FURTHER PUNISHING THE WRONGFULLY ACCUSED: *MANUEL V. CITY OF JOLIET*, THE FOURTH AMENDMENT, AND MALICIOUS PROSECUTION

JAMES R. HOLLEY*

I. INTRODUCTION

The Fourth Amendment to the United States Constitution provides people the right "to be secure . . . against unreasonable searches and seizures," which "shall not be violated, . . . but upon probable cause."[1] The import of this right is difficult to overstate; the Supreme Court of the United States has repeatedly said that "[n]o right is held more sacred, or is more carefully guarded, . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[2] In the context of police interactions with civilians, seizure is broadly defined: "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[3] This broad definition demonstrates society's intolerance for any unreasonable restriction of a person's "freedom to walk away."

While these principles may be clear to the Supreme Court, the Seventh Circuit's view of Fourth Amendment protections against unreasonable seizures is muddy and incomprehensible. The Seventh Circuit held, in brief, that only due process applies when a person is held after the initial arrest or seizure, not the Fourth Amendment.[4] This

* J.D. Candidate, Duke University School of Law, Class of 2018.

1. U.S. CONST. amend. IV.

2. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

3. *Id.* at 16.

4. Manuel v. City of Joliet, 590 Fed. Appx. 641, 643 (7th Cir. 2015) (quoting Llovet v. City

holding conflicts with Supreme Court precedent that demonstrates that the Fourth Amendment applies to pretrial detention, and this holding is the issue at stake in *Manuel v. City of Joliet*. In *Manuel*, the petitioner claims that the Fourth Amendment applies to his pretrial detention, but the respondents argue that the Due Process Clause applies instead. As a result, *Manuel* is scheduled to appear before the Supreme Court.[5] The Court granted the writ of certiorari here to resolve a circuit split between the Seventh Circuit and every other circuit that has directly addressed the question.[6] In keeping with precedent, the Supreme Court should resolve this case by reversing the Seventh Circuit, and hold that the Fourth Amendment applies to all unreasonable seizures, including those that extend through the pretrial period. To hold otherwise would deprive Manuel and others in his situation of relief in federal courts where there supposedly is an "adequate state remedy."[7]

II. FACTUAL BACKGROUND

On March 18, 2011, an African American male named Elijah Manuel was riding as a passenger in his car while his brother drove.[8] Police pulled the car over for not using turn signals.[9] A police officer, Terrence Gruber, claiming to smell burnt cannabis in the car, opened the passenger-side door and pulled Manuel out of the car.[10] Gruber immediately pushed him to the ground, handcuffed him, and struck him repeatedly.[11] According to Manuel, Gruber yelled at him, saying, "[y]ou remember me, street punk? Now I got you, you fucking nigger."[12] Manuel claims that the police searched his car and tore it apart in the process.[13] Gruber then patted Manuel down and found a bottle of

---

of Chicago, 761 F.3d 759, 764 (7th Cir. 2014)), *cert. granted*, 136 S. Ct. 890 (2016).

5. *See Monthly Argument–Supreme Court of the United States October 2016*, SUPREMECOURT.GOV, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2016.pdf (last visited Sep. 28, 2016) (detailing the Supreme Court's Fall 2016 oral argument schedule).

6. *See QPReport*, SUPREMECOURT.GOV, https://www.supremecourt.gov /qp/14-09496qp.pdf (last visited Oct. 3, 2016) (concerning the question presented before the Supreme Court in Manuel v. City of Joliet).

7. *See infra* note 52 and accompanying text for an example of this deprivation of federal relief for constitutional violations that are unlikely to be vindicated in potentially biased state courts.

8. *Manuel*, 590 Fed. Appx. at 642.

9. *Id.*

10. *Id.*

11. *Id.*

12. Brief for Petitioner at 3, Manuel v. City of Joliet, No. 14-9496 (U.S. May 2, 2016) [hereinafter Brief for Petitioner].

