**ANNOTATIONS AND COMMENTS**

1. **Malicious Prosecution, generally**

“[L]abeling a section 1983 claim as one for a ‘malicious prosecution’ can be a shorthand way of describing a kind of legitimate section 1983 claim; the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead.” *Uboh v. Reno*, 141 F.3d 1000, 1003 (11th Cir. 1998) (quoting *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996)). “The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person—i.e., the right to be free of unreasonable or unwarranted restraints on personal liberty.” *Id.* (quoting *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). “If malicious prosecution or abuse of process is committed by state actors and results in the arrest or other seizure of the defendant . . . we now know that the defendant’s only constitutional remedy is under the Fourth Amendment . . . .” *Id.* (quoting [*Smart v. Bd. of Trs. of the Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1994177958&amp;pubNum=0000506&amp;originatingDoc=I05949509944811d9bc61beebb95be672&amp;refType=RP&amp;fi=co_pp_sp_506_434&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=(sc.History%2Aoc.Search)%23co_pp_sp_506_434) [1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1994177958&amp;pubNum=0000506&amp;originatingDoc=I05949509944811d9bc61beebb95be672&amp;refType=RP&amp;fi=co_pp_sp_506_434&amp;originationContext=document&amp;transitionType=DocumentItem&amp;contextData=(sc.History%2Aoc.Search)%23co_pp_sp_506_434)).

To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of her Fourth Amendment right to be free from unreasonable seizures. *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004); *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003); *Uboh*, 141 F.3d at 1004-05. “As to the constituent elements of the common law tort of malicious prosecution, [the Eleventh Circuit] has looked to both federal and state law and determined how those elements have historically developed.” *Wood*, 323 F.3d at 881 (*citing Uboh*, 141 F.3d at 1002-04; *Whiting*, 85 F.3d at 584-86). While “both state law and federal law help inform the elements of the common law tort of malicious prosecution, a Fourth Amendment malicious prosecution claim under § 1983 remains a federal constitutional claim, and its elements and whether they are met ultimately are controlled by federal law.” *Id.* at 882.

1. **Malice**

The Eleventh Circuit has not, to date, enunciated a federal malice standard for § 1983 malicious prosecution claims. However, the Court has stated: “When malicious prosecution is brought as a federal constitutional tort, the outcome of the case does not hinge on state law, but federal law, and does not differ depending on the tort law of a particular state.” *Wood*, 323 F.3d at 882 n.17. Even so, courts may need to refer to the applicable common law for any additional modification of the instruction that may be needed for the definition of malice, in the absence of controlling Eleventh Circuit precedent. *See, e.g.*, *Blackshear v. City of Miami Beach*, 799 F. Supp. 2d 1338, 1348-49 (S.D. Fla. 2011); *Brown v. Benefield*, 757 F. Supp. 2d 1165, 1181 (M.D. Ala. 2010); *Buckner v. Shetterly*, 621 F. Supp. 2d 1300, 1302 n.2 (M.D. Ga. 2008).

1. **Favorable Termination**

The withdrawal of criminal charges pursuant to a compromise or agreement does not constitute favorable termination and, thus, cannot support a claim for malicious prosecution. *See* *Uboh*, 141 F.3d at 1006 (“It is worth noting that the charges involved in this action were not dismissed pursuant to any agreement among the parties.”). Likewise, a favorable termination does not exist where the stated basis for the dismissal of criminal charges has been “in the interests of justice,” or expressly remanded for retrial. *Id.* at 1005 (citing *Singer*, 63 F.3d at 118). By contrast, a favorable termination does exist by virtue of an acquittal, an order of dismissal reflecting an affirmative decision not to prosecute, a dismissal based on the running of the statute of limitations, an entry of a *nolle prosequi*, and, in some cases, a granted writ of *habeas corpus*. *Id.* However, actual innocence is not required to satisfy the favorable termination requirement of a malicious prosecution claim. *Id.*

1. **Seizure**

A seizure under the Fourth Amendment occurs when a state actor places a restraint on an individual’s personal liberty. *Uboh*, 141 F.3d at 1003. A plaintiff bears the burden of proving that she was seized in relation to the prosecution, in violation of her constitutional rights. *Kingsland*, 382 F.3d at 1235. An arrest following the filing of an information suffices for a seizure after judicial proceedings have commenced. *Uboh*, 141 F.3d at 1004 (citation omitted); *Kingsland*, 382 F.3d at 1235. In the case of a warrantless arrest, the judicial proceeding does not begin until the party is arraigned or indicted. *Kingsland*, 382 F.3d at 1235; *see also, e.g.*, *Mejia v. City of New York*, 119 F. Supp. 2d 232, 254 (E.D.N.Y. 2000) (“[T]he existence, or lack, of probable cause is measured as of the time the judicial proceeding is commenced (e.g., the time of the arraignment), not the time of the preceding warrantless arrest.”). Thus, the plaintiff’s arrest cannot serve as the predicate deprivation of liberty because it occurred prior to the time of arraignment, and was not one that arose from malicious prosecution as opposed to an unlawful arrest. *Kingsland*, 382 F.3d at 1235.

1. **Injury**

The injury involved in a § 1983 claim for malicious prosecution may include both the injury which results from the unlawful seizure and injury associated with the prosecution of the criminal proceeding. *See Whiting*, 85 F.3d at 584-86.

1. **Causation**

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

1. **Damages**

For the damages instruction, see Pattern Instruction 5.13.