

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

JEREMY C. MYERS,

**Appellant,**

Case No. 12-1482

v.

BRIAN KOOPMAN,

**Appellee.**

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

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**APPELLANT'S OPENING BRIEF**

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Respectfully submitted,

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**ORAL ARGUMENT IS REQUESTED**

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entered 11/8/2012

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### **PRIOR OR RELATED APPEALS**

This case was the subject of a prior interlocutory appeal, Case No. 11-1299, 462 Fed. Appx. 823, (Colo. 2012).

Plaintiff-Appellant Jeremy C. Myers (“Myers”), by and through his attorneys, Randall R. Meyers and Joseph Fonfara, for his opening brief, states:

**I. STATEMENT OF JURISDICTION**

The United States District Court for the District of Colorado has jurisdiction over this matter pursuant to 28 U.S.C. §1331 (federal question). This case involves a civil rights malicious prosecution claim against Brian Koopman, a Loveland police detective, relating to the search of premises belonging to Plaintiff and the subsequent arrest and prosecution of Myers for drug related charges. Said prosecution was terminated prior to trial in the state court.

Koopman moved to dismiss Myers’ malicious prosecution claim that Myers filed as part of an amended complaint. [Doc. No. 128, *Motion to Dismiss Amended Complaint* filed 3/1/11 at 13-14]. Subsequently, the District Court denied Koopman’s motion to dismiss as to the malicious prosecution claims and also denied Koopman’s claim for absolute immunity. [Doc. No. 140, *Order Concerning Defendants’ Motion to Dismiss* entered 6/17/11 at 11-12]. Koopman filed an interlocutory appeal as to the issue of absolute immunity [Doc. No. 147, *Notice of Appeal* filed 6/30/11]. Subsequent to briefing and oral argument, this Court denied Koopman’s interlocutory appeal [Doc. No. 01018793613, 2/14/12]. This appellate court’s jurisdiction derives from 28 U.S.C. §1291.

In a previous order, *Order Concerning Defendants' Motion to Dismiss* [Doc.140, 6/17/11], the District Court found that Myers stated a viable procedural due process claim under the due process clause of the Fourteenth Amendment, *Id.* at 10. The District Court also found that Myers had alleged sufficient facts to establish the malice element of a Fourth Amendment malicious prosecution claim. *Id.* at 11.

On March 8, 2012, Koopman filed a *Motion for Judgment on the Pleadings* [Doc. No 169 filed 3/8/12]. The District Court granted Koopman's motion [Doc. No. 244, 11/8/12] dismissing the remaining claim of Myers.

This appeal ensues, seeking review of the District Court's order granting the Motion for Judgment on the Pleadings. [Doc. No. 251, *Notice of Appeal* filed 12/5/12].

## **II. STATEMENT OF THE ISSUES**

A. Whether the District Court erred in dismissing Myers' Fourth Amendment malicious prosecution claim as being untimely filed based on its finding that Myers' Fourth Amendment claim was founded on a false imprisonment theory rather than upon a malicious prosecution claim as Myers averred in his Complaint.

B. Whether the District Court erred by dismissing his claim for malicious prosecution on grounds that his assertions regarding Fourteenth Amendment protections cannot be addressed and resolved when, and if, there is a state remedy available to afford relief.

C. Whether the District Court erred as a matter of law in declining to accept a “continuing seizure” theory that is based on a claimant’s criminal prosecution subsequent to his release from detention when and if a claimant asserts a violation of his Fourth Amendment protections on a complaint for malicious prosecution and the trial court relies instead on a theory that Fourth Amendment violations cease upon a claimant’s release from detention or incarceration.

### **III. STATEMENT OF THE CASE**

Plaintiff Myers initiated this action with a Complaint filed in state court against the Defendant [Doc. # 2 *Complaint and Jury Demand*, filed 11/05/2009, removed and filed in federal court 12/01/2009]. The original Complaint asserted five claims under 42 U.S.C. § 1983 for alleged violations of the Plaintiff’s constitutional rights. Those claims stemmed from the issuance and execution of a no-knock search warrant for Myers’ property, as well as from his arrest and charges for drug crimes in state court. The claims for relief in the Complaint (the complaint originally included multiple parties) included: (1) a Fourth Amendment claim for unreasonable search and seizure, asserted against all defendants except District Attorney Abrahamson; (2) a claim, asserted by Plaintiff Myers only, for malicious prosecution under the Fourth and Fourteenth Amendments, asserted against all defendants; (3) a claim for use of excessive force in conducting the search, asserted against all defendants except District Attorney Abrahamson; (4) a claim for failure to train or supervise the other defendants, which failures allegedly

