute a denial of due process within the meaning of the Fourteenth Amendment where there was an adequate state remedy available.⁴⁹ Relying upon this holding, the First Circuit has held that "the availability of an adequate remedy for malicious prosecution under [state] law . . . is fatal to [a § 1983] claim."⁵⁰

III. FACTS AND PROCEDURAL HISTORY

In March of 1987, Veda Moore approached City of Macomb, Illinois Police Detective Roger Oliver and other police detectives seeking police "protection" from an individual she claimed was threatening her for cocaine debts.⁵¹ At the time of this request, Moore had recently completed a thirty day stay in a narcotics treatment center for cocaine addiction.⁵²

Detective Oliver allegedly agreed to provide Moore with police

⁴⁵ *Torres*, 893 F.2d at 411.

⁴⁶ *Albright v. Oliver*, 975 F.2d 343, 347 (7th Cir. 1993). Furthermore, there is an incentive to file a claim under § 1983 even if an adequate state remedy is available because "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1988).

⁴⁷ See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 531-36 (1984); *Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981).

⁴⁸ 451 U.S. 527 (1981).

⁴⁹ *Id.* at 541-43.

⁵⁰ *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 43 (1st Cir. 1994) (citations omitted).

⁵¹ *Albright v. Oliver*, 114 S. Ct. 807, 823 nn.3, 5 (1994) (Stevens, J., dissenting).

⁵² Brief for Respondent at 6, *Albright v. Oliver*, 114 S. Ct. 807 (1994) (No. 92-833).

protection if she would act as an informant against narcotics dealers in the Macomb area.⁵³ Specifically, under the agreement with the police, Moore would first identify potential narcotics dealers without direction from Detective Oliver and then purchase narcotics from those dealers with money provided to her from the Macomb Police Department through Detective Oliver.⁵⁴ In addition, Detective Oliver paid Moore between fifty and seventy-five dollars for each purchase of a controlled substance that she reported.⁵⁵

Throughout the spring and summer of 1987, Moore represented to Detective Oliver that she had purchased controlled substances pursuant to this arrangement from over fifty separate individuals.⁵⁶ On 17 July 1987, Moore delivered a substance that appeared to be cocaine to Detective Oliver and reported that she had purchased the substance from John Albright, Jr. in a room at the Pace Hotel in Macomb, Illinois.⁵⁷ Detective Oliver submitted the substance to the police laboratory for testing.⁵⁸ On 2 September 1987, the laboratory concluded that the substance was actually baking powder.⁵⁹

On 10 September 1987, Detective Oliver related Moore's version of the Pace Hotel transaction to a McDonough County Grand Jury.⁶⁰ The grand jury returned an indictment for the sale of a "look-alike substance," and the Circuit Court of McDonough County issued an arrest warrant for John Albright, Jr.⁶¹

Detective Oliver went to the home of John Albright, Jr. on 28 September 1987 to execute the arrest warrant.⁶² After being informed by Mr. Albright's wife that her husband was a sixty-year-old retired registered pharmacist,⁶³ and that they had two sons named Kevin and John David Albright,⁶⁴ Detective Oliver realized that Mr. Albright may not be the person from whom Moore had allegedly purchased the "look-alike substance."⁶⁵

Based on this information, Detective Oliver scratched John Albright, Jr.'s name from the arrest warrant and inserted the name of John David Albright, presuming that he must be the individual Moore

⁵³ *Albright*, 114 S. Ct. at 823 n.3 (Stevens, J., dissenting).

⁵⁴ Respondent's Brief at 6, *Albright* (No. 92-833).

⁵⁵ *Id.*

⁵⁶ Brief for Petitioner at 8, *Albright v. Oliver*, 114 S. Ct. 807 (1994) (No. 92-833).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Respondent's Brief at 6, *Albright* (No. 92-833).

⁶¹ *Albright v. Oliver*, 114 S. Ct. 807, 823 n.4 (1994) (Stevens, J., dissenting).

⁶² Respondent's Brief at 6, *Albright* (No. 92-833).

⁶³ *Albright*, 114 S. Ct. at 810 n.1.

⁶⁴ Petitioner's Brief at 8, *Albright* (No. 92-833).

⁶⁵ *Id.*

had implicated.⁶⁶ Upon learning of the warrant for his arrest, John David Albright, who had been living and working in Chicago, Illinois since September, 1986, returned to Macomb.⁶⁷ On 1 October 1987, John David Albright met with Detective Oliver at the police station and informed him that he was not in Macomb on 17 July 1987, the date Moore allegedly purchased the substance in question.⁶⁸

With John David Albright still present at the police station, Detective Oliver telephoned Moore and informed her that neither John Albright, Jr. nor his son, John David Albright, could have been the individual from whom she had allegedly purchased the "look-alike substance" at the Pace Hotel on the night of July 17.⁶⁹ He inquired whether the individual could have been John Albright, Jr.'s other son, Kevin Albright.⁷⁰ In response, Moore confirmed that Kevin Albright was the man from whom she had made the purchase.⁷¹

On 16 October 1987, Detective Oliver attested to a criminal information charging that Kevin Albright had sold a "look-alike substance" to Moore on 17 July 1987.⁷² Following the issue of an arrest warrant,⁷³ Kevin Albright surrendered to Detective Oliver on 19 October 1987, but denied any involvement in the alleged crime.⁷⁴

Detective Oliver arrested Kevin Albright and the judge set bond at \$3500.⁷⁵ Mr. Albright paid the ten percent bond (\$350) required by Illinois law and was released.⁷⁶ As a condition of his bond, Kevin Albright was prohibited from leaving the state of Illinois without leave of court.⁷⁷

On 5 January 1988, Detective Oliver testified at a preliminary hearing that Kevin Albright sold the "look-alike substance" to Moore on 17 July 1987.⁷⁸ At this hearing, Detective Oliver failed to advise the court of various circumstances surrounding Kevin Albright's arrest, including: Moore's prior history; Detective Oliver's previous testimony to the Grand Jury; and the various arrest warrants issued pursuant to the alleged July 17 sale.⁷⁹ Regardless of this failure, the court found

⁶⁶ *Albright*, 114 S. Ct. at 823 n.4 (Stevens, J., dissenting).

⁶⁷ *Id.* at 810.

⁶⁸ Respondent's Brief at 8-9, *Albright* (No. 92-833).

⁶⁹ *Id.*

⁷⁰ *Albright*, 114 S. Ct. at 810 n.1.

⁷¹ *Id.*

⁷² Petitioner's Brief at 9, *Albright* (No. 92-833).

⁷³ *Id.*

⁷⁴ Respondent's Brief at 7, *Albright* (No. 92-833).

⁷⁵ *Id.*

⁷⁶ *Albright v. Oliver*, 114 S. Ct. 807, 810 (1994).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Petitioner's Brief at 11-12, *Albright* (No. 92-833).

probable cause for Kevin Albright to stand trial.⁸⁰

On 27 June 1988, the court dismissed the criminal action on the basis that it did not state an offense under Illinois law.⁸¹ Almost two years to the day after the dismissal of the charges against Kevin Albright, he filed a claim in federal district court against Detective Oliver and the city of Macomb, Illinois pursuant to 42 U.S.C. § 1983, alleging that his "liberty" interest to be free from criminal prosecution absent probable cause had been violated.⁸² The district court, in an unreported opinion, granted respondent's motion to dismiss on the theory that the complaint did not state a claim under § 1983.⁸³ The Court of Appeals for the Seventh Circuit affirmed this decision while concluding that petitioner filed his suit as malicious prosecution because the statute of limitations had passed for his false arrest claim.⁸⁴ Although the court acknowledged that malicious prosecution can be a component of a constitutional tort, it held that prosecution without probable cause could only be actionable under § 1983 when accompanied by incarceration, loss of employment, or other "palpable consequence."⁸⁵ Furthermore, the court rejected petitioner's argument that his "confinement" to Illinois deprived him of his constitutional "liberty," noting that Detective Oliver's testimony at the preliminary hearing was not intended to curtail petitioner's right to travel.⁸⁶ Finally, the court of appeals rejected petitioner's argument that he was denied the equal protection of the laws because the state's arbitrary act of selecting petitioner for prosecution did not create a "class" for purposes of the Equal Protection Clause.⁸⁷ The Supreme Court granted certiorari⁸⁸ on the issue of whether the Due Process Clause of the Fourteenth Amendment could provide a basis for petitioner's § 1983 claim.⁸⁹

⁸⁰ *Albright*, 114 S. Ct. at 810.