13. *Id.* at 3 n.2.

pills.[14] The police tested the pills at the scene for drugs and falsified the results so they could claim that the pills contained ecstasy, and then promptly arrested Manuel.[15]

According to Manuel, the police continued to lie about the pills throughout Manuel's detainment and the grand jury proceedings on March 31, 2011, even though a lab report on April 1, 2011 showed that the pills were not ecstasy.[16] Despite this lab report, Manuel was arraigned on April 8, 2011, and was incarcerated until the day after the Assistant State's Attorney dismissed the charges on May 4, 2011.[17] As a direct result of this incarceration, Manuel missed work and college courses, which he was still required to pay for despite his being forced to drop them.[18] Manuel claims that, since he was unable to work, he could not pay his bills and had to default on them, which harmed Manuel's credit score.[19]

Manuel sued the City of Joliet and several of its police officers on April 10, 2013.[20] He brought this suit in the United States District Court for the Northern District of Illinois under 42 U.S.C. § 1983.[21] His main civil right claim was that the defendants engaged in malicious prosecution, largely because they deliberately falsified the drug tests.[22] The district court dismissed most of Manuel's claims because they were brought past the two-year statute of limitations.[23] The court then dismissed the malicious prosecution claim on the grounds that malicious prosecution is a claim based on the right to due process, for which he was barred from bringing a claim in federal court because he could have sought relief in Illinois state courts.[24] Manuel appealed the malicious prosecution claim to the Seventh Circuit Court of Appeals, arguing that the malicious prosecution claim was founded on Fourth Amendment, not due process, grounds.[25] The Seventh Circuit disagreed with Manuel, and affirmed the district court's decision.[26] Manuel

14. *Manuel*, 590 Fed. Appx. at 642.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Brief for Petitioner, *supra* note 12, at 6.
20. *Manuel*, 590 Fed. Appx. at 642.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 642–43 ("[T]here is no . . . claim under federal law if . . . state law provides a similar cause of action.") (citing Newsome v. McCabe, 256 F.3d 747, 750–51 (7th Cir. 2001)).
25. *Id.* at 642.
26. *Id.* at 642–44.

petitioned the Supreme Court for writ of certiorari, which the Supreme Court granted on January 15, 2016.[27]

III. LEGAL BACKGROUND

Here, the core legal issue concerns malicious prosecution claims made under the Fourth Amendment and 42 U.S.C. § 1983. Accordingly, the following sections grant a brief overview of both Section 1983 generally and malicious prosecution claims more specifically.

A. 42 U.S.C. § 1983 claims

42 U.S.C. § 1983 provides a federal cause of action for those whose constitutional rights have been violated by some party acting under the authority of a state or local government.[28] Liability is available against any "government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights."[29] However, local governments may be sued under Section 1983 for actions arising from informal governmental "custom."[30] Section 1983 is not a source of constitutional rights in itself, but "a method for vindicating federal rights elsewhere conferred."[31] Manuel brought his claim under this statute, claiming that his Fourth Amendment rights were violated because the police unreasonably seized him throughout pretrial detention.[32] Because the Fourth Amendment itself does not explicitly provide a civil cause of action, Manuel must turn to Section 1983 for relief.

B. "Malicious prosecution" claims and the Fourth Amendment

To prove a malicious prosecution claim at common law, the plaintiff generally must show that: (1) the defendant filed a criminal complaint

27. Manuel v. City of Joliet, 136 S. Ct. 890, 890 (2016).

28. *See* 42 U.S.C. § 1983 (2012) ("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.").

29. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978).

30. *See id.* at 691 ("Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.") (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970)).

31. Albright v. Oliver, 510 U.S. 266, 271 (1994) (plurality opinion) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

32. Brief for Petitioner, *supra* note 12, at 11.

against the plaintiff "with malice and without probable cause"; and (2) the proceeding terminated, prior to a legal ruling, in the plaintiff's favor.[33] Prior to 1994, most courts of appeals considered Section 1983 malicious prosecution claims in the context of a constitutional right to due process, whether substantive or procedural.[34] However, the courts that did recognize this claim disagreed on whether malicious prosecution alone could violate the Constitution, or whether some other injury was also necessary.[35]

