



1999

Constitutional Law - Constitutional Remedy - The Third Circuit's Approach to 42 U.S.C. 1983 Malicious Prosecution Claims

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Recommended Citation

Mary E. Williams, *Constitutional Law - Constitutional Remedy - The Third Circuit's Approach to 42 U.S.C. 1983 Malicious Prosecution Claims*, 44 Vill. L. Rev. 919 (1999).

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1999]

CONSTITUTIONAL LAW—CONSTITUTIONAL REMEDY?
THE THIRD CIRCUIT'S APPROACH TO 42 U.S.C. § 1983
MALICIOUS PROSECUTION CLAIMS

I. INTRODUCTION

The common law tort of malicious prosecution affords an individual relief where an official, acting under color of state law, abuses his or her discretion.¹ Essentially, malicious prosecution grants an individual relief where an officer of the state instigates a prosecution without probable cause.² Similar to the tort of malicious prosecution, the Civil Rights Act of 1981³ (“§ 1983”) also provides relief for the misuse of state authority, provided such abuse amounts to a violation of an individual’s constitutional rights.⁴ The question then becomes does an individual with a cause of action for malicious prosecution also have a cause of action under § 1983,

1. *See, e.g.*, *Lee v. Mihalich*, 847 F.2d 66, 69-70 (3d Cir. 1988) (listing common law elements for tort of malicious prosecution); *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987) (enumerating elements of malicious prosecution). *See generally* RESTATEMENT (SECOND) OF TORTS § 669 (1977) (defining malicious prosecution).

To establish a claim for malicious prosecution, generally there must be “malice in fact.” *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119, 883 (5th ed. 1984) (explaining common law requirement of “malice in fact”). “Malice in fact” is usually present where an official has initiated legal proceedings for a reason other than to render justice. *See id.* In contrast to a probable cause determination, the jury decides whether “malice in fact” exists. *See id.* To establish “malice in fact,” some courts require more than an absence of probable cause, while other courts see the absence of probable cause as establishing a presumption of malice. *See id.* Finally, a minority of courts adhere to the “English Rule” that, in addition, special damages must be shown. *See id.*

2. *See* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1219 (1979) (discussing when individual has cause of action for malicious prosecution).

3. 42 U.S.C. § 1983 (1994) (codifying Civil Rights Act of 1981). The text of § 1983 provides:

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.

Id.

4. *See id.* (providing relief if misuse of state authority is violation of constitutional rights). Specifically, § 1983 provides redress for misuses of state power that violate a person’s constitutional rights, privileges, or other immunities secured by the Constitution. *See id.* For a further discussion of the meaning of § 1983, see *infra* notes 14-15 and accompanying text.

and if so, which particular portion of the United States Constitution does malicious prosecution protect?⁵ In *Albright v. Oliver*,⁶ the Supreme Court of the United States considered these questions.⁷ Although the Court attempted to provide lower courts with answers to these and other questions surrounding § 1983 malicious prosecution claims, most lower courts agree with the United States Court of Appeals for the Tenth Circuit, which stated that “*Albright* [merely] muddied the waters rather than clarified them.”⁸

In an attempt to “clarify” these waters, this Casebrief analyzes the constitutional requirements and prohibitions surrounding § 1983 claims for malicious prosecution.⁹ Part II begins by recounting the state of affairs in the United States Courts of Appeals prior to the Supreme Court’s decision in *Albright*.¹⁰ Part II then discusses the *Albright* opinion and re-evaluates the lower courts’ views on this issue as a result of that opinion.¹¹ Next, part III focuses specifically on the Third Circuit’s approach to § 1983 malicious prosecution claims, both before and after *Albright*.¹² Finally, part IV suggests that there may be a possible split within the Third Circuit on this issue.¹³

II. BACKGROUND

Congress enacted § 1983 to provide citizens with a legal remedy for violations of certain constitutional rights.¹⁴ Specifically, the statute affords

5. See Eric J. Wunsch, Note, *Fourth Amendment and Fourteenth Amendment—Malicious Prosecution and § 1983: Is There a Constitutional Violation Remediable Under Section 1983?*, *Albright v. Oliver*, 85 J. CRIM. L. & CRIMINOLOGY 878, 879 (1994) (describing diversity of opinion as to whether malicious prosecution is actionable under § 1983). For a further discussion of the actionability of § 1983 claims for malicious prosecution, see *infra* notes 17-18 and accompanying text.

6. 510 U.S. 266 (1994).

7. See *id.* at 268-71 (finding substantive due process could not afford petitioner relief under § 1983 malicious prosecution claim where other more explicit text of constitution provided protection). For a further discussion of the Court’s decision in *Albright*, see *infra* notes 46-82 and accompanying text.

8. *Taylor v. Meacham*, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996).

9. For a further discussion of the constitutional requirements surrounding § 1983 claims, see *infra* notes 13-148 and accompanying text.

10. For a further discussion of the different lower court opinions, see *infra* notes 21-44 and accompanying text.

11. For a further discussion of the decision in *Albright*, see *infra* notes 45-79 and accompanying text. For a further discussion of the lower courts’ opinions after *Albright*, see *infra* notes 80-92 and accompanying text.

12. For a further discussion of the Third Circuit’s view of § 1983 malicious prosecution actions, see *infra* notes 93-141 and accompanying text.

13. For a further discussion of the possible split within the Third Circuit, see *infra* notes 142-47 and accompanying text.

14. See *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (finding § 1983 provides constitutional cause of action). Section 1983 does not confer federal rights, but rather establishes a cause of action when other constitutional liberties have been infringed. See *id.* (stating § 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred”).

a person a civil action where an official, acting under "color of law," deprives a person of his or her constitutional rights, privileges and immunities.¹⁵ To state a claim under § 1983, the plaintiff must allege a violation of a specific constitutional provision.¹⁶ Thus, one of the controversies surrounding § 1983 is whether all common law torts recognizing liability for abuse of discretion are actionable under the statute.¹⁷ With respect to the common law tort of malicious prosecution, the debate has been especially acute.¹⁸

Prior to the Supreme Court's *Albright* decision, some courts took the view that simply alleging the common law elements of the tort of malicious prosecution was sufficient to establish a well-pleaded complaint under § 1983.¹⁹ To justify this view, these courts inferred that the Fourteenth Amendment required that states determine the issue of probable cause

15. See *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (finding parties entitled to relief where officer abuses position). Courts have interpreted the phrase "under color of law" to be synonymous with the phrase "state action" as required by the Fourteenth Amendment. See *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) ("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."). Section 1983 comes into play where a violation of federal rights can be "fairly attributable to the State." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982) (explaining implications of infringement of federal rights). As a result, an official is said to act "under color of law" if he or she has state authority and proceeds to use such authority. See *Roberts v. Acres*, 495 F.2d 57, 59 (7th Cir. 1974) (stating individual acts "under color of law" if "clothed with the authority of the state and purporting to act thereunder").

16. See *Graham v. Connor*, 490 U.S. 386, 394 (1989) (explaining requirement under § 1983 that plaintiff "identify[] the specific constitutional right allegedly infringed").

17. See Wunsch, *supra* note 5, at 879 (stating "the courts have not held that every common-law tort committed by an individual acting 'under color of law' is actionable under § 1983"); see also Martin A. Schwartz, *Section 1983 Litigation*, 11 *TOURO L. REV.* 299, 301 (1995) (finding circuit courts have struggled with issue of whether claims for malicious prosecution may be asserted under § 1983); Kristin J. Brandon, Note, *Taking the Tort Out of Constitutional Law: The "Constitutional Tort" of Malicious Prosecution*, *Albright v. Oliver*, 63 *U. CIN. L. REV.* 1447, 1460 (1987) ("Prior to *Albright*, the lower courts of appeals had split regarding malicious prosecution and the manner in which it could rise to the level of a constitutional tort.").

18. See, e.g., *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992), *aff'd*, 510 U.S. 266 (1994) (stating that for claims alleging malicious prosecution there has been "embarrassing diversity of judicial opinion" regarding whether such claims are actionable under § 1983); *Brummett v. Camble*, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991) (finding that First, Fifth and Sixth Circuits "seem also to have flip-flopped on the constitutional tort status of malicious prosecution"); see also Wunsch, *supra* note 5, at 880 (asserting that "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.>").

19. See Colleen R. Courtade, Annotation, *Actionability of Malicious Prosecution Under 42 U.S.C.A. § 1983*, 79 *A.L.R. FED.* 896, 901-02 (1986) ("Some courts . . . have conclud[ed] that a mere allegation of malicious prosecution is sufficient to state a claim under § 1983. However, most courts . . . have held that the tort of malicious prosecution, standing alone, does not implicate constitutionally protected rights, and thus is not actionable under § 1983.>").

prior to prosecution.²⁰ Thus, because one of the elements of a claim for malicious prosecution is that the proceeding must have been initiated absent probable cause, simply pleading the common law elements for the tort of malicious prosecution appeared to satisfy the § 1983 requirement that the complaint allege a violation of a specific constitutional provision.²¹

Other courts, however, chose not to take such an expansive reading of the statute.²² These courts held that a claim for malicious prosecution

20. See *Albright*, 510 U.S. at 292 (Stevens, J., dissenting) (finding that common law elements of malicious prosecution satisfy § 1983 claim). Essentially, Justice Stevens argued that initiation of an action without probable cause amounts to a violation of a person's due process rights under the Fourteenth Amendment. See *id.* (Stevens, J., dissenting) (finding Due Process Clause protects against baseless prosecution). To support his due process probable cause requirement, Justice Stevens looked to the Court's decision in *Hurtado v. California*. See *id.* (Stevens, J., dissenting) (referring to prior Supreme Court decision) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). There, the Court held that California was not required to proceed by way of grand jury indictment in initiating a prosecution, but only because the state had adequate safeguards to ensure that no prosecution would be instituted without first making a proper probable cause determination. See *Hurtado*, 110 U.S. at 538. Therefore, *Hurtado* appears to have held that states must make a probable cause determination before initiating a prosecution or else be in violation of a person's due process rights. See *id.* Thus, if the essence of a malicious prosecution action is the initiation of prosecution without probable cause, then such elements in and of themselves should implicate a violation of one's Fourteenth Amendment rights. See *Albright*, 510 U.S. at 295 (Stevens, J., dissenting) (finding commencement of criminal action without probable cause quintessential type of due process violation).