⁸¹ *Id.*

⁸² *Id.* at 810-11.

⁸³ *Id.* at 811.

The court "also held that Detective Oliver was entitled to a defense of qualified immunity, and that the complaint failed to allege facts sufficient to support municipal liability against the city of Macomb. The District Court also dismissed without prejudice the common-law claim of malicious prosecution against Detective Oliver. These issues are not before this Court."

Id. at 811 n.3.

⁸⁴ *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992).

⁸⁵ *Id.* at 346-47.

⁸⁶ *Id.*

⁸⁷ *Id.* at 348.

⁸⁸ *Albright v. Oliver*, 113 S. Ct. 1382 (1993).

⁸⁹ *Albright v. Oliver*, 114 S. Ct. 807, 810 (1994).

IV. SUMMARY OF OPINIONS

The Supreme Court granted certiorari to determine whether the Due Process Clause of the Fourteenth Amendment provided an individual the right to be free from criminal prosecution without probable cause.⁹⁰ In a seven-two decision, the four Justice plurality held that petitioner's claim could not be maintained under the Due Process Clause and affirmed the decision of the Court of Appeals for the Seventh Circuit to dismiss petitioner's claim pursuant to Federal Rule of Civil Procedure 12(b) (6) for failure to state a claim upon which relief can be granted.⁹¹

A. PLURALITY OPINION

In an opinion by Chief Justice Rehnquist, the plurality⁹² held that under the Due Process Clause of the Fourteenth Amendment, "substantive due process, with its 'scarce and open-ended guideposts'" could not provide a basis for petitioner's 42 U.S.C. § 1983 claim.⁹³ The plurality, acknowledging its reluctance to expand the concept of substantive due process, maintained that it must analyze petitioner's claim under the Fourth Amendment, because the Framers intended the Fourth Amendment to cover pretrial deprivations of liberty.⁹⁴ Since the petitioner did not present the Fourth Amendment issue in his petition for certiorari, the plurality dismissed petitioner's claim without expressing an opinion as to whether petitioner would succeed under the Fourth Amendment.⁹⁵

The plurality began its analysis of petitioner's claim by declaring that to succeed in a § 1983 claim, the petitioner must first identify the specific constitutional provision allegedly infringed by the State.⁹⁶ Applying this requirement to petitioner's claim, the plurality maintained that petitioner's action alleged that respondent infringed his "substantive due process right to be free of prosecution without probable cause."⁹⁷ The plurality noted that petitioner Albright did not allege that Illinois denied him procedural due process, or violated his Fourth Amendment Rights, despite the plurality's recognition that "his surrender to the State's show of authority constituted a seizure for

⁹⁰ *Albright*, 113 S. Ct. at 1382.

⁹¹ *Albright*, 114 S. Ct. at 814.

⁹² Justices O'Connor, Scalia, and Ginsburg joined Chief Justice Rehnquist's opinion.

⁹³ *Albright*, 114 S. Ct. at 813-14 (citing *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992)).

⁹⁴ *Id.* at 813.

⁹⁵ *Id.* at 813-14.

⁹⁶ *Id.* at 811.

⁹⁷ *Id.* at 812.

the purposes of the Fourth Amendment."⁹⁸ Analyzing petitioner's claim in this rubric, Chief Justice Rehnquist recognized that petitioner's claim to be free from criminal prosecution absent probable cause was "markedly different" from the Court's past protections of substantive due process, which have mostly related to "marriage, family, procreation, and the right to bodily integrity."⁹⁹ The plurality stated that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."¹⁰⁰

Chief Justice Rehnquist then rejected petitioner's reliance upon prior Supreme Court cases that recognized the Fourteenth Amendment confers both substantive and procedural rights as the basis for a § 1983 claim.¹⁰¹ While conceding that the Due Process Clause protects substantive rights intended to secure individuals from the arbitrary exercise of government power, Chief Justice Rehnquist stated that the Constitution demanded more inquiry in a criminal prosecution than simply whether, in the Court's view, "the governmental action in question was 'arbitrary.'"¹⁰²

Having rejected the simple application of an "arbitrary" test, the plurality then proceeded to analyze the history of the Due Process Clause to discern the appropriate test to apply to petitioner's claim.¹⁰³ Although the Supreme Court was reluctant to apply the Fifth Amendment's Due Process Clause to the States in the late nineteenth century,¹⁰⁴ it has since held that a number of the procedural protections contained in the Bill of Rights were made applicable to the States through the Fourteenth Amendment.¹⁰⁵ As a result, Chief Justice Rehnquist concluded that the course of decision has "substituted . . . the specific guarantees of the various provisions of the Bill of Rights embodied in the first [Ten] Amendments to the Constitution for the more generalized language contained in the earlier cases construing the Fourteenth Amendment."¹⁰⁶ Based upon this historical analysis, the plurality announced its refusal to analyze a claim under the

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 812 (quoting *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992)).

¹⁰¹ *Id.* (noting petitioner's reliance on *United States v. Salerno*, 481 U.S. 739, 746 (1987) and *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

¹⁰² *Id.*

¹⁰³ *Id.* at 812-13.

¹⁰⁴ *Id.* at 812. *Hurtado v. California*, 110 U.S. 516 (1884), "did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury." *Albright*, 114 S. Ct. at 812.

¹⁰⁵ *Id.* at 812-13.

¹⁰⁶ *Id.* at 813.

"'more generalized notion of 'substantive due process'. . . '[w]here a particular amendment provides an explicit textual source of constitutional protection.'"¹⁰⁷

Applying this test to petitioner's claim, the plurality determined that the Framers intended pretrial deprivations of liberty to be adjudicated under the Fourth Amendment, not the Fourteenth Amendment.¹⁰⁸ It noted that the Fourth Amendment relates to "deprivations of liberty that go hand in hand with criminal prosecutions."¹⁰⁹ Therefore, the plurality held that petitioner's claim came under the Fourth Amendment, not under the Due Process Clause of the Fourteenth Amendment.¹¹⁰

Finally, since petitioner did not present the Fourth Amendment question in his petition for certiorari, the plurality affirmed the decision of the Court of Appeals for the Seventh Circuit dismissing petitioner's claim.¹¹¹

B. JUSTICE SCALIA'S CONCURRENCE

In a brief concurring opinion, Justice Scalia agreed with the plurality's dismissal of petitioner's claim and argued that the Due Process Clause of the Fourteenth Amendment could not supplement specific textual provisions of the Constitution.¹¹²

Justice Scalia asserted that while there may be many different abuses of the trial process, petitioner's "deprivation of life, liberty, or property, if any, consisted of [his] pretrial arrest."¹¹³ He then maintained that the Due Process Clause of the Fourteenth Amendment guarantees merely that certain procedures are followed as a prerequisite to a deprivation of liberty.¹¹⁴ While he recognized that the Court's current jurisprudence acknowledges substantive due process within the Fourteenth Amendment's Due Process Clause, he argued that "it cannot be used to impose additional requirements upon such of the states' criminal processes as are already addressed . . . by the Bill of Rights."¹¹⁵ Since the Bill of Rights contains procedural guarantees within the Fifth and Sixth Amendments governing the period before

¹⁰⁷ *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest")).