In 1994, the Supreme Court held that substantive due process is an inappropriate vehicle for claims concerning pretrial detention.[36] *Albright v. Oliver*[37] concerned a man (Albright) in Illinois who surrendered himself on an arrest warrant for selling a substance that looked like, but was not actually, an illegal drug.[38] However, the case was soon dismissed because Albright was not charged with a crime under Illinois law.[39] He petitioned the Supreme Court to rule that the Fourteenth Amendment afforded a substantive right "to be free from criminal prosecution except upon probable cause."[40] The Court disagreed, stating in the plurality decision that Albright's claims ought to be judged under the Fourth Amendment.[41] The Court explained that when an Amendment in the Bill of Rights deals more specifically with a constitutional issue, using those specific guarantees is preferable to using the more general terms available in the Fourteenth Amendment.[42] The Court noted, "the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions," so Albright should have brought his claim under the Fourth Amendment, not the Due Process Clause.[43]

The Court did not directly address malicious prosecution claims in the context of the Fourth Amendment. Instead, in a footnote, the Court lamented the "embarrassing diversity of judicial opinion" concerning a

33. 19 FRUMER & FRIEDMAN, PERSONAL INJURY ACTIONS, DEFENSES, AND DAMAGES § 93.02[1] (Matthew Bender, Rev. Ed. 2015).
34. Hernandez-Cuevas v. Taylor, 723 F.3d 91, 98 (1st Cir. 2013).
35. *See Albright*, 510 U.S. at 270 n.4 (plurality opinion) (quoting Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992)) (noting the "embarrassing diversity of judicial opinion" on the matter).
36. *Id.* at 275.
37. 510 U.S. 266 (1994).
38. *Id.* at 268.
39. *Id.*
40. *Id.*
41. *Id.* at 271.
42. *Id.* at 273.
43. *Id.* at 274–75.

malicious prosecution claim under Section 1983, but made no conclusion in the matter other than holding that substantive due process is an inappropriate vehicle for these claims.[44] Despite this, the vast majority of circuits began treating malicious prosecution claims being covered by the Fourth Amendment,[45] specifically throughout the pretrial period.[46] In fact, only the Seventh Circuit has directly addressed this question *and* decided that malicious prosecution claims are not covered under the Fourth Amendment, but instead under the Due Process Clause.[47]

IV. HOLDING

In *Manuel v. City of Joliet*, the Seventh Circuit Court of Appeals affirmed the district court's decision to dismiss Manuel's claim on the basis that Illinois provided an adequate remedy for malicious prosecution claims.[48] In making this decision, the court relied on its precedent in *Newsome v. McCabe*,[49] where the Seventh Circuit considered *Albright* and concluded that, while an initial seizure may fall under the Fourth Amendment, any further proceedings against the seized person must be analyzed under the right to procedural due process instead.[50] The court in *Newsome* did not explain why the Fourth Amendment only extends to arrests; the court merely stated that "Newsome had a potential [F]ourth [A]mendment claim [concerning the wrongful arrest and detention]," but the statute of limitations had run on this claim.[51] It is unclear why the court in *Newsome* takes this stance, beyond the freestanding assumption that the Fourth Amendment covers only the actual arrest in a wrongful seizure case.

The court in *Manuel* agreed with *Newsome*, saying that "federal claims of malicious prosecution are founded on the right to due process, not the Fourth Amendment," and that there is "nothing but confusion

44. *Id.* at 270 n.4 (quoting Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992)).

45. *See* Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99 (1st Cir. 2013) (citing to each of the Circuits that recognize Fourth Amendment malicious prosecution claims through the pretrial period).

46. *Id.*

47. *See* Manuel v. City of Joliet, 590 Fed. Appx. 641, 643 (7th Cir. 2015) ("[F]ederal claims of malicious prosecution are founded on the right to due process, not the Fourth Amendment").

48. *Id.* at 642.

49. 256 F.3d 747, 750–51 (7th Cir. 2001); s*ee generally Manuel*, 590 Fed. Appx. at 642–44 (citing *Newsome* repeatedly as the court's primary controlling authority).

50. *See Newsome*, 256 F.3d at 750–51 (agreeing with Justice Kennedy's concurring opinion in *Albright* that some due process applies to criminal prosecution proceedings).