In addition, Justice Stevens believed that the Fifth Amendment provided *Albright* protection from the federal government accusing a citizen of an infamous crime. See *id.* at 291 (Stevens, J., dissenting) (rejecting Fourth Amendment as proper grounds upon which to base plaintiff's claim). The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." See U.S. CONST. amend. V. Under the Fifth Amendment, the government, by way of a grand jury, must first make a finding of probable cause before it may accuse a person of an infamous crime. See *Albright*, 510 U.S. at 291 (Stevens, J., dissenting). Thus, because there was not a sufficient finding of probable cause in *Albright*'s case, Justice Stevens found the plaintiff's Fifth Amendment rights were violated. See *id.* (Stevens, J., dissenting).

21. For a further discussion of why some courts view malicious prosecution actions as violating the Constitution, see *supra* note 20 and accompanying text.

22. See John T. Ryan, Jr., Note, *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?*, 64 GEO. WASH. L. REV. 776, 790 (1996) (recognizing that some courts "have adopted narrower views of malicious prosecution," meaning more than common law elements must be alleged under § 1983); see also Wunsch, *supra* note 5, at 881 (recognizing that "[o]ther 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'" (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc)). For a further discussion of courts that view § 1983 as requiring more than the common law elements of the tort of malicious prosecution, see *infra* notes 37-45 and accompanying text.

alone does not implicate constitutionally protected rights.²³ Instead, these courts required that a plaintiff allege not only the common law elements for malicious prosecution, but also a violation of his or her rights that reaches constitutional magnitude.²⁴ The controversy thus arises among these courts over which provision or provisions of the Constitution will support a § 1983 malicious prosecution action.²⁵

A. *Courts Taking the View That the Common Law Elements for Malicious Prosecution Satisfy a § 1983 Claim*

The elements for the common law tort of malicious prosecution are: (1) the defendant initiated a criminal proceeding against the plaintiff absent probable cause; (2) the proceeding was resolved in the plaintiff's favor; and (3) the defendant acted with malice in bringing the proceeding.²⁶ Courts taking the expansive approach view allegation of the elements for the tort of malicious prosecution as sufficient for a cause of action under § 1983.²⁷ The United States Courts of Appeals for the Second, Third, Fourth, Fifth and Eleventh Circuits have taken this approach.²⁸

23. See, e.g., *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) (stating malicious prosecution actionable under § 1983 "only if defendants' conduct also infringes some provision of the Constitution or federal law").

24. See *Ryan*, *supra* note 22, at 790 (explaining that some courts have required plaintiff to allege specific violation of constitutional provision in addition to common law elements); see also *Schwartz*, *supra* note 17, at 301 (1995) (stating that some circuit courts have "ruled that malicious prosecution may be litigated under section 1983 only when the contested conduct is sufficiently egregious, whatever that may be"). For a further discussion of courts that take the narrow view of § 1983 malicious prosecution claims, see *infra* notes 37-45 and accompanying text.

25. See *Wunsch*, *supra* note 5, at 880 ("The debate [among circuit courts] entails not only whether malicious prosecution itself violates the federal Constitution, but also what particular provision the tort violates."). For a further discussion of the debate among courts over which constitutional provisions provide a remedy, see *infra* notes 82-94 and accompanying text.

26. For a further discussion of the common law tort of malicious prosecution, see *supra* note 1 and accompanying text.

27. See *Albright v. Oliver*, 510 U.S. 266, 270 n.4 (1994) (referring to lower court opinions that see "elements of a malicious prosecution action under § 1983 [as the] same as the common-law tort of malicious prosecution"), *aff'g* 975 F.2d 343 (7th Cir. 1992).

28. See *Brummett v. Camble*, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991) ("Our most recent cases have assumed that malicious prosecution violates § 1983."); *NAACP v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (finding that "[t]here is a federal right to be free from malicious prosecutions") (citing *Strength v. Hubert*, 854 F.2d 421, 425 (11th Cir. 1988) as citing *Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir. 1972)); *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) (finding constitutional action under § 1983 is met where common law elements of malicious prosecution are met); *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 § 1983."); *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1984) (stating that "the elements of liability for the constitutional tort of malicious prosecution under § 1983 coincide with those of the common law tort"); *Losch v. Borough of*

For example, in *Brummett v. Camble*,²⁹ the United States Court of Appeals for the Fifth Circuit found that the plaintiff had established a cause of action for malicious prosecution under § 1983 where he had been prosecuted under an inapplicable Texas statute for his unwillingness to make good on a bank loan.³⁰ The court found that where a plaintiff claims initiation of an allegedly baseless cause of action that ends in his or her favor, such plaintiff potentially has relief under § 1983.³¹

Parkesburg, 736 F.2d 903, 907 (3d Cir. 1984) ("It is clear that the filing of charges without probable cause and for reasons of personal animosity is [alone] actionable under § 1983."); *Morrison v. Jones*, 551 F.2d 939, 940 (4th Cir. 1977) (stating allegation of constitutional violation is not required); *Inada v. Sullivan*, 523 F.2d 485, 487-88 (7th Cir. 1975) (explaining that allegation of elements of malicious prosecution is sufficient for § 1983 claim).

29. 946 F.2d 1178 (5th Cir. 1991).

30. *See id.* at 1179. Brummett had borrowed \$33,445.80 from a bank in Texas, secured by equipment and inventory from his stereo shop. *See id.* Later, Brummett ran into financial trouble and was unable to meet his loan payments. *Id.* When the bank tried to collect the equipment Brummett had used as collateral for the loan, Brummett "informed them that it had been sold to customers in the normal course of business." *Id.* The bank, after failing to get Brummett's signature on a new note, filed charges against Brummett under Texas law. *See id.* (stating "Brummett received a letter from then County Attorney Dan Boulware, advising Brummett that he was subjected to indictment for 'removing' the collateral that secured his debt to FSB [First State Bank of Cleburne Texas]—a felony violation of TEX. PENAL CODE § 32.33"). The charges, however, were later dismissed due to insufficient evidence. *See id.* at 1180 (dismissing charges approximately three years later). Thereafter, Brummett brought an action against the prosecutors Boulware and Maclean, the county, the loan officer, the bank, the district and county attorneys and the president of the bank for malicious prosecution under § 1983, alleging that the district and county attorneys and both major stockholders of the bank had conspired with the bank to persuade the jury to convict Brummett, even though Brummett contended that he had not violated the law. *See id.* (contending no violation of law because Texas law requires collateral be transferred out of state and that prosecution was thus in bad faith). The district court eventually dismissed the charges against the public defendants, but upheld the action with respect to the private defendants. *See id.* (dismissing charges against public defendants on theory of qualified immunity). Ultimately, however, the district court also dismissed the charges against the private defendants because the court held that the statute of limitations had run on Brummett's malicious prosecution claim. *See id.* The Fifth Circuit affirmed dismissal of charges against the public defendants, but remanded the case to the district court with respect to the private defendants because it held that Brummett's malicious prosecution claim had been timely. *See id.* at 1184 (finding statute of limitations in malicious prosecution action does not accrue until underlying criminal proceeding has terminated in plaintiff's favor). State law determines the statute of limitations for § 1983 malicious prosecution claims; however, federal law determines when the cause of action accrues. *See Board of Regents v. Tomanio*, 446 U.S. 478, 483-86 (1980) (finding that federal, not state law, governs accrual of § 1983 malicious prosecution claims).

31. *See Brummett*, 946 F.2d at 1181 n.2 ("Our most recent cases have assumed that malicious prosecution violates § 1983."); *see also Thomas v. Kipperman*, 846 F.2d 1009, 1011 (5th Cir. 1989) (finding common law elements of malicious prosecution as satisfying cause of action under § 1983); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988) (stating that § 1983 claim is appropriately based on tort of malicious prosecution); *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 257-60

Likewise, in *White v. Frank*,³² the United States Court of Appeals for the Second Circuit held that the common law elements of malicious prosecution establish a claim under § 1983.³³ The plaintiff in *White* brought a § 1983 malicious prosecution action, alleging that two police officers had perjured testimony to a grand jury, at a pretrial hearing and at the actual trial.³⁴ With respect to whether § 1983 could afford a plaintiff relief in a cause of action for malicious prosecution, the court stated that “[t]here can be no question [but] that malicious prosecution can form the basis for imposition of liability under section 1983.”³⁵ Thus, these decisions show that prior to *Albright*, several circuit courts had concluded that the common law action for malicious prosecution satisfied the requirements for a § 1983 claim.³⁶

B. *Courts Taking the View That Plaintiff Must Allege a Violation of Constitutional Magnitude to Establish a § 1983 Claim*

Other circuit courts, however, have taken the view that to establish a cause of action under § 1983 for malicious prosecution, the complaint must assert a deprivation of a federally guaranteed right in addition to the common law elements of the tort.³⁷ The United States Courts of Appeals

(5th Cir. 1984) (holding that malicious prosecution is sufficient basis for § 1983 claim).

In the past, however, the Fifth Circuit had ruled that malicious prosecution was not actionable under § 1983. *See Cook v. Houston Post*, 616 F.2d 791, 794 (5th Cir. 1980) (finding torts abusing process were not actionable under § 1983); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978) (“[T]he common law tort of misuse of legal procedure, without more, does not rise to the level of Constitutional wrong remedied by Section 1983.”); *Curry v. Ragan*, 257 F.2d 449, 450 (5th Cir. 1958) (“Neither the 14th Amendment nor the Civil Rights Act purport to secure a person against unfounded or even malicious claims or suits in state courts, especially so when the laws and courts of the state are available and furnish adequate remedies to a person aggrieved.”).

The Fifth Circuit, however, explained that its present view stemmed from the fact that an implied constitutional right exists to be free of prosecution absent probable cause. *See Wheeler*, 734 F.2d at 256 (finding that Constitution protects against charges brought only upon probable cause).