¹¹⁰ *Id.* at 813-14.

¹¹¹ *Id.* at 813.

¹¹² *Id.* at 814 (Scalia, J., concurring).

¹¹³ *Id.* (Scalia, J., concurring).

¹¹⁴ *Id.* (Scalia, J., concurring).

¹¹⁵ *Id.* (Scalia, J., concurring) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

and during trial, Justice Scalia concluded that those requirements could not be supplemented through utilization of the device the Court has referred to as "substantive due process."¹¹⁶

C. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg agreed with the plurality that petitioner's claim is properly analyzed under the Fourth Amendment, but, unlike the plurality, proceeded to perform that analysis.¹¹⁷ After speculating as to why petitioner pressed a Fourteenth Amendment argument to the Court and not one based on the Fourth Amendment, Justice Ginsburg ultimately concluded that petitioner had a valid § 1983 claim based upon violation of his Fourth Amendment rights, but found that his failure to assert this claim to the Court barred any relief.¹¹⁸

Initially, Justice Ginsburg stated that petitioner's "submission to arrest unquestionably constituted a [Fourth Amendment] seizure."¹¹⁹ However, after acknowledging that petitioner advanced only a Fourteenth Amendment "substantive due process right to be free from prosecution without probable cause," Justice Ginsburg speculated that petitioner's "strategic decision appear[ed] to have been predicated on two doubtful assumptions, the first relating to the compass of the Fourth Amendment, the second, to the time for commencing this civil action."¹²⁰

First, Justice Ginsburg argued that petitioner may have anticipated a holding limiting his "seizure" to the period from his surrender until he was released on bond, and thus Detective Oliver's allegedly misleading testimony could not be analyzed under the Fourth Amendment.¹²¹ Responding to this concern, Justice Ginsburg asserted that the common-law meaning of the Amendment's term "seizure" held it "to continue even after release from official custody."¹²² Since the common law purpose of an arrest was to ensure an appearance in court, Justice Ginsburg concluded that the distinction between pre-trial incarceration and bail is a "distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite."¹²³ Thus, according to Justice Ginsburg, petitioner was "seized" for purposes of the Fourth Amendment despite his re-

¹¹⁶ *Id.* (Scalia, J., concurring).

¹¹⁷ *Id.* at 814-16 (Ginsburg, J., concurring). *See also id.* at 813 (plurality declines to address petitioner's claim under the Fourth Amendment).

¹¹⁸ *Id.* at 814-17 (Ginsburg, J., concurring).

¹¹⁹ *Id.* at 814 (Ginsburg, J., concurring).

¹²⁰ *Id.* at 815 (Ginsburg, J., concurring).

¹²¹ *Id.* (Ginsburg, J., concurring).

¹²² *Id.* (Ginsburg, J., concurring).

¹²³ *Id.* (Ginsburg, J., concurring).

lease on bail.¹²⁴

Justice Ginsburg then buttressed her argument that petitioner was "seized" for purposes of the Fourth Amendment with an argument based upon "common sense and common understanding."¹²⁵ When facing criminal charges, a person must appear in court at the state's command, is often restricted from travelling outside the state without leave of court, and must prepare a defense at great financial and emotional expense.¹²⁶ Justice Ginsburg acknowledged that an alleged wrongdoer incarcerated until trial undoubtedly suffers greater burdens, but argued that the difference "should not lead to the conclusion that a defendant released pretrial is not still 'seized' in the constitutionally relevant sense."¹²⁷ Finally, Justice Ginsburg noted that Detective Oliver's allegedly misleading testimony at the preliminary hearing perpetuated the state's "seizure" of petitioner.¹²⁸

After concluding that petitioner was "seized" for purposes of the Fourth Amendment, Justice Ginsburg addressed whether the statute of limitations would have barred petitioner's Fourth Amendment claim.¹²⁹ She asserted that the statute of limitations should have accrued upon the dismissal of the lawsuit against petitioner, not at the date of his arrest, as the Court of Appeals for the Seventh Circuit suggested in dictum.¹³⁰ Because petitioner remained "seized" until dismissal of the charges against him, his cause of action accrued at the end of the criminal proceedings, rather than at the time of his arrest.¹³¹ As a result, she concluded that petitioner could have asserted a Fourth Amendment claim within the statute of limitations.¹³²

Finally, although petitioner's Fourth Amendment claim was "neither substantively deficient nor inevitably time-barred,"¹³³ Justice Ginsburg concluded that petitioner's abandonment of the claim in the district court and failure to reassert it in front of the Supreme Court barred the Court from asserting it for him.¹³⁴ Thus, she concurred with the plurality decision dismissing petitioner's complaint.¹³⁵

¹²⁴ *Id.* at 815-16 (Ginsburg, J., concurring).

¹²⁵ *Id.* (Ginsburg, J., concurring).

¹²⁶ *Id.* at 815 (Ginsburg, J., concurring). In addition, while criminal prosecution is pending, a criminal defendant may suffer reputational harm and experience severely diminished employment prospects. *Id.* (Ginsburg, J., concurring).

¹²⁷ *Id.* at 815-16 (Ginsburg, J., concurring).

¹²⁸ *Id.* at 816 (Ginsburg, J., concurring).

¹²⁹ *Id.* (Ginsburg, J., concurring).

¹³⁰ *Id.* (Ginsburg, J., concurring).

¹³¹ *Id.* (Ginsburg, J., concurring).

¹³² *Id.* (Ginsburg, J., concurring).

¹³³ *Id.* (Ginsburg, J., concurring).

¹³⁴ *Id.* at 816-17 (Ginsburg, J., concurring).

¹³⁵ *Id.* (Ginsburg, J., concurring).

D. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy¹³⁶ also agreed with the plurality that "an allegation of arrest without probable cause must be analyzed under the Fourth Amendment."¹³⁷ However, he wrote separately to explain that petitioner's due process claim arose not out of his arrest by Detective Oliver, but out of an allegedly malicious criminal prosecution against him.¹³⁸ Therefore, Justice Kennedy analyzed the criminal proceedings, not the arrest, under the Due Process Clause, and ultimately concluded that the existence of a state tort remedy in Illinois for malicious prosecution disposed of petitioner's claim.¹³⁹

The threshold question for Justice Kennedy was "whether the due process requirements for criminal proceedings include a standard for the initiation of a prosecution."¹⁴⁰ Justice Kennedy argued that the Bill of Rights imposes no standard for the initiation of a prosecution, nor does it require a pretrial hearing.¹⁴¹ While he conceded that a criminal procedure may violate the Due Process Clause even if it does not violate a specific provision of the Bill of Rights, he argued that while the "common law provided for a grand jury indictment and a speedy trial[,] it did not provide a specific evidentiary standard applicable to a pretrial hearing on the merits of the charges."¹⁴² Since the Bill of Rights guarantees these traditional requirements of the criminal process, any standard that governed the initiation of a criminal proceeding would be superfluous to the Constitutional protections governing the criminal process.¹⁴³

Nevertheless, Justice Kennedy acknowledged that the due process inquiry does not end there.¹⁴⁴ For purposes of petitioner's claim, he assumed *arguendo* that the Due Process Clause protected petitioner's interest in freedom from malicious prosecution.¹⁴⁵ Still, he argued that prior precedent clearly denied recovery under 42 U.S.C. § 1983 for "a state actor's random and unauthorized deprivation of that interest[,] . . . [as] long as the state provides an adequate post-deprivation remedy."¹⁴⁶

¹³⁶ Justice Thomas joined in Justice Kennedy's opinion.

