IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIAN KOOPMAN

Appellant, Case No. 11-1299

v.

JEREMY C. MYERS,

Appellee.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Robert E. Blackburn
D.C. No. 09-CV-02802-REB-MEH

APPELLEE'S BRIEF

Respectfully submitted,

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ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

PLAINTIFF-APPELLEE Jeremy C. Myers ("Myers"), by and through his attorney, Randall R. Meyers, for his reply brief, states:

I. STATEMENT OF JURISDICTION

Plaintiff Myers adopts the Statement of Jurisdiction as set forth in Defendant-Appellant's Brief.

II. STATEMENT OF THE ISSUES

Plaintiff Myers adopts the Statement of The Issues as set forth in Defendant-Appellant's Brief.

III. STATEMENT OF THE CASE

Plaintiff Myers adopts the Statement of The Case as set forth in Defendant-Appellant's Brief.

IV. STATEMENT OF FACTS

Plaintiff Myers adopts the Statement of Facts as set forth in Defendant-Appellant's Brief with the following additions:

Plaintiff contends that the customs, policies, and/or actual practices (including any lack thereof) approved and engaged in by Defendant Koopman before, during, and after the search represented a deliberate choice to follow a

course of action made from among various alternatives and were a moving force behind the constitutional violations Plaintiff claims are at issue.

For example and as noted in Defendant's averment of facts, Defendant Koopman had the subject property under video surveillance with two cameras for approximately 3 to 4 months prior to the warrant and the search. These two cameras were perched atop neighboring businesses and had a "bird's eye" view of the subject property. Thus, Myers contends as a fact that if Koopman did have a confidential informant, the surveillance video should have debunked the information provided to him by that informant. Koopman would have known that the informant's claims were not supported by his own video surveillance at the time of the application for the warrant. Additional averments in Plaintiff's Amended complaint reveal factual contradictions to Koopman's Affidavit. For instance, a review of the video surveillance and results of the search reveal:

A. Mr. Myers never once was seen bringing onto the Premises any of the items listed in the Affidavit.

B. There were no video cameras placed by Mr. Myers on the Premises.

C. There were no dogs on the property at any time or any sign of their presence.

D. Defendant Koopman never once saw Mr. Myers dumping anything in the old molasses silo west of the Premises, because either no such silo existed or the structure confused by Defendant Koopman as a silo could not be accessed by Mr. Myers, given the location and size of the hole in the structure.

E. Mr. Myers had moved out of the Premises over a month before September 6, 2007, and had not lived there during that time.

F. Shane McWhorter nor anyone else was ever seen "inside the top of" one of the outbuildings on the property. Mr. Myers did not even know a Shane McWhorter.

G. The numerous individuals who drove onto or nearby the Premises from time to time and at all hours of the day either were one of the following: trespassers unknown to Mr. Myers who came and dumped trash in the dumpster searched by Defendant Koopman, thieves or vandals who came on the property to do damage, or were employees of Amalgamated Sugar or Omnitrax Railroad, service agents for the Motorola cell tower located near the Premises, a renter of the Amalgamated Sugar property, employees of Ridex, a sandwich vender, a uniform delivery truck, or an unknown water contractor for Amalgamated Sugar, all of whom used the same driveway.

H. Defendant Koopman never saw Mr. Myers bury finished product in various places on the property or hide different components of his methamphetamine lab in different areas on the property to avoid detection or discovery by the police or other methamphetamine users, and

I. Defendant Koopman never saw broken windows on the Premises other than one on the front of the building that was obviously not broken by any kind of gunshot.

Even though the search warrant authorized a search to include "the yard and curtilage thereof, and any and all outbuildings and vehicles" and even though Koopman's Affidavit attested that items were buried on the property and located in various locations, the search was limited in scope, inconsistent, and included a building not owned by Myers or his father and to which they had no access (hereinafter referred to as "the White Building").

Upon information and belief, the White Building is owned or at least controlled by Amalgamated Sugar, which owns or controls the property north and to the west of the Premises. All of the windows in the building were either boarded up or had metal bars, or both, so as to make access to the interior virtually impossible. This inaccessibility existed for a considerable period of time prior to

Mr. Myers' occupancy of the Premises. The west end door was locked with a lock controlled by Amalgamated Sugar and for which Mr. Myers had no key or ability to open. That building had served as the sugar beet laboratory during the time when Great Western Sugar owned it, as is evidenced by public records recorded in the Larimer County Clerk's records. The White Building contained items left in there by Great Western since 1985 when it ran its sugar processing operation. Many of the items were used for chemical analysis and testing. Mr. Myers was never inside that building.