32. 855 F.2d 956 (2d Cir. 1988).

33. *See id.* at 961 n.5 (stating “[t]here can be no question that malicious prosecution can form the basis for imposition of liability under Section 1983”); *see also Raysor v. Port Auth.*, 768 F.2d 34, 39 (2d Cir. 1985) (finding common law elements satisfy § 1983 claim); *Russo v. New York*, 672 F.2d 1014, 1018 (2d Cir. 1982) (same), *modified on other grounds*, 721 F.2d 410 (2d Cir. 1983); *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980) (same).

34. *See White*, 855 F.2d at 957 (discussing plaintiff's allegations). The court held that as a result of such official abuse of discretion, the plaintiff had been improperly incarcerated for nearly two years. *See id.*

35. *Id.* at 961 n.5.

36. For a further discussion of the courts following this view, see *supra* notes 26-35 and accompanying text.

37. *See Courtade*, *supra* note 19, at 902 (finding that most courts require plaintiff to allege violation of constitutional rights in addition to common law elements of malicious prosecution to constitute cause of action under § 1983); *see also*

for the First, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have taken this view.³⁸

To illustrate, in *Coogan v. City of Wixom*,³⁹ the United States Court of Appeals for the Sixth Circuit held that a plaintiff bringing a § 1983 claim for malicious prosecution must allege, in addition to the common law elements of malicious prosecution, a violation of his or her constitutional rights.⁴⁰ The plaintiff had previously been convicted for arson based upon two officers' determinations that sufficient evidence existed to establish probable cause for the crime.⁴¹ The charges, however, were dismissed due to the court's inability to render a speedy trial.⁴² Upon dismissal, the plaintiff brought a § 1983 claim for malicious prosecution, but the court dismissed the plaintiff's action due to the inability to show a lack of probable cause with respect to the proceedings for arson.⁴³ Nevertheless, the

Schwartz, *supra* note 17, at 301 (comparing Second and Third Circuits with First and Sixth Circuits and stating that latter allow litigation under § 1983 for malicious prosecution only when "defendant acted with an intent to violate the plaintiff's constitutionally protected rights"); Brandon, *supra* note 17, at 1461 (finding that other circuit courts have commanded that plaintiff establish violation of Constitution in addition to common law elements of tort of malicious prosecution).

38. See *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"); *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992) (classifying decision as requiring more than common law elements of tort for malicious prosecution); *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."); *Morales v. Ramirez*, 906 F.2d 784, 790 (1st Cir. 1990) (finding that abuse of official's authority must reach level of constitutional magnitude to establish claim under § 1983); *Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990) ("We agree with the majority rule that the defendant must subject the plaintiff to a deprivation of constitutional magnitude in order to state a claim under section 1983."); *Usher v. Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987) (finding that claim for malicious prosecution may be had under § 1983 where state provides no remedy and where malicious prosecution is "conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights" (citing *Coogan v. City of Wixom*, 820 F.2d 170, 174 (6th Cir. 1987) (asserting that malicious prosecution does not automatically constitute denial of due process); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc)); *Vasquez v. Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985) (rejecting idea that common law elements of malicious prosecution satisfy § 1983 claim); *Dunn v. Tennessee*, 697 F.2d 121, 123 (6th Cir. 1982) (same).

39. 820 F.2d 170 (6th Cir. 1987).

40. See *id.* at 175 (citing *Dunn*, 697 F.2d at 125, as holding that "[o]nly when 'the misuse of a legal proceeding is so egregious as to subject the aggrieved individual to a deprivation of constitutional dimension' does § 1983 provide a remedy for a claim of malicious prosecution").

41. See *id.* Defendant, Bruce Kirby, a Wixom police officer, determined that the plaintiff, Edward Coogan, had intentionally set fire to the office of his real estate business on two separate occasions. See *id.* at 171-72 (basing determination on existence of irregular burn patterns and fact that Coogan had increased his fire insurance coverage just prior to burnings).

42. See *id.* at 172 (articulating reason for dismissal of charges against plaintiff).

43. See *id.* at 173 (rejecting plaintiff's contention that officer had instigated prosecution absent probable cause). The court stated that "[w]here there are suf-

court indicated that in its view, a proper § 1983 action for malicious prosecution “[o]nly [exists] ‘when the misuse of a legal proceeding is so egregious as to subject the aggrieved individual to a deprivation of constitutional dimension’”⁴⁴ As a result of this case, it is clear that other circuit courts have required an additional violation of constitutional magnitude to establish a well-pleaded complaint under § 1983 for malicious prosecution.⁴⁵

C. *The Albright v. Oliver Decision*

In *Albright v. Oliver*,⁴⁶ the plaintiff, Kevin Albright, was accused of selling a substance that resembled cocaine to a police informant.⁴⁷ Although the police discovered that the substance was not cocaine, the detective on the case still testified to a criminal information regarding the sale, and as a result, an arrest warrant was issued for Albright’s arrest.⁴⁸ There was some confusion in locating Albright and arresting him because the informant told police that she had purchased the substance from John Albright, Jr., when in reality it was his son, Kevin Albright.⁴⁹ Once Kevin Albright was found, however, he immediately surrendered to the detective and bond was set at \$350.⁵⁰ Albright met his bond and was released on the condi-

cient facts to warrant a prudent person in a defendant’s position to believe that a crime was committed and that the person charged committed it,” failure to investigate further does not negate probable cause. *Id.* Because the officer had obtained expert assistance and done a thorough investigation, the court concluded that there had been probable cause to arrest the plaintiff in this case. *See id.*

44. *Id.* at 175 (quoting *Dunn*, 697 F.2d at 125).

45. For a further discussion of courts that require a violation of constitutional magnitude to make out a claim for malicious prosecution under § 1983, see *supra* notes 37-45 and accompanying text.

46. 975 F.2d 343 (7th Cir. 1992), *aff’g* 510 U.S. 266 (1994).

47. *See id.* at 344 (discussing conditions of petitioner’s arrest). Prior to the filing of the criminal information, the undercover informant, Veda Moore, told Detective Oliver that John Albright, Jr., sold her cocaine at a hotel for students in the city of Macomb. *See Albright*, 510 U.S. at 268 n.1 (describing place of alleged crime). What Moore believed to be “cocaine,” however, was really baking powder. *See id.*

48. *See Albright*, 975 F.2d at 344 (describing Oliver’s testimony at criminal information).

49. *See id.* (finding that when Oliver served John Albright, Jr. with arrest warrant, Oliver discovered that Albright was “retired pharmacist in his sixties,” and thus, could not be who Moore had said he was). After also ruling out the possibility of Albright’s oldest son, John David Albright, Detective Oliver, upon confirmation by Moore, concluded that the sale was actually made by Kevin Albright, John Albright, Jr.’s second son. *See Albright*, 510 U.S. at 268 n.1 (confirming second son was actually one involved in illegal sale). Subsequently, a grand jury indicted Kevin Albright on charges of selling a “look-alike” substance. *See id.* (explaining charges against Kevin Albright).

50. *See Albright*, 975 F.2d at 344, 347 (noting, however, that upon surrender to Detective Oliver, Albright denied his guilt of such offense). Kevin Albright did admit, however, that he had been in Macomb the night Moore alleged that he sold the look-alike substance. *See id.* at 344.

tion that he would not leave the state of Illinois without court permission.⁵¹ Later, the detective testified at a preliminary hearing, but never mentioned that there had been complications in arresting Albright.⁵²

The action was subsequently dismissed because the charges did not amount to an offense under Illinois law.⁵³ Approximately two years after the charges were dropped, Albright instituted a cause of action against the detective for malicious prosecution under § 1983.⁵⁴ In his complaint, Albright alleged that his substantive due process rights under the Fourteenth Amendment had been violated because he had a liberty interest in being free from criminal prosecution absent probable cause.⁵⁵

Unable to find a cause of action under § 1983, however, the District Court dismissed Albright's claim.⁵⁶ The Court of Appeals for the Seventh Circuit affirmed the decision, but on different grounds.⁵⁷ Thereafter, the

51. *See id.* at 344 (stating defendant could not leave state without court consent).

52. *See id.* (stating that Detective Oliver did not disclose that he had previously tried to arrest Albright's father and brother at preliminary hearing).

53. *See id.* (noting that appellate court did not know reason behind trial court's determination, because appellate court could not locate decision).

54. *See Albright*, 510 U.S. at 269 (describing cause of action against Detective Oliver in his individual and official capacities). Albright argued that the police had violated his substantive due process rights to be free of malicious prosecution. *See id.*

55. *See id.* (stating that "Oliver deprived him of substantive due process under the Fourteenth Amendment—his 'liberty interest'—to be free from criminal prosecution except upon probable cause.").

56. *See id.* (granting defendant's 12(b)(6) motion on grounds that Albright's claim did not state cause of action under § 1983). The court also found 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 269 n.3.

57. *See Albright*, 975 F.2d at 348. The Seventh Circuit determined that petitioner had filed under § 1983 because the statute of limitations had run under a suit for false arrest. *See id.* at 345. The court stated that although malicious prosecution can establish part of a claim under § 1983, without incarceration, loss of employment, or other such consequence, mere prosecution absent probable cause could not serve as a basis under § 1983. *See id.* at 346-47 (holding prosecution without some other "palpable consequence[]" did not constitute cause of action under § 1983). Furthermore, the Seventh Circuit took the view that where an adequate state tort remedy existed, the plaintiff, without more, should not be able to sue under § 1983. *See id.* (stating "just as in the garden-variety public-officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest"). The court also disagreed with Albright's argument that his inability to leave the state constituted a denial of his constitutionally protected right to travel because, as the court reasoned, Albright's confinement was meant only to assure that he would attend the preliminary hearing, not to ensure that Albright would not leave Illinois. *See id.* Finally, the court rejected Albright's equal protection argument because he did not constitute a "class" of persons necessary for an equal protection analysis. *See id.* at 348.