¹³⁷ *Albright*, 114 S. Ct. at 817 (Kennedy, J., concurring).

¹³⁸ *Id.* (Kennedy, J., concurring).

¹³⁹ *Id.* at 817-19 (Kennedy, J., concurring).

¹⁴⁰ *Id.* at 817 (Kennedy, J., concurring).

¹⁴¹ *Id.* (Kennedy, J., concurring).

¹⁴² *Id.* (Kennedy, J., concurring).

¹⁴³ *Id.* at 818 (Kennedy, J., concurring).

¹⁴⁴ *Id.* (Kennedy, J., concurring).

¹⁴⁵ *Id.* (Kennedy, J., concurring).

¹⁴⁶ *Id.* (Kennedy, J., concurring).

Justice Kennedy relied on *Parratt v. Taylor*¹⁴⁷ for the proposition that federal courts are often not the correct venue to litigate many common law claims, "even when a state actor is the alleged wrongdoer."¹⁴⁸ Without this limitation, he contended, the Fourteenth Amendment could be the vehicle by which any "alleged injury which may have been inflicted by a state official acting under color of law" could be litigated under § 1983.¹⁴⁹ He concluded that, given the precedential force of *Parratt*, plaintiffs cannot litigate claims under § 1983 arising from the random and unauthorized act of a state actor that can be remedied at state law.¹⁵⁰ Applying this rule to petitioner's case, Justice Kennedy disposed of petitioner's claim by noting that Illinois provided an adequate tort remedy for malicious prosecution.¹⁵¹ The fact that petitioner brought the claim after the statute of limitations for malicious prosecution had expired did not alter the adequacy of the *Parratt* rule.¹⁵²

Finally, Justice Kennedy recognized that lack of an adequate state tort remedy would buttress a claim for violation of the Due Process Clause enforceable under § 1983.¹⁵³ However, since that question was not before the Court and Illinois provided an adequate state tort remedy, Justice Kennedy concurred in the judgment holding that petitioner's claim be dismissed.¹⁵⁴

E. JUSTICE SOUTER'S CONCURRENCE

Justice Souter began his opinion by acknowledging his agreement with the Court's dismissal of petitioner's claim, while announcing his disagreement with the plurality's reasoning.¹⁵⁵ He contended that the Fourth Amendment should not preempt analysis of petitioner's claim under the Fourteenth Amendment.¹⁵⁶ However, under the Fourteenth Amendment, he asserted that petitioner's failure to allege an injury resulting solely from the alleged malicious prosecution against him required the court to exercise judicial self-restraint by not expanding the limits of the Due Process Clause to encompass peti-

¹⁴⁷ 451 U.S. 527 (1981).

¹⁴⁸ *Albright*, 114 S. Ct. at 818 (Kennedy, J., concurring).

¹⁴⁹ *Id.* (Kennedy, J., concurring) (quoting *Parratt*, 451 U.S. at 544). As an example, Justice Kennedy stated that even a party who is simply involved in an automobile accident with a state official could allege a violation under § 1983. *Id.* (Kennedy, J., concurring).

¹⁵⁰ *Id.* (Kennedy, J., concurring).

¹⁵¹ *Id.* at 819 (Kennedy, J., concurring).

¹⁵² *Id.* (Kennedy, J., concurring).

¹⁵³ *Id.* (Kennedy, J., concurring).

¹⁵⁴ *Id.* (Kennedy, J., concurring).

¹⁵⁵ *Id.* at 819-20 (Souter, J., concurring).

¹⁵⁶ *Id.* at 820 (Souter, J., concurring).

tioner's claim.¹⁵⁷ Therefore, he concurred in the judgment of the plurality.¹⁵⁸

Justice Souter first argued that the Court had previously rejected the proposition that a specific constitutional provision can preempt the application of a more general one and denied that "incorporation of the substantive guarantees of the first eight amendments to the Constitution defines the [outer] limits of due process protection."¹⁵⁹ Nevertheless, Justice Souter felt that the Court had to exercise judicial self-restraint when asked to expand the protections of substantive due process, and contended that the Fourteenth Amendment should not be used to duplicate protections adequately addressed by other constitutional provisions.¹⁶⁰

Applying judicial self-restraint to petitioner's claim, Justice Souter declared that it failed to allege any injury which resulted from the initiation of a baseless prosecution against petitioner that did not also result from his seizure by the State, correctly analyzed under the Fourth Amendment.¹⁶¹ As such, "[n]one of these injuries . . . is alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody."¹⁶² Therefore, he concluded, the petitioner failed to show a substantive deprivation of liberty attributable to the initiation of the prosecution.¹⁶³

The significance of petitioner's failure, Justice Souter asserted, lies in the courts of appeals' recognition that injuries similar to petitioner's have provided a § 1983 claim based on a violation of the Fourth Amendment's Search and Seizure Clause, not the Fourteenth Amendment's Due Process Clause.¹⁶⁴ Since damages to reputation, limitation on movement, burden of defending, and other attendant harms tend to occur after arrest, Justice Souter concluded "it is not surprising that rules of recovery for such harms have naturally coalesced under the Fourth Amendment."¹⁶⁵

Finally, Justice Souter recognized the potential for an injury to occur during the interim period between the filing of a groundless criminal charge and a Fourth Amendment seizure, but remarked that

¹⁵⁷ *Id.* at 820-22 (Souter, J., concurring).

¹⁵⁸ *Id.* at 819-20 (Souter, J., concurring).

¹⁵⁹ *Id.* at 820 (Souter, J., concurring) (citing *Adamson v. California*, 332 U.S. 46, 89-92 (1947) (Black, J., dissenting)).

¹⁶⁰ *Id.* (Souter, J., concurring).

¹⁶¹ *Id.* at 821 (Souter, J., concurring).

¹⁶² *Id.* (Souter, J., concurring).

¹⁶³ *Id.* (Souter, J., concurring).

¹⁶⁴ *Id.* (Souter, J., concurring).

¹⁶⁵ *Id.* at 821-22 (Souter, J., concurring).

this was not petitioner's claim.¹⁶⁶ Therefore, Justice Souter concluded that the Court should exercise judicial self-restraint and concurred in the plurality's opinion dismissing petitioner's claim.¹⁶⁷

F. JUSTICE STEVENS' DISSENT

Justice Stevens¹⁶⁸ presented the issue in petitioner's claim as whether the Fourteenth Amendment provides a constraint on state government's power to accuse an individual of a crime comparable to the Fifth Amendment's constraint on the federal government.¹⁶⁹ As Justice Stevens points out, the Fifth Amendment requires a grand jury determination that there is probable cause to support the federal government's accusation.¹⁷⁰ Justice Stevens argued that states are also required to adequately protect the probable cause requirement for initiation of a criminal prosecution.¹⁷¹ Applying the facts of petitioner's claim, he contended that the state did not satisfy the probable cause requirement in this case.¹⁷² Next, he asserted that the state's failure to meet the probable cause requirement violated petitioner's "liberty" under the Fourteenth Amendment and that "compliance with certain procedural formalities which ordinarily ensure that a prosecution will not commence absent probable cause" does not meet the demands of the Due Process Clause.¹⁷³ Therefore, he dissented from the decision of the plurality dismissing petitioner's claim.¹⁷⁴

Initially, Justice Stevens declared that *Hurtado v. California*,¹⁷⁵ while not requiring states to initiate a prosecution by grand jury indictment, mandates that states adequately protect the probable cause requirement for initiation of a criminal prosecution.¹⁷⁶ After factually analyzing petitioner's claim, he concluded that the probable cause requirement was not satisfied in this case.¹⁷⁷

Following this factual analysis, Justice Stevens declared that the Due Process Clause is unquestionably implicated where an individual is convicted and incarcerated,¹⁷⁸ but "extend[s] well beyond freedom

¹⁶⁶ *Id.* at 822 (Souter, J., concurring).

