Exhibit B

FILED
United States Court of Appeals
Tenth Circuit

March 26, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DOUGLAS A. GLASER,

Plaintiff - Appellant,

v.

CITY AND COUNTY OF DENVER, COLORADO, et al.,

Defendants - Appellees.

No. 18-1049

ORDER

Before **HARTZ**, **McKAY**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

March 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DOUGLAS A. GLASER,

Plaintiff - Appellant,

v.

CITY AND COUNTY OF DENVER, COLORADO; SECOND JUDICIAL DISTRICT; MITCH MORRISSEY; JOE MORALES; ANDY SHOPNECK; DOUGLAS PRITCHARD; DENVER POLICE OFFICER YOUNG,

Defendants - Appellees.

No. 18-1049
(D.C. No. 1:16-CV-00233-RM-MLC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **McKAY**, and **MORITZ**, Circuit Judges.

Douglas A. Glaser, a pro se Colorado inmate, appeals the dismissal of his action alleging claims under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). On initial screening the district court dismissed most of the claims as frivolous under 28 U.S.C. § 1915A, and

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

later dismissed the remaining claims under Fed. R. Civ. P. 12(b)(6). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

This litigation is an offshoot of a prosecution of Mr. Glaser for securities violations and later civil-rights litigation. *See Glaser v. City & Cty. of Denver*, 557 F. App'x 689, 694-96 (10th Cir. 2014) (unpublished). For purposes of this appeal, we assume as true the well-pleaded factual allegations in Mr. Glaser's amended complaint (the Complaint). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). According to the Complaint, the prosecution on the securities violations was dismissed in February 2007, reinstated, and then dismissed once again in February 2008. After the second dismissal Mr. Glaser filed a federal lawsuit claiming constitutional violations by certain government officials. The Complaint alleges that those officials then began to follow and harass him. In particular, on April 19, 2008, he was stopped by federal agents, including Agent Douglas Pritchard of the Department of Homeland Security, on suspicion of driving under the influence (DUI). He alleges that the agents laughed at him and said, "We have him now, he will never get out of jail this time." R. at 40 (internal quotation marks omitted). Denver police officer Theodore Young arrived on scene and arrested Mr. Glaser without administering a blood-alcohol test or a breath test. Mr. Glaser posted bond and was released.

Two years later, on April 10, 2010, Agent Pritchard testified at Mr. Glaser's probable-cause hearing on the DUI charge. He said that he alone stopped Mr. Glaser

and that no other federal agents were present. He also said that Mr. Glaser was speeding, driving erratically, and not stopping at red lights. Based on this testimony, the court determined the arrest was supported by probable cause. But at Mr. Glaser's trial in county court in March 2012, Agent Pritchard changed his testimony and asserted that multiple agents from the Department of Homeland Security had surrounded and stopped Mr. Glaser's vehicle. Additionally, Officer Young testified that Mr. Glaser's eyes were "red and watery." R. at 46. Mr. Glaser was convicted and served 730 days in jail, but his conviction was reversed by the district court on appeal because the trial court abused its discretion in denying Mr. Glaser's challenge to a juror for cause. The case was remanded; but rather than retry Mr. Glaser, the prosecution dismissed the case on January 27, 2014.

On January 26, 2016, Mr. Glaser initiated this action. The Complaint asserted claims alleging 1) malicious prosecution; 2) "Retaliation-Vindictive Prosecution"; 3) slander, defamation of character, and harassment; 4) conspiracy to violate constitutional rights; and 5) "Supervisory Failure/Unconstitutional Law, Policy, or Custom." *Id.* at 46, 60. The district court screened the Complaint under 28 U.S.C. § 1915(A) and dismissed as legally frivolous all but the claims alleging malicious prosecution against Agent Pritchard and Officer Young. The court determined that it was obvious from the face of the Complaint that the rest of the claims were barred by the governing 2-year statute of limitations and that they were largely repetitive of claims that were previously dismissed as untimely in a prior action.

