

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KEVIN ALBRIGHT, Petitioner v. ROGER OLIVER, ETC.,
ET AL.

CASE NO: No. 92-833

PLACE: Washington, D.C.

DATE: Tuesday, October 12, 1993

PAGES: 1-48

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W. WASHINGTON, D.C. 20005-5650
202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEVIN ALBRIGHT, :

4 Petitioner :

5 v. : No. 92-833

6 ROGER OLIVER, ETC., ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, October 12, 1993

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:04 a.m.

13 APPEARANCES:

14 JOHN H. BISBEE, ESQ., Macomb, Illinois; on behalf of the
15 Petitioner.

16 JAMES G. SOTOS, ESQ., Itasca, Illinois; on behalf of the
17 Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 92-833, Kevin Albright v. Roger Oliver.

5 Mr. Bisbee.

6 ORAL ARGUMENT OF JOHN H. BISBEE

7 ON BEHALF OF THE PETITIONER

8 MR. BISBEE: Mr. Chief Justice, and may it
9 please the Court:

10 QUESTION: Wait just a minute, Mr. Bisbee.
11 Spectators should not talk while they remain in the
12 courtroom. The Court remains in session.

13 MR. BISBEE: Thank you, Your Honor. If it
14 please the Court:

15 This case arises under the Civil Rights Act of
16 1871, which affords a cause of action to individuals who
17 are deprived of rights secured by the Constitution of the
18 United States by officials acting under color of State
19 law.

20 This Court has frequently admonished and
21 instructed that those of us litigating these cases advise
22 of the specific nature of the right protected. The right
23 protected asserted by Mr. Albright in this case is the
24 right to liberty secured by substantive due process.

25 This Court has further admonished and instructed

1 counsel that when a right protected -- or liberty right
2 protected by substantive due process is asserted, that the
3 party declare -- delineate with some degree of
4 particularity the exact nature of the right. And the
5 exact nature of the right that Mr. Albright asserts in
6 this court today, Your Honors, is the right to be free of
7 a criminal prosecution except upon probable cause to
8 believe that a crime has been committed and that the
9 individual sought to be made the party defendant committed
10 the crime.

11 The United States Court of Appeals for the
12 Seventh Circuit in Chicago held that we -- that Mr.
13 Albright did not state a cause of action. The court,
14 however, did state that the actions of the defendant, the
15 respondent in this case, Mr. Roger Oliver, a police
16 detective with the city of Macomb, Illinois Police
17 Department, a city of about 25,000 people -- his actions
18 were shocking and that they, in all likelihood, had
19 exceeded the boundaries of reasonableness which that court
20 had --

21 QUESTION: Well, Mr. Bisbee.

22 MR. BISBEE: Yes, Your Honor.

23 QUESTION: Why is it that the mere filing of a
24 criminal charge without more should constitute a
25 deprivation of liberty? The State is just saying we have

1 cause to believe that you, John Jones, committed a crime.
2 Now, why is that a deprivation of liberty at that stage?

3 MR. BISBEE: Your Honor, I believe if that
4 charge is without probable cause -- it is without
5 deprivation of liberty, but the Court need not reach that
6 question particularly under the circumstances --

7 QUESTION: Well, why should it be, in light of
8 holdings that, for instance, a defamatory statement by a
9 government official would not constitute a deprivation of
10 liberty?

11 MR. BISBEE: A defamatory statement by a
12 government official does not deprive liberty because it
13 does not deprive any right protected by the Constitution
14 of the United States, Your Honor. That is why.

15 The charge -- the invocation of criminal
16 process; the bringing to bear of the most severe power
17 possessed by government against an individual; the
18 requirement that the individual at that point do whatever
19 is necessary, whether it be the posting of bond with the
20 State, whether it be the securing of counsel, whether it
21 be the procuring of investigative services, whether it be
22 whatever else is necessary in order to defend not just his
23 reputation but his very liberty, his very ability to lead
24 his life as he has chosen to lead his life; that is what
25 is at stake at that point.

1 QUESTION: So your contention is that even
2 though he is never arrested on the criminal charge, that
3 the mere filing of it deprives him of liberty.

4 MR. BISBEE: If the mere filing of it is without
5 probable cause, Your Honor, that is my contention. But
6 the Court need not reach that issue.

7 QUESTION: Mr. Bisbee, he was arrested, and
8 police officers don't prosecute, they arrest. And what
9 troubles me about the case you're bringing is you start
10 out with a potential Fourth Amendment claim, an analogy to
11 the common law false arrest. That's what the police
12 officer does and that's what he's responsible for.

13 And then you're shifting over to substantive due
14 process because you missed out on what you conceive to be
15 the statute of limitations. The Fourth Amendment governs
16 the police officer's conduct. It says thou shalt not
17 seize unreasonably without probable cause. Why isn't that
18 the rubric under which this case should be treated? Why
19 should we suddenly get into a new territory simply because
20 the action was started arguably too late?

21 MR. BISBEE: Justice Ginsburg, it is altogether
22 correct, as you state, that the police officer's original
23 and customary duty is to make the arrest. You're also
24 absolutely correct that the criteria in the Fourth
25 Amendment governing reasonable searches and seizures

1 govern his actions.

2 But with all respect, Justice Ginsburg, your
3 statement is incomplete in that in most jurisdictions,
4 including Illinois, a police officer plays a substantial
5 role in the institution of the criminal charge itself.
6 And it did in this case.

7 And most often, Your Honor, the police officer
8 is the one, because of the burdens placed upon the
9 prosecutor's office. As the Court enunciated so clearly
10 in *Imbler v. Pachtman*, 10, 15 years, it is the police
11 officer who is the one who is privy to and has knowledge
12 of the investigative sources, the people who are able to
13 give him information as to when crimes are --

14 QUESTION: What is the police officer doing
15 other than backing up his arrest? He made an arrest and
16 then the person technically is in arrest status until the
17 criminal case is over. He's released on bond, but he is
18 technically arrested for the duration of that procedure.

19 So why does the police officer's participation
20 shift from the arrest -- initial arrest, and then whatever
21 statements he makes thereafter is consistent with
22 maintaining the arrest, rather than shifting the police
23 officer from the role of police officer to the role of
24 prosecutor?

25 MR. BISBEE: I must respectfully disagree with

1 the predicate of your question. In this case the officer
2 attested to the charging document. The officer did far
3 more than simply create the impetus for the arrest. He
4 attested to the charging document itself. He attested to
5 the facts that he asserted, that Kevin Albright had sold
6 controlled substances to someone named Veda Moore.