Koopman collected various items and samples during the search, including items from the White Building, which were all sent to the Colorado Bureau of Investigation for analysis. During the search of the White Building, an ordinary Mason jar containing a white substance was recovered.

Officers Brubaker and Lintz with the Larimer County Drug Task Force reported to the local newspaper, the Loveland Reporter-Herald, "that's a lot of dope" referring to the large Mason jar that they claimed was full of as much as 1800 amphetamine hits. The article appeared on the front page of the newspaper.

Mr. Myers, prior to the search on September 6, 2007, had started his excavating business, Buck Antler Excavating LLC, and had been operating it from

the Premises. As a direct result of the expenses and costs incurred by him as a result of the search and his subsequent arrest, Mr. Myers was forced to sell his equipment and abandon his business to pay for the expenses and attorney fees he was forced to incur.

After the search was completed, Defendant Koopman submitted a sworn affidavit in support of a warrantless arrest of Mr. Myers. Relying on the false statements of his Affidavit and the unsupported assumptions that the materials seized were part of a methamphetamine production process, which ultimately proved to be false, and in spite of the fact that there was never any evidence of sale or manufacture of any illegal substance and even though there was no probable cause nor any basis for a reasonable belief that probable cause existed, Defendant Koopman obtained a warrantless arrest determination. Mr. Myers, through his attorney, arranged to appear at the Loveland Police department to surrender and post bond and be released. Mr. Myers appeared on Friday, September 7, 2007 pursuant to the agreement arranged by his attorney and Defendant Koopman and had pre-arranged with a bondsman to post bond.

When Defendant Koopman was notified of Mr. Myer's arrival, Defendant Koopman informed the officer on duty that Mr. Myers could not post bond as

Koopman was filing additional charges and that Mr. Myers should be taken into custody, contrary to the terms of the agreement.

Mr. Myers was detained in the Larimer County Detention Center until the following Monday, when two bonds were posted for his release.

The results from the Colorado Bureau of Investigation of the testing of all items taken from the Premises and the White Building during the search came back negative, establishing there was no presence of a controlled substance. The mason jar of white substance seized from a former sugar factory and touted as dope in the beginning, contained ----- sugar. Defendant Koopman had specifically requested the CBI testing. Those results were available October 3, 2007 and sent to Defendant Koopman. At the status review hearing on October 15, 2007, Deputy District Attorney Lynch provided a copy of the test results to Mr. Myers' attorney, indicating he had reviewed them. Nothing was done by the prosecutor to dismiss the charges against Mr. Myers at that time. After multiple delayed hearings, a preliminary hearing was held on November 5, 2007, wherein Defendant Koopman still maliciously testified about his unsubstantiated belief of wrongdoing by Plaintiff, even though Deputy District Attorney Roy had in his file the same negative results from the Colorado Bureau of Investigation that were provided by Deputy District Attorney Lynch on October 15, 2007. Only after the results were

forced out in open Court by Plaintiff's counsel did the district attorney drop all charges against Mr. Myers at a subsequent hearing on November 15, 2007.

The circumstances of Plaintiff's arrest and incarceration provide additional, supportive facts to the claim of malicious prosecution.

Larimer County regulations require remediation of a meth site. This was done by a county approved environmental hygienist at the expense of Plaintiff. Plaintiff alleges that Koopman had been informed of the results from the environmental hygienist (which showed no significant presence of meth) at some point during the prosecution, yet ignored those results in the same manner that he ignored the other evidence that showed no probable cause.

The commander of the LCDTF publicly declared that the field test strips used by Koopman were always accurate. These test strips are frequently used and have proven to be reliable in past instances. Notwithstanding this fact, all seven tests used by Koopman showed false positive results.

On a date subsequent to dismissal of the criminal charges and after the institution of this action, Defendant, through pleadings in this case, revealed that he obtained a second confidential informant with information that the reason that no drug related items were found on the premises at the search was because Plaintiff was "tipped off" as to the pending search and hid or buried any evidence of a meth

operation. Defendant included this information in his pleadings, via sworn affidavit, notwithstanding the fact that the video surveillance showed no such activity by Plaintiff. Plaintiff does not believe there is a second confidential informant any more than he believes in the existence of the first informant.

Acts that persisted after the dismissal that have no useful purpose in the prosecution of the criminal offense can constitute evidence of a malingering state of mind of Koopman, a state of mind that can only be described as a reckless disregard for the truth, abuse of authority, and malicious behavior.

