Where Will It End, and When?

Malicious Prosecution and the Constitution

By Dale Conder, Jr.

Manuel **will probably lead to more circuit splits than it was presumed that it would heal.**

The Supreme Court of the United States has never "explored the contours of a Fourth Amendment malicious-prosecution suit under §1983[.]" *Wallace v. Kato*, 549 U.S. 384, 390 n.2 (2007) (citing *Albright v. Oliver*, 510 U.S. 266, 270–71 (1994) (plurality opinion)). Although in *Albright* the Supreme Court did not recognize a Fourth Amendment malicious-prosecution claim, its statements led the majority of the circuit courts to adopt this cause of action. *See, e.g.*, *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013). One reason is that malicious prosecution "undermines an individual's right to be free from unreasonable seizures under the Fourth Amendment." *Davis v. Malitzki*, 451 Fed. Appx. 228, 232 (3rd Cir. 2011). Would the Supreme Court's grant of certiorari in *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017) bring clarity to the issue of malicious prosecution cases under §1983?

The facts of *Manuel* are not complicated. Manuel and his brother were driving around Joliet, Illinois, late one night when two police officers stopped them for not signaling a turn. *Id.* at 915. One officer searched Manuel and found pills in a vitamin bottle. *Id.* A field test performed on the pills was negative for controlled substances. *Id.* Despite the lack of evidence that Manuel had committed a crime, the officers arrested him and took him to the local jail. *Id.* Once they arrived at the jail, an evidence technician tested the pills, and the test results were negative for controlled substances. *Id.* The technician prepared a report on the test and falsely claimed that the results were positive for ecstasy. *Id.* One of the officers wrote in his report that based on his experience and training, "he knew the pills to be ecstasy." *Id.* And if that were not enough, one of the officers told the grand jury that the test results confirmed that the pills were ecstasy. *Id.* at 915 n.2. These false reports led another officer to prepare a criminal complaint against Manuel for unlawful possession of a controlled substance. *Id.* at 915. Based on this record, the local judge found probable cause for the charge. *Id.*

Approximately two weeks later, a technician at the state police laboratory tested the pills and found that the pills were not controlled substances. The technician prepared

■ Dale Conder, Jr., is a member of the law firm Rainey Kizer Reviere & Bell PLC, with offices in Jackson, Memphis, and Nashville, Tennessee. Mr. Conder is a resident in the firm's Jackson, Tennessee, office. He practices in the areas of general insurance defense, employment law, and defense of municipalities and their employees, particularly police officers in §1983 litigation. Mr. Conder has published and lectured in the areas of trial practice, civil procedure, and civil rights litigation. He is a member of DRI and the Tennessee Defense Lawyers Association.

a truthful report. *Id.* But it was another month before the prosecutor dropped the charges against Manuel. *Id.* Because of the false statements about controlled substances, Manuel spent 48 days in jail. *Id.* Manuel filed suit under the Fourth Amendment, for his initial arrest without probable cause and for his subsequent detention without probable cause. *Id.*

On the one hand, some courts require a plaintiff to prove a Fourth Amendment violation and the state common law elements of malicious prosecution.

The district court dismissed the false-arrest claim on statute-of-limitations grounds, and the court dismissed the continued-detention claim based on Seventh Circuit case law, which held that such a claim must be brought as a due process challenge, not under the Fourth Amendment. And the Seventh Circuit affirmed the dismissal.

The question that Manuel presented in his petition for certiorari was "whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious-prosecution claim [under] the Fourth Amendment." Pet. for Writ of Cert., *Manuel*, 2015 WL 9855124 at *i. (No. 14-9496), also available at http://www.scotusblog.com/. And that was the issue on which the Court granted certiorari. *Manuel*, 137 S.Ct. at 923 (Alito, J., dissenting). The Supreme Court's grant of certiorari led many observers to believe that the Court might explore the contours of this cause of action and give the circuits some guidance.

Alas, the Court did not reach the issue on which it granted certiorari. Instead, the majority viewed Manuel's issue as if there were a period after the word "process." *Id.* at 922 n.10. The Seventh Circuit—having held that Manuel did not have a claim—did not reach the issue of whether Manuel's claim "should resemble the malicious-prosecution tort." *Id.* The Supreme Court, being "a court of review, not of first view," left the malicious-prosecution issue to the Seventh Circuit. *Id.* The Court simply held that Manuel's challenge of his continued detention should be asserted under the Fourth Amendment, not the Fourteenth. *Id.* at 914–15.

Where Does *Manuel* Leave the Malicious-Prosecution Claim?

Where does *Manuel* leave the malicious-prosecution claim? The short answer is that "with the exception of a few circuits, *Manuel* leaves us right where we were before the Court decided *Manuel*." But to understand where this is, a circuit review of the malicious-prosecution law under §1983 is in order.