7 QUESTION: Couldn't that be regarded simply as
8 consistent with and perpetuating the arrest status of the
9 defendant?

10 MR. BISBEE: Well, it certainly is part of that.
11 But, Your Honor, as this Court held in Malley v. Briggs,
12 the -- individuals are held responsible for the natural
13 consequences of their actions. And certainly a police
14 officer who participates, particularly as materially as
15 Detective Oliver did, in the attestation to the criminal
16 charge, has begun an action the natural consequence of
17 which, the inevitable consequence of which is going to be
18 the criminal prosecution. And in this case it was a
19 criminal prosecution, we allege, without probable cause.

20 QUESTION: What is the closest decision of this
21 Court, Mr. Bisbee, that supports your contention that the
22 interests of the defendant in not being prosecuted on
23 probable cause is a substantive liberty interest?

24 MR. BISBEE: Probably Brinegar v. the United
25 States. A close second, Your Honor, being --

1 QUESTION: What was the first one?

2 MR. BISBEE: Brinegar v. the United States,
3 decided in 1949.

4 QUESTION: Well, that didn't -- that dealt with
5 the Fourth Amendment.

6 MR. BISBEE: It certainly did. But the
7 language -- the dictum, Your Honor, and I think dictum
8 whereby this Court has assumed that probable cause for a
9 prosecution is necessary --

10 QUESTION: Well, Brinegar was a case in a
11 Federal court and the dicta certainly didn't say that not
12 being -- freedom from prosecution without probable cause
13 is a substantive liberty interest, did it?

14 MR. BISBEE: Your Honor, it came awfully close.
15 Because Brinegar did say that the probable cause standard
16 was designed to prevent unfounded charges of crime and to
17 protect the individual from unfounded charges of crime,
18 notwithstanding the fact that it arose in a Fourth
19 Amendment search context under the Volstead Act, or
20 something.

21 QUESTION: Well, do you think we should then go
22 through all our cases that explain the reason for the
23 adoption of, say, the Fourth Amendment or the Fifth
24 Amendment, and say that all of those reasons become
25 substantive liberty interests?

1 MR. BISBEE: Well, I think -- in your case -- in
2 this situation, Your Honor, the answer is yes. Because
3 you can go back. In a linear -- in a linear chronology,
4 going back to *Hurtado v. California* in 1884 where the
5 Court in very clear terms -- when it said that a grand
6 jury was not necessary, the grand jury indictment was not
7 necessary to due process, nonetheless said that the core
8 value, the core value which the grand jury was designed to
9 protect, namely the right to be free from prosecution
10 except upon probable cause, was very much a part of the
11 individual liberty.

12 And you take that type of -- you take the
13 language and the holding in *Hurtado v. California*, you
14 take it into *Brinegar v. the United States*, and you tie it
15 in, then, with cases like *Ingraham v. Wright*, which is the
16 student paddling case, and you take footnotes 41 and 42
17 and you have the Court coalescing, coalescing the liberty
18 to be free from unwanted infliction of State --

19 QUESTION: You're taking three cases, all of
20 which were decided against the claimant of constitutional
21 rights, and saying that dicta in them have created a new
22 constitutional right.

23 MR. BISBEE: Your Honor, I'm saying that the
24 dicta in those cases created the assumption that has been
25 implicit in this Court's decisions from -- as long -- as

1 far back as 1884 in an explicit sense, that probable cause
2 is required to support a prosecution.

3 QUESTION: Mr. Bisbee, are you familiar with
4 Graham against Connor, a 1989 decision of this Court?

5 MR. BISBEE: Yes.

6 QUESTION: Which seemed to me similar in that
7 there was an argument that we shift from the Fourth
8 Amendment to the Fifth Amendment. And the Court said no,
9 this entire case should be analyzed as a Fourth Amendment
10 case.

11 MR. BISBEE: That's because it was a Fourth
12 Amendment case. That's because the case involved the
13 detention -- the arrest and detention of the individual
14 under circumstances of excessive force. And --

15 QUESTION: Wasn't Mr. Albright seized
16 throughout -- from the time that he first showed up until
17 the time that that criminal charge was dropped, wasn't he
18 technically seized?

19 MR. BISBEE: Certainly. But we don't claim any
20 excessive force, Your Honor. This is not an excessive
21 force case, as was Graham.

22 QUESTION: But I thought you were claiming that
23 he was seized without probable cause?

24 MR. BISBEE: Well, he was seized without
25 probable cause. He would have --

1 QUESTION: Isn't that a Fourth Amendment
2 violation?

3 MR. BISBEE: That would have been. But we -- as
4 you --

5 QUESTION: Without -- you can do it as gently as
6 possible.

7 MR. BISBEE: Pardon -- excuse me?

8 QUESTION: You can do it entirely gently. If
9 you have no reason to arrest a person, it's a Fourth
10 Amendment violation.

11 MR. BISBEE: That part of it is. But that, Your
12 Honor, quite honestly, is ancillary to the essential
13 problem. In the general circumstance, an arrest, or a
14 search, or the other problems protected against by the
15 Fourth Amendment are most often mere incidents of what is
16 really at stake here, and that is the invocation of --

17 QUESTION: Is it -- is it an incident that the
18 person is in a state of seizure until the criminal
19 prosecution is dropped. He's out on bond but he's got
20 restrictions, and all that is an attribute of being
21 arrested.

22 MR. BISBEE: Your Honor, it's an attribute of
23 being arrested at some point. As this Court said in
24 *Graham v. Connor*, at some point to the time of charging,
25 at which time the due process clause does take over.

1 QUESTION: I can understand your argument if the
2 arrest started at a certain point and stopped, and then
3 the charge started at a certain point. But if, what I
4 thought I heard you to say, the seizure, the arrest does
5 indeed continue, that the person remains in a state of
6 arrest until the criminal charge is dropped, then I don't
7 understand why we go from the Fourth Amendment to the
8 Fifth Amendment.

9 MR. BISBEE: Well, in the -- the easy answer to
10 that in this case, as you pointed out, was that the
11 statute of limitations was not abided by by the plaintiff
12 in this case, and therefore he had no Fourth Amendment
13 claim. He could not do it because the cause of action for
14 a Fourth Amendment claim accrued at the time of the
15 arrest. So we --

16 QUESTION: But why do you -- you take that to be
17 gospel. Is it necessary -- necessarily so? If one
18 conceives of the arrest as continuing until the criminal
19 charges are dismissed, then maybe the statute of
20 limitations should have started ticking later rather than
21 earlier.