V. SUMMARY OF THE ARGUMENTS

Mr. Myers' pursuit of his claim of malicious prosecution against Detective Koopman is supported by the holdings of virtually every case cited by Detective Koopman including numerous relevant cases decided by the Supreme Court, this Court, and other circuit courts since the ***Albright v. Oliver***, 510 U.S. 266 (1994) decision. No anomaly exists to justify absolute immunity for Detective Koopman. The facts of this case establish that Koopman's series of ongoing investigative actions, continuing through and beyond his testimony at the preliminary hearing, and his deliberate and concerted efforts to conceal and misrepresent material facts to mislead prosecutors remove from him any right to claim absolute immunity

which may be afforded prosecutors acting in a judicial capacity. He cannot hide behind the officials whom he has defrauded.

Detective Koopman misrepresents the nature of this case. Mr. Myers does not seek an action for defamation stemming from Koopman's testimony at a hearing. This action seeks damages for a malicious prosecution Koopman pursued over an extended period of time, even beyond his testimony, wherein he used his investigative position to mislead the prosecutor into bringing charges against Mr. Myers without any probable cause. He fabricated information that was misleading and failed to disclose exculpatory information in a manner and sequence of actions and inactions that can only be characterized as malicious. He was not performing any judicial role when he committed those acts.

No reason exists to grant absolute immunity for Koopman's testimony at the preliminary hearing. It was merely a part of the continuum of malicious actions taken by Koopman to seek conviction of an innocent man. Again, the suit at hand is not for defamation resulting from that testimony – it is for malicious prosecution conducted by an investigating police officer over an extended period of time. There is no authority to support such a carved out exemption, and the weight of existing authority requires that no such immunity be granted.

For the reasons detailed below, Koopman has not articulated an argument to justify absolute immunity for the actions that are the subject of this litigation. The District Court properly denied his motion and Mr. Myers respectfully requests this Court affirm that denial.

VI. ARGUMENT

A. MALICIOUS PROSECUTION CAUSES OF ACTION AGAINST POLICE OFFICERS ARE WELL ESTABLISHED

It is worth noting at the outset that virtually every appellate case analyzing a Section 1983 action typically deals with multiple causes of action, arguments based on multiple constitutional rights, and a variety of defendants who performed different and unique roles in the underlying case. In this analysis it is essential to carefully review the underlying facts of any case before applying a holding to a case that may not have the same relevant facts or roles performed by the individuals involved. While this admonition is usually valuable for any matter, it is particularly true in the analysis of Section 1983 cases. The "murkiness" claim by Koopman is more aptly characterized as a failure by Koopman to carefully apply only those cases that deal with facts and issues that are similar to the case at hand.

This Court, and multiple other jurisdictions as well, have had numerous occasions to consider malicious prosecution causes of action against police officers since ***Albright v. Oliver***, 510 U.S. 266 (1994). Three years after ***Albright***, a unanimous United States Supreme Court, in ***Kalina v. Fletcher***, 522 U.S. 118, 118 S.Ct. 502 (1997) addressed issues similar to those raised here upon a prosecutor's claim for absolute immunity when the prosecutor made false statements of fact in an affidavit. The Court's conclusions in ***Kalina*** are instructional here. First, the Court refused to draw a distinction between a police officer and a prosecutor in determining immunity, stating, "we examine 'the nature of the function performed, not the identity of the actor who performed it'." ***Kalina*** at 127. Second, the Court concluded, "In determining immunity, we accept the allegations of respondent's complaint as true. Quoting ***Buckley v. Fitzsimmons***, 509 U.S. 259, 261, 113 S.Ct. 2606, 2609, 125 L.Ed. 209 (1993). The third, and most significant lesson from ***Kalina***, is the Court's conclusion that the act of preparing and attesting to the facts within an affidavit are essentially those of a complaining witness, regardless of who does it. A complaining witness does not enjoy the protection afforded by the doctrine of absolute immunity. Similarly, before ***Albright*** and ***Kalina***, the U.S. Supreme Court considered and rejected absolute immunity under analogous facts in ***Malley v. Briggs***, 475 U.S. 335 (1986). There, a police officer presented a court

with an affidavit that failed to establish probable cause. ***Malley*** found that the most the officer could claim was qualified immunity, not the absolute immunity he sought. The Court further reasoned:

> Neither the common law nor public policy affords any support for absolute immunity. Such immunity cannot be permitted on the basis that petitioner's function in seeking the arrest warrants was similar to that of a complaining witness, since complaining witnesses were not absolutely immune at common law. As a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law. Nor is there any tradition of absolute immunity for a police officer requesting a warrant comparable to that afforded a prosecutor at common law. In the case of an officer applying for a warrant, the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. The *Harlow* "objective reasonableness" standard, which gives ample room for mistaken judgments, will not deter an officer from submitting an affidavit when there is probable cause to make an arrest, and defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. ***Id.*** at 340-341.