51. *Id.* at 750.

gained" by using the Fourth Amendment to analyze malicious prosecution claims, which concern proceedings post-arraignment.[52] The court further said that "once detention by reason of arrest turns into detention by reason of arraignment[,] . . . *the Fourth Amendment falls out of the picture*."[53] Thus, because Illinois had adequate remedies for malicious prosecution claims, the court concluded that Manuel ought to have pursued a state due process claim instead of a federal one.[54]

In response to Manuel's claim that the court should reconsider *Newsome*, the Seventh Circuit conceded that Manuel had a "strong argument" for overturning *Newsome*, at least in part because ten other circuits recognized malicious prosecution claims under the Fourth Amendment.[55] Despite this, the court stated that "given the position [it has] consistently taken in upholding *Newsome*, Manuel's argument is better left for the Supreme Court."[56] Presumably, the court wanted the Supreme Court to resolve the severe circuit split before acting. The court concluded by affirming the district court's decision granting the defendants' motion to dismiss.[57]

V. ARGUMENTS

Here, the key issue is whether the Fourth Amendment covers malicious prosecution throughout the pretrial phrase, or whether due process becomes the right at issue post-arraignment.

A. Petitioner's Arguments

Manuel's overall argument consists of three main points: (1) the Fourth Amendment covers malicious prosecution claims over the pretrial period without probable cause, (2) the Due Process Clause is irrelevant to the malicious prosecution claim, and (3) this claim permits relief under § 1983.

52. *Manuel*, 590 Fed. Appx. at 642–43.

53. *Id.* at 643–44 (omission in original) (emphasis added) (quoting Llovet v. City of Chicago, 761 F.3d 759, 763 (7th Cir. 2014)).

54. *Id.* at 644. In making this determination, the Seventh Circuit relied on *Parratt v. Taylor*, 451 U.S. 527, 542 (1981), which held, in part, that "an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment."

55. *Manuel*, 590 Fed. Appx. at 643.

56. *Id.* (internal citations omitted).

57. *Id.* at 644.

Manuel argues that the Supreme Court has consistently treated the Fourth Amendment as covering cases of unconstitutional, pretrial detention of suspects.[58] Specifically, he reads the Court's holding in *Albright* to find malicious prosecution claims under the Due Process Clause inappropriate due to the Court's preference for "specific guarantees" over "more generalized language."[59] He argues instead that the Fourth Amendment would be the proper basis for such a claim.[60] Manuel further claims that the Court's prior holdings show that post-arrest requirements for probable cause are the same as the requirements for an arrest warrant, and thus, permitting pretrial detention without probable cause violates the Fourth Amendment the same way an arrest without probable cause would.[61] Specifically, Manuel cites Supreme Court precedent to bolster his claim that the Fourth Amendment covers the entire pretrial period, not merely the initial arrest.[62] Manuel claims that limiting the reach of the Fourth Amendment would give police officers a perverse incentive to ignore the need for arrest warrants and press for legal proceedings, despite a lack of probable cause.[63]

Manuel then argues that the Due Process Clause is irrelevant to hisP claim, because *Albright* holds that the Fourth Amendment is the appropriate constitutional peg.[64] Although there was no majority opinion in *Albright*, Manuel reasons that there is no controlling opinion because the *Marks Rule* does not apply.[65] Manuel then argues that Supreme Court precedent supports the use of the Fourth Amendment in these types of cases, both specifically and more generally.[66] Manuel concludes, because the Court in *Albright* rejected the application of due process to malicious prosecution claims, the Due Process Clause cannot apply here.[67]

---

58. Brief for Petitioner, *supra* note 12, at 14.
59. Albright v. Oliver, 510 U.S. 266, 273 (1994).
60. Brief for Petitioner, *supra* note 12, at 15.
61. *Id.* at 20–21.
62. *Id.* at 20–22 (citing Gerstein v. Pugh, 420 U.S. 103 (1975) and United States v. Mendenhall, 446 U.S. 544, (1980)).
63. Brief for Petitioner, *supra* note 12, at 24–25.
64. *Id.* at 26.
65. *Id.* at 27–28. Normally, the *Marks Rule* dictates that the narrowest opinion controls.
66. *Id.* at 29–30 (citing *Gerstein*, 420 U.S. at 127 to show that the Supreme Court has explicitly used the Fourth Amendment for these types of claims, and Albright v. Oliver, 510 U.S. 266, 275 (1994) to show the avoidance of due process' "scarce and open-ended guideposts" where possible).
67. Brief for Petitioner, *supra* note 12, at 30.