22 MR. BISBEE: Maybe so. But as I understood --

23 QUESTION: But you didn't argue that.

24 MR. BISBEE: I didn't argue that and it's not
25 how I understood the law. Because I did understand the

1 law to be simply that the cause of action for an arrest,
2 whether at common law or under section 1983, accrued at
3 the time of the arrest. Nevertheless, Your Honor -- and
4 the point is that Graham v. Connor was explicit that at
5 some point -- now, whether we're talking about something
6 metaphysical here or not, I don't know. But at some point
7 after the arrest has taken place, the due process clause
8 does take over.

9 QUESTION: All right, assuming it does and
10 assuming that we were to accept your position by
11 approaching the case not on the assumption that Justice
12 Ginsburg has questioned on, but on the assumption that
13 somehow there is an independent set of interests at stake,
14 your answer to Justice O'Connor's question in which you
15 were telling, sort of, what the -- what the consequences
16 were, were all property consequences.

17 So that even if we accept your analysis, aren't
18 you making, not a substantive due process claim based on
19 liberty, but a substantive due process claim based on
20 property? You know, he had to put up bail, he had to hire
21 counsel and so on. Those are all money issues.

22 MR. BISBEE: Well, those too are money issues,
23 those too are property issues. Property issues certainly
24 are not irrelevant to this claim, and they're certainly
25 not --

1 QUESTION: They don't turn it into a liberty
2 claim, do they, independent of the liberty interest
3 implicated by the arrest and its consequences for him?

4 MR. BISBEE: Not necessarily so, but they are
5 alleged in the complaint in this case. But, Your Honor, I
6 do believe --

7 QUESTION: No, I realize that. But, I mean, are
8 they consistent? If you don't accept Justice Ginsburg's
9 analysis, then are the consequences that you're resting on
10 consistent with a liberty due process claim?

11 MR. BISBEE: Well, we believe they are, Your
12 Honor, for the simple reason that the liberty to be free
13 from a prosecution, with all of its attendant
14 consequences, is -- entails --

15 QUESTION: Well then under the Takings Clause
16 we've got a liberty interest because the property owner
17 has a liberty interest in being free from improper
18 takings. I mean, if that's going to be the analysis,
19 everything would be subsumed under liberty now?

20 MR. BISBEE: But that's a specific prohibition.
21 Here liberty is the broad majestic term. Liberty is the
22 term that is -- that is customarily used, and liberty is
23 the term that falls --

24 QUESTION: Isn't there some majesty in property
25 under due process?

1 MR. BISBEE: Well, certainly there is, Your
2 Honor. But there is -- that is a separate prohibition.
3 And we have here -- under the liberty rubric we have
4 several -- the essential problem that is created in a
5 situation like this is the freedom of the individual from
6 the arbitrary conduct of the Government.

7 QUESTION: You can't go after the prosecutor.
8 Isn't that so?

9 MR. BISBEE: That's so.

10 QUESTION: Isn't it odd that you're going after
11 the police officer whose main job is to arrest for a
12 prosecution because you can't go against the prosecutor?
13 Something doesn't quite fit.

14 MR. BISBEE: We, Your Honor, you know there's
15 certainly superficial appeal to that position. I
16 sympathize with it. It is not, however, altogether
17 complete for the simple reason that oftentimes it is the
18 police officer who is the one most privy to what it is
19 that constitutes a crime.

20 QUESTION: Well, Mr. Bisbee, it could well be
21 that the police officer just sees what he sees and reports
22 it to the prosecutor without being negligent or deficient
23 or misleading, and the prosecutor makes a decision to
24 proceed.

25 MR. BISBEE: In which case the police --

1 QUESTION: Should the police officer be liable?

2 MR. BISBEE: No, he shouldn't be, and I don't
3 think he would be because there --

4 QUESTION: Absent any misleading or misconduct?

5 MR. BISBEE: He would -- if what the police
6 officer presented to the prosecutor is within the realm of
7 what the Court talked about as being within the realm of
8 objective reasonableness in Malley v. Briggs, the police
9 officer would not be liable. There would be no causation.

10 QUESTION: Let me ask you something else. To
11 what extent do you rest your claim on the deprivation of
12 the right to travel?

13 MR. BISBEE: We rest the claim on the right to
14 travel as an incident of the liberty. I suppose the right
15 to travel in this case, because Kevin Albright alleged
16 that he sought to go to St. Louis, Missouri for purposes
17 of seeking job prospects, could be construed also as
18 property, and sometimes those lines blur.

19 We would consider that a liberty right. I think
20 it's been held by this Court in any number of cases to be
21 a liberty right. It is implicit in the broader liberty.

22 I believe I indicated in the petition for
23 certiorari that I had more or less focused on that in the
24 court of appeals, but I do believe it to be a incident of
25 the broader liberty we're talking about, the freedom from

1 arbitrary governmental conduct, which is really what
2 happens when you have the invocation of the State criminal
3 process under circumstances where there is no probable
4 cause.

5 QUESTION: And you didn't mention in --

6 QUESTION: Mr. Bisbee, you don't mention
7 anywhere in your brief on the merits any right to travel,
8 your blue brief.

9 MR. BISBEE: Well, I believe -- you may be
10 correct. I can't remember at this moment, Your Honor.
11 But certainly the aspect -- it is alleged in the
12 complaint.

13 QUESTION: Well, it may be alleged in the
14 complaint, but the complaint was a couple of years ago
15 back in the district court. Your opponent here is
16 entitled to judge what he has to respond to by the terms
17 of the brief you file here.

18 MR. BISBEE: Well, I'll concede that certainly,
19 Your Honor. And if -- if, indeed, there is any failure to
20 mention the freedom to travel in the brief, then I was
21 remiss in failing to do so. It was, I know, however,
22 specified in the petition for certiorari, in which I
23 indicated that the right to travel is but an incident of
24 the broader liberty here that we assert.

25 The broader liberty that comes in under the

1 various criteria of substantive due process which this
2 Court has always -- has protected, has set forth. The
3 concepts of -- being implicit in the concept of ordered
4 liberty, deeply rooted in our Nation's history and
5 traditions. And most importantly in this case, the
6 freedom from arbitrary governmental conduct.

7 QUESTION: Mr. Bisbee, you are making a
8 constitutional tort analogue for the common law tort of
9 malicious prosecution. But you had a diversity case and
10 you had a malicious prosecution common law claim which you
11 dropped. Why did you -- why did you drop the malicious
12 prosecution claim?