There has been a litany of subsequent cases since ***Albright*** and ***Kalina***. In fact, this Court has addressed claims of malicious prosecution and absolute immunity on multiple occasions. As recent as 2004, the Tenth Circuit reached the same issues Koopman presents in this appeal in ***Pierce v. Gilchrist***, 359 F.3d 1279 (10th Cir. 2004). In a detailed analysis of the malicious prosecution cause of action, the Court specifically addressed ***Albright*** and concluded that the forensic police officer was instrumental in the plaintiff's continued confinement and

therefore could not escape liability. *Id*, at 1291. Quoting the ***Restatement (Second) Torts*** *§ 655*, the Court held a malicious prosecution action applies to anyone initiating proceedings knowing there is no probable cause for the proceeding. *Id.*, at 1292. The standard of **42 U.S.C. § 1983** applies equally to the person who "causes [any citizen] to be subjected" to deprivation of a constitutional right, as well as the person who "subjects" the citizen to such violation. ***Id.***

The ***Pierce*** decision could not be more direct in its recitation and adoption of the historical position that a police officer, acting as Koopman did, is not immune from a malicious prosecution charge, even if he is not a "prosecutor":

> This Court has previously held that officers who conceal and misrepresent material facts to the district attorney are not insulated from a § 1983 claim for malicious prosecution simple because the prosecutor, grand jury, trial court, and appellate court all act independently to facilitate erroneous convictions. ***Pierce v. Gilchrist,*** at 1292.

In so stating, this Court reaffirmed the earlier holding in ***Robinson v. Maruffi***, 895 F.2d 649 (10th Cir. 1990). In ***Robinson,*** the court relied on ***Jones v. City of Chicago,*** 856 F.2d 985 (7th Cir. 1988). In both ***Pierce*** and ***Robinson***, the Tenth Circuit quoted with approval the often-quoted statement in ***Jones*** on the subject:

> [A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial - none of these decisions will shield a police officer who deliberately

supplied misleading information that influenced the decision....

> If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded. ***Jones v. City of Chicago***, 856 F.2d at 994.

The above-cited decisions are sufficient to put to rest Koopman's argument of any "anomaly". As noted in the District Court below, more recent case law further supports Myer's position. In ***Mink v. Suthers***, 482 F.3d 1244 (10th Cir. 2007), this Court acknowledged that courts have rejected extending absolute immunity to police officers. ***Id.***, at 1260. There, a prosecutor was denied absolute immunity when that individual performed "the detective's role in searching for the clues and corroboration that might give probable cause to recommend that a suspect be arrested...." ***Id.*** The Court concluded, "to qualify for absolute immunity, then, an action must be 'closely associated with the judicial process'." ***Id.***, quoting ***Burns v. Reed***, 500 U.S. 478, 495 (1991). As stated above, the Supreme Court in ***Kalina*** found that the actions of a police officer are not closely associated with the judicial process.

This Court delved further into immunity issues when it held in 2008 that officers were not even entitled to qualified immunity on a §1983 malicious prosecution claim when they presented false information in support of probable

cause. ***Wilkins v. DeReyes***, 528 F.3d 790 (10th Cir. 2008). In ***Mink v. Knox***, 613 F.3d 995, 999 (10th Cir. 2010), this Court again stated "Absolute immunity, however, does not extend to those actions that are investigative or administrative in nature."

Finally, in a very recent unpublished case, (decided on other grounds) the standard upon which Myers relies was once again reiterated and endorsed:

> Nonetheless, officers are not shielded from liability if a causal connection can be established demonstrating that the prosecutor's and court's actions were not truly independent causes. [*citing* ***Pierce v. Gilchrist***] Most commonly, officers can be liable for malicious prosecution if they conceal or misrepresent material facts to the prosecutor, whose judgment was thereby influenced by the misstatements. ***Id.*** Such a demonstration is sufficient to meet the causation requirements of § 1983. ***Calvert v. Ediger***, 415 Fed.Appx. 80, 2011 WL 754839 (10th Cir. March 4, 2011) (*unpublished*).