Finally, Manuel argues that Section 1983 permits federal malicious prosecution claims, even when there is a state remedy, because Section 1983 claims that are grounded in constitutional rights are "supplementary" to state remedies.[68] Manuel also argues that permitting his claim would fulfill the core purpose of Section 1983, namely, creating a cause of action for compensation of injuries caused by a deprivation of a right.[69]

B. Respondents' Arguments

City of Joliet, Illinois, et al., ("Respondents") argue that the Fourth Amendment does not apply to Manuel's claim, and that the Due Process Clause, not the Fourth Amendment, governs after a prosecution begins.[70]

The respondents' first argument is that Manuel's Fourth Amendment claims, while perhaps valid, are time-barred because he brought them more than two years after the initial arrest, which exceeds the statute of limitations.[71] This argument responds directly to Manuel's assertion that the Fourth Amendment covers the entire pretrial period, which implies that the statute of limitations does not eliminate Manuel's claim.[72] The respondents reason that a Fourth Amendment claim has nothing to do with terminating a proceeding, as required in malicious prosecution cases.[73] They also claim that permitting such claims would deprive people that are merely imprisoned wrongfully of a cause of action under the Fourth Amendment.[74] They further claim that malicious prosecution does not have seizure (which is crucial to Fourth Amendment claims) as an element,[75] and malice (which is an element of malicious prosecution claims) has no place in Fourth Amendment law.[76]

---

68. *Id.* at 31–32 (quoting Monroe v. Pape, 365 U.S. 167, 183 (1961)).

69. Brief for Petitioner, *supra* note 12, at 33; *see* Carey v. Piphus, 435 U.S. 247, 254–55 (1978) (explaining that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. . . . [Rights exist] to protect persons from injuries to particular interests").

70. Brief for Respondents at 1–3, Manuel v. City of Joliet, No. 14-9496 (U.S. Aug. 3, 2016) [hereinafter Brief for Respondents].

71. *Id.* at 17.

72. *See* Brief for Petitioner, *supra* note 12, at 20. As noted in the facts above, Manuel brought his claim less than two years after termination of proceedings against him, but more than two years after the initial wrongful arrest.

73. Brief for Respondents, *supra* note 70, at 18.

74. *Id.*

75. *Id.* at 19–25.

76. *Id.* at 25–29.

The respondents further argue that the Fourth Amendment covers "discrete wrong[s]," not "'the *effects*' of th[ose] wrong[s],"[77] and that time should accrue starting at the initial arrest based on Supreme Court jurisprudence.[78] Further, accepting Manuel's claim would defeat the purpose of a statute of limitations, namely, to reduce costly and complex lawsuits multiple years down the road.[79]

The remainder of the respondents' argument is that the Due Process Clause, not the Fourth Amendment, covers claims after prosecution begins.[80] The respondents reiterate their claim that the Fourth Amendment applies only to determining whether there was probable cause for the initial seizure.[81] They further state that these prosecutions have potential problems with abuse of procedure, not unreasonable seizures.[82] Finally, the respondents argue that state law is a superior vehicle for malicious prosecution claims because it allows for state experimentation, permitting individual states to determine what remedies work best.[83] They conclude that "[t]his experimentation is beneficial and permits states to account for variations in their criminal practice and procedure."[84]

VI. ANALYSIS

It is crucial to note, before analyzing which argument is more likely to succeed, that there are only eight justices on the Supreme Court as of this commentary.[85] Because of this unusual situation, it is entirely possible that there would be a four-four split, a decision that is very unlikely to have any lasting value as nationwide precedent.

However, the law currently stands strongly in Manuel's favor. There is little doubt, given Supreme Court precedent, that the term "seizure" in the Fourth Amendment context includes detention awaiting trial

77. *Id.* at 29 (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)).

78. *See* Brief for Respondents, *supra* note 70, at 29–30 ("Indeed, even if a defendant has 'give[n] present effect to the past illegal act and therefore perpetuate[d] the consequences,' the date of the original wrong still defines the claim's accrual." (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 557 (1977) (alteration in original)).

79. Brief for Respondents, *supra* note 70, at 32–33.

80. *Id.* at 34–35.

81. *Id.* at 36.