¹⁶⁷ *Id.* at 820-22 (Souter, J., concurring).

¹⁶⁸ Justice Blackmun joined in Justice Stevens' opinion.

¹⁶⁹ *Albright*, 114 S. Ct. at 822 (Stevens, J., dissenting).

¹⁷⁰ *Id.* (Stevens, J., dissenting).

¹⁷¹ *Id.* (Stevens, J., dissenting).

¹⁷² *Id.* at 823 (Stevens, J., dissenting).

¹⁷³ *Id.* at 823-27 (Stevens, J., dissenting).

¹⁷⁴ *Id.* at 832 (Stevens, J., dissenting).

¹⁷⁵ 110 U.S. 516 (1884).

¹⁷⁶ *Albright*, 114 S. Ct. at 822 (Stevens, J., dissenting).

¹⁷⁷ *Id.* at 823 (Stevens, J., dissenting).

¹⁷⁸ *Id.* (Stevens, J., dissenting).

from an improper criminal conviction.”¹⁷⁹ He noted that the parameters of the Due Process Clause have never been fully defined, and that formal commencement of a criminal proceeding violates “a range of identified liberty interests . . . of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection” by the Fourteenth Amendment.¹⁸⁰ Therefore, he concluded, the Court should have continued its analysis to determine “what measure of ‘due process’ must be provided an accused in connection with this deprivation of liberty.”¹⁸¹

Justice Stevens relied on various precedents to discern that the Due Process Clause of the Fourteenth Amendment demands a responsible decision whether there is probable cause to prosecute an individual for a criminal violation.¹⁸² Analyzing this requirement of “probable cause to prosecute,” he rejected an approach where “a state’s compliance with facially valid procedures for initiating a prosecution [would be] by itself sufficient to meet the demands of due process, without regard to the substance of the resulting probable cause determination.”¹⁸³ He argued that it is “well established that adherence to procedural forms will not save a conviction that rests in substance on false evidence or deliberate deception.”¹⁸⁴ Analogizing the initiation of a criminal prosecution to such a conviction, he concluded that compliance with facially valid procedures for the initiation of a prosecution would not, by itself, meet the demands of the Due Process Clause.¹⁸⁵

Finally, Justice Stevens commented upon the various opinions that supported the Court’s judgment.¹⁸⁶ Beginning with the plurality opinion, he identified two “glaring flaws.”¹⁸⁷ First, he asserted that petitioner’s pretrial deprivation of liberty is addressed specifically by the Fifth, not the Fourth, Amendment.¹⁸⁸ While acknowledging that this is of lesser importance, he contended that “the cramped view of the Fourteenth Amendment taken by the plurality today has been rejected time and time again by the Court.”¹⁸⁹ He argued that the Due Process Clause recognizes liberty interests not “limited to the realm

¹⁷⁹ *Id.* at 824 (Stevens, J., dissenting).

¹⁸⁰ *Id.* at 824-25 (Stevens, J., dissenting).

¹⁸¹ *Id.* at 825 (Stevens, J., dissenting).

¹⁸² *Id.* (Stevens, J., dissenting).

¹⁸³ *Id.* at 826 (Stevens, J., dissenting).

¹⁸⁴ *Id.* (Stevens, J., dissenting).

¹⁸⁵ *Id.* at 826-27 (Stevens, J., dissenting).

¹⁸⁶ *Id.* at 827-35 (Stevens, J., dissenting).

¹⁸⁷ *Id.* at 828 (Stevens, J., dissenting).

¹⁸⁸ *Id.* (Stevens, J., dissenting).

¹⁸⁹ *Id.* (Stevens, J., dissenting).

outside [of the] criminal law.”¹⁹⁰ Second, Justice Stevens maintained that the plurality virtually ignored the principle that “‘the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.’”¹⁹¹ Relying on this assertion, he faulted the plurality for attempting to limit the Due Process Clause by the specific guarantees within the Bill of Rights.¹⁹²

Justice Stevens began his comments on Justice Ginsburg’s concurring opinion by acknowledging his agreement with her contention that petitioner could have alleged a cause of action under § 1983 based on the Fourth Amendment.¹⁹³ However, he asserted that petitioner’s “abandonment of a claim based on the seizure should [not] constitute a waiver of the claim based on the [allegedly malicious] accusation,”¹⁹⁴ because the Fourth Amendment protection “does not fully encompass the liberty interest that is at stake.”¹⁹⁵ Therefore, he concluded that Justice Ginsburg’s opinion does not adequately explain her conclusion that the complaint should be dismissed.¹⁹⁶

Justice Stevens next faulted Justice Souter’s concurrence for wrongly characterizing petitioner’s claim “as an invitation to enter uncharted territory” under the Fourteenth Amendment.¹⁹⁷ Citing various precedents, he concluded that the claim is “manifestly of constitutional dimension.”¹⁹⁸

Justice Stevens also argued that Justice Kennedy’s concurrence incorrectly relied upon *Parratt v. Taylor*¹⁹⁹ to dispose of petitioner’s claim.²⁰⁰ He contended that the *Parratt* rule was inapplicable to this case, because it “is limited to situations in which no constitutional violation occurs.”²⁰¹ Therefore, Justice Stevens concluded that in cases such as petitioner’s, in which there is an alleged constitutional violation, § 1983 provides a federal remedy regardless of the presence of an adequate state remedy.²⁰²

Finally, Justice Stevens’ opinion noted that none of the five opinions supporting the judgment of affirmance “endorses the reasoning

¹⁹⁰ *Id.* at 829 (Stevens, J., dissenting).

¹⁹¹ *Id.* (Stevens, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

¹⁹² *Id.* at 830 (Stevens, J., dissenting).

¹⁹³ *Id.* (Stevens, J., dissenting). Note, however, that Justice Ginsburg acknowledged petitioner’s failure to raise the Fourth Amendment issue. *Id.* at 815 (Ginsburg, J., concurring).

¹⁹⁴ *Id.* at 831 (Stevens, J., dissenting).

¹⁹⁵ *Id.* at 832 (Stevens, J., dissenting).

¹⁹⁶ *Id.* at 830 (Stevens, J., dissenting).

¹⁹⁷ *Id.* at 832 (Stevens, J., dissenting).

¹⁹⁸ *Id.* (Stevens, J., dissenting).

¹⁹⁹ 451 U.S. 527 (1981).

²⁰⁰ *Albright*, 114 S. Ct. at 833 (Stevens, J., dissenting).

²⁰¹ *Id.* at 834 (Stevens, J., dissenting).