caused the constitutional violations alleged in the Complaint, asserted against the cities of Loveland and Fort Collins, Colorado, the chiefs of the Loveland and Fort Collins police departments, the Larimer County Sheriff, District Attorney Abrahamson and Larimer County; and (5) a claim alleging conspiracy by all defendants to violate the plaintiffs' civil rights.

The action was removed to the U.S. District Court for Colorado [Doc. No. 1, *Notice of Removal* filed 12/1/09], and the defendants all moved for dismissal of the claims on multiple grounds. [Doc. No. 14, *Motion to Dismiss Claims Against Defendants Brian Koopman, Luke Hecker and City of Loveland* filed 1/07/10]; [Doc. No. 16, *Motion to Dismiss All Claims Against James A. Alderden In his Official and Individual Capacity, Larimer County, Larimer County Board of County Commissioner, Larry Abrahamson in his Official Capacity, and the Eighth Judicial District* filed 1/07/10]; [Doc. No. 22, *Joinder re Motion to Dismiss Claims* filed 1/08/10]. The District Court dismissed, with prejudice, the Plaintiffs first and third claims as alleged against each of the defendants, finding said claims were barred by the applicable statute of limitations. In addition, the District Court dismissed all of the claims asserted against Koopman and the police chiefs in their official capacities. The District Court also concluded the Plaintiffs did not adequately plead their second, fourth and fifth claims for relief, but deferred a

determination as to whether the plaintiffs should have an opportunity to amend said claims following determination of the defendants entitlement to qualified immunity, as raised in then-pending motions for summary judgment also filed by the defendants. [Doc. No. 99, *Order Concerning Defendants' Motion to Dismiss*, entered 9/27/10 at 12-14]; [Doc. No. 118, *Order Granting Motion for Clarification & Granting in Part the Motion to Dismiss of Defendants Harrison & Fort Collins*, entered 1/28/11].

Shortly thereafter, the District Court granted the summary judgment motions of the Larimer County Board of County Commissioners, Sheriff, and District Attorney, and that of the Eighth Judicial District, concluding no reasonable fact finder could find in favor of the Plaintiffs on their claims against these defendants. The District Court denied the summary judgment motions of Defendants Koopman and Hecker based on qualified immunity grounds, denied motions for summary judgment filed by the City of Fort Collins and its police chief pending completion of additional discovery, and also denied the City of Loveland's motion for summary judgment pending completion of discovery on the claims alleged against it. As part of that ruling, the Court also dismissed without prejudice the Plaintiffs' second, fourth and fifth claims, but granted leave for the Plaintiffs to file an amended complaint in an effort to remedy the pleading flaws in those claims for

relief as found in its prior Order addressing the motions to dismiss. [Doc. No. 126, *Order Concerning Motions for Summary Judgment* entered 2/11/11 at 25-27].

Myers thereafter filed an Amended Complaint bringing a single claim for “malicious prosecution” under 42 U.S.C. § 1983 against only Koopman and the City of Loveland. [Doc. No. 127, *Plaintiff’s Amended Complaint and Jury Demand* filed 3/2/11].

#### **IV. STATEMENT OF FACTS**

On September 5, 2007, Koopman, a detective with the Loveland Police Department, executed an affidavit in support of a no-knock search warrant which later was executed at a property that had been occupied by Myers in Loveland, Colorado. Myers alleges that Koopman “maliciously, intentionally and/or recklessly made false and misleading statements” in this affidavit. [Doc. No. 127, Plaintiff’s Amended Complaint and Jury Demand filed 3/2/11 at 5, paragraph 14]. Koopman’s false and misleading statements in the warrant affidavit included a representation that “an unnamed confidential informant indicated that a methamphetamine lab existed in the attic” of a building occupied by Myers, and that various other facts indicative of a methamphetamine lab existed on the premises. *Id.* at 5, paragraph 14 (a) through (m). Myers further alleged that

Koopman knew that “the information given by his confidential informant... was false.” *Id.* at 17, paragraph 41(a). During his investigation, Koopman had two video surveillance cameras installed to monitor Myers’ property. One camera was installed in late May 2007, and the other was installed in mid-August 2007. *Id.* at 5, paragraphs 12-13. The information captured by those cameras was inconsistent with most of the information contained in Koopman’s affidavit. *Id.* at 7, paragraph 15.