82. *Id.* at 41.

83. *Id.* at 53–54.

84. *Id.* at 54.

85. *See Members of the Supreme Court of the United States–Text Version*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited Sep. 28, 2016) (detailing the presence of only eight Justices for the Fall 2016 session).

absent probable cause. The respondents' reliance on other Supreme Court cases is flawed because the case on which they primarily rely explicitly does not cover the pretrial detention period. The respondents' other arguments are either unsupported, or are simply irrelevant because they contradict established Supreme Court precedent.

The strongest point for Manuel's case is *Albright v. Oliver*, which clearly states that explicit constitutional guarantees are much preferred to more general ones, such as substantive due process claims.[86] The Court concluded that, since the Fourth Amendment is "relevan[t] to the deprivations of liberty that go hand in hand with *criminal prosecutions*,"[87] Albright ought to have brought his claim under the Fourth Amendment, and that substantive due process "can afford him no relief."[88]

The respondents correctly note that this decision issued from a plurality; however, the Court stated in *Marks v. United States* that, when there is no majority opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[89] In *Albright*, the justices who concurred in the judgment but not the reasoning either would have conceded a due process violation in some situations similar to Albright's,[90] or would have held that there was no substantive due process violation in instances of malicious prosecution.[91] There is little common ground between these opinions, other than the fact that no violation of substantive due process occurred. Thus, the respondents' contention that *Albright* has no majority force is irrelevant under the *Marks* doctrine, and their reliance on Justice Kennedy's concurring opinion in *Albright* is a misapplication of *Marks*.[92]

---

86. Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion). Note that the Court here discusses only substantive, not procedural, due process. *See id* at 275 (Scalia, J., concurring) ("[P]etitioner has in any case not invoked "procedural" due process."). But because procedural due process is just as general as substantive, the Court would apply the Fourth Amendment in the same way if this claim were procedural due process.

87. *Id.* at 274 (emphasis added).

88. *Id.* at 275 (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).

89. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

90. *See* 510 U.S. at 286 (reasoning that, in certain circumstances, "there would be force to the argument that the malicious initiation of a baseless criminal prosecution infringes an interest protected by the Due Process Clause") (Kennedy, J., concurring).

91. *See id.* at 289 (saying that "petitioner has not shown a substantial deprivation of liberty from the mere initiation of prosecution") (Souter, J., concurring).

92. *See* Brief for Respondents, *supra* note 70, at 9 (recognizing that the Seventh Circuit

It is difficult to see how the Court could have been clearer; the Fourth Amendment, not the Fourteenth Amendment, governs rights violations that result from criminal prosecutions, which plainly includes the pretrial period between arraignment and trial.[93]

Even if the holding in *Albright* is insufficient in itself to demonstrate that pretrial detention may constitute a seizure under the Fourth Amendment, the Court's other precedent still shows that Manuel's reading is correct. In *Gerstein v. Pugh*, the Court faced a situation concerning probable cause in pretrial detentions.[94] There, the Court stated that "[b]oth the standards and procedures for arrest *and detention* have been derived from the Fourth Amendment."[95] The Court further stated that when determining the validity of pretrial detention, "[t]he sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. . . . The standard is the same as that for arrest."[96] The respondent's reliance on *Gerstein* that "[the Court] do[es] not imply that the accused is entitled to judicial oversight or review of the decision to prosecute" is misleading.[97] The Court in *Gerstein* clarified that "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause," but also noted that "a suspect who is presently detained may challenge the probable cause *for that confinement*."[98] There is no question that by either party here or elsewhere that *Gerstein* is still good law the respondents' misleading use of *Gerstein* demonstrates their acceptance of the law contained therein. Thus, Supreme Court precedent shows that the Fourth Amendment standard of probable cause applies not only to the time of arrest, but also to pretrial detention.

This conclusion becomes more apparent through other Supreme Court Cases. The Court in *United States v. Mendenhall* held that "a person has been 'seized' within the meaning of the Fourth Amendment . . . if . . . a reasonable person would have believed that he was not free

---

"[e]mbrac[ed] Justice Kennedy's concurrence in *Albright*," who would have found due process violations in some situations like Albright's).

93. *See id.* at 274 ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.").