²⁰² *Id.* at 835 (Stevens, J., dissenting).

of the Court of Appeals, and none of them commands a majority."²⁰³ Adding that none of the opinions rejected his contention that "the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime," Justice Stevens dissented.²⁰⁴

V. ANALYSIS

In *Albright v. Oliver*, the United States Supreme Court correctly affirmed the decision of the Court of Appeals for the Seventh Circuit dismissing petitioner's claim.²⁰⁵ By holding that a potential § 1983 claim based upon the State's arrest and alleged initiation of a malicious prosecution must be analyzed under the Fourth Amendment, not the Fourteenth Amendment,²⁰⁶ the Court discourages plaintiff's from "aim[ing] in the general direction of the federal Constitution with buckshot."²⁰⁷ The Court set a standard that future potential plaintiffs allege a specific constitutional violation as a prerequisite to a § 1983 claim based upon malicious prosecution, rather than rely on the "'more generalized notion of substantive due process'" as the basis for their claim.²⁰⁸ However, by declining to analyze petitioner's claim under the Fourth Amendment, the Court did not resolve the split of opinion among the circuit courts as to whether the tort of malicious prosecution may provide a basis for relief under § 1983.²⁰⁹ Thus, the only guidance for the lower federal courts lies in Justice Ginsburg's concurrence.²¹⁰

A. SUBSTANTIVE DUE PROCESS VERSUS THE FOURTH AMENDMENT: WHICH PROVISION GOVERNS?

The plurality in *Albright* was faced with a very specific claim

²⁰³ *Id.* (Stevens, J., dissenting).

²⁰⁴ *Id.* (Stevens, J., dissenting).

²⁰⁵ *Id.* at 810 (dismissing petitioner's Fourteenth Amendment claim).

²⁰⁶ *Id.* at 813-14. See *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). "[The Fourth Amendment] is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Id.*

²⁰⁷ *Chiplin Enters. v. City of Lebanon*, 712 F.2d 1524, 1526 (1st Cir. 1983).

²⁰⁸ *Albright*, 114 S. Ct. at 813 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

²⁰⁹ See *Brummett v. Camble*, 946 F.2d 1178, 1180-81 n.2 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2323 (1992) (cataloging the divergence of approaches taken by the courts of appeals).

²¹⁰ *Albright*, 114 S. Ct. at 814-817 (1994) (Ginsburg, J., concurring). However, the failure of the Court to address petitioner's claim under the Fourth Amendment was the result of petitioner's failure to raise the issue in petition for certiorari. The plurality correctly declined to analyze the Fourth Amendment issue, for such analysis would arguably violate the Case or Controversy requirement of Article III of the Constitution. Justice Ginsburg, noting petitioner's failure to raise the issue, was the only justice to address petitioner's claim under the Fourth Amendment.

brought in the petition for certiorari: whether a groundless criminal prosecution violates a Fourteenth Amendment substantive due process liberty right to be free from criminal prosecution absent probable cause.²¹¹ Although there has been a split among the circuit courts of appeals as to what provision of the Constitution a § 1983 claim based upon malicious prosecution violates,²¹² petitioner specifically presented only a substantive due process claim in his petition for certiorari.²¹³ Applying a substantive due process analysis, the Court correctly concluded that petitioner's specific claim of a pretrial deprivation of liberty could not rest upon a liberty interest derived from the Court's protections under substantive due process, because the specific constitutional protections within the Fourth Amendment and procedural due process preclude the Court from articulating such a liberty right.

However, the Court has also stated that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."²¹⁴ Despite this, the Court has consistently recognized a general reluctance to expand the notions of substantive due process analysis.²¹⁵ The Court has previously found substantive rights pertaining to "marriage, procreation, contraception, family relationships, child rearing, and education."²¹⁶ None of these cases, however, presented issues pertaining to an alleged abuse of the legal process, such as the tort of malicious prosecution. Cases involving abuse of the legal process have typically been adjudicated pursuant to "the procedural protections contained in the Bill of Rights . . . made applicable to the states by the Fourteenth Amendment,"²¹⁷ not under substantive due process.²¹⁸

In *Hurtado v. California*,²¹⁹ an early case applying the Fourteenth Amendment's due process clause to an alleged abuse of the legal process, the Court held that the words 'due process of law' in the Four-

²¹¹ Petitioner's Brief at 8, *Albright* (No. 92-833).

²¹² See *supra* notes 40 to 44 and accompanying text (noting the difference of opinion among the Circuit Courts).

²¹³ *Albright*, 114 S. Ct. at 812.

²¹⁴ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992).

²¹⁵ *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Id.* (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985)).

²¹⁶ *Casey*, 112 S. Ct. at 2807.

²¹⁷ *Albright*, 114 S. Ct. at 812.

²¹⁸ *Id.* at 812-13 (listing cases that have applied specific procedural protections within the Bill of Rights to the States).

²¹⁹ 110 U.S. 516 (1884).

teenth Amendment did not require the States to initiate a prosecution by grand jury indictment, but only required that the States enact judicial proceedings to "preserve[] . . . principles of liberty and justice."²²⁰ Therefore, the Court in *Hurtado* did not create a substantive right to be free from state prosecution absent a grand jury indictment.²²¹ Rather, the Court held that the Fourteenth Amendment did not require the states to follow certain procedures mandated by the Fifth Amendment for federal criminal prosecutions.²²² Therefore, when applying the Fourteenth Amendment's Due Process Clause to the states, the Court initially held that there was no *substantive* right to be free from the state's deprivation of life, liberty, or property, but only that certain *procedures* be followed in a deprivation of an individual's life, liberty, or property by the State.²²³ The Court has stated that "[t]his requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."²²⁴

Since *Hurtado*, the Court has had the opportunity to refine the procedures constitutionally due a potential defendant under the Fourteenth Amendment. Consistently applying specific provisions of the Bill of Rights pertaining to criminal proceedings to the States, the Court has declined to recognize broad substantive due process rights within the context of those proceedings.²²⁵ Given the past application of these processes to the States, the plurality was correct to conclude that "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'"²²⁶ To conclude otherwise would subject every procedural safeguard within the Bill of Rights to substantive review. This would transform the Fourteenth Amendment due process clause into an "all-encompassing" provision, and subject each and every procedural protection within the Bill of Rights to substantive due process review, hardly the intent of the Framers of the Fourteenth Amendment.²²⁷

²²⁰ *Id.* at 537. *Hurtado* specifically held that the Fifth Amendment's requirement of indictment by grand jury was not applicable to the States. *Id.* at 534-35.

²²¹ *Id.* at 534-38.

²²² *Id.*

²²³ *Id.* at 533.

²²⁴ *Id.* (quoting *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875)).

²²⁵ See *Albright v. Oliver*, 114 S. Ct. 807, 812-13 (1994). This process has generally been referred to as "incorporation" of the specific provisions of the Bill of Rights against the states through the Fourteenth Amendment.

²²⁶ *Id.* at 813 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

²²⁷ See, e.g., Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). Both articles agree that, at a minimum, the Fourteenth Amendment was passed to constitu-

Moreover, it would render the procedural safeguards within the Bill of Rights superfluous, as each provision would ultimately be evaluated under substantive due process review.

Most recently, the Court has required constitutional claims to be adjudicated under a specific constitutional provision rather than under the "more generalized notion of 'substantive due process,'" if such a provision is applicable.²²⁸ This jurisprudence coincides with the Court's reluctance to expand the notions of substantive due process.²²⁹ Therefore, if the Fourth Amendment governs petitioner's claim, the plurality correctly dismissed petitioner's substantive due process claim.²³⁰

While the plurality properly held that the Framers intended the Fourth Amendment to govern pretrial deprivations of liberty such as petitioner alleged,²³¹ the more difficult question the Court faced was whether the Fourth Amendment applies to a § 1983 claim predicated on an abuse of process.²³² If it does, then the Court's precedent precludes a substantive due process review.²³³

Nevertheless, the plurality was not without guidance when analyzing petitioner's claim. In *Graham v. Connor*,²³⁴ the Court refused to analyze a claim to be free from excessive force under substantive due process "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this . . . governmental conduct."²³⁵ Although *Graham* applied specifically to the use of excessive force during a seizure,²³⁶ the analysis is applicable to petitioner's claim as well, because the Framers intended pretrial deprivations of liberty to be adjudicated under the Fourth Amendment.²³⁷

Nevertheless, while the plurality correctly concluded that the Fourth Amendment precluded substantive due process review of petitioner's claim, the plurality's conclusion that the Fourth Amendment

tionalize the Civil Rights Act of 1866, not to subject every claim against the government to substantive due process review.