Supreme Court granted certiorari to determine whether the Due Process Clause of the Fourteenth Amendment could serve as the basis for a § 1983 claim.⁵⁸ Although holding that the substantive Due Process Clause was not the constitutional hook under which Albright could bring his claim, the Court's decision did not address several controversial issues surrounding § 1983 malicious prosecution claims.⁵⁹ Thus, the *Albright* decision has left many of the lower federal courts with unresolved questions, primarily involving which constitutional provisions will satisfy a claim under § 1983.⁶⁰

1. Justice Rehnquist: *The Plurality Opinion*

Justice Rehnquist gave the four-justice plurality opinion by clearly stating that to claim relief under § 1983, the plaintiff must identify the specific constitutional provision he or she claims has been violated.⁶¹ Because Albright had alleged a violation of his substantive due process right to be free of prosecution absent probable cause (versus a violation of his procedural due process rights or his Fourth Amendment rights), Justice Rehnquist proceeded to analyze whether such a provision could provide the basis for his malicious prosecution claim under § 1983.⁶² According to Justice Rehnquist, it could not.⁶³

58. See *Albright*, 510 U.S. at 268 (stating “[p]etitioner asks us to recognize a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause”).

59. See, e.g., *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998) (discussing *Albright*'s failure to establish whether plaintiff in malicious prosecution suit must allege violation of Fourth Amendment or whether procedural due process or other explicit text of Constitution may serve as basis for § 1983 cause of action). The court went on to note the confusion among lower courts over what constitutes a Fourth Amendment seizure. See *id.* at 174. For a further discussion of the unsettled effects of *Albright*, see *infra* notes 82-94 and accompanying text.

60. See *Torres*, 163 F.3d at 172 (referring to *Albright*'s confusing aftermath). For a further discussion of the variance among lower courts due to *Albright*, see *infra* notes 82-94 and accompanying text.

61. See *Albright*, 510 U.S. at 271 (stating “[t]he first step in any such claim is to identify the specific constitutional right allegedly infringed”); see also *Graham v. Connor*, 490 U.S. 386, 394 (1989) (same); *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (same).

62. See *Albright*, 510 U.S. at 271 (noting that Albright had not alleged violation of his procedural due process rights, nor violation of his Fourth Amendment rights). Thus, the court only considered whether Albright's claim fell under a substantive due process analysis. See *id.* For a discussion of Justice Ginsburg's opinion of the possibility that Albright's claim amounted to a Fourth Amendment seizure, see *infra* notes 71-81 and accompanying text.

63. See *Albright*, 510 U.S. at 275 (stating that “substantive due process . . . [could] afford [petitioner] no relief”). For a further discussion of why Albright's claim did not fall within substantive due process, see *infra* notes 64-67 and accompanying text.

Albright argued that the Due Process Clause protected his right to be free from malicious prosecution absent probable cause.⁶⁴ Justice Rehnquist disagreed, however, stating that the rights previously deemed by the Court to be liberty interests affording protection under the substantive Due Process Clause of the Fourteenth Amendment, had generally been found in the areas of "marriage, family, procreation and the right to bodily integrity."⁶⁵ In Justice Rehnquist's view, the liberty interest that Albright alleged was thus very distinct.⁶⁶ Because of this, and the fact that the Court had historically been careful not to expand the category of rights protected under the Due Process Clause, the Court declined to do so here.⁶⁷

On the other hand, because petitioner was alleging a violation of his pretrial liberties, and because the Framers had designed the Fourth Amendment to cover deprivations of pretrial liberties, Justice Rehnquist concluded that the plaintiff should have brought his claim under the Fourth Amendment.⁶⁸ Justice Rehnquist stated that, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection[,]'" the court should not review a claim under the general notion of

64. See *Albright*, 510 U.S. at 271 ("[Petitioner] claims that the action of respondents infringed his substantive due process right to be free of prosecution without probable cause.").

65. *Id.* at 272; see *Planned Parenthood v. Casey*, 505 U.S. 833, 847-49 (1992) (discussing cases that recognized substantive due process rights).

66. See *Albright*, 510 U.S. at 272 ("Petitioner's claim to be free from prosecution except on the basis of probable cause is markedly different from those [previously] recognized.").

67. See *id.* (refusing to expand substantive due process concept "because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended"). Justice Rehnquist did, however, recognize that the Fourteenth Amendment does confer both substantive and procedural due process rights. See *id.*; see also *United States v. Salerno*, 481 U.S. 739, 746 (1987) (responding to Albright's argument that Fourteenth Amendment has substantive and procedural due process rights designed to protect individual from arbitrary exercise of governmental power); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (same). The court refused, however, to concede that in every instance where government action is alleged to be arbitrary that one's substantive and procedural due process rights are necessarily implicated. See *Albright*, 510 U.S. at 272 ("[I]t does not follow that, in all of the various aspects of a criminal prosecution, the only inquiry mandated by the Constitution is whether, in the view of the Court, the governmental action in question was 'arbitrary.'").

68. See *Albright*, 510 U.S. at 274. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Court explained that although not all of the Bill of Rights had been incorporated under the Fourteenth Amendment, many of them, such as the Fourth Amendment, have been. See *Albright*, 510 U.S. at 272-73 (enumerating Bill of Rights made applicable to states).

substantive due process.⁶⁹ Unfortunately, because Albright had not specifically alleged that his Fourth Amendment rights were violated, the Court did not analyze whether Albright's claim would have been successful.⁷⁰

2. Justice Ginsburg's Concurring Opinion: The Concept of Seizure

Justice Ginsburg agreed with the plurality opinion that Albright could not institute a cause of action under § 1983 based on a violation of his substantive due process rights.⁷¹ Justice Ginsburg also agreed Albright

69. *Albright*, 510 U.S. at 273-74.

70. *See id.* at 275 ("We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari."). The court did hold, however, that petitioner's pre-trial arrest fell within the Fourth Amendment concept of seizure. *See id.* at 271; *see also* *Bower v. County of Inyo*, 489 U.S. 593, 596 (1989) (finding restraint must be intentional); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (finding restraint on liberty constitutes "seizure").

As Justice Rehnquist noted, Albright probably recognized that he should have asserted a violation of his Fourth Amendment rights, however, because Albright had probably assumed that the statute of limitations for an unlawful arrest had run, he brought his action under the Fourteenth Amendment. *See Albright*, 510 U.S. at 271 n.5 (stating "Albright may have missed the statute of limitations for any claim he had based on an unconstitutional arrest or seizure"). The court declined to express a view as to when such claim may have run. *See id.* For a further discussion of the concept of "seizure," *see infra* notes 75-81 and accompanying text.

71. *See Albright*, 510 U.S. at 276 (Ginsburg, J., concurring) (agreeing with "plurality that Albright's claim against the police officer responsible for his arrest is properly analyzed under the Fourth Amendment rather than under the heading of substantive due process").

Justice Ginsburg noted that petitioner had probably declined to invoke the Fourth Amendment because he assumed that the courts would not find him still "seized" once released from official custody, notwithstanding the fact that he had been required to attend a preliminary hearing. *See id.* at 277 (Ginsburg, J., concurring). According to Justice Ginsburg, Albright probably believed that the courts would define the concept of seizure narrowly because of the Supreme Court's holding in *Graham v. Connor*. *See id.* at 277 n.2 (citing *Graham v. Connor*, 490 U.S. 386, 389 (1989) and finding substantive due process, not Fourth Amendment, applies to post-arrest pre-charge interrogation). Because such a narrow definition of the term "seizure" would have the effect of excluding Detective Oliver's allegedly misleading testimony given at the preliminary hearing, Albright had chosen to pursue his claim under a substantive due process analysis. *See id.* at 277 (Ginsburg, J., concurring).

Additionally, if the court determined that Albright's "seizure" ended at the time of his arrest, then as the Court of Appeals suggested, the statute of limitations would have accrued at that time, and consequently, the applicable statute of limitations would have run before his complaint was filed. *See id.* at 280 (Ginsburg, J., concurring) ("The Court of Appeals suggested in dictum that any Fourth Amendment claim Albright might have had accrued on the date of his arrest . . ."). If, however, as Justice Ginsburg concluded, the concept of "seizure" is found to continue even upon official release from custody, the accrual date for a § 1983 action for malicious prosecution should be upon dismissal of the criminal charges:

Once it is recognized, however, that Albright remained effectively "seized" for trial so long as the prosecution against him remained pending, and that Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure,

should have brought his claim under the Fourth Amendment.⁷² Unlike the other Justices, however, Justice Ginsburg did consider whether, for purposes of the Fourth Amendment, Albright's pretrial deprivations and restrictions on travel during the trial could possibly amount to a seizure.⁷³ Ultimately, Justice Ginsburg concluded that they could amount to a seizure (*i.e.*, that Albright would have had a valid claim under § 1983 had he alleged a violation of his Fourth Amendment rights); however, because Albright had not chosen to predicate his claim under such provision, the Court could not afford him a remedy.⁷⁴

For purposes of the Fourth Amendment, Justice Ginsburg explained that a seizure was meant to run from the time of arrest to the time a person was released from official custody.⁷⁵ Citing support from common law, Justice Ginsburg explained that an arrest had historically been viewed as merely a means for securing a defendant's appearance in court.⁷⁶ Because other types of court-imposed restrictions similarly ensure an individual's court attendance, such as the requirement of bond or a restraint on travel, Justice Ginsburg argued that these types of restraints could likewise constitute Fourth Amendment seizures.⁷⁷ Thus, according to Justice Ginsburg, the only difference between pretrial incarceration and bail is that they are simply different methods for securing a defendant's appearance in court.⁷⁸ They were not, as Justice Ginsburg emphasized, distinctions

then the limitation period should have a different trigger. The time to file the [section] 1983 action should begin to run not at the start, but at the end of the episode in suit

Id. (Ginsburg, J., concurring). Thus, according to Justice Ginsburg, Albright could have brought an action for violation of his Fourth Amendment rights and he would have been within the statute of limitations. *See id.* (Ginsburg, J., concurring).

