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

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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ORAL ARGUMENT IS REQUESTED
Scanned PDF Format Attachment is Included

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ATTACHMENTS

None.

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STATUTE

DEFENDANT-APPELLANT Brian Koopman ("Koopman"), by and through his attorneys, WICK & TRAUTWEIN, LLC, for his reply brief, states:

I. INTRODUCTION

At no time has Koopman misrepresented the nature of Myers' claim, as Myers boldly contends in page 10 of the Appellee's Brief. In fact, Koopman's brief repeatedly emphasizes that Myers' sole remaining claim in this action is one for malicious prosecution against Koopman only. His various other claims against a plethora of defendants have all been invalidated by the District Court. Thus, the question now squarely before this Court for the first time is whether Myers has a valid Fourth Amendment claim for malicious prosecution against Koopman – a police officer – in light of Justice Ginsburg's concurring opinion in *Albright v. Oliver,* 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring), or whether Koopman is entitled to absolute immunity for said claim.

As discussed at length in Koopman's opening brief, this sole remaining claim presents the very anomaly described by Justice Ginsburg in *Albright*, in that it focuses on a police officer's role in allegedly maintaining and pursuing a criminal prosecution. However, it is the prosecutor who is the principal player in carrying out a prosecution, not a police officer, and the prosecutor has absolute immunity for his conduct in commencing those formal criminal proceedings.

Accordingly, as intimated by Justice Ginsburg, Koopman should be entitled to share in the prosecutor's absolute immunity.

For the reasons discussed below, the counterarguments made in Myers' answer brief do not provide a valid reason for finding otherwise.

II. ARGUMENT

A. Whether a plaintiff actually has a cognizable Fourth Amendment claim for malicious prosecution against a police officer under Section 1983 is still very much in question.

Koopman's opening brief begins with a discussion of the "embarrassing diversity of judicial opinion," the words utilized by the U.S. Supreme Court itself, in referring to the body of case law discussing whether a claim for malicious prosecution exists under 42 U.S.C. §1983. *See, Albright,* 510 U.S. at 271, n.7. As set forth therein, the courts – including both the U.S. Supreme Court and the Tenth Circuit Court of Appeals – have wrestled with the question of what constitutional basis supports bringing such a claim under Section 1983, when a claim for malicious prosecution is really one rooted in state tort law. Thus, as pointed out by Koopman, it is within this hazy Constitutional framework that this Court must analyze Myers' malicious prosecution claim against Koopman.

Myers brushes aside this problematic starting point by simply attributing the lack of clarity to Koopman's alleged failure to "carefully apply only those cases

that deal with the facts and issues that are similar to the case at hand" (*Appellee's Brief,* at 11). However, the fact of the matter is that the U.S. Supreme Court in *Albright* specifically left open the question of whether a claim for malicious prosecution exists under the Fourth Amendment. *Albright,* 510 U.S. at 275 ("We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari"). Thus, as noted by this Court, the *Albright* decision "muddied the waters" rather than clarifying them. *Taylor v. Meacham,* 82 F.3d 1556, 1561 (10th Cir. 1996).

Moreover, just a few years ago, the U.S. Supreme Court again reiterated that it has "never explored the contours of a Fourth Amendment malicious-prosecution suit under §1983," and declined to do so there. *Wallace v. Kato,* 549 U.S. 384, 390 127 S.Ct. 1091, 1096, 166 L.Ed.2d 973, n. 2 (2007). In doing so, it again specifically left open the question of whether such a claim is even cognizable under §1983. *Id.* ("Assuming without deciding that such a claim is cognizable under § 1983, petitioner has not made one").

Thus, the reality is that the U.S. Supreme Court has yet to finally decide whether Myers even has a Fourth Amendment claim for malicious prosecution against Koopman under the circumstances alleged here. That reality is not one of

Koopman's creation, and is one which the Court must bear in mind as it addresses the issues here.

B. If Myers has a Fourth Amendment claim for malicious prosecution, case law subsequent to *Albright* suggests it is limited in scope and legally distinct from any time-barred claims Myers may have had for false arrest or unreasonable search and seizure. Yet, the vast majority of Myers' allegations relate to these time-barred claims.