13 MR. BISBEE: It was -- Your Honor, it was
14 dismissed with leave, without prejudice, under the
15 provisions of rule 41(a)(1), (2), or something like that,
16 without prejudice. However -- and with due respect to the
17 resourcefulness of my opposing counsel, Illinois has a
18 statute of limitations whereby claims against municipal
19 employees must be brought within 1 year.

20 So the statute of limitations in our -- I don't
21 want to make a total judicial concession here, but the
22 statute of limitations with respect to the claim against
23 Oliver under a common law malicious prosecution theory
24 probably also is barred by the statute of limitations.
25 But it is -- it has not been formally dismissed. There is

1 leave to reinstate it if need be. I don't have -- I'm not
2 sanguine about its prospects if it is reinstated.

3 QUESTION: You're saying one reason -- one
4 reason was the statute of limitations. Was the other
5 reason so you could have a final judgment?

6 MR. BISBEE: Well, that did create a final
7 judgment, Your Honor, correct. But it's -- but that
8 wasn't an academic final judgment because I am not
9 sanguine at all about the prospects for the common law
10 malicious prosecution claim.

11 QUESTION: And you never did argue that on
12 the -- on the false arrest, or Fourth Amendment arrest
13 without probable cause, that the statute of limitations
14 might have run from the dismissal of the charges rather
15 than from the date of the arrest?

16 MR. BISBEE: I did not argue that, Your Honor.
17 I did not believe that to be the law. I did not think
18 that would be a good faith argument. I think that the
19 proper argument that I have to make in this case --

20 QUESTION: A good faith argument -- you think
21 it's meritless to say that the statute of limitations
22 might have run from when the arrest ended rather than from
23 when the arrest started?

24 MR. BISBEE: As I understand the -- as I
25 understood the law at that time. Now, I may be being

1 educated at this very moment, but as I understood the law
2 at that time, the cause of action for a false arrest
3 accrued at the moment of the arrest. And the 2 years had
4 expired by the time the case came to my attention, came to
5 me.

6 QUESTION: Mr. Bisbee, could I go back to what
7 Justice O'Connor was asking. What -- why -- you say what
8 is involved here is freedom to be free from arbitrary
9 government action. But defamation by a government
10 official, let's say a police chief who issues a bulletin
11 saying that you're a criminal, that's arbitrary government
12 action. Now, what deprivation of freedom existed here
13 that did not exist in that case?

14 MR. BISBEE: Your Honor --

15 QUESTION: Other than the arrest.

16 MR. BISBEE: Your Honor --

17 QUESTION: You say he had have to spend money to
18 defend himself. So also in the defamation case, you have
19 to spend money to rehabilitate his reputation.

20 MR. BISBEE: Your Honor, the processes of the
21 State are not invoked in any formal sense in the case of
22 an incidental defamation by someone who happens --

23 QUESTION: So what. Who cares about processes
24 so long as you're not under arrest?

25 MR. BISBEE: Who -- Your Honor, who cares about

1 processes when you're facing the prospect of jail, when
2 you're facing the prospect of punishment, when you're
3 facing --

4 QUESTION: You could say the same thing in the
5 defamation case. You -- you're reputation is ruined. You
6 can't get a job. People won't hire you. You have to
7 spend money to somehow rehabilitate your reputation. Why
8 isn't that a deprivation of liberty?

9 MR. BISBEE: Your Honor, that may be the
10 situation. That may be the most onerous of situations --

11 QUESTION: Why?

12 MR. BISBEE: -- Which attains in the defamation
13 situation. However, it is a necessary consequence of what
14 happens when the State begins criminal process. When the
15 State attempts in a systematic -- the criminal law, after
16 all, Your Honor --

17 QUESTION: The only thing different, it seems to
18 me, is that in the one case you're arrested, you cannot
19 run around without posting a bond or whatever. Whereas in
20 the other case you're subjected to just as much expense,
21 just as much heartache, just as much inconvenience.

22 MR. BISBEE: Justice Scalia, as you well know,
23 you know as a scholar of the law, the criminal law is
24 nothing more than the organized vengeance of the State.
25 And that has what has -- that is what has been wrought

1 against the individual when criminal processes commence.
2 That doesn't happen with the incidental publication of a
3 flyer.

4 QUESTION: It's the organized vengeance, but it
5 wreaks that vengeance by grabbing your body and throwing
6 it into jail.

7 MR. BISBEE: Your Honor, as this Court said a
8 long time ago -- and maybe the case has been decimated
9 beyond any -- any practical value at this time, but in
10 Boyd v. the United States this Court said that the
11 incidents of arrest and the search and the seizure and
12 things of that sort are mere incidents of aggravation to
13 what happens when the individual becomes the victim of the
14 organized vengeance of the State.

15 And that is what has been happen -- that's what
16 happens in the case of a prosecution. That is what
17 happens in the case of a prosecution when there is no
18 buffer, no buffer like probable cause. And that is the
19 rule that we ask this Court to adopt.

20 And I notice that my time is running short. I
21 would like to reserve the remaining time, if I may,
22 please, Your Honor.

23 QUESTION: Very well, Mr. Bisbee.

24 MR. BISBEE: Thank you.

25 QUESTION: Mr. Sotos, we'll hear from you.

1 ORAL ARGUMENT OF JAMES G. SOTOS

2 ON BEHALF OF THE RESPONDENTS

3 MR. SOTOS: Thank you, Mr. Chief Justice, and
4 may it please the Court:

5 Your Honors, we have three principal
6 submissions. First, that the Court should not expand the
7 concepts of fundamental liberties and substantive due
8 process in order to reach a claim that an individual was
9 charged with a crime without probable cause so long, of
10 course, as that individual was not incarcerated pending
11 disposition of the charges.

12 Secondly, to the extent that there might be some
13 intrusion on a liberty interest, the focus for purposes of
14 due process should be on whether the State provides
15 adequate procedures in order to protect against the risk
16 of an arbitrary deprivation of that interest. And in this
17 case I would point out that the petitioner concedes he
18 advances no challenge to Illinois' procedures for
19 processing and filing of criminal charges.

20 Finally, in the event that the Court determines
21 that there would be a fundamental right which could
22 potentially be implicated under the circumstances of this
23 case, we would submit that principles of substantive due
24 process should not be implicated unless a petitioner or a
25 plaintiff alleges facts which are sufficient to support an

1 inference of malice or improper purpose or some other form
2 of intentional or egregious misconduct.

3 QUESTION: Does the existence of the cause of
4 action for malicious prosecution in the State of Illinois
5 have a bearing on any one of those three rationales that
6 you've mentioned?