72. *See id.* at 280 (Ginsburg, J., concurring). Justice Ginsburg agreed with the plurality that where an Amendment explicitly protected certain rights, that provision, and not "the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 281 (Ginsburg, J., concurring) (declining to break new ground in notion of substantive due process).

73. *See id.* at 276-79 (Ginsburg, J., concurring) (conducting Fourth Amendment analysis).

74. *See id.* at 280 (Ginsburg, J., concurring) (stating that Albright's Fourth Amendment claim was not "substantively deficient," but because "Albright abandoned [it] in the District Court and did not attempt to reassert [it] in this Court," she would agree with plurality).

75. *See id.* at 279 (Ginsburg, J., concurring) (finding that "a defendant released pretrial is . . . still 'seized' in the constitutionally relevant sense").

76. *See id.* at 278 (Ginsburg, J., concurring) ("The purpose of an arrest at common law, in both criminal and civil cases, was 'only to compel an appearance in court,' and 'that purpose is equally answered, whether the sheriff detains [the suspect's] person, or takes sufficient security for his appearance, called bail.'").

77. For a further discussion of why bail constitutes a seizure, see *supra* note 76 and accompanying text.

78. *See Albright*, 510 U.S. at 278-79 (Ginsburg, J., concurring) (finding defendant released pre-trial, but with limitations, "scarcely at liberty"). Thus, according to Justice Ginsburg, so long as a person's movements are restricted, no matter the

between "seizure and its opposite."⁷⁹ Essentially, Justice Ginsburg's concept of seizure would entail any situation or form of control over a defendant that restrains his or her liberty when its effect is to ensure a defendant's appearance in court.⁸⁰ According to Justice Ginsburg, a person may still be seized for Fourth Amendment purposes, even if they have been released from official custody.⁸¹

D. *The State of Affairs Among the Circuit Courts After Albright*

Due to the *Albright* decision, it now appears that most courts recognize § 1983 malicious prosecution actions.⁸² Some courts take the view that malicious prosecution claims may only be brought under the Fourth Amendment.⁸³ Other courts, however, have viewed *Albright* as limited to its facts and see a possible violation of due process where the deprivation of liberty alleged is due to an abuse of process.⁸⁴

The Fourth, Sixth, Seventh, Tenth and Eleventh Circuits have held that an action for malicious prosecution under § 1983 can only be predicated upon a violation of a plaintiff's Fourth Amendment rights.⁸⁵ In con-

form, the defendant remains effectively seized for Fourth Amendment purposes. *See id.*

79. *Albright*, 510 U.S. at 278 (Ginsburg, J., concurring).

80. For a further discussion of "seizure" according to Justice Ginsburg, see *supra* notes 75-79 and accompanying text.

81. *See Albright*, 510 U.S. at 279 (Ginsburg, J., concurring) (holding person still facing charges, notwithstanding release from official custody, "still 'seized' in the constitutionally relevant sense" because he is bound to appear in court for trial).

82. *See Torres v. McLaughlin*, 163 F.3d 169, 181-83 (3d Cir. 1998) (Debevoise, J., dissenting) (finding most courts of appeals recognize an action for malicious prosecution under § 1983, however, some courts differ with respect to constitutional provision that must be allegedly violated); *see also* Ryan, *supra* note 22, at 803 ("The decision reached in *Albright* has created confusion in the lower federal courts. The availability of § 1983 for relief on a malicious prosecution claim brought under the Fourteenth Amendment remains unclear.").

83. For a list of courts taking the view that § 1983 malicious prosecution claims can only be brought under the Fourth Amendment, see *infra* note 85 and accompanying text.

84. For a list of courts taking the view that § 1983 claims for malicious prosecution may be predicated upon other constitutional provisions, see *infra* note 86 and accompanying text.

85. *See, e.g., Whiting v. Traylor*, 85 F.3d 581, 584-86 (11th Cir. 1996) (reading *Albright* to mean that right protected under § 1983 malicious prosecution claim is Fourth Amendment right to be free from unreasonable seizures); *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996) (holding that malicious prosecution claims must be brought for violation of Fourth Amendment and not for violation of substantive due process); *Taylor v. Waters*, 81 F.3d 429, 435-37 (4th Cir. 1996) (finding that plaintiff must show deprivation consistent with concept of "seizure"); *Moore v. Hayes*, No. 94-1894, 1996 WL 200282, at *3 (6th Cir. Apr. 24, 1996) ("To the extent that a claim of malicious prosecution is actionable under § 1983, the Supreme Court has held that the claim must be judged under the probable cause requirements of the Fourth Amendment."); *Smart v. Board of Trustees*, 84 F.3d 432, 434 (7th Cir. 1994) (interpreting *Albright* to allow constitu-

trast, the First, Third, Seventh and Ninth Circuits have stated that a plaintiff may allege a violation of his or her due process rights.⁸⁶ Moreover, the Second and Fifth Circuits have fluctuated on the issue.⁸⁷ The Second Circuit has stated that where the facts for a claim of malicious prosecution under § 1983 fit more appropriately under the concept of seizure, the plaintiff should only be allowed to base his or her claim upon a violation of his or her Fourth Amendment rights.⁸⁸ The Second Circuit, however, has attempted to avoid the issue of whether a plaintiff may still allege a violation of due process until it encounters the proper case under which to analyze the issue.⁸⁹

Similarly, the Fifth Circuit has not come forth with a clear stance on this issue.⁹⁰ In *Blackwell v. Barton*,⁹¹ the Fifth Circuit held that the plaintiff must bring an action under § 1983 in a case of mistaken identity under the Fourth Amendment and not the Fourteenth Amendment.⁹² In *Brothers v. Klevenhagen*,⁹³ however, the Fifth Circuit stated that with respect to an official's abuse of authority after arrest, a plaintiff should claim a violation under the Due Process Clause not the Fourth Amendment.⁹⁴

tional malicious prosecution claims provided they allege violation of Fourth Amendment). *But see* *Ruehman v. Sheahan*, 34 F.3d 525, 528-29 (7th Cir. 1994) (noting that plaintiffs may pursue due process theory against defendant).

86. *See Torres*, 163 F.3d at 172 (finding § 1983 malicious prosecution claim can be based upon violation of constitutional provision other than Fourth Amendment); *Hall v. Gonfrade*, No. 93-2368, 1994 WL 527165, at *2 (1st Cir. Sept. 29, 1994) (stating that plaintiff in malicious prosecution action under § 1983 can claim deprivation of constitutional due process rights); *Cantarella v. Kuzemchak*, No. 93-16333, 1994 WL 529530, at *2 (9th Cir. Sept. 29, 1994) (holding that § 1983 action for malicious prosecution is conceivable under due process).

87. For a further discussion of the Second and Fifth Circuit decisions, see *infra* notes 88-94 and accompanying text.

88. *See Ayeni v. Mottola*, 35 F.3d 680, 691 (2d Cir. 1994) (finding it "doubtful that any plaintiff may pursue a Fifth Amendment substantive due process claim based on the same facts as alleged in a Fourth Amendment unreasonable search claim"). The Second Circuit went on to say that it would appear that "substantive due process is unavailable as a restraint on conduct regulated by the Fourth Amendment." *Id.*

89. *See id.* (finding possibility for substantive due process violation where conduct of search and seizure "shocks the conscience" of court).

90. For a further discussion of the split in the Fifth Circuit, see *infra* notes 91-94 and accompanying text.

91. 34 F.3d 298 (5th Cir. 1994).

92. *See id.* at 302 (requiring action under Fourth Amendment violation).

93. 28 F.3d 452 (5th Cir. 1994).

94. *See id.* at 456-57 (finding Fourteenth Amendment claim proper where official abuse of authority occurs after arrest).

III. ANALYSIS

A. *The Third Circuit's View Pre-Albright*

Prior to the *Albright* decision, the Third Circuit took the most expansive approach with respect to § 1983 malicious prosecution claims.⁹⁵ For example, in *Lee v. Mihalich*,⁹⁶ the plaintiffs, a nursing home and its owner, brought an action against investigators with the state Attorney General's office, seeking damages for malicious prosecution under § 1983.⁹⁷ In response, the officials moved for dismissal of the action on grounds of qualified immunity.⁹⁸ The United States District Court for the Eastern District

95. See Wunsch, *supra* note 5, at 880 (stating that “[t]he 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”); see also Ryan, *supra* note 22, at 790 (stating that Third Circuit has adopted liberal view with respect to malicious prosecution actions under § 1983).

96. 847 F.2d 66 (3d Cir. 1988).

97. See *id.* at 67. The Denver Nursing Home, owned by William Lee, was a participant in Pennsylvania's Medicaid Assistance Program, which received federal reimbursements for certain allowable expenses. See *id.* at 67-68. Leonard Mihalich and Bradford King, investigators for the Medicaid Fraud Unit, suspected that the Denver Nursing Home might have been involved in improprieties regarding claims for reimbursements and began an investigation into the home's operation. See *id.* at 68. Following the investigation, King and Mihalich filed two 64 count informations alleging Medicaid fraud against Lee and the Denver Nursing Home. See *id.* Because the law governing the action required that criminal prosecutions be brought within two years after the offense was committed, and because the court determined that the last criminal act occurred on January 11, 1980 (*i.e.*, the date of the last report Denver Nursing Home filed) and the informations were not filed until January 12, 1982, such informations were untimely. See *id.* The investigators, however, arguing under an exception that allows criminal actions to be brought within one year of the “discovery” of the offense, where fraud is an element of the crime, asserted that if the fraud was not discovered until execution of the search warrant in July, 1981, then the information filed on January 12, 1982, was timely. See *id.* The Court of Common Pleas rejected this argument. See *id.* (assuming that if investigators had had sufficient evidence to support their case they had it “by early November of 1980,” thus concluding that evidence secured in July of 1981 via search warrant, was cumulative). As a result, the charges against Lee and the nursing home were dropped. See *id.* Upon dismissal of the charges Lee and the Denver Nursing Home brought suit for malicious prosecution under § 1983, alleging that the prosecution was malicious because the investigators “disregarded a clear statute of limitations ban.” See *id.*

98. See *id.* at 67. Government officials conducting their discretionary duties generally are immune from civil damages for liability where their actions “do[] not violate clearly established statutory or constitutional rights of which a reasonable person would . . . know[].” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity was created to insulate government officials from the personal costs of litigation and the burden such litigation imposes upon government officials' ability to perform their official duties. See *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (explaining purpose behind defense of qualified immunity). When resolving issues of qualified immunity, the first step is to determine “whether the plaintiff has alleged a deprivation of a constitutional right.” *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). Whether qualified immunity

of Pennsylvania denied the investigators' motion.⁹⁹ The Third Circuit, however, determined that the investigators were, in fact, entitled to the defense of qualified immunity.¹⁰⁰ Even though appellees were not successful in their malicious prosecution action, the Third Circuit clearly stated that a claim for malicious prosecution brought under § 1983 is properly pleaded where the elements of liability for the common law tort of malicious prosecution are sufficiently alleged.¹⁰¹

applies depends upon how clearly the right which the plaintiff asserts has been established by law. *See id.* (referring to question whether right allegedly violated was clearly established at time of events); *Anderson*, 483 U.S. at 640 (stating "contours of the right must be sufficiently clear"). The test for qualified immunity is whether a reasonable officer would understand that what he or she has done violates the law. *See Anderson*, 483 U.S. at 641. The subjective belief of the officer is not what is important, but whether a reasonable jury could find that the officer's belief in the lawfulness of his or her actions was reasonable or not. *See Martin v. Malhoyt*, 830 F.2d 237, 253-54 (D.C. Cir. 1987).