94. Gerstein v. Pugh, 420 U.S. 103, 105 (1975).

95. *Id.* at 111 (emphasis added).

96. *Id.* at 120 n.21(citing Mallory v. United States, 354 U.S. 449, 456 (1957)).

97. *See* Brief for Respondents, *supra* note 70, at 20 (quoting *Gerstein*, 420 U.S. at 119) ("*Gerstein* thus made clear that the Fourth Amendment does not 'entitle[] [the accused] to judicial oversight or review of the decision to prosecute.'").

98. *Gerstein* at 119 (emphasis added).

to leave";[99] one is no more free to leave in pretrial detention than during an initial arrest. Further, the Court in *County of Riverside v. McLaughlin* clearly states that a warrantless arrest requires a "judicial determination[] of probable cause within 48 hours of arrest" to avoid Fourth Amendment concerns.[100] The language in *McLaughlin* strongly implies that a detention without probable cause beyond this 48 hour window violates "what is permissible under the Fourth Amendment."[101]

The respondents cite some case law in support of their argument, chief among them *Bell v. Wolfish*, as an example of language that they argue supports their defense. The respondents reason that the Court applied *Gerstein* only to the initial arrest decision, implying that the Fourth Amendment right against unreasonable seizures applies only to the initial arrest.[102] However, the Court in *Bell* was extremely careful to clarify that the issue is "an aspect of pretrial detention that is *not* alleged to violate any express guarantee of the Constitution".[103] In other words, *Bell*, despite the respondents' claim to the contrary, does not support their argument, but instead expressly states that it does not even addressing the issue of pretrial detention under the Fourth Amendment. Thus, the respondents' repeated reliance on *Bell* is only detrimental to their claims;[104] why rely on a case that does not even concern the issue here if there is more favorable law available? It is likely that the respondents could not find anything more favorable, and thus resorted to *Bell* in the fashion seen here.

The respondents' other counter-arguments are similarly non-persuasive. Their contention that malicious prosecution claims include elements not covered under the Fourth Amendment is irrelevant; the main issue is whether pretrial detention absent probable cause is a violation of the Fourth Amendment right against unreasonable seizures. Their argument that holding for Manuel would deprive others

99. United States v. Mendenhall, 446 U.S. 544, 554 (1980). Although this decision was issued by a plurality, the concurrence declined to join the opinion on other grounds, which does not affect the validity of the quoted portion.

100. Cty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

101. *See id.* (stating that "[o]ur task in this case is to articulate more clearly the boundaries" of Fourth Amendment rights).

102. *See* Bell v. Wolfish, 441 U.S. 520, 533–34 (1979) (noting that *Gerstein* partially concerns "the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails").

103. *Id.* at 534 (emphasis added).

104. *See* Brief for Respondents, *supra* note 70, at 31, 37, 39, and 43 (citing *Bell* on each of these pages).

of Fourth Amendment protection is weak because Manuel's definition of the Fourth Amendment right against unreasonable seizure is broader than respondents', and therefore would apply to *more* individuals. Further, malicious prosecution claims may add to the Fourth Amendment burden by requiring a finding of malice without having to show that malice is an element of Fourth Amendment claims generally; not all rights are rooted solely in the United States Constitution.[105] The respondents' final substantive claim that due process is the appropriate area of law for a claim like Manuel's is likewise non-persuasive, because, as shown above, the Fourth Amendment clearly applies to Manuel's claim. Even if Manuel could make a due process claim, there is no reason to suppose that Manuel could not make such a claim in addition to a Fourth Amendment claim. The respondents' policy arguments, while well-reasoned, cannot outweigh constitutional mandates as interpreted by the Supreme Court, and so do not deserve consideration here.

VII. CONCLUSION

The Fourth Amendment is a precious safeguard against violations of the "sacred . . . right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[106] There is little doubt that the Supreme Court considers this right to extend to all unreasonable seizures throughout the pretrial period. The Seventh Circuit's decision below and the respondents' stance here as regarding the Fourth Amendment's applicability are indefensible, and the Supreme Court should reaffirm the coverage of the Fourth Amendment as it pertains to pretrial detention.

105. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78–79 (1982) (distinguishing between "congressionally created rights" and "constitutional rights") (overruled on other grounds by statute).

106. Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).