Agent Pritchard and Officer Young each later moved to dismiss the remaining claims under Fed. R. Civ. P. 12(b)(6). A magistrate judge recommended that the motions be granted, and, over Mr. Glaser's objections, the district court accepted the recommendation and dismissed the remaining claims. The court concluded that Mr. Glaser's allegations were more aptly construed as claims of false imprisonment, which were time-barred; that defendants were entitled to absolute immunity for their testimony; and that to the extent Mr. Glaser alleged malicious prosecution, he failed to state a claim. Mr. Glaser now challenges both the district court's initial order of dismissal under § 1915(A)(b) and its later order dismissing his claims against Agent Pritchard and Officer Young under Rule 12(b)(6).[1]

II

We first address the initial dismissal order.[2] Mr. Glaser contends the district court erred in dismissing as time-barred all but the claims alleging malicious prosecution against Agent Pritchard and Officer Young. He asserts that the rest of his claims were previously raised and dismissed in an earlier lawsuit under *Heck v. Humphrey*, 512 U.S. 477 (1994), and thus the statute of limitations ought to be tolled

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[1] Although Mr. Glaser challenges the dismissal of all his claims against all defendants, only Agent Pritchard and Officer Young have filed briefs on appeal.

[2] "[T]his court has not yet determined whether a dismissal pursuant to § 1915A on the ground that the complaint is legally frivolous is reviewed *de novo* or for abuse of discretion." *Plunk v. Givens*, 234 F.3d 1128, 1130 (10th Cir. 2000); *see also Flute v. United States*, 723 F. App'x 604, 605 (10th Cir.) (unpublished) (same), *cert. dismissed*, 139 S. Ct. 188 (2018). The issue is inconsequential here because Mr. Glaser cannot prevail under either standard.

until January 27, 2014, when the prosecution dismissed the DUI charges. But even though *Heck* previously prevented consideration of the claims while Mr. Glaser's conviction was in force, *Heck* did not guarantee that once the court could consider the claims (after the conviction was set aside) the claims must be deemed timely. As it turns out, the claims accrued more than two years before Mr. Glaser's conviction, so they were barred by the statute of limitations even before *Heck* had any application.

Moreover, Mr. Glaser offers no rebuttal to the district court's equally dispositive conclusion that his claims are frivolous because they are repetitive of claims he brought in his earlier lawsuit. *See Childs v. Miller*, 713 F.3d 1262, 1265 (10th Cir. 2013) ("Repetitious litigation of virtually identical causes of action may be dismissed . . . as frivolous or malicious." (brackets and internal quotation marks omitted)); *see also Murrell v. Shalala*, 43 F.3d 1388, 1389-90 (10th Cir. 1994) (failure to challenge equally dispositive alternative ruling forecloses appellate relief). In fact, his argument implicitly, if not explicitly, concedes that these claims were repetitive. Under these circumstances, we affirm the district court's dismissal.

As for the surviving claims against Agent Pritchard and Officer Young, we review de novo the district court's dismissal under Rule 12(b)(6), affording Mr. Glaser's pro se materials a liberal construction. *See Childs*, 713 F.3d at 1264. Dismissal based on the statute of limitations is appropriate under Rule 12(b)(6) "when the dates given in the complaint make clear that the right sued upon has been

extinguished." *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980).

The statute of limitations for a § 1983 action is set by state law, although federal law prescribes when the action accrued. *See Wallace v. Kato*, 549 U.S. 384, 387-88 (2007). We look to the forum state's statute of limitations for personal-injury claims. *See id.* at 387. In Colorado the relevant statute of limitations applicable to a § 1983 action is two years. *See Braxton v. Zavaras*, 614 F.3d 1156, 1160 (10th Cir. 2010). A § 1983 action "accrues when the facts that would support a cause of action are or should be apparent." *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995) (internal quotation marks omitted).[3]

Here, the accrual of Mr. Glaser's claims turns on a proper interpretation of his allegations. He alleged that he was arrested on April 19, 2008, without probable cause. He averred that Agent Pritchard and Officer Young denied him a blood-alcohol or breath test, he experienced numerous hardships before trial, and he served 730 days in jail without any proof he was driving under the influence. He further alleged that Agent Pritchard offered perjured testimony, presumably at the April 2010 probable-cause hearing, and then changed his testimony at trial, and that both Agent Pritchard and Officer Young perjured themselves during the trial to obtain his conviction.