7 MR. SOTOS: We think it would have some bearing
8 on our second submission with respect to the procedures
9 that are provided by the State. The State provides
10 comprehensive procedures for the filing and processing of
11 charges. Information has to be filed upon a prosecutor's
12 official oath. The Sixth Amendment safeguards, of course,
13 attach at the time of the filing of the charge. Illinois
14 provides all criminal defendants with a preliminary
15 hearing to determine probable cause.

16 QUESTION: All right. And so far -- and that's
17 how I understood your second point. All you said is that
18 the Illinois criminal procedures system is adequate to
19 vindicate the right.

20 MR. SOTOS: We --

21 QUESTION: But that doesn't seem to me to
22 account for the malicious prosecution action which I'm
23 somewhat surprised that is missing from your analysis.

24 MR. SOTOS: Well, we do believe that under a
25 Parratt v. Taylor type analysis, that the fact that the

1 State of Illinois provides a common law tort remedy for
2 malicious prosecution certainly makes it much easier for
3 the Court to conclude that the entirety of Illinois'
4 procedures are adequate. And certainly the malicious
5 prosecution remedy is a very important aspect of those
6 procedures.

7 QUESTION: Yes. But if the challenge is to --
8 of the adequacies of Illinois' criminal procedures, would
9 it be -- would you say the criminal procedures are
10 preserved -- reserved from challenge because there's a
11 civil remedy, when there's a civil remedy?

12 That's quite different from Parratt. There you
13 had a civil claim. And you say you looked at the entire
14 procedure to say that that's adequate.

15 MR. SOTOS: We think that the focus, for
16 purposes of a procedural due process analysis, should be
17 on the entirety of the remedies that the State provides.
18 And that includes the criminal -- the remedies that are
19 inherent in the criminal process, as well as the post
20 deprivation common law tort remedy.

21 QUESTION: But then your argument would be the
22 same if there were no malicious prosecution action in the
23 State of Illinois?

24 MR. SOTOS: That would be a difficult -- more
25 difficult case, but we would -- I would not take the

1 position that the State remedies were rendered inadequate
2 solely because a State chose to do away with its common
3 law tort remedy.

4 QUESTION: So you're relying on the State
5 criminal procedure apparatus to vindicate the defendant's
6 rights, correct?

7 MR. SOTOS: In this case we're not, Your Honor,
8 because the State of Illinois does provide the common law
9 tort remedy. But if we were here on another case in which
10 a State did not provide that remedy, we do think there
11 would be a strong argument that the State's criminal
12 procedures, in and of themselves, could satisfy due
13 process.

14 As Justice Stevens indicated in his concurrence
15 opinion in Daniels v. Williams, the State does not have to
16 provide a post deprivation common law tort remedy in all
17 circumstances to satisfy --

18 QUESTION: Well, so, Mr. Sotos, you take the
19 view, then, that if the officer makes an arbitrary arrest
20 without probable cause there is no Fourth Amendment
21 violation simply because the State has its criminal
22 procedures to take care of these things?

23 MR. SOTOS: No, certainly we do not take that
24 position. In the arrest context, the actual act of the
25 arrest would implicate a fundamental right under the

1 Fourth Amendment and give rise to a Fourth Amendment false
2 arrest claim. Which I would point out that the Seventh
3 Circuit Court of Appeals noted in this case that the
4 petitioner's complaint did state a valid Fourth Amendment
5 claim for an arrest without probable cause.

6 QUESTION: Well, do you think there might be a
7 valid substantive due process claim made on the basis of
8 travel restrictions that are imposed as a result of an
9 unlawful arrest?

10 MR. SOTOS: I don't think so. And I would point
11 out that the petitioner pressed the fundamental right to
12 travel claim below.

13 QUESTION: And why not?

14 MR. SOTOS: Because in this particular case --

15 QUESTION: That is a constitutionally protected
16 liberty interest, is it not?

17 MR. SOTOS: Certainly, it is. But there is no
18 contention in this case that this prosecution was brought
19 for purposes of presenting -- of preventing Mr. Albright
20 from leaving the State. In --

21 QUESTION: Well, but if it results in an order
22 saying you can't leave and all of this was obtained on the
23 basis of an unlawful arrest, is there -- is there some
24 deprivation of the right to travel there?

25 MR. SOTOS: I would say not in this case,

1 because there is no allegation here that the petitioner
2 even sought to leave the State.

3 QUESTION: Well suppose that is the allegation?

4 MR. SOTOS: Under those circumstances, if there
5 had been an allegation that the petitioner sought to leave
6 the State, I would submit that the restriction that the
7 State of Illinois imposes on the fundamental right to
8 travel is a very narrowly tailored restriction which is
9 necessary to serve the State's compelling interest of
10 insuring that criminal defendants appear for trial.

11 QUESTION: So it's okay to enter such an order
12 even though it is based on an arrest made without probable
13 cause. That makes it okay.

14 MR. SOTOS: No. My point would be that under
15 those circumstances the State's restriction would be
16 justified under a -- under a due process analysis, because
17 it was narrowly tailored to serve the State's interest.
18 All the individual has to do is go into court and ask for
19 leave to leave the State.

20 Now presumably if, in a given circumstance,
21 there were some special circumstances that rendered it
22 unlikely that the person would return for trial, then the
23 State's restriction would be justified under those -- for
24 those purposes.

25 QUESTION: May I give you hypothetical that has

1 kind of troubled me as I've thought about this case.
2 Supposing you had an arrest supported by probable cause.
3 A witness had sworn to a set of facts that established
4 probable cause and the man is arrested. But before the
5 preliminary hearing, the witness recants and the police
6 officers investigate the facts and decide there really is
7 not probable cause.

8 The arrest was lawful when made, but at the time
9 they institute the prosecution they know they do not have
10 probable cause. Is there any interference with his
11 liberty by going forward with the case?

12 MR. SOTOS: So, the probable cause would
13 dissipate from the point of arrest --

14 QUESTION: Correct.

15 MR. SOTOS: -- To the time of moving forward. I
16 would submit that that would depend upon whether or not
17 the criminal defendant was incarcerated at the time the
18 probable cause dissipated.

19 QUESTION: Supposing it was just restriction to
20 the bond conditions. He had to put up money to get out on
21 bond and his travel restrictions are similar to they were
22 in this case.

23 MR. SOTOS: No, we would contend that under
24 those circumstances that's not a significant enough
25 restraint on liberty to warrant a separate determination

1 of probable cause and to prevent the State from going
2 forward.