99. *See Lee v. Mihalich*, No. CIV.A. 83-2093, 1987 WL 11905, at *3 (E.D. Pa. June 2, 1987) (denying defendant's motion for summary judgment based on defense of qualified immunity). After the district court denied defendant's motion for summary judgment based on the defense of qualified immunity, the defendants were able to appeal the decision because an order denying such defense is a final judgement. *See Lee*, 847 F.2d at 67 ("An order denying a summary judgment motion for qualified immunity is an appealable final order."); *see also Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (finding "an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal"), *on remand to sub nom. Pelletier v. Federal Home Loan Bank*, 130 F.3d 429 (9th Cir. 1997), *and reh'g in part* 145 F.3d 1094 (9th Cir. 1998); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (finding order denying summary judgment motion for qualified immunity is appealable final decision), *on remand to sub nom. Forsyth v. Kleindienst*, 772 F.2d 894 (3d Cir. 1983); *Hynson v. City of Chester*, 827 F.2d 932, 933 (3d Cir. 1987) (noting parties asserting qualified immunity defense may appeal order denying summary judgment because denial is "final decision").

100. *See Lee*, 847 F.2d at 71-72 (stating that Appellants were entitled to defense of qualified immunity). In the court's opinion, because the Pennsylvania law was unclear regarding when the statute of limitations ran for this type of action, a reasonable jury could conclude that the investigators did not know that their actions violated the law. *See id.* at 70-71 (stating "[o]n this record no reasonable jury could find that the unlawfulness of the investigators' actions was so apparent that their claim of qualified immunity must be denied").

101. *See id.* at 69-70 (stating common law elements for malicious prosecution satisfy claim under § 1983); *see also Deary v. Three Un-named Police Officers*, 746 F.2d 185, 194 n.11 (3d Cir. 1984) (listing elements necessary for § 1983 action for malicious prosecution), *abrogation on other grounds, sub nom. Karnes v. Skrutski*, 62 F.3d 485 (3d Cir. 1995); *Losch v. Parkesburg*, 736 F.2d 903, 907 (3d Cir. 1984) (finding that filing merely for reasons of personal animosity, without probable cause, is actionable under § 1983); *Jennings v. Shuman*, 567 F.2d 1213, 1217 (3d Cir. 1977) (noting that malicious prosecution occurs when there is no probable cause and action is based on bad motive); *Bell v. Brennan*, 570 F. Supp. 1116, 1118 (E.D. Pa. 1983) (finding elements of liability for constitutional tort of malicious prosecution under § 1983 coincide with those of common law tort). According to the Third Circuit, a civil action for a § 1983 malicious prosecution requires that: "(1) the defendant initiate a criminal proceeding; (2) which ends in plaintiff's favor; (3) which was initiated without probable cause; and (4) the defendant acts maliciously or for a purpose other than bringing the defendant to justice." *See Lee*,

B. *Post Albright Third Circuit Decisions*1. *Facts of Torres v. McLaughlin*

In *Torres v. McLaughlin*,¹⁰² the plaintiff, Torres, was arrested and charged with unlawful possession of eighty-seven vials of cocaine with intent to deliver.¹⁰³ As a result of his arrest, Torres was required to attend a preliminary hearing, a pretrial hearing and to post bond.¹⁰⁴ At trial, the arresting officer, Officer McLaughlin, was the sole witness for the government.¹⁰⁵ Based on his testimony, the jury found Torres guilty and sentenced him to three to six years in jail and assessed a fine of \$10,000.¹⁰⁶

Seven and a half months later, Torres' attorney moved for a new trial and the Commonwealth sought a *nolle prosequi*, because both believed that McLaughlin had previously lied about a search warrant in another case.¹⁰⁷ The court granted both motions and released Torres.¹⁰⁸ Upon his release from jail, Torres brought a § 1983 claim for malicious prosecution against Officer McLaughlin and his supervisor, John Sunderhauf, alleging that McLaughlin had conveyed false information to the prosecutor that had resulted in Torres' incarceration.¹⁰⁹ Torres asserted that his First, Fourth, Fifth and Fourteenth Amendment rights had been violated.¹¹⁰ McLaughlin moved for summary judgment, claiming that he was entitled to the defense of qualified immunity.¹¹¹ The District Court, however, interpreting *Albright*, held that claims for malicious prosecution under § 1983 must

847 F.2d at 69-70 (citing elements of malicious prosecution claim under § 1983). Actual malice is defined as "ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Id.* at 70; see RESTATEMENT (SECOND) OF TORTS § 668 (1977) (defining "actual malice" as "ill will").

102. 163 F.3d 169 (3d Cir. 1998).

103. *See id.* at 170

104. *See id.* at 171 (stating Torres appeared at preliminary hearing, was informed of charges, signed his own bond and was required to attend pre-trial hearing and trial).

105. *See id.*

106. *See id.*

107. *See id.* (asserting McLaughlin may have lied in application for search warrant in another, unrelated case). A *nolle prosequi* is a voluntary withdrawal by the plaintiff in a civil action or the prosecuting attorney in a criminal suit. *See BLACK'S LAW DICTIONARY* 1048 (6th ed. 1990) (defining "*nolle prosequi*" as "[a] formal entry upon the record, by the plaintiff in a civil suit, or more commonly, by the prosecuting attorney in a criminal action by which he declares that he 'will no further prosecute' the case, either as to some of the defendants, or altogether."); *see also* *Brantley v. Commonwealth*, 506 A.2d 970, 973 (Pa. Commw. Ct. 1986).

108. *See Torres*, 163 F.3d at 171 (granting attorney's and Commonwealth's motion, thus, releasing Torres).

109. *See id.*

110. *See id.* The district court, however, concluded that only a claim for a violation of Torres' Fourth Amendment rights could survive. *See id.* (dismissing Torres' claims for violations of his First, Fifth and Fourteenth Amendments).

111. *See id.*

be analyzed under the Fourth Amendment.¹¹² Because the court determined that Torres' post-conviction incarceration amounted to a seizure and thus, a violation of his Fourth Amendment rights, it denied defendant's motion for summary judgment.¹¹³ Subsequently, defendants appealed this denial of their summary judgment motion based on the defense of qualified immunity.¹¹⁴

2. *The Third Circuit Holding*

First, the Third Circuit held that after *Albright* it was clear that § 1983 claims for malicious prosecution must allege violations of constitutional magnitude.¹¹⁵ Second, in contrast to the district court's decision, the Third Circuit did not find that either Torres' post-conviction incarceration amounted to a Fourth Amendment seizure or that § 1983 claims for malicious prosecution must always be analyzed under the Fourth Amendment.¹¹⁶ Rather, the court interpreted *Albright* to mean that only where

112. *See id.* at 172 (finding district court construed *Albright* "to allow *only* malicious prosecution claims based on violations of the Fourth Amendment").

113. *See Torres v. McLaughlin*, 966 F. Supp. 1353, 1364 (finding that post-incarceration conviction amounts to Fourth Amendment seizure and there was sufficient evidence to survive summary judgment motion), *rev'd*, 163 F.2d 169 (3d Cir. 1998). The district court, however, rejected Justice Ginsburg's opinion, suggesting that even the requirement that Torres attend a preliminary hearing could constitute a seizure. *See id.* On the other hand, the district court suggested that restrictions on a person's travel or requiring the defendant to post bond could amount to a Fourth Amendment seizure. *See id.* at 1360-61.

114. *See Torres*, 163 F.3d at 171. The Third Circuit, however, never addressed whether the officials should have been entitled to the defense of qualified immunity because the court, in refusing to find a violation of Torres' Fourth Amendment rights (because it refused to recognize post-conviction incarceration as a seizure), never reached the question. *See id.* at 174-75.

115. *See id.* at 172. Senior Judge Debevoise explained that although the court previously had only required persons asserting § 1983 malicious prosecution actions to allege its common law elements, in light of *Albright* it was now clear that plaintiffs must allege a violation of a constitutional right. *See id.* at 180-81 (Debevoise, J., dissenting).