[3] Mr. Glaser's *Bivens* claim is subject to the same statute of limitations as his § 1983 claim. *See Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009).

These allegations are properly construed as raising claims of both malicious prosecution *and* false imprisonment. "Our case law distinguishes between seizures based on whether they are imposed with or without legal process." *Sanchez v. Hartley*, 810 F.3d 750, 757 (10th Cir. 2016). "[S]eizures imposed pursuant to legal process generally trigger claims for malicious prosecution, while seizures imposed without legal process generally trigger claims for false imprisonment." *Id.* A warrantless arrest is a detention without legal process. *See Wallace*, 549 U.S. at 389. "A claim of false imprisonment accrues when the alleged false imprisonment ends," *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013), and "a false imprisonment ends once the victim becomes held pursuant to [legal] process," *Wallace*, 549 U.S. at 389 (emphasis omitted). But "when . . . [the arrestee] is bound over by a magistrate or arraigned on charges," he may have a new claim for malicious prosecution resulting from the "wrongful institution of legal process." *Id.* at 389-90 (emphasis omitted). "A claim of malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor." *Myers*, 738 F.3d at 1194.

Mr. Glaser disavows a false-imprisonment claim so he can take advantage of the later accrual date of a malicious-prosecution claim. But he does not disavow his allegations of illegal arrest and pretrial hardship before the institution of legal process, which assert claims of false imprisonment. Because a false-imprisonment claim accrues upon a judicial determination of probable cause, *see Young v. Davis*, 554 F.3d 1254, 1257 (10th Cir. 2009), Mr. Glaser's claims accrued no later than the time of his probable-cause hearing on April 10, 2010. Mr. Glaser did not initiate this

action until January 26, 2016, well after the 2-year statute of limitations had expired. He asserts no basis for tolling, and thus, to the extent he claimed false imprisonment, the claims were time-barred.

Of course, Mr. Glaser also alleged that after the institution of legal process, which was allegedly based on an illegal finding of probable cause, he was compelled to appear in court, forced to stand trial, wrongly convicted, and imprisoned for 730 days. These post-legal-process allegations are properly construed as claiming malicious prosecution. Mr. Glaser's Complaint alleged that the criminal DUI proceedings at issue here had been terminated on January 27, 2014, which, to the extent he alleged malicious prosecution, would mark the accrual date for his claims. *See Heck*, 512 U.S. at 489. Mr. Glaser initiated this action on January 26, 2016, so his malicious-prosecution claims were timely.

But there is a defect in those claims. Mr. Glaser alleged that his convictions on the DUI charges were vacated and the prosecution dismissed the case on January 27, 2014. The decision vacating the convictions indicates that they were reversed because the trial court abused its discretion in denying Mr. Glaser's challenge to a juror for cause. On remand the prosecution elected to dismiss the case rather than retry Mr. Glaser after he had already served his sentence.[4] Under these circumstances, Mr. Glaser cannot state a claim of malicious prosecution.

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[4] We may consider both the state court's decision and evidence of the prosecution's dismissal, which are central to Mr. Glaser's claims, because he references them in his Complaint, *see* R. at 42, and does not dispute their authenticity. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002).

One element of a malicious-prosecution claim is that "the original action terminated in the plaintiff's favor." *Cordova v. City of Albuquerque*, 816 F.3d 645, 650 (10th Cir. 2016). We have held that a prosecutor's abandonment of criminal "proceedings is ordinarily insufficient to constitute a favorable termination if the prosecution is abandoned pursuant to an agreement of compromise with the accused; because of misconduct on the part of the accused; or out of mercy requested or accepted by the accused." *Wilkins v. DeReyes*, 528 F.3d 790, 802-03 (10th Cir. 2008) (brackets, ellipses, and internal quotation marks omitted). "These reasons for withdrawal of a charge do not necessarily constitute favorable terminations because they do not indicate the innocence of the accused or are at least consistent with guilt." *Id.* at 803 (internal quotation marks omitted). Consequently, we "look to the stated reasons for the dismissal as well as to the circumstances surrounding it to determine if the dismissal indicates the accused's innocence." *Margheim v. Buljko*, 855 F.3d 1077, 1086 (10th Cir. 2017) (internal quotation marks omitted).