3 QUESTION: The restraint is precisely the same
4 as the one that was caused by the arrest.

5 MR. SOTOS: Again, we would distinguish between
6 the restraint that is caused by the arrest, which is an
7 actual seizure where the person's body is taken into
8 custody, and the restraint which may be imposed by the
9 conditions of the bond, which -- and in saying that, we
10 don't seek to minimize or belittle the fact that a
11 criminal defendant, even one who is on bail, can suffer a
12 substantial price in terms of anxiety, emotional distress,
13 and --

14 QUESTION: Mr. Sotos, isn't a criminal defendant
15 technically in a state of arrest, whether he's out on
16 bond, until the proceeding concludes?

17 MR. SOTOS: I don't think so, Justice Ginsburg.
18 Again, I would distinguish between an arrest and a
19 detention and a situation when a person is on bond. When
20 that person is on bond --

21 QUESTION: Isn't -- isn't, even on the civil
22 side, the historical notion that the sheriff tags a
23 person, brings that person before the tribunal, and that
24 seizure is what gives the tribunal authority?

25 Is it we're civilized, so we allow the defendant

1 in the civil case to be at liberty, defendant in a
2 criminal case to be at bond, but technically the seizure
3 continues until the proceeding is over? Isn't that so?

4 MR. SOTOS: I would disagree with that. I would
5 continue to adhere to my position that the seizure occurs
6 at the time of the arrest. The formal charge gives the
7 State -- moves the State processes forward. But so long
8 as the individual is free on bail, I would not concede
9 that he is under arrest even in a technical sense. He has
10 the freedom at that point to live with his family and
11 among his friends, to pursue his occupation, in this case
12 his education.

13 QUESTION: So in this case you say there was
14 never really any arrest. You wouldn't even say that there
15 was an arrest, because this person understood that there
16 was a warrant out for him and came in voluntarily.

17 MR. SOTOS: Well, the petitioner alleges that he
18 was under arrest. But --

19 QUESTION: And I thought that that was accepted
20 by the district court and by the court of appeals.

21 MR. SOTOS: Certainly. And that gave rise at
22 that moment to a plausible Fourth Amendment claim for an
23 unlawful arrest.

24 The problem, as we see it in this case, is
25 because the false -- the Fourth Amendment false arrest

1 claim is --

2 QUESTION: What was the moment of that arrest,
3 since he wasn't -- he wasn't, in fact, seized by a police
4 officer?

5 MR. SOTOS: Perhaps at the point where he had to
6 go through the indignities of the booking process, being
7 photographed, taken through the process. He presumably
8 was not free to leave at that point. He had to complete
9 that booking process until he left. And the Seventh
10 Circuit, at least, noted that that was the point which
11 would be considered an arrest.

12 QUESTION: You think -- the criminal defendant
13 has asked the question; are you arrested after the charge
14 is lodged? The answer to that question is, no, I'm no
15 longer arrested.

16 MR. SOTOS: That's correct. After he is
17 released from the police station, if he's made bail I
18 think the appropriate answer to that question is I am no
19 longer under arrest. However, I have been charged with an
20 offense which I'll have to answer in court.

21 And I would submit that the reason that the --
22 the fact that the false arrest claim was dismissed as
23 untimely is why we're into this area of substantive due
24 process. What the petitioner really is attempting to do
25 is to take the entire Fourth Amendment body of probable

1 cause jurisprudence and graft it onto the substantive
2 component to the due process clause as a means of reaching
3 the charging decision.

4 And I think that ignores the fact that criminal
5 defendants do not have a right to be charged only upon
6 reliable evidence, in the same sense that a police officer
7 must make a preliminary determination of reliability
8 before conducting a search or a seizure.

9 QUESTION: Whether the arrest technically
10 persists until the end, certainly the effects of the
11 arrest continue until the person is discharged, until the
12 indictment is dismissed -- or the information, in this
13 case.

14 MR. SOTOS: I would concede that certainly the
15 criminal defendant suffers the effects, the anxiety and
16 the emotional distress as a result of the pendency of all
17 of the proceedings against him, which may include the fact
18 that he had been arrested. Nonetheless, I would not
19 concede that the arrest itself actually continues through
20 the point of determination to the proceedings. The arrest
21 occurs when the individual's freedom of movement is
22 curtailed at the point when he is taken into custody. And
23 then when he is released, I would submit that that arrest
24 is over.

25 QUESTION: Even if there are restrictions where

1 he can travel on his release? What was it, don't leave
2 the State?

3 MR. SOTOS: That, again, would depend upon -- I
4 think that would depend on an allegation that the
5 petitioner would have to make that the proceedings were
6 brought in order to curtail his fundamental right to
7 travel and --

8 QUESTION: Is the arrest over once he's released
9 from the jailhouse, even though he's told he can't leave
10 the State?

11 MR. SOTOS: If he was told that he could not
12 leave the State.

13 QUESTION: Right.

14 MR. SOTOS: That would perhaps be true. In this
15 particular case, the State of Illinois' restriction
16 requires only that the individual go into court and seek
17 leave of court before leaving the State. I don't view --

18 QUESTION: Well, if we said don't leave the
19 State unless we tell you you can, that's what you should
20 say. Don't say don't leave the State, just say don't
21 leave the State unless we tell you you can leave the
22 State, right? You really think that makes a difference?

23 MR. SOTOS: Well, again, I think that the -- for
24 purposes of analyzing the -- any claim that -- which would
25 be based on a fundamental right to travel, the focus would

1 have to be on whether or not the State's restriction was
2 narrowly tailored to serve its compelling State interests.

3 QUESTION: I'm not talking about right to travel
4 now. I'm talking about arrest. Are you under arrest when
5 you're -- when you're released from the jailhouse but
6 cannot leave the State?

7 MR. SOTOS: If you're told --

8 QUESTION: And if you say no, my next question
9 is going to be what if you can't leave the city?

10 MR. SOTOS: I would think that that would -- if
11 you're told you can't leave the city or the State, that
12 that would be tantamount to perhaps a continuation of the
13 arrest. But still, under those circumstances, that would
14 only give rise to a Fourth Amendment claim for an unlawful
15 arrest.

16 QUESTION: That was my question. Doesn't the
17 arrest persist in the sense that he's still under the
18 restraint of the arrest, can't leave the State without
19 court permission? The allegation here is he didn't seek
20 the court's permission because it would have been
21 expensive, his lawyer's clock would have been ticking for
22 the time that the application was made.

23 MR. SOTOS: We don't view that as a necessary --
24 as an acceptable justification for not going into court
25 and asking the court to leave -- to leave the State.

1 QUESTION: But the question is doesn't that
2 restraint show that the arrest is, indeed, continuing,
3 that he can't leave the State without getting permission
4 from the court?