²²⁸ *Graham v. Connor*, 490 U.S. 386, 395 (1989).

²²⁹ See *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992).

²³⁰ *Albright*, 114 S. Ct. at 813-14 (concluding that petitioner's claim should be addressed under the Fourth Amendment).

²³¹ *Id.* at 813.

²³² See *supra* notes 40 to 44 and accompanying text (listing the disagreement among Circuit Courts as to what provision of the Constitution malicious prosecution violates).

²³³ See *supra* note 226 and accompanying text (noting that when a specific provision of the Constitution applies, it, not substantive due process, governs adjudication of the case).

²³⁴ 490 U.S. 386 (1989).

²³⁵ *Id.* at 395.

²³⁶ *Id.*

²³⁷ *Albright v. Oliver*, 114 S. Ct. 807, 813 (1994).

specifically governs "pretrial deprivations of liberty"²³⁸ failed to recognize that *procedural* due process is implicated by a § 1983 claim based upon malicious prosecution.²³⁹ *Hurtado* recognized over 100 years ago that the Fourteenth Amendment requires the states to operate "according to the settled course of judicial proceedings,"²⁴⁰ and, applying a procedural due process analysis, the Court more recently "rejected the notion that all of the required incidents of a fundamentally fair trial were to be found in the provisions of the Bill of Rights."²⁴¹ Therefore, while the plurality correctly concluded that the application of the Fourth Amendment to petitioner's claim precludes substantive due process review, it does not follow that application of the Fourth Amendment to a § 1983 claim predicated on malicious prosecution should also preclude due process analysis.²⁴²

Furthermore, the plurality noted that "[t]he Framers considered the matter of *pretrial* deprivations of liberty, and drafted the Fourth Amendment to address it."²⁴³ However, not all § 1983 claims rest upon a pretrial abuse of the legal process.²⁴⁴ Although petitioner's case involved a claim under § 1983 based upon malicious prosecution that occurred pretrial,²⁴⁵ a § 1983 claim based upon malicious prosecution may involve alleged abuse of the legal process during trial.²⁴⁶ Indeed, an element of any malicious prosecution claim requires that

²³⁸ Ironically, the Fourth Amendment can only be applied by the plurality to govern petitioner's claim through incorporation of that amendment against the States via substantive due process within the meaning of the Fourteenth Amendment.

²³⁹ See *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) ("An abuse of process is by definition a denial of procedural due process.") (quoting *Jennings v. Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977)). However, as noted, the Court was precluded from addressing a possible procedural due process violation by petitioner's failure to present that issue in petition for certiorari. See *supra* note 211 and accompanying text (noting that petitioner presented only a substantive due process claim to the Supreme Court).

²⁴⁰ *Hurtado v. California*, 110 U.S. 516, 533 (1884) (quoting *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875)).

²⁴¹ *Albright v. Oliver*, 114 S. Ct. 807, 813 n.6 (1994) (addressing the Court's holding in *In re Winship*, 397 U.S. 358 (1970)).

²⁴² To be sure, the plurality does not hold that procedural due process is not violated by a § 1983 claim based upon malicious prosecution, but merely fails to recognize that it may be implicated in addition to the Fourth Amendment. *Albright*, 114 S. Ct. at 813-14. See also *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 43 (1st Cir. 1994) ("*Albright* would appear virtually to foreclose reliance on *substantive* due process as the basis for a viable malicious prosecution claim under section 1983") (emphasis added).

²⁴³ *Albright*, 114 S. Ct. at 813 (emphasis added).

²⁴⁴ See, e.g., *White v. Frank*, 855 F.2d 956 (2d Cir. 1988) (case proceeded to trial and plaintiff was convicted before perjury of investigative officer was discovered and § 1983 claim filed); *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989) (plaintiffs acquitted after jury trial before § 1983 claim brought).

²⁴⁵ See *supra* notes 72 to 81 and accompanying text (noting that the charges against plaintiff were dismissed prior to a jury trial).

²⁴⁶ See *supra* note 239.

the underlying judicial proceeding ended in plaintiff's favor,²⁴⁷ with no requirement that the proceeding end before trial. Therefore, it is quite possible that a § 1983 claim based upon malicious prosecution could involve a deprivation of liberty during or even after trial and, under the plurality's reasoning, the Fourth Amendment would not dispositively preclude application of substantive due process to the claim.²⁴⁸

B. ANALYSIS OF A FOURTH AMENDMENT CLAIM: WAS PETITIONER SEIZED?

Before Justice Ginsburg could analyze petitioner's claim under the Fourth Amendment,²⁴⁹ it was necessary to establish that petitioner was "seized." There is no debate that an arrest of an individual by the State is a "seizure" under the Fourth Amendment.²⁵⁰ However, it is less obvious that the seizure continues despite a defendant's release on bail.²⁵¹ Nevertheless, Justice Ginsburg adamantly argued that petitioner was seized by the State until the criminal charges against him were dismissed.²⁵²

Because *Albright* was seized, the facts of his case implicate the Fourth Amendment. While the Court chose not to address this issue because it was not before the Court,²⁵³ petitioner's failure to advance the Fourth Amendment claim to the Court precluded the plurality from providing guidance to the lower federal courts struggling with the issue of whether a malicious prosecution claim is actionable under § 1983.²⁵⁴ Justice Ginsburg's concurrence provides the only

²⁴⁷ See *supra* note 12 and accompanying text (listing the requirements for common law malicious prosecution claim).

²⁴⁸ Since a "specific constitutional guarantee" is required to preclude substantive due process analysis, and the Fourth Amendment governs "pretrial deprivations of liberty," it is unclear whether the Fourth Amendment, or any other constitutional provision, would preclude substantive due process analysis of a trial (or post-trial) deprivation of liberty. *Albright v. Oliver*, 114 S. Ct. 807, 813 (1994).

²⁴⁹ Justice Ginsburg was the only justice to analyze petitioner's claim under the Fourth Amendment. *Id.* at 814-17. As noted, the plurality correctly declined to address this issue. See *supra* note 210.

²⁵⁰ See *California v. Hodari D.*, 499 U.S. 621, 624 (1991). ("[A]n arrest [is] . . . the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence."). See also *Robbins v. California*, 453 U.S. 420, 451 (1981) (Stevens, J., dissenting) ("[E]very arrest is a seizure of the person within the meaning of the Fourth Amendment.")

²⁵¹ *Albright*, 114 S. Ct. at 815-16 (Ginsburg, J., concurring). Justice Ginsburg speculates that petitioner failed to advance a Fourth Amendment argument for fear of a narrow definition of the word seizure. *Id.* See *supra* note 121 and accompanying text.

²⁵² *Albright*, 114 S. Ct. at 815-16. See *supra* notes 117 to 128 and accompanying text.

²⁵³ *Albright*, 114 S. Ct. at 813.