On September 5, 2007, Koopman obtained a no-knock search warrant for Myers’ property based on the false and malicious statements in Koopman’s affidavit. *Id.* at 8-9, paragraph 16. On Thursday, September 6, 2007, members of the Larimer County Drug Task Force, along with the Larimer County and Loveland SWAT teams, executed the no-knock warrant at Myers’ property. *Id.* at 9, paragraph 17. During the search, seven field tests were conducted on suspected drugs found during the search and each test showed a false positive for the presence of an illegal drug. *Id.* at 15, paragraph 37(h). Koopman either “fabricated the results maliciously or the [test] strips were intentionally and/or improperly used to achieve a malicious pre-determined goal.” *Id.* After the search was completed, Koopman prepared or endorsed an affidavit in support of a warrant for the arrest of Myers. *Id.* at 12-13, paragraph 34. The affidavit contained false

statements to support the issuance of the arrest warrant and Koopman “acted maliciously, recklessly, knowingly, intentionally, willfully and wantonly” in preparing or endorsing the affidavit. *Id.*

Myers was arrested on Friday, September 7, 2007 and was detained in the Larimer County Detention Center until Monday, September 10, 2007 at which time he was released on bond. *Id.* at 11, paragraph 24-26. Criminal charges were subsequently filed against Myers by the district attorney and several hearings were held in his criminal case between September 7, 2007, and November 17, 2007. *Id* at 11, paragraph 27. Ultimately, further testing conducted by the Colorado Bureau of Investigation on the samples recovered during the search demonstrated that no controlled substances were recovered from Myers’ property or from the neighboring buildings that were searched on September 6, 2007. *Id.* at 11, paragraph 28. Myers alleges, on information and belief, that Koopman was aware of these negative test results at the time of his preliminary hearing testimony on November 15, 2007, and lied under oath as to that fact. *Id.* at 15, paragraph 37(g). The district attorney dropped all charges against Myers at the November 15, 2007 preliminary hearing. *Id.* at 12, paragraph 28.

## V. SUMMARY OF THE ARGUMENTS

The Tenth Circuit has long recognized the legal viability of a §1983 malicious prosecution claim. *Taylor v. Meacham*, 82 F.3d 1556 (10<sup>th</sup> Cir. 1996) (“Reconciling these various cases, we conclude that our circuit takes the common law elements of malicious prosecution as the "starting point" for the analysis of a Section(s) 1983 malicious prosecution claim, but. . . . .”) , *Pierce v. Gilchrist*, 359 F.3d 1279 (10<sup>th</sup> Cir. 2004) (“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 . . . . .”), *Wilkins v. DeReyes*, 528 F.3d 790 (10<sup>th</sup> Cir. 2008) (“Our cases suggest a §1983 malicious prosecution claim need not always rest on the right to be free from unreasonable searches and seizures under the Fourth Amendment. As we have previously noted, a plaintiff's § 1983 malicious prosecution claim may also encompass procedural due process violations.”), *Mondragon v. Thompson*, 519 F.3d 1078 (10<sup>th</sup> Cir 2008) (“After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim.”). Tenth Circuit case law further recognizes that such a claim can rest upon both the Fourth and Fourteenth Amendments to the U.S. Constitution. *Wilkins*, fn5. The viability of a malicious prosecution claim under both the Fourth and Fourteenth Amendments was likewise recognized in this case

by the District Court in its order denying Koopman's Motion to Dismiss [Doc. No. 140, 6/17/11, pgs. 7-11].

For purposes of the statute of limitations, a Fourth Amendment claim for an unlawful search and seizure would accrue at the point of a person's release from custody, while malicious prosecution claims do not accrue until such time as the charges are dismissed. *Wilkins*. The District Court, in its order granting judgment on the pleadings, failed to properly analyze this as a Fourth Amendment malicious prosecution claim for purposes of the applicable statute of limitations.