5 MR. SOTOS: Again --

6 QUESTION: If he weren't arrested, why would he
7 need the State's permission?

8 MR. SOTOS: We would not make that concession.
9 We think this case differs from Justice Scalia's
10 hypothetical because he was not told that he could not
11 leave the State. There were incidental restrictions on
12 his bond which included a requirement that he ask the --
13 ask the court before he leaves the State. We don't view
14 that as being the same as a situation where a person is
15 arrested and then told you cannot leave the State, you
16 cannot leave the city.

17 QUESTION: You cannot leave the State unless the
18 court permits you to.

19 MR. SOTOS: Unless you first seek leave of
20 court, correct.

21 QUESTION: Well, I suppose you would argue at
22 least that before a defendant subject to that sort of a
23 bond could raise the question, he would have had to go and
24 see if he might have been allowed to leave the State.

25 MR. SOTOS: Certainly, that is our contention,

1 that the individual would at least have to allege that he
2 sought to leave the State and he was restricted from doing
3 so, before he would raising a claim based on a fundamental
4 right to travel. And I would again point out that that
5 issue is nowhere mentioned in the petitioner's brief and
6 it's only mentioned in his --

7 QUESTION: I wasn't asking about a fundamental
8 right to travel. I was and I'm still concerned about the
9 status of this person as an arrested person, and whether
10 that's an indication that maybe he's still under arrest.

11 MR. SOTOS: We would contend that under the
12 circumstances of this case he was not under arrest after
13 he left the police station, and was essentially free to go
14 about his daily affairs with very few restrictions by the
15 State.

16 QUESTION: And if he couldn't make bail so that
17 he was actually incarcerated, would his claim be a Fourth
18 Amendment or Fifth Amendment claim?

19 MR. SOTOS: We believe that under *Gerstein v.*
20 *Pugh* that would be a Fourth Amendment claim, because
21 *Gerstein* held that the Fourth Amendment requires a
22 preliminary determination of probable cause to all
23 criminal defendants who are incarcerated who don't make
24 bail.

25 In asking the Court to exercise restraint and to

1 not recognize a new fundamental right in this case, we do
2 not dispute the fact that the Constitution can play a
3 prominent role with respect to the charging decision.
4 Charges that are brought on the basis of a person's race,
5 sex, or religion can all give rise to an equal protection
6 claim. A prosecution initiated in retaliation for a
7 person's exercise of their right of free speech or as a
8 result of a person's political views can give rise to a
9 First Amendment claim.

10 And, again, to the extent that the filing of the
11 charge is viewed as implicating some liberty interests,
12 it's our position that due process should focus on the
13 procedures that the State provides. And, again, under
14 Illinois law there are a host of procedures inherent in
15 the criminal process and there is, of course, if all of
16 that isn't sufficient, the recognition by the State of a
17 common law tort claim for malicious prosecution.

18 QUESTION: Which was time barred, and that's why
19 it was dropped?

20 MR. SOTOS: Early in the proceedings in the
21 district court I pointed out to Mr. Bisbee that the
22 Illinois Tort Immunity Act required common law claims
23 against public officials to be brought within 1 year -- a
24 common law malicious prosecution claim to be brought
25 within 1 year of the dismissal of the charges. And it was

1 after that that he dropped the common law malicious
2 prosecution claim --

3 QUESTION: Without prejudice?

4 MR. SOTOS: Without prejudice, that's correct.

5 One other flaw in the petitioner's probable
6 cause standard that he proposed upon this Court, we
7 believe, is that it would permit liability for mere
8 negligence of a public official. And in so doing, what
9 the petitioner is seeking to create is a Federal remedy
10 which is not only supplementary to the remedy which is
11 provided now at the common law, but in fact is a much
12 broader remedy because what it does is read out the
13 element of malice which exists at the common law.

14 As a result of that, under the petitioner's
15 probable cause standard it is conceivable that virtually
16 every criminal defendant, after acquitted, could turn
17 around and sue in Federal court claiming that the evidence
18 was insufficient to support the charges against me.

19 We would submit that that standard far exceeds
20 the restrictions which this Court has placed on the scope
21 of due process violations in cases like Daniels v.
22 Williams and Davidson v. Cannon, where the Court held that
23 mere negligence is never enough to implicate the due
24 process clause. And, traditionally, what has been
25 required is intentional --

1 QUESTION: I don't quite understand that
2 argument. Acquitted defendants, in order to prevail, have
3 to prove an absence of probable cause, not just that they
4 were found -- not found guilty beyond a reasonable doubt.

5 MR. SOTOS: That's correct. But our position is
6 that it would be -- it would not take a lot for a criminal
7 defendant who was acquitted to turn around and simply
8 allege that the evidence was insufficient to justify the
9 charges against me, which is really what's happening --

10 QUESTION: And then don't they have a false
11 arrest charge?

12 MR. SOTOS: Pardon?

13 QUESTION: If they can do that, don't they have
14 a false arrest claim as a matter of State law, if they're
15 going to argue there was no probable cause?

16 MR. SOTOS: That would address probable cause
17 for the filing of the -- for the arrest.

18 QUESTION: Right.

19 MR. SOTOS: But in this particular case -- a
20 little background about this case. What --

21 QUESTION: I thought you said you needed malice
22 for the State -- for the State claim to be sustained.

23 MR. SOTOS: Of a malicious prosecution claim.

24 QUESTION: Yes.

25 MR. SOTOS: That's true. And I believe Justice

1 Stevens was --

2 QUESTION: But not false arrest.

3 MR. SOTOS: That's correct. A false arrest
4 claim would be based solely on the Fourth Amendment, which
5 requires only that a seizure be reasonable.

6 QUESTION: Okay.

7 MR. SOTOS: What the petitioner really is
8 alleging is this claim is that he was prosecuted on the
9 basis of information which was provided to him by an
10 obviously unreliable paid informant. And in so doing,
11 really what he is contending is that he has the right to
12 be charged only upon reliable evidence.

13 But, again, we know from cases in the grand jury
14 context such, as the United States v. Williams, that
15 that's not the case. In that case the Court refused to
16 require a prosecutor to even turn over exculpatory
17 evidence to a grand jury.

18 Now, in this case we're not even talking about
19 exculpatory evidence. Rather, it involves bits and pieces
20 of information which the petitioner claims cast grave
21 doubt on the informant's reliability: the fact that she
22 was herself a cocaine addict; the fact that the substance
23 which she turned over to the officer turned out to be
24 baking soda; and finally the fact that she had previously
25 identified another member of petitioner's family before

1 suggesting that it was petitioner that sold this
2 substance.