116. *See id.* at 173-74 (finding post-conviction incarceration does not amount to seizure under Fourth Amendment). The court stated that the law is clearly established as to when a Fourth Amendment seizure begins. *See id.* at 174 (finding it "beyond dispute that the Fourth Amendment has been construed to include events both before and after a formal arrest"); *see also Bell v. Wolfish*, 441 U.S. 520, 556-60 (1979) (assuming *arguendo* that Fourth Amendment applies to pretrial detainees' room and body cavity searches); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1974) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (finding Fourth Amendment applies to police conduct that stops short of "a 'technical arrest' or 'full-blown search'"). On the other hand, the court stated that the law was not clearly defined as to when a seizure ends. *See Torres*, 163 F.3d at 174 (stating that Supreme Court had not determined when Fourth Amendment protections no longer protect individuals from unreasonable searches and seizures). Because a post-conviction incarceration occurs long after an arrest, the court declined to categorize it as a seizure and to afford it Fourth Amendment protection. *See id.* Rather, the court believed that the Fourth

claims are covered by explicit Constitutional text is a person prohibited from alleging a violation of his or her substantive due process rights.¹¹⁷ Thus, the court reasoned, where a claim falls within the definition of a seizure, it must be brought under the Fourth Amendment because this provision specifically addresses such deprivations of liberty.¹¹⁸ The court, however, held that where the Constitution does not explicitly cover a malicious prosecution claim, such a claim may be based on a Constitutional provision other than the Fourth Amendment.¹¹⁹

Amendment was meant only to apply to pretrial deprivations of liberty. *See id.* (“[The] Framers of the Constitution drafted the Fourth Amendment to quell *pre-trial* deprivations of liberty.”). The court adopted this view despite Justice Ginsburg’s opinion in *Albright*, stating that certain restrictions on a person’s liberty occurring post-trial might amount to a seizure. *See id.*; *Riley v. Dorton*, 115 F.3d 1159, 1163 (4th Cir. 1997) (refusing to apply Fourth Amendment beyond pretrial deprivations of liberty), *cert. denied*, 118 S. Ct. 631 (1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (finding that mistreatment of pretrial detainee falls under Fourteenth Amendment); *Brothers v. Klevenhagen*, 28 F.3d 452, 456 (5th Cir. 1994) (noting that text of Fourth Amendment does not support its application to events after arrest); *Wilkins v. May*, 872 F.2d 190, 192-93 (7th Cir. 1989) (concluding that constitutionality of pretrial detention falls under Fourteenth Amendment rather than Fourth Amendment). The court went on to say that even those courts that have extended the concept of seizure to apply to the period a defendant is kept with his or her arresting officer do not hold that a post-conviction incarceration amounts to a seizure. *See Torres*, 163 F.3d at 174; *see also Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998) (“[I]t seriously misunderstands the Fourth Amendment to treat a conviction based on improperly obtained evidence as an independent violation of the Fourth Amendment. The conviction is not an unreasonable search and seizure.”); *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996) (“Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody . . .”).

In addition, the court did not interpret *Albright* to mean that a plaintiff must allege a violation of his or her Fourth Amendment rights in order to satisfy a § 1983 claim for malicious prosecution. *See Torres*, 163 F.3d at 172.

117. *See Torres*, 163 F.3d at 172 (noting that “*Albright* commands that claims governed by explicit constitutional text may not be grounded in substantive due process.”). Senior Judge Debevoise, dissenting, however, pointed out that a majority of the courts of appeals have held otherwise, interpreting *Albright* to require § 1983 malicious prosecution claims to be predicated upon the Fourth Amendment. *See id.* at 181 (Debevoise, J., dissenting) (stating that majority of circuit courts, including Second, Fourth, Sixth, Seventh, Tenth and Eleventh Circuits, conclude that “constitutional malicious prosecution claims remain viable after *Albright* although based upon violations of the Fourth Amendment”). For a further discussion of appellate courts finding plaintiffs must allege a violation of Fourth Amendment rights, *see supra* note 85 and accompanying text.

118. *See Torres*, 163 F.3d at 172 (interpreting *Albright* to mean that where plaintiff brings § 1983 action for malicious prosecution alleging deprivation of pretrial liberty, plaintiff must also allege violation of Fourth Amendment rights).

119. *See id.* (interpreting *Albright* to represent “broader proposition that a section 1983 claim may be based on a constitutional provision other than the Fourth Amendment” such as procedural due process or other explicit text of Constitution). It is only where the constitution provides explicitly for an alleged violation that a plaintiff may not base his or her complaint upon substantive due process. *See id.*

Because the Third Circuit did not find that a post-conviction incarceration, such as Torres asserted, fell within the definition of a seizure, and because the district court had dismissed plaintiff's First, Fifth and Fourteenth Amendment claims, it reversed the lower court's decision and remanded the case to the district court to enter summary judgment in favor of McLaughlin.¹²⁰

3. *Facts of Gallo v. City of Philadelphia*

The only other Third Circuit case that has seriously attempted to apply the *Albright* analysis is *Gallo v. City of Philadelphia*.¹²¹ In *Gallo*, the owner of a cabinet business, was charged with arson.¹²² Following an indictment, Gallo was required to post a \$10,000 bond, was restricted from leaving New Jersey, was required to attend all court hearings and was instructed to contact Pretrial Services weekly.¹²³ Upon discovering, however, that the fire marshal altered his original report from electrical appliance to incendiary and added to the text that he believed someone had deliberately wrapped a cloth around the iron, thus suggesting arson, the jury acquitted

120. *See id.* at 175 (holding plaintiff's post-conviction incarceration did not rise to seizure, thus, reversing order of district court and remanding case to district court). The court, upon remanding the case to the district court, directed that summary judgment be entered in favor of the two officers, McLaughlin and Sunderhauf. *See id.*

121. *See Gallo v. City of Philadelphia*, 161 F.3d 217, 221 (3d Cir. 1998) (noting that this was court's "first occasion to consider *Albright's* holding that section 1983 malicious prosecution claims must show more than a substantive due process violation"). Even though the court has addressed two post *Albright* malicious prosecution claims, it has not had occasion to consider the relevant issue in *Albright*. *See Montgomery v. De Simone*, 159 F.3d 120, 124 (3d Cir. 1998) (considering only whether plaintiff must demonstrate absence of probable cause to establish malicious prosecution claim); *Hilferty v. Shipman*, 91 F.3d 573, 579 (3d Cir. 1996) (addressing only issue of whether *nolle prosequi* satisfies common law element of malicious prosecution that proceeding end in plaintiff's favor).

122. *See Gallo*, 161 F.3d at 219-20 (explaining former charge against plaintiff that, having ended in his favor, led plaintiff to bring claim for malicious prosecution under § 1983). Gallo was charged with setting fire to his cabinet shop located in Philadelphia. *See id.* at 219 (stating that fire broke out on June 11, 1989). The fire marshal, dispatched to determine the cause of the fire, stated in his report that the fire had started when a hand iron ignited a cloth. *See id.* After the fire, Gallo filed a claim with his insurance company. *See id.* The insurance company's two investigators spoke to Pelszynski, whereupon they filed a revised report as to the fire's cause, stating this time that the fire was due to incendiary because someone deliberately placed a cloth around a heated iron. *See id.* Upon filing this revised report, the fire marshal gave the case to the joint Philadelphia-Federal arson task force, whereupon Thomas Rooney and William Campbell, as agents from the Bureau of Alcohol, Tobacco & Firearms, filed a report stating that the fire was due to incendiary, making no mention of the fire marshal's original report. *See id.* Based on this report, a federal grand jury indicted Gallo. *See id.* (stating "Gallo [was indicted] on two counts of mail fraud, one count of malicious destruction of a building by fire, and one count of making false statements to obtain a loan").

123. *See id.* (stating restrictions on plaintiff's pretrial liberties). Although Gallo was never arrested, detained or handcuffed, his restrictions remained in effect until his trial in March of 1995. *See id.*

Gallo.¹²⁴ Following dismissal of the charges, Gallo brought an action for malicious prosecution under § 1983, alleging that the municipal fire marshal altered his views on the fire's cause because of pressure from Gallo's insurance company.¹²⁵

The District Court for the Eastern District of Pennsylvania held that Gallo must assert a violation of his Fourth Amendment rights; however, the court ruled that the restrictions on Gallo's post-indictment liberty, (*i.e.*, the requirement that he post bond, the prohibition against his leaving New Jersey, the requirement that he attend all court hearings and that he contact Pretrial Services on a weekly basis) did not amount to Fourth Amendment seizures.¹²⁶

Conversely, the Third Circuit, relying on Justice Ginsburg's analysis, found that the restrictions on Gallo's post-indictment liberty amounted to a Fourth Amendment seizure.¹²⁷ In addition, the court interpreted *Albright* to mean that one must allege more than the common law elements for malicious prosecution to assert a claim under § 1983 and, specifically,

124. *See id.* at 219-20. It was not until two months before Gallo's trial that he learned of the fire marshal's original report. *See id.* at 219. The fire marshal, however, denied the existence of an original report. *See id.* at 219-20. The jury, however, believing the evidence, acquitted Gallo of the charges of arson. *See id.* at 220 (believing report had been altered). For a further discussion of the discrepancy between the fire marshal's original report and the report submitted at trial, see *supra* note 122 and accompanying text.

125. *See id.* at 220. Following acquittal of his charges, Gallo filed two suits, one claiming that the City of Philadelphia, Pelszynski, Kufta and Rizzo, among others, had instigated a federal prosecution against him without probable cause and the other, a *Bivens* action, claiming that Rooney and Campbell had violated his constitutional rights when they failed to admit the existence of the original report. *See id.* Because both suits alleged violations of plaintiff's constitutional rights, the district court combined the two actions. *See id.* (consolidating *Bivens* action and claim for § 1983 malicious prosecution violation).

126. *See id.* Upon plaintiff having asserted his § 1983 malicious prosecution claim, Rooney and Campbell both filed motions to dismiss based on qualified immunity and contending that they were not required to have turned over the original report sooner than they had. *See id.* (filing motion to dismiss and asserting that failure to deliver exculpatory material in more timely manner is not violative of Constitution). The district court granted both of these motions because it determined that Gallo's pretrial restrictions did not amount to seizures under the Fourth Amendment. *See id.* (interpreting *Albright* to require plaintiff allege violation of Fourth Amendment in order to satisfy § 1983 malicious prosecution claim). The court did not, however, rule on whether Gallo had met the common law elements for the tort of malicious prosecution or whether the federal agents were entitled to qualified immunity. *See id.* (refusing to consider issue because that Gallo's allegations did not amount to seizure).