The District Court's dismissal of Myers' claim under the Fourteenth Amendment is equally erroneous. In its previous *Order Concerning Defendant's Motion to Dismiss* [Doc. No. 140, 6/17/11, pgs. 7-11], the District Court recognized several prior Tenth Circuit holdings regarding Fourteenth Amendment *procedural* due process claims as they relate to malicious prosecution. But because the District Court improperly analyzed Myers' Fourth Amendment claim as one for false imprisonment, it erred in applying the findings in *Becker v. Kroll*, 494 F.3d 904 (10<sup>th</sup> Cir. 2007) and dismissing Myers' malicious prosecution claim under the Fourteenth Amendment.

Since Myers' Fourth Amendment claim was grounded in malicious prosecution and was not false imprisonment, as claimed by the District Court, the

requisite accrual date for statute of limitation purposes was November 15, 2007 (the date the charges were dismissed) and not September 10, 2007 (his pre-trial release date).

For the reasons detailed below, the District Court improperly granted Defendant Koopman's Motion for Judgment on the Pleadings and Myers respectfully requests this Court reverse the District Court's ruling.

## **VI. ARGUMENT**

### **A. The District Court Erroneously Concluded That Myers' Fourth Amendment Claim Was One For False Imprisonment And, Thus, Was Time-Barred**

“The operative complaint is the Plaintiff’s Amended Complaint and Jury Demand [#127] filed March 2, 2011”. See *Order Granting Defendant’s Motion For Judgment on the Pleadings* [#244] filed November 8, 2012, at p. 3. “In his amended complaint, the plaintiff, Jeremy Myers, asserted a claim under the Fourth and Fourteenth Amendments which he labels as a claim for malicious prosecution”, *Id.*

The District Court had previously recognized the viability of a claim for malicious prosecution under both the Fourth and Fourteenth Amendments of the

U.S. Constitution. *Order Concerning Defendant's Motion to Dismiss* [#140, 6/17/11, pgs. 7-11]. “Based on the law established by the United States Court of Appeals for the Tenth Circuit, I conclude the Myers has not stated a viable *substantive* due process claim under the Fourteenth Amendment. (Emphasis added). However, I conclude that Myers has stated a viable *procedural* due process claim under the Due Process Clause of the Fourteenth Amendment”, *Id* at p. 7. (Emphasis added).

As to the preclusion of a substantive due process claim, the District Court supported its conclusions by citing Tenth Circuit law. *Taylor v. Meacham*, 82 F.3d 1556 (10<sup>th</sup> Cir. 1996) (citing *Albright V. Oliver*, 510 U.S. 266 (1994)). As to the viability of a procedural due process claim, the District Court cited both *Mondragon v. Thompson*, 519 F.3d 1078 ( 10<sup>th</sup> Cir. 2008) and *Pierce v. Gilchrist*, 359 F.3d 1279 (10<sup>th</sup> Cir. 2004). The District Court also found that Myers’ claim for Fourth Amendment malicious prosecution was also viable if he could show those elements of malice in his amended complaint.

Myers takes no issue with the District Court as to its conclusion concerning substantive v. procedural due process. And Myers believes, as did the District Court, that the Tenth Circuit does recognize §1983 malicious prosecution claims under both the Fourth and Fourteenth Amendments. *Wilkins v. DeReyes*, 528 F.3d

790 (10<sup>th</sup> Cir. 2008), see, specifically fn5. In its *Order Granting Defendant's Motion For Judgment on the Pleadings*, the District Court does not argue otherwise.

Myers' initial claim based on Fourth Amendment search and seizure (false imprisonment) (original Complaint, Doc. 2, filed 12/01/09) was had been previously dismissed by the District Court as time barred. See *Order Concerning Defendants' Motion to Dismiss* [#99] filed September 27, 2010. Thus, such a claim was not included by Myers when he filed his Amended Complaint and Jury Demand on March 2, 2011 as had been specifically directed by the District Court. However, Myers' amended complaint did include a Fourth and Fourteenth Amendment malicious prosecution claim.

For purposes of the statute of limitations, false imprisonment and malicious prosecution carry two different accrual dates. While the applicable statute of limitations for either is two years, the accrual date for false imprisonment is the date of release from detention and the accrual date for malicious prosecution is the date the prosecution was terminated. In this instance, those dates are September 10, 2007 (date of release) and November 15, 2007 (date of termination). Myers filed his complaint on November 5, 2009. Thus, a Fourth Amendment claim based

on false imprisonment would be time barred and a Fourth Amendment claim for malicious prosecution would not.