3 QUESTION: And also the fact that she had about
4 50 other cases that didn't work out, wasn't that right?

5 MR. SOTOS: Well, again, there are a number of
6 allegations which cast doubt on the informant's
7 reliability. But my point is that in the charging process
8 the State has never been required to justify its charges
9 upon only reliable evidence. That has been a function for
10 the trial process, rather than the charging process.

11 And there's a distinction to be drawn in the
12 Fourth Amendment context where the Fourth Amendment, of
13 course, serves as the only constitutional buffer between
14 the State and the citizen. In those cases police officers
15 are required to make an initial determination of
16 reliability. But, again, that's never been a requirement
17 of the State with respect to the charging process, and
18 acceptance of petitioner's standard here would require
19 that the Court went that far.

20 Your Honors, we have several other backup
21 arguments in our grief -- in our brief that address the
22 statute of limitations, qualified immunity, the
23 insufficiency of the petitioner's allegations of municipal
24 liability. But unless there are any questions on those or
25 the other matters I've raised here, I'll leave those to

1 the briefs.

2 QUESTION: Thank you, Mr. Sotos.

3 Mr. Bisbee, you have 4 minutes remaining.

4 REBUTTAL ARGUMENT OF JOHN H. BISBEE

5 ON BEHALF OF PETITIONER

6 MR. BISBEE: Thank you, Your Honor.

7 QUESTION: Maybe you can clarify whether you're
8 urging here reversal of the judgment against the city --
9 the City of Macomb, or is that out of the case now?

10 MR. BISBEE: It's not out of the case. I am not
11 urging -- I am urging reversal of the judgment against the
12 City of Macomb.

13 QUESTION: On the basis of what?

14 MR. BISBEE: Now, let me see if I -- perhaps I
15 misunderstood your question, Justice Ginsburg.

16 QUESTION: I understood that the -- the City of
17 Macomb was out of it because there was no pattern or
18 practice or something to establish --

19 MR. BISBEE: That's correct. We have alleged in
20 the complaint that the city council and the mayor
21 delegated to Officer Oliver the right to make all final
22 determinations in terms of how to effect and how to
23 enforce the Illinois laws relative to controlled
24 substances within the corporate limits of the City of
25 Macomb.

1 QUESTION: Well, where is that in your
2 question -- your question presented certainly doesn't say
3 anything about a judgment against the City of Macomb.

4 MR. BISBEE: And by further answer to that, I do
5 not believe that is raised within the -- it's contemplated
6 within the question presented on certiorari.

7 QUESTION: So it's not for us to decide.

8 MR. BISBEE: I wouldn't think so, and I should
9 have answered that quickly.

10 Your Honor, one -- Mr. Chief Justice, one thing
11 I would like to point out. I was not as remiss as I
12 thought when I advised you that I did not raise the issue
13 of travel in the brief. At page 7 of the petitioner's
14 brief we do set forth in the statement of facts that a
15 standard condition of his bond prohibit him from traveling
16 outside the State of Illinois. And on page 18 of the
17 brief we made mention again of the other conditions
18 imposed upon his liberty. So the point was raised.

19 QUESTION: But you never raise it as the -- as a
20 claim of a constitutional right to travel.

21 MR. BISBEE: Not as a separate constitutional
22 claim of right to travel, except as set forth in the
23 complaint. It was the petitioner's assumption that it was
24 subsumed within the general and broader liberty.

25 And another point I did not address in

1 responding to Justice Souter's questions as to the
2 liberties going beyond the purely property interests
3 that -- which he pointed out to me. The Sixth Amendment
4 speedy trial cases point out precisely the types of
5 liberties that are imposed when someone is prosecuted.

6 And, indeed, in *Barker v. Wingo* the triggering
7 point of the prejudice is a certain passage of time
8 which -- whereby prejudice is assumed. And in *United*
9 *States v. Lovasco*, this Court said that the mere filing of
10 prosecution creates the anxiety and the other things which
11 necessarily impose upon an individual's liberty who is
12 subjected to the organized vengeance of the State.

13 QUESTION: Mr. Bisbee, you are taking the
14 constitutional tort enunciated in *Bivens* and you're
15 fitting it precisely to the common law mold. It seems to
16 me that diminishes the notion of a constitutional tort to
17 say, well, it comes in pieces, and so here is the false
18 arrest piece and here's the malicious prosecution piece,
19 and we make it coincide precisely with the common law tort
20 development.

21 MR. BISBEE: Your Honor, I hope that I am not
22 understood as saying that. I hope that I am understood as
23 saying what the Chief Justice indicated in *Daniels v.*
24 *Williams*, that the due process clause protects against
25 the -- or involves the large interests of the governors

1 and the governed. And there is not a larger interest of
2 the governors and the governed than the prosecution of an
3 individual. And, indeed --

4 QUESTION: So the whole thing should -- Bivens
5 even should have been under -- instead of the Fourth
6 Amendment, should have been under due process because it's
7 this encompassing concept.

8 MR. BISBEE: As I understand Bivens, Your Honor,
9 it came about simply because there was not a -- an
10 analogue to section 1983 which covers Federal -- Federal
11 deprivations of constitutional rights committed by Federal
12 officials. That is the real gravamen of Bivens. Here we
13 have the situation where there is a specific statute
14 designed to enforce the Fourteenth Amendment which, in
15 turn, was designed to enforce the results of the Civil
16 War, and made applicable to prevent State officials from
17 abridging rights protected by the Constitution.

18 And the right to be free from a prosecution
19 without probable cause, far from what Mr. Sotos said to
20 the Court a moment ago, as a new right -- it is not a new
21 right, it is a right which has been --

22 QUESTION: But I don't -- I understand what you
23 said, that there was nothing -- no statute between the
24 Constitution and the claim. Here there is 1983. But in
25 terms of the notion of the constitutional basis for it,

1 why didn't Bivens then go to the Fifth Amendment instead
2 of the Fourth Amendment?

3 MR. BISBEE: Well, I don't know why the Court
4 did what it did in Bivens in that respect, Your Honor,
5 except to say that all elements, the Fourth, the Fifth,
6 and the Sixth Amendments all combine to create and
7 delineate the contours of the liberty which is protected
8 in these situations from a prosecution.

9 My time is up. Thank you very much.

10 CHIEF JUSTICE REHNQUIST: Thank You, Mr. Bisbee.
11 The case is submitted.

12 (Whereupon, at 11:56 a.m., the case in the
13 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

----- KEVIN ALBRIGHT, Petitioner v. ROGER OLIVER , ETC., -----

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