One final issue warrants response. Koopman has made what he identifies as a "shoehorn" argument, in which he attempts to discredit Myers' malicious prosecution cause of action by claiming that many of the same facts used for the malicious prosecution claim were also used in the unreasonable search cause of action which was dismissed by the District Court as time barred. In so doing, he draws what he sees as a parallel argument to cases he cites out of the Seventh Circuit. This argument is untenable. When there is case law on point, this jurisdiction need not look to other jurisdictions for guidance. Simply put, this

jurisdiction recognizes malicious prosecution as a cause of action. It recognizes that such a cause of action may be maintained against a police officer *or a prosecutor* depending on the functions they perform. Even in the Seventh Circuit, in ***Washington v. Summerville,*** 127 F.3d 552 (7th Cir. 1997), the opinion of Circuit Judge Rovner in a concurring/dissenting opinion, beginning at 560, assessed a similar argument to that made by Koopman. Judge Rovner writes:

> At bottom, then, it seems to me that the majority must be saying that a malicious prosecution claim may never lie against a police officer when that claim is based in part on allegations common to a false arrest or excessive force claim. I find that to be a rather astonishing rule of law, and one that directly contradicts the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 8(a) ('Relief in the alternative or of several different types may be demanded.')" *Id.*, at 561.

B. THE AUTHORITIES RELIED UPON BY KOOPMAN ARE EASILY DISTINGUISHED

Koopman relies on a variety of cases to support his argument for absolute immunity as to the entire claim, as well as, alternatively, for his testimony at the preliminary hearing. Without exception, his reliance, for those reasons set forth at the beginning of this argument, is without merit, either because the cases are inapposite or do not stand for the proposition advocated by Koopman.

Koopman argues ***Taylor v. Mecham***, 82 F.3d 1556 (10th Cir. 1996) as precedent for developing the "anomaly" argument he finds in ***Albright***. Yet, in ***Taylor***, the plaintiff presented "no evidence" to suggest defendant included false statements or omitted any facts. ***Id.***, at 1563. This Court, eight years later in ***Pierce v. Gilchrist***, specifically reviewed ***Taylor*** and made specific note of the fact that while that case did not reject the right in general to bring a malicious prosecution action, the case was decided solely because of the unique facts of that case. ***Pierce v. Gilchrist***, 359 F.3d at 1286 – 1289. ***Taylor***, in fact, in many ways is dispositive of those issues on appeal that Koopman raises here. First, as Koopman recognizes, The Tenth Circuit is one of the many courts which recognizes the viability of a malicious prosecution claim under Section 1983. Second, ***Taylor*** acknowledges that the constitutional provision at play is a Fourth Amendment claim, citing ***Albright***. Thus, the District Court's Order that Koopman appeals from conforms to Tenth Circuit authority.

Koopman also refers to the Seventh Circuit case of ***Reed v. City of Chicago***, 77 F.3d 1049 (7th Cir. 1996) as "strikingly similar" to Mr. Myers' case. He is clearly incorrect. First, ***Reed*** was decided specifically on Illinois state law. Second, the reference to "shoehorning" a wrongful arrest claim into a malicious prosecution case was made because the plaintiff did not present any evidence to

support a malicious prosecution claim but rather reiterated the evidence presented for wrongful arrest. Plaintiff did not allege perjured testimony or improper acts by the defendants. ***Id.***, at 1053. Mr. Myers has clearly alleged facts to support his malicious prosecution claim that are separate and distinct from any wrongful search or excessive force claim. Finally, even though the claim was denied, the ***Reed*** Court nonetheless agreed that there could be a basis for bringing a malicious prosecution case against an officer. The ***Reed*** decision is more supportive of Mr. Myers' position than it is of Koopman's "anomaly" argument.

Koopman refers to ***Washington v. Summerville***, *op. cit* as "very analogous to this one." Yet there, a *nolle prosequi* was entered in the underlying action. Under Illinois state law, in order to prevail on a malicious prosecution case, a *nolle prosequi* is not sufficient if the prosecutor abandons the prosecution "for reasons not indicative of the defendant's innocence." ***Id.***, at 557. The plaintiff, appearing *pro se*, failed to prove the reason for the abandonment and additionally failed to present any evidence beyond the basic false arrest and excessive force claims. Mr. Myers' fact situation is not analogous to these facts and Koopman's suggestion that the holding in that case is relevant to this case is without merit.