Though the U.S. Supreme Court did not decide in *Wallace* whether a malicious prosecution claim is cognizable under §1983, it explained that any such claim is legally distinct from a claim for false arrest/imprisonment:

> "Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process* – when, for example, he is bound over by a magistrate or arraigned on charges. [cites omitted]. Thereafter, unlawful detention forms part of the damages for the 'entirely distinct' tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process. [cites omitted]. 'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself.'" *Wallace, 549 U.S. at 389-90.*

This distinction was significant in *Wallace* because – like in this case – the plaintiff there failed to timely file his claim for false arrest or imprisonment. *Id.*, at 391-392. Because the tort of false imprisonment was legally distinct from

malicious prosecution, the Court found the statute of limitations for the false imprisonment claim began to run at the time he was bound over for trial, not at the time the charges were later dropped against him. *Id.*

Subsequent to *Wallace*, this Court has also recognized that a claim for malicious prosecution concerns detention only "after the institution of legal process." *Mondragon v. Thompson,* 519 F.3d 1078, 1083 (10th Cir. 2008); *Wilkins v. DeReyes,* 528 F.3d 790, 798-99 (10th Cir. 2008). In *Wilkins*, this Court described such a claim as follows:

> "Depending on the circumstances of the arrest, a plaintiff can challenge the institution of legal process as wrongful in one of two ways. If arrested without a warrant – and thus triggering 'the Fourth Amendment require[ment of] a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest,' [cite omitted] – a plaintiff can challenge the probable cause determination made during the constitutionally-required probable cause hearing. *See, e.g., Reed v. City of Chicago,* 77 F.3d 1049, 1053-54 (7th Cir. 1996) (concluding the plaintiff failed to state a malicious prosecution claim when he challenged only the warrantless arrest, but not the subsequent institution of legal process). Or, if arrested pursuant to a warrant, plaintiff can challenge the probable cause determination supporting the warrant's issuance. *See, e.g., Meacham,* 82 F.3d at 1562 (analyzing the Fourth Amendment malicious prosecution claim 'that the affidavit prepared . . . in support of the arrest warrant contained deliberately false statements and omissions, thereby misleading the judge into issuing the arrest warrant'). Either way, the allegation would state a Fourth Amendment violation sufficient to support a § 1983 malicious prosecution cause of action."
>
> *Wilkins,* 528 F.3d at 798-99.

See also Singer v. Fulton County Sheriff, 63 F.3d 110, 117 (2nd Cir. 1995) ("Typically, a warrantless deprivation of liberty from the moment of arrest to the time of arraignment will find its analog in the tort of false arrest. . . while the tort of malicious prosecution will implicate post-arraignment deprivations of liberty"; "Therefore, to successfully pursue a § 1983 claim of malicious prosecution in violation of his Fourth Amendment rights, [a plaintiff] must show some post-arraignment deprivation of liberty that rises to the level of a constitutional violation"); *Donahue v. Gavin*, 280 F.3d 371 (3rd Cir. 2002) (emphasizing that the Fourth Amendment applies to those actions which occur between arrest and pre-trial detention).

Again, as pointed out in Koopman's opening brief, this legal distinction between claims of false-arrest and malicious prosecution is significant here because the vast majority of Myers' allegations in the Amended Complaint (cut and pasted into the first six-and-a-half pages of his answer brief) pertain to alleged activities occurring before his warrantless arrest and prior to the initiation of legal process. They do not allege any deprivation of liberty following the institution of legal process; they allege a brief weekend of detention just immediately following his warrantless arrest, after which he was released on bond for the criminal proceedings leading up to the preliminary hearing (when the charges were

dismissed). Though Myers argues that Koopman's alleged malicious activities continued even after the charges were dismissed, the fact of the matter is that Myers was not subject to any restraint on his liberty at that time.

Accordingly, as argued in Koopman's opening brief, Myers is doing nothing more than trying to "shoehorn" his time-barred claims for false arrest and unreasonable search and seizure into a malicious prosecution claim against the sole remaining defendant in this action – a police officer, not a prosecutor. As reflected in the case law cited in Koopman's opening brief, there is a line of cases in which the Seventh Circuit Court of Appeals has precluded plaintiffs from doing just that. While Myers dismisses that authority with the assertion that this Court need not rely on authority from the Seventh Circuit when there is case law on point in this jurisdiction, the fact of the matter is that this precise situation does not appear to have arisen in this Circuit. Moreover, it should be noted that this Court has specifically cited the Seventh Circuit case of *Reed, supra,* on more than one occasion. *See Wilkins,* 528 F.3d at 798-99 (quoted above); *Taylor*, 82 F.3d at 1564. It has thus apparently found the Seventh Circuit's reasoning on this issue persuasive in the past, and there is no good reason to ignore it now.

Thus, in addressing the issue before this Court, it clearly must focus on those limited actions alleged to have been taken by Koopman with regard to the initiation

of legal process that resulted in a wrongful post-arraignment deprivation of liberty (if any), notwithstanding Myers' continuing efforts to roll all of his other allegations into this claim.

C. If Myers has such a limited malicious prosecution claim against Koopman under § 1983, Koopman should be entitled to the same absolute immunity as the prosecutor pursuant to *Albright.*

As discussed above, it is the institution of legal process which separates a malicious prosecution claim from Myers' time-barred claims for false arrest or unreasonable search and seizure. However, as Justice Ginsburg pointed out in *Albright*, to allege this type of claim against a police officer – not the prosecutor – is "anomalous":

> "The principal player in carrying out a prosecution – in 'the formal commencement of a criminal proceeding'. . . – is not police officer but prosecutor. Prosecutors, however, have absolute immunity for their conduct . . . .
>
> By focusing on the police officer's role in initiating and pursuing a criminal prosecution, rather than his role in effectuating and maintaining a seizure, Albright's theory raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity." *Id.* (quoting *Albright*, 510 U.S. at 831) (Stevens, J., dissenting) (noting that the issue is open).