²⁵⁴ *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992) (noting the "embarrassing diversity of judicial opinion" on whether malicious prosecution violates the Constitution).

guidance.²⁵⁵

C. "OBJECTIVE REASONABLENESS" GOVERNS A FOURTH AMENDMENT CLAIM

Under the Fourth Amendment, the Court must determine if the police officer's seizure of petitioner pursuant to the evidence available to him was "objectively reasonable."²⁵⁶ Under this standard, an officer violates the Fourth Amendment if the Court determines that the officer had "no reasonable grounds" for believing that a seizure was legal.²⁵⁷

Applying this standard to particular cases, the Court has announced that "searches pursuant to a warrant will rarely require any deep inquiry into reasonableness."²⁵⁸ An issued warrant becomes *prima facie* evidence that an investigating officer acted reasonably in conducting a search or seizure; "[o]nce the warrant issues, there is literally nothing more that the policeman can do in seeking to comply with the law."²⁵⁹ Therefore, "a warrant issued by a magistrate normally suffices to establish" that an investigating officer has "acted in good faith in conducting the search."²⁶⁰ Pursuant to this analysis, the Court has declared "that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail."²⁶¹

Nevertheless, a warrant may be invalidated (and thus the seizure unconstitutional) because it was later determined that the information upon which the magistrate issued the warrant fell short of probable cause.²⁶² A neutral magistrate's finding of probable cause, implicit in the issuance of a search or arrest warrant, "does not preclude inquiry into the knowing or reckless falsity of the affidavit on which the determination was based."²⁶³ Therefore, when an arrest warrant has been issued, the standard of "objective reasonableness" requires that an individual show "knowing or reckless falsity of the affidavit" before the seizure will be declared invalid, and the individ-

²⁵⁵ See *supra* note 249.

²⁵⁶ See *United States v. Leon*, 468 U.S. 897, 922 (1984) (holding that a police officer's seizure must be based upon objectively reasonable reliance of the evidence available).

²⁵⁷ *Id.* at 923.

²⁵⁸ *Illinois v. Gates*, 462 U.S. 213, 266-67 (1983) (White, J., concurring in judgment).

²⁵⁹ *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring).

²⁶⁰ *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982).

²⁶¹ *United States v. Ventresca*, 380 U.S. 102, 106 (1965).

²⁶² *Gates*, 462 U.S. at 263 (White, J., concurring in judgment).

²⁶³ *United States v. Leon*, 468 U.S. 897, 914 (1984) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

ual's constitutional rights deemed violated.²⁶⁴ Once the court has determined that an individual was seized in violation of his Fourth Amendment rights, that individual may use § 1983 as "a method for vindicating [those] federal rights."²⁶⁵

Assuming that petitioner had raised a Fourth Amendment claim, the Court's first step would be to acknowledge that petitioner was arrested pursuant to the issuance of an arrest warrant.²⁶⁶ Therefore, before the Court can conclude that petitioner's Fourth Amendment rights were violated, the Court must conclude that there was "knowing or reckless falsity of the affidavit" submitted by Detective Oliver to the neutral magistrate for issuance of the arrest warrant.²⁶⁷

Petitioner did not allege that Detective Oliver presented any false testimony to the magistrate or at the preliminary hearing. Therefore, the seizure was not initiated pursuant to a "knowing . . . falsity of the affidavit."²⁶⁸ He merely failed to present all of the circumstances surrounding the arrest of petitioner for sale of a look-alike substance.²⁶⁹ However, petitioner did not allege that Detective Oliver's failure to

²⁶⁴ *Id.* If a warrant is declared invalid for lack of probable cause, the evidence obtained pursuant to that seizure is excluded from being entered into evidence. This "exclusionary rule" is designed to operate as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

²⁶⁵ *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979). However, Justices Kennedy and Stevens debate whether petitioner could seek relief under § 1983, because Illinois provided an adequate postdeprivation remedy. See *supra* notes 145 to 149, 193 to 196 and accompanying text. The debate centers around whether the holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), applies to situations involving constitutional violations resulting from random and unauthorized acts of state actors and what role the federal courts should play in § 1983 claims where an adequate state postdeprivation remedy is available. The controversy surrounding the application of *Parratt* has continued. See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984); *Zinerman v. Burch*, 494 U.S. 113 (1990). However, analysis of the various arguments is tangential to the discussion within this Note.

²⁶⁶ See *supra* note 73 and accompanying text. Indeed, not only was petitioner arrested (seized) pursuant to an arrest warrant, but probable cause to stand trial was also determined through a preliminary hearing. See *supra* note 80 and accompanying text. It is unclear what effect this additional finding of probable cause should have on a court reviewing the objective reasonableness of the seizure. However, if both findings were predicated upon one individual's testimony (through affidavit or otherwise), it seems logical that a court should apply the test of "knowing or reckless falsity" to both determinations. See *Leon*, 468 U.S. at 914.

²⁶⁷ *Leon*, 468 U.S. at 914. Presumably, if there was "knowing or reckless falsity" of the testimony of Detective Oliver at the preliminary hearing, this would also constitute a violation of petitioner's Fourth Amendment rights. See *Albright v. Oliver*, 114 S. Ct. 801, 816 (1994) (Ginsburg, J., concurring) ("Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure").

²⁶⁸ *Leon*, 468 U.S. at 914.

²⁶⁹ See *supra* note 79 and accompanying text (listing the various issues Detective Oliver failed to relate at the preliminary hearing).

present this information at this point in the criminal proceedings violated procedural due process under Illinois law.²⁷⁰ Therefore, even if his testimony was "deliberately misleading,"²⁷¹ petitioner must show that Detective Oliver's reliance on the information that Ms. Moore gave him made his testimony recklessly false.²⁷² Where "[t]he affidavit related the results of an extensive investigation and . . . provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause," the seizure will be deemed reasonable.²⁷³ Under this rubric, each Justice must make a factual determination whether Detective Oliver met this standard. Given the decision in *Albright*, at least two Justices²⁷⁴ would probably have found that Detective Oliver did not meet this standard. Regardless, since the specific factual situation in *Albright* will not present itself before the Court again, each § 1983 claim based upon malicious prosecution must be analyzed separately under the objective reasonableness standard to determine if an individual's Fourth Amendment rights were violated.

IV. CONCLUSION

Though the Court correctly held that petitioners must ground their § 1983 claims in the Fourth Amendment to the Constitution rather than the Fourteenth Amendment, petitioner's failure to raise the Fourth Amendment issue resulted in the Court's inability to definitively resolve whether malicious prosecution violates § 1983. Future plaintiffs are guided only by the plurality's refusal to recognize a substantive due process claim and Justice Ginsburg's concurring opinion. Therefore, it remains unclear whether a § 1983 claim based upon malicious prosecution violates the Fourth Amendment or procedural due process. Given the continued federal court inconsistency in the analysis of these claims, the Court will ultimately have to revisit the issue. When the Court finally does analyze the issue under the Fourth

²⁷⁰ See *supra* note 211 (noting that petitioner only advanced a substantive due process violation in his petition for certiorari).

²⁷¹ *Albright*, 114 S. Ct. at 816 (Ginsburg, J., concurring).

²⁷² *Leon*, 486 U.S. at 914.

²⁷³ *Id.* at 926.

²⁷⁴ Justices Stevens and Blackmun, who both dissented in the case. *Albright*, 114 S. Ct. at 822-35.

Amendment, it will have to decide whether procedural safeguards already deemed constitutional by the Court as valid protections of liberty are nevertheless subject to substantive review. Given the plurality in the *Albright* case, the answer to that question will most likely be an emphatic "No."

ERIC J. WUNSCH