In *Hernandez-Cuevas*, 723 F.3d at 91, the First Circuit cleared up any confusion left by the First Circuit's earlier malicious-prosecution cases. *Id.* at 100 n.10. The First Circuit held that the Fourth Amendment's protections extend beyond the arrest point and initial legal process to the pretrial period. *Id.* at 99–100. The First Circuit noted that the circuits that recognize this Fourth Amendment claim fall into one of two groups. On the one hand, some courts require a plaintiff to prove a Fourth Amendment violation and the state common law elements of malicious prosecution. *Id.* at 99 (including the Second, Third, Ninth, and Eleventh Circuits). This requires the plaintiff to prove the defendant's subjective malice. *Id.* And on the other hand, the Fourth, Fifth, Sixth, and Tenth Circuits follow a purely constitutional approach and require only proof of a Fourth Amendment violation. *Id.*

The first group's melded common law and constitutional approach is demonstrated in the Second Circuit's *Manganiello v. City of New York*, 612 F.3d 149 (2d Cir. 2010). In *Manganiello*, the plaintiff was a special patrol officer assigned to patrol a condominium complex with Officer Acosta. *Id.* at 154. Acosta was killed one morning while the two officers were on duty. *Id.* Agostini, a New York detective assigned to investigate the murder, created a document to show that the plaintiff was in the building at the time of the shooting. *Id.* at 156. Agostini knew that other evidence contradicted his manufactured document. *Id.* at 156–57. And Agostini met with witnesses and pressured them into supporting his case against the plaintiff, for example, by pressuring one witness into claiming that Manganiello tried to buy a gun from him. *Id.* This led Agostini to arrest the plaintiff, and after Agostini and other witnesses testified, a grand jury indicted the plaintiff for murder. *Id.* at 157–58. After an acquittal on the murder charge, the plaintiff sued, among others, Agostini for malicious prosecution. *Id.* at 154.

Under New York law, a malicious-prosecution claim consists of these elements: "(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Id.* at 161. When the malicious-prosecution claim is part of a constitutional claim, a plaintiff must also prove "a violation of his rights under the Fourth Amendment.
Id. at 160–61.

The Third Circuit and the Eleventh Circuit require the same basic elements for a Fourth Amendment malicious-prosecution claim as the Second Circuit. *See McKenna v. City of Phila.*, 582 F.3d 447, 461 (3rd Cir. 2009); *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010). The Ninth Circuit, similar to the Second, Third, and Eleventh, requires proof of the malicious-prosecution elements for the state law claims. *See Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 (9th Cir. 2009). However, the Ninth Circuit's additional element is a little different. It adds to the state law malicious prosecution elements the requirement that a plaintiff prove that a defendant's prosecution without probable cause was "for the purpose of denying [the plaintiff] equal protection or another specific constitutional right." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995).

We now look at those circuits that do not require proof of the state law elements for a malicious-prosecution claim. Although these courts do not require that each of the elements in a state law claim be proved, they do incorporate some of the elements.

For example, the Fourth Circuit defines "a malicious prosecution claim under §1983… as a Fourth Amendment claim for unreasonable seizure [that] incorporates certain elements of the common law tort." *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012). The elements of the constitutional malicious-prosecution claim are "that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Id.*

The Fifth Circuit's position is that there is no free-standing malicious-prosecution cause of action under the Constitution. *See Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 812 (5th Cir. 2010). To state a malicious-prosecution claim under §1983 or *Bivens,* a plaintiff must allege a constitutional violation. *Inez v. Catalina*, 398 F.3d 363, 366–67 (5th Cir. 2005) (requiring allegations of a Fourth Amendment violation); *Castellano v. Fragozo*, 352 F.3d 939, 956–59 (5th Cir. 2003) (reversing the district court's dismissal of the malicious-prosecution claim under the Fourteenth Amendment). And the Eighth Circuit appears to agree with the Fifth Circuit. *See Kurtz v. City of Shrewsbruy*, 245 F.3d 753, 758 (8th Cir. 2001) (citing cases requiring allegations of constitutional or federal statutory injury).

In the Sixth Circuit, a malicious-prosecution claim based on a Fourth Amendment violation requires proof that (1) "a criminal prosecution was initiated against the plaintiff and that the defendant 'ma[d]e, influence[d], or participate[d] in the decision to prosecute'"; (2) "there was a lack of probable cause for the criminal prosecution"; (3) "the plaintiff must show that, 'as a consequence of a legal proceeding,' the plaintiff suffered a 'deprivation of liberty,' as understood in our Fourth Amendment jurisprudence, apart from the initial seizure"; and (4) "the criminal proceeding must have been resolved in the plaintiff's favor." *Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir. 2010).

Although the Tenth Circuit falls in the camp that does not incorporate the state law elements of the malicious-prosecution claim, it does require proof of malice. *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008).

The Seventh Circuit After *Manuel*

And now we turn back to *Manuel* to review the Seventh Circuit's law on malicious prosecution. Before *Manuel*, the Seventh Circuit's view was "that a federal claim for malicious prosecution is actionable only if the state fails to provide an adequate alternative, whether called a claim of malicious prosecution or something else." *Julina v. Hanna*, 732 F.3d 842, 845 (7th Cir. 2013). The Seventh Circuit based its view on (1) *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that a Fourteenth Amendment due process claim fails if there is an adequate state law remedy; and (2) Justices Kennedy and Thomas's concurring opinion in *Albright. Julian*, 732 F.3d at 845.