Myers asserts that the Tenth Circuit recognizes Fourth Amendment malicious prosecution claims. Myers' amended complaint challenged Detective Koopman's probable cause for the ensuing charges and, consequently, the institution of legal process, a requirement of Tenth Circuit law. *Wilkins v. DeReyes*, 528 F.3d 790 (10<sup>th</sup> Cir. 2008), see also, fn5. Unlike the District Court's apparent conclusion, Myers argues that a Fourth Amendment false imprisonment claim and a Fourth Amendment malicious prosecution claim, although grounded in the same constitutional provision, can coexist. *Wilkins, Id.* at fn5.

A §1983 malicious prosecution claim, which requires favorable termination as an element, does not accrue until the alleged malicious prosecution terminates in favor of the plaintiff. *Juan Mata v. Ron Anderson, Sgt.*, No.10-2031 (10<sup>th</sup> Cir. 03/31/2011).

The District Court erred in its conclusion that Myers' Fourth Amendment claim was anything other than for malicious prosecution and erred again by claiming it to be time barred.

**B. The District Court Erred When It Dismissed The Fourteenth Amendment Due Process Claim On The Ground A State Remedy Was Available To Afford Relief**

The District Court misapplied the findings in *Becker v. Kroll*, 494 F.3d 904 (10<sup>th</sup> Cir. 2007) to the instant case.

*Becker* stands for two propositions as is applicable to this case. First, the facts of *Becker* show us that that case is distinguishable in that the *Becker* court found there was no seizure as contemplated by the Fourth Amendment and, therefore, no Fourth Amendment violation. This was critical to the *Becker* conclusion in that the Tenth Circuit had previously concluded that a Fourteenth Amendment Due Process Claim essentially must be underpinned by the violation of some other constitutional provision, such as the Fourth Amendment, in order to support a viable Fourteenth Amendment due process violation. "We have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be "the Fourth Amendment's right to be free from unreasonable seizures."

Citing *Taylor*, 82 F.3d at 1561; see *Pierce*, 359 F.3d at 1285--86," *Id.* *Becker* further concluded that a violation of the Fourth Amendment requires the intentional acquisition of physical control (citing *Brower v. County of Inyo*, 489

U.S. 593 (1989)). The salient facts in *Becker*, as the Court found, did not support a seizure in the traditional, constitutional sense and, thus, the Court could find no Fourth Amendment violation in *Becker* which could serve as the requisite “underpinning” by which the Court could then extend the Fourteenth Amendment’s due process protections. This is not to say that courts need ignore procedural due process. Indeed, the U.S Supreme Court, and the Tenth Circuit, has recognized that a state’s post-deprivation tort remedy satisfies the procedural requirements of the Due Process Clause (*Parratt v. Taylor*, 451 U.S. 527 (1981), *Becker v. Kroll*, 494 F.3d 904 (10<sup>th</sup> Cir. 2007)). But they do not do so in a vacuum.

The second proposition in *Becker* was that, standing alone, the Fourteenth Amendment’s Due Process Clause cannot be the basis of a claim for malicious prosecution. Both *Parratt* and *Becker* scrutinized the Fourteenth Amendment’s due process malicious prosecution in the absence of a relevant constitutional underpinning such as the Fourth Amendment. A correct reading of those opinions requires that a Fourteenth Amendment analysis, in the context of malicious prosecution and due process, must be combined with the existence (or absence) of a Fourth Amendment seizure.