Koopman claims ***Briscoe v. LaHue***, 460 U.S. 325 (1983) is supportive of his argument, but fails to identify how the holding there does so. The ***Briscoe*** case

relates to an action for perjured testimony at a criminal trial and as such offers little assistance in this matter.

The opinion specifically states it is not applicable to immunity at pretrial proceedings such as probable cause hearings. ***Brisco*** at 1112.

The real anomaly is how Koopman can ignore all the cases cited above which deal with police officers and absolute immunity, and rely instead on cases dealing with prosecutors where niches of absolute immunity were carved out in situations that could be argued to be investigative or administrative in nature. ***Jensen v. Wagner***, 603 F.3d 1182 (10th Cir. 2010); ***Van de Kamp v. Goldstein***, 555 U.S. 335 (2009). In order to benefit from the rulings above, Koopman would have to argue that the false and misleading facts used for the affidavit and the false and misleading testimony offered at the preliminary hearing were necessary for the prosecutor to fulfill his obligations to the court. Koopman's role was not that of an advocate and the presentation of false facts does not make him so. The entire body of case law relevant to this matter draws a clear distinction between investigative officers and the prosecuting attorney and the roles they perform.

Koopman provides no authority for segregating his testimony at the preliminary hearing from the continuum of malicious conduct he pursued before, during, and beyond the preliminary hearing. The cases he cites deal specifically

with actions brought solely for perjury at a trial or hearing, or where the plaintiff failed to provide any other evidence other than the testimony itself. It is interesting to note that Koopman intimates Myers alleges perjury at the preliminary hearing, because the complaint does not seek any cause of action for perjury. The complaint and the stated facts point to a consistent pattern of conduct by Koopman that maliciously sought prosecution of Myers. That course of conduct included Koopman's testimony at the preliminary hearing, but it also included more. It makes no sense to carve one small part of Koopman's conduct out of the rest, when it is relevant to the cause of action at issue, malicious prosecution – not perjury. Having failed to present any relevant authority for the proposition, Myers respectfully requests that Koopman's attempt for immunity as to his testimony at the preliminary hearing should also be denied.

C. THE GINSBURG FOOTNOTE IS NO BASIS FOR THE RELIEF SOUGHT BY KOOPMAN

Koopman relies to an excess on the footnote by Justice Ginsburg in her concurring 1994 opinion in ***Albright***. The comment does little to support his appeal considering the weight of authority supporting the District Court's denial of absolute immunity. First, it's important to note that the Supreme Court's focus in

Albright was on deciphering how the Fourth and Fourteenth Amendments factored into § 1983 actions.

Second, it must be remembered, as Judge Rovner does in ***Washington v. Summerville,*** that Justice Ginsburg recognized the same action pursued by Mr. Myers in his complaint.

> Yet my colleagues lose sight of the fact that despite that footnote, Justice Ginsburg would recognize a malicious prosecution-type case against a police officer when the plaintiff alleges, [as Mr. Myers does], that the officer perpetuated the initial Fourth Amendment 'seizure' by providing false or misleading testimony in the proceedings against the defendant. ***Washington v. Summerville***, 127 F.3d at 560.

Taken in context, Justice Ginsburg's comment offers no support for Koopman's desire for immunity.

Finally, if the footnote was so compelling as to warrant a major deviation from the wealth of case law that supports a malicious prosecution action against a police officer who has violated the constitutional right claimed by Myers, seventeen years have passed and numerous opportunities have presented themselves to a variety of appellate courts to make that leap. None have chosen to do so. To the contrary, as set out above, a consistent line of decisions has been reached both before and after ***Albright***, which do just the opposite. Koopman

offers this Court no reason or justification to reverse the District Court's denial of absolute immunity for his malicious actions.

VII. STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Counsel does not believe oral argument is necessary to resolve the issues in this appeal.

VIII. CONCLUSION

The District Court's Order denying Koopman absolute immunity should be affirmed.

Respectfully submitted this 16th day of September, 2011.

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Dated: September 16, 2011

By: /s/ Nicki Easton
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AND PRIVACY ACY REDACTIONS

I hereby certify that a copy of the foregoing APPELLEE'S BRIEF, as submitted in Native .pdf form via the court's ECF System, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Norton Anti-Virus with Spysweeper, Version 7.0.8.7., and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ Nicki Easton
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2011, I electronically filed the foregoing Appellee's Brief using the CM/ECF system which will send notification of such filing to the following e-mail address:

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