But the Supreme Court changed this with its reversal and remand in *Manuel.* The claim will now be analyzed as a Fourth Amendment claim, and the adequacy of state law remedies should no longer matter. The problem is that the Court did not—as Justice Alito said—decide the question that it agreed to review. Because of this, the Seventh Circuit and the other circuits still do not know if a constitutional malicious-prosecution claim is to be analyzed under the Fourth Amendment.

Moving on After *Manuel*

In *Manuel*, the Court decided only that the "Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." *Manuel*, 137 S.Ct. at 920. Justice Alito's dissent correctly notes that the Court did not decide that this is a malicious-prosecution-type claim. *Id.* at—924-925 (Alito, J., dissenting). This is important because whether it is a malicious-prosecution claim would determine when the statute of limitations accrues. *Id.* at 925. Justice Alito's dissent also raises the issue of how to reconcile the Fourth Amendment's objective reasonableness standard with the subjective standard of malice in malicious-prosecution cases. *Id.* Of course, the courts could analogize the constitutional claim to a malicious-prosecution claim for the purpose of determining when the statute of limitations begins without having to incorporate a malice requirement. For example, in *Sykes*, the Sixth Circuit declined to impose the malice requirement in a constitutional malicious-prosecution claim. 625 F.3d at 309–10. And there is a distinction between the arrest and the prosecution. *Id.* at 310–11. There can be probable cause to arrest that would preclude a false-arrest claim, but one could still state a malicious-prosecution claim if the legal process was wrongfully commenced or continued.

This distinction between the false-arrest claim and the malicious-prosecution claim gives rise to another issue. Can a plaintiff prove his or her malicious-prosecution claim after an indictment?

The problem is that the Court did not—as Justice Alito said—decide the question that it agreed to review. Because of this, the Seventh Circuit and the other circuits still do not know if a constitutional malicious-prosecution claim is to be analyzed under the Fourth Amendment.

In *Rehberg v. Paulk*, the Supreme Court held that a grand jury witness is entitled to the same absolute immunity as a trial witness. 132 S. Ct. 1497, 1510 (2012). The effect of *Rehberg* on a constitutional malicious-prosecution claim comes into play because a grand jury indictment prevents a plaintiff from establishing the lack-of-probable-cause element. *See Sanders v. Jones*, 845 F.3d 721, 732 (6th Cir. 2017).

In *Sanders*, the officer arrested a female for selling marijuana. 845 F.3d at 723. The officer's police report identified Sanders as the person from whom the confidential informant purchased the marijuana. The officer, however, knew that he misidentified the seller in his report. But he sent the

Malicious, continued on page 80

Malicious, from page 23
report to the prosecutor's office, and this led to the prosecutor obtaining a grand jury indictment. Once the prosecutor learned that Sanders had not sold the marijuana, she dismissed the charges. Sanders then sued the officer for malicious prosecution.

Because the indictment established probable cause, Sanders would have to attack the officer's grand jury testimony to win her case. To do so, Sanders would have to show that the officer "knowingly or recklessly present[ed] false testimony to the grand jury to obtain the indictment." The only way to do this was through the officer's grand jury testimony. *Id.* at 732–33. The problem is that after *Rehberg*, the officer would have absolute immunity for his testimony to the grand jury. *Id.* at 733. Based on Sanders's allegations, she was pursuing a malicious-prosecution claim, not a false-arrest claim. And because she could not establish an element of her claim without using grand jury testimony, her claim failed. *Id.* at 734 and n.6.

This does not mean that whenever there is an indictment a malicious-prosecution claim must fail, but it does make a plaintiff's case tougher. If the elements can be proved without the use of the grand jury testimony, the claim is not based on that testimony and can continue. *See Coggins v. Buonora*, 776 F.3d 108, 113 (2d Cir. 2015), *cert. denied*, 135 S. Ct. 2335 (2015). For example, if an officer made false statements to a prosecutor outside of a grand jury, and these statements influenced the prosecutor to pursue the matter, a claim could survive the indictment. *Sanders*, 845 F.3d at 731.

Conclusion

From *Manuel* we now know that a challenge to pretrial detention—even beyond the commencement of legal process—is a Fourth Amendment case. What we do not know is whether this is a malicious-prosecution-type claim for the purpose of the statute of limitations. Is malice an element of the claim? And we do not even know if malicious prosecution is actionable under the Fourth Amendment. In his dissent, Justice Alito said that such a claim would have to be brought under the Fourteenth Amendment because of the element of malice and the ordinary meaning of the term "seizure."

The Court's decision in *Manuel* will probably lead to more circuit splits than it was presumed that it would heal. And when is the end of this pretrial period from which this Fourth Amendment cause of action can arise?