Myers tries to downplay the significance of this statement by Justice Ginsburg, contending that courts have allegedly had numerous opportunities to

address this issue since *Albright* was decided, but have allegedly decided not to extend absolute immunity to police officers. However, a review of the cases cited by Myers in support of that proposition show they do not support this assertion. In fact, this issue has never been squarely before the courts since *Albright* was decided.

The two most recent U.S. Supreme Court cases addressing the issue of absolute immunity are *Van de Kamp v. Goldstein*, 555 U.S. 335, 129 S.Ct. 855, 864 L.Ed.2d 706 (2009) and *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed. 471 (1997), both of which involved questions of whether prosecutors – not police officers – were entitled to absolute immunity on the facts presented in each of those cases. Moreover, *Kalina* involved a claim of unreasonable seizure, not a malicious prosecution claim. Further, while Myers points to *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1985) as supposedly rejecting absolute immunity for police officers, that case also involved a false arrest claim, not one for malicious prosecution, and was decided before *Albright*. In fact, Justice Ginsburg was not even a member of the U.S. Supreme Court at the time that case was decided.

The Tenth Circuit cases cited by Myers also do not support his assertion that "this court and multiple other jurisdictions as well. [sic] have had numerous

opportunities to consider malicious prosecution causes of actions since *Albright*. . ." (*Appellee's Brief*, at 12). For instance, *Pierce v. Gilchrest*, 359 F.3d 1279 (10th Cir. 2004) only involved the question of whether the plaintiff – who spent fifteen years in state prison for a rape he did not commit – had sufficiently alleged a malicious prosecution claim against a police department's forensic chemist. The issues of absolute immunity and Justice Ginsburg's opinion in *Albright* were not raised by the defendant in that case, nor were they addressed by this Court there.

Similarly, Myers' reliance on *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990) in support of the above proposition is also misplaced. Again, *Robinson* was decided before *Albright*, and did not in any way address the issue of absolute immunity. It is thus difficult to see how Myers can claim it "put to rest" the issue of the "anomaly" pointed out by Justice Ginsburg four years later. (*Appellee's Brief*, at 15).

Myers' continued reliance on *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2008) and *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007) for the proposition that absolute immunity does not extend to activities which are investigative or administrative in nature also does not "put to rest" the issue either. First, neither one of those cases involved police officers or claims of malicious prosecution. Moreover, as discussed in Koopman's opening brief, this Court's more recent

decision in *Jensen v. Wagner*, 603 F.3d 1182 (10th Cir. 2010) holds that "absolute immunity may attach even to . . . administrative or investigative activities 'when those functions are necessary so that a prosecutor may fulfill his function as an officer of the court.'" *Id.* at 1195. The U.S. Supreme Court suggested the same in *Van de Kamp, supra.* Thus, the two *Mink* cases are certainly not dispositive of this issue either.

In short, Myers could not be more wrong in his assertion that either this Court or the U.S. Supreme Court have had ample opportunity to address the issue now squarely before this Court: whether a police officer should be entitled to share a prosecutor's absolute immunity for actions taken after the initiation of legal process, when the narrow claim of malicious prosecution is the only claim pending and remains against the police officer only. The closest this Court has come to doing so was in *Taylor, supra,* in which it acknowledged the question raised by Justice Ginsburg but declined to address it because the plaintiff there did not allege any impropriety following the police officer's investigation and preparation of the arrest warrant affidavit. *Taylor*, 82 F.3d at 1563. Thus, this case for the first time squarely presents the very anomaly noted by Justice Ginsburg.

Based upon the principles and legal authority discussed above and at length in Koopman's opening brief, it is now clear that – to the extent Myers even has a

viable Fourth Amendment claim for malicious prosecution – said claim is limited to any actions Koopman may have taken following the initiation of legal process against Myers. Said claim cannot be supported by the vast majority of allegations in Myers' Amended Complaint which relate to his time-barred claims of false arrest and/or unreasonable search and seizure. Further, pursuant to its *de* novo review, the Court can conclude that Koopman is indeed entitled to absolute immunity for this single remaining claim of malicious prosecution. Myers' arguments to the contrary in his answer brief do not provide a compelling reason to hold otherwise.

III. CONCLUSION

The District Court's Order denying Koopman absolute immunity, and thus denying the motion to dismiss the amended complaint, should be reversed.

Respectfully submitted this 3rd day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2011, I electronically filed the foregoing Reply Brief using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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