127. *See id.* at 222 (finding pretrial liberties of posting bond, restrictions on travel and contact with weekly service amounted to seizure within meaning of Fourth Amendment). The *Gallo* court relied on Justice Ginsburg's analysis of seizure, stating that even though one incarcerated pending trial suffers greater restraints on liberty than one released on bail, only the latter remains seized. *See id.* at 223.

that the plaintiff must show a deprivation of liberty consistent with the notion of seizure.¹²⁸

C. *The Current State of the Law in the Third Circuit*

With respect to § 1983 claims for malicious prosecution, the *Albright* decision has narrowed the Third Circuit's formerly expansive view.¹²⁹ Today, the Third Circuit takes the position that claims for malicious prosecution under § 1983 must allege more than just the common law elements of malicious prosecution.¹³⁰

Whether the Third Circuit requires that claims for malicious prosecution be brought under the Fourth Amendment, however, is not clear.¹³¹ In *Gallo*, the court stated that "a plaintiff asserting a malicious prosecution claim must show 'some deprivation of liberty consistent with the concept of "seizure."'"¹³² In *Torres*, however, the court stated that a plaintiff could bring a cause of action for a § 1983 malicious prosecution claim under a provision other than the Fourth Amendment, such as procedural due process.¹³³ In this court's view, the *Albright* decision merely established that where the Constitution explicitly provides protection, a plaintiff cannot bring a cause of action under the more loosely defined concept of substantive due process.¹³⁴ Thus, because the court in *Gallo* determined that the restrictions on plaintiff's pretrial liberties (*i.e.*, the requirements that he post bond, that he attend all court hearings and that he keep in contact with Pretrial Services) amounted to a seizure, a violation that is specifically

128. See *id.* at 223-24 (finding common law elements of malicious prosecution alone do not satisfy § 1983 claim). The court stated that simply proving prosecution without probable cause states only an action for the common law tort of malicious prosecution. See *id.* at 222 ("*Albright* implies that prosecution without probable cause is not, in and of itself, a constitutional tort."). Rather, § 1983 is intended to rectify violations of constitutional magnitude. See *id.* (finding deprivation of liberty consistent with notion of seizure to satisfy constitutional violation requirement). For a further discussion of why some courts find a constitutional violation contained within the common law elements of malicious prosecution, see *supra* note 17 and accompanying text.

129. For a further discussion of why the Third Circuit has narrowed its formerly expansive view, see *supra* note 128 and accompanying text.

130. For a further discussion of the Third Circuit's requirements for malicious prosecution, see *supra* note 115 and accompanying text.

131. For a further discussion of whether the Third Circuit allows § 1983 malicious prosecution claims to be predicated upon sections other than the Fourth Amendment, see *infra* notes 132-41 and accompanying text.

132. See *Gallo*, 161 F.3d at 222 (quoting *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). For a further discussion of this issue, see *infra* notes 131-39 and accompanying text.

133. See *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998) (stating "a section 1983 claim may be based on a constitutional provision other than the Fourth Amendment" and that "*Albright* commands that claims governed by explicit constitutional text may not be grounded in substantive due process").

134. For a further discussion on the limitations to substantive due process claims, see *supra* notes 117-19 and accompanying text.

provided for by the Fourth Amendment, then presumably both the *Torres* court and the *Gallo* court would agree that based on these facts the plaintiff had to bring his § 1983 claim for malicious prosecution under the Fourth Amendment.¹³⁵ *Gallo* never stated that a plaintiff *must* allege a violation of the Fourth Amendment, it merely acknowledged that because the plaintiff was alleging facts that amounted to a seizure, the court should analyze his § 1983 malicious prosecution claim under the Fourth Amendment.¹³⁶

Thus, it is possible that these two holdings are consistent.¹³⁷ The *Torres* court said that other courts may be requiring that plaintiffs allege a violation of their Fourth Amendment rights only because those cases' factual situations involved only pretrial deprivations of liberty.¹³⁸ Because the Fourth Amendment covers pretrial deprivations of liberty, then consistent with *Albright*, these courts should require the action to be brought under the Fourth Amendment.¹³⁹ When the allegation, however, does not fall within the purview of the Fourth Amendment (*i.e.*, does not constitute seizure), the *Torres* court reads *Albright* as allowing a § 1983 action for malicious prosecution under another constitutional provision.¹⁴⁰ Thus, it is possible that the Third Circuit simply views *Gallo* as factually distinct, requiring only that plaintiffs who allege violations consistent with those asserted by the plaintiff in *Gallo* allege violations under the Fourth Amend-

135. See *Torres*, 163 F.3d at 172. The court stated:

[T]o the extent that other courts of appeal seem to hold that *Albright* requires a Fourth Amendment violation as a basis for a section 1983 malicious prosecution claim, we note that those cases are factually distinct from *Torres*'s. *Albright* and the subsequent courts of appeal cases that rely on the Fourth Amendment involved *pre-trial* deprivations of liberty. *Torres*'s claims, however, arises from *post-conviction* incarceration.

Id. (emphasis in original).

136. For a further discussion of the holding in *Gallo*, see *supra* notes 126-28 and accompanying text.

137. For a further discussion of why the *Gallo* and *Torres* decisions may be consistent, see *supra* notes 129-34 and accompanying text.

138. See *Torres*, 163 F.3d at 172 (stating that to extent other court of appeals have required allegation of Fourth Amendment violation, "[those] cases . . . involved *pre-trial* deprivations of liberty. *Torres*'s claim, however, arises from *post-conviction* incarceration").

139. See *id.* (requiring plaintiffs bringing § 1983 claims for malicious prosecution to allege violations of constitutional provision that provide explicitly for such violations).

140. See *id.* (distinguishing *Albright* factually). Justice Rehnquist explained that in *Albright*, plaintiff's claim was a very limited one that did not raise a procedural due process argument. See *id.* Thus, because *Albright* did not assert a violation of any other constitutional amendments, the *Torres* court did not interpret *Albright* as limiting § 1983 malicious prosecution claims to violations of the Fourth Amendment. See *id.* at 173 (finding "section 1983 malicious prosecution claim may also include police conduct that violates the Fourth Amendment, the procedural due process clause or other explicit text of the Constitution"). For a further discussion of why the court takes an expansive view of § 1983 malicious prosecution actions, see *supra* notes 131-36 and accompanying text.

ment, while plaintiffs claiming different types of violations may still allege violations under other constitutional provisions.¹⁴¹

One thing that is relatively certain from the *Torres* decision, however, is that the Third Circuit does not view post-conviction incarcerations as amounting to seizures.¹⁴² On the other hand, the *Gallo* decision seems to stand for the proposition that certain pretrial deprivations of liberty, such as the requirement that plaintiff post bond, the restrictions on his or her travel or the requirement that plaintiff attend court hearings, will amount to a Fourth Amendment seizure.¹⁴³

IV. CONCLUSION

Because of the Supreme Court's decision in *Albright*, it is now clear that plaintiffs alleging a § 1983 claim for malicious prosecution in the Third Circuit must demonstrate some violation of constitutional magnitude.¹⁴⁴ Just what amounts to "constitutional magnitude," however, is not entirely certain.¹⁴⁵ It is possible that the *Torres* decision and the decision in *Gallo* are consistent with one another, both allowing claims for malicious prosecution under § 1983 to be brought under other constitutional provisions, but only where the facts alleged do not amount to Fourth Amendment seizures.¹⁴⁶ It is clear that the *Torres* court takes this view.¹⁴⁷ On the other hand, *Gallo* may have stopped short of interpreting *Albright*, as many other circuit courts have, to mean that § 1983 malicious prosecution claims may only be predicated upon Fourth Amendment viola-

141. For a further discussion of how *Gallo* is factually distinct, see *supra* notes 117-19 and accompanying text.

142. For a further discussion of why the court rejected post-conviction incarceration as seizure, see *supra* note 116 and accompanying text.

143. See *Gallo v. City of Philadelphia*, 161 F.3d 217, 225 (3d Cir. 1998). On the other hand, there may even be a split within the Third Circuit regarding the pretrial deprivations in *Gallo* that were determined to constitute a seizure. See *Torres*, 163 F.3d at 176 (Debevoise, J., dissenting) (alluding to fact that plaintiff in *Torres* suffered similar pretrial deprivations, although court refused to label them as seizure). The plaintiff in *Torres*, like the plaintiff in *Gallo*, also suffered pretrial deprivations, such as the fact that he was released only upon bond. See *id.* at 179 (citing *Gallo*, 161 F.3d at 222) (Debevoise, J., dissenting) (stating that "[t]he recent decision of another panel of this Court agrees with Justice Ginsburg's concurring opinion in *Albright* and holds that restrictions such as those imposed upon Torres in this case amount to a seizure"). Thus, because the court in *Torres* refused to acknowledge these similar pretrial deprivations as seizures, the possibility of a split in the Third Circuit remains. See *id.* (Debevoise, J., dissenting).

144. For a further discussion of why the Third Circuit now requires § 1983 malicious prosecution claims to allege a violation of constitutional dimension after *Albright*, see *supra* note 116 and accompanying text.

145. For a further discussion of the possible split within Third Circuit, see *supra* notes 129-143 and accompanying text.

146. For a further discussion of the possible consistency within the Third Circuit, see *supra* notes 131-137 and accompanying text.

147. For a further discussion of the decision in *Torres*, see *supra* note 140 and accompanying text.

tions.¹⁴⁸ Because there have only been two decisions in the Third Circuit that have addressed this issue, it remains to be seen how the court will decide this possible split.¹⁴⁹ Although plaintiffs must wait for the courts definitively to resolve this issue—*Gallo*, like *Albright*, having “muddied the waters” for practioners in the Third Circuit—plaintiffs’ best bet is to bring a § 1983 malicious prosecution action under the Fourth Amendment and to attempt to allege violations that amount to deprivations of pretrial liberties.

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148. For a further discussion of possible split, see *supra* notes 129-143 and accompanying text.

149. For a further discussion of how the Third Circuit has only considered these issues on two occasions, see *supra* note 121 and accompanying text.