This case contrasts with the facts in *Becker* in precisely that way. Myers asserts, and the District Court so recognized, that he was constitutionally “seized”

for Fourth Amendment purposes. See *Order Granting Defendant's Motion For Judgment on the Pleadings* [#244] filed November 8, 2012, at 7. Factually, Myers was arrested on September 7, 2007, posted bond, and was released from custody on September 10, 2007. The District Court apparently theorizes that Myers' release on September 10, 2007 ended further analysis of any Fourth Amendment claim he may have after that date since he suffered no further incarceration. Myers filed his initial complaint (in state court) on November 5, 2009, more than two years after his release from incarceration. To extrapolate forward, the District Court reasons that, "for the purpose of Myers' Fourth Amendment claim, *in the nature of false imprisonment*, Myers' claim against Koopman accrued on the date of Myers' release, September 10, 2007." (Emphasis added). *Order Granting Defendant's Motion For Judgment on the Pleadings* [#244] filed November 8, 2012, at p. 7. Myers' First Claim for Relief in his original complaint was a Fourth Amendment unreasonable search and seizure claim. His Second Claim for Relief was a Fourth and Fourteenth Amendment claim for malicious prosecution. Despite having dismissed the original Fourth Amendment unreasonable seizure claim as being time barred, the District Court mischaracterized Myers' surviving Fourth Amendment claim as one for false imprisonment. Myers' Fourth Amendment claim was grounded in malicious prosecution.

It is difficult to see how the District Court's reasoning could ever give rise to a Fourth Amendment malicious prosecution claim. A defendant would either need to remain in custody until their case was favorably terminated, or be "re-seized" between the original seizure and the termination. This is not Tenth Circuit law.

By improperly identifying Myers' Fourth Amendment claim as *in the nature of false imprisonment*, the District Court was able to conclude that it was time barred. This further enabled the District Court to apply the findings in *Becker*, *Id* (no underlying Fourth Amendment claim, no viable Fourteenth Amendment claim). Myers's Fourth Amendment claim was for malicious prosecution and was not time barred. *Mata, Id. Becker*, then, has no applicability to this case.

### **C. The District Court Erred When It Declined To Accept A "Continuing Seizure" Theory When A Claimant Asserts A Violation Of His Fourth Amendment Protections On A Complaint For Malicious Prosecution.**

The concept of continuing seizure has been much debated since being introduced by Justice Ginsberg in her concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994). A variety of circuits have considered the issue, reaching a variety of conclusions.

Courts in the Tenth Circuit have not been immune from the concept. The issue was most recently addressed by the Utah Supreme Court in *Peak Alarm Co.*,

*Inc. v. Salt Lake City Corp.*, 243 P.3d 1221 (Utah 2010). The Utah court analyzed the issues in *Peak* within the context of Tenth Circuit law. In *Peak*, the Utah Supreme Court walked through the traditional Tenth Circuit analysis of §1983 claims under the Fourth and Fourteenth Amendments for claims based on illegal seizure and malicious prosecution. In this case, Myers was seized in the traditional sense in that he was subjected to an arrest and detention. Myers was also subjected to legal process in that he was arrested pursuant to a warrant and charged criminally. See *Young v. Davis*, 554 F.3d 1254 (10<sup>th</sup> Cir. 2009) for what constitutes the initiation of legal process.

*Peak* reiterated this circuit's findings in *Wilkins v. DeReyes*, 528 F.3d 790, 799 n.5 (10<sup>th</sup> Cir. 2008) and *Pierce v. Gilchrist*, 359 F.3d 1279 (10<sup>th</sup> Cir. 2004) by recognizing that a malicious prosecution claim is a second Fourth Amendment claim that comes on the heels of a false arrest or imprisonment claim. As noted in *Peak*, federal courts have held a cause of action for malicious prosecution under the Fourth Amendment can be maintained when the plaintiff is detained "after the wrongful institution of legal process". A malicious prosecution claim based on the Fourth Amendment is viewed as a seizure, as a consequence of the improper use of legal process, *Peak, Id.* Thus, Myers was subjected to a continuing seizure within the *Wilkins* context, that is, the second Fourth Amendment claim (malicious

prosecution) that comes on the heels of the first Fourth Amendment claim (false arrest or imprisonment).

**VII. STATEMENT OF COUNSEL AS TO ORAL ARGUMENT**

Counsel believes oral argument would be helpful to the Court.

**VIII. CONCLUSION**

The District Court's Order, granting Defendant's Motion for Judgment on the Pleadings, should be reversed.

Respectfully submitted this 15<sup>th</sup> day of March, 2013.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

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Dated: March 15, 2013

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**CERTIFICATE OF DIGITAL SUBMISSION  
AND PRIVACY REDACTIONS**

I hereby certify that a copy of the foregoing APPELLANT'S OPENING 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, 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.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2013, I electronically filed the foregoing Opening Brief using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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