Mr. Glaser insists his DUI proceedings terminated in his favor because his convictions were overturned and none of the foregoing reasons caused the prosecution to dismiss his case. That may be, but he offers nothing to suggest that the dismissal of the charges on remand was indicative of his innocence. Rather, the record reflects that the DUI proceedings were dismissed on grounds unrelated to the merits of the case. *See Cordova*, 816 F.3d at 651 (dismissal for speedy-trial violation was "on technical, procedural grounds which had nothing to do with the merits of case" and was not indicative of innocence). The prosecutor simply elected not to

retry the case after Mr. Glaser had already served his entire sentence. This in no way indicates that Mr. Glaser was innocent. Accordingly, he failed to state a claim for malicious prosecution, and the district court correctly dismissed his claims under Rule 12(b)(6).[5]

III

The judgment of the district court is affirmed. Mr. Glaser's motion to proceed on appeal *in forma pauperis* is granted. The relevant statute, 28 U.S.C. § 1915(a)(1), does not permit litigants to avoid payment of filing and docketing fees, only *prepayment* of those fees. Though we have disposed of this matter on the merits, Mr. Glaser remains obligated to pay all filing and docketing fees, and he must continue making partial payments until the entire fee is paid in full.

Entered for the Court

Harris L Hartz
Circuit Judge

[5] In light of this conclusion, we need not consider the district court's alternate rulings concerning absolute immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 16-cv-00233-RM-MLC

DOUGLAS A. GLASER,

Plaintiff,

v.

DOUGLAS PRITCHARD, and
DENVER POLICE OFFICER YOUNG,

Defendants.

ORDER

This matter is before the Court on the June 12, 2017, Recommendation and Order of United States Magistrate Judge ("Recommendation") (ECF No. 60), recommending the following: (1) granting Defendant Pritchard's Motion to Dismiss (ECF No. 41); and (2) granting Defendant Young's Motion to Dismiss. (ECF No. 45). Plaintiff has filed "Objection to Recommendation/Motion for Final Order" ("Objection"). (ECF No. 61). Defendant Young filed a response to the Objection. (ECF No. 62). Defendant Pritchard did not file a response. The Recommendation, Objection, and all related pending matters are now ripe for determination.

I. BACKGROUND AND PROCEDURAL HISTORY

The Court has reviewed the Background and Procedural History set forth in the Recommendation and finds they accurately reflect the record. The Objection is sometimes unclear; therefore, to the extent Plaintiff objects to any matter set forth in the Background or Procedural History, it is overruled as conclusory or contrary to the Court's review of the record.

Accordingly, the Background and Procedural History are accepted and incorporated herein by reference.[1] Nonetheless, the Court sets forth a summary.

Pro se Plaintiff, Douglas Glaser ("Plaintiff") alleges that he was arrested for a DUI without probable cause or any rational basis for the arrest and in retaliation for exercising his constitutional rights. Specifically, Plaintiff alleges that on April 19, 2008, his vehicle was surrounded by multiple federal agents from the Department of Homeland Security, including Defendant Douglas Pritchard ("Defendant Pritchard"). Defendant Theodore Young ("Defendant Young") showed up a short while later and arrested Plaintiff for driving under the influence.

At Plaintiff's probable cause hearing on April 10, 2010, the court found there was probable cause to arrest Plaintiff based on Defendant Pritchard's testimony. At Plaintiff's DUI trial in March 2012, Defendant Pritchard allegedly changed his testimony in regards to how many people were present during Plaintiff's stop. Plaintiff alleges that Defendant Pritchard provided false testimony in both the probable cause hearing and at trial. Plaintiff also alleges Defendant Young gave false testimony by stating Plaintiff's eyes were "red and watery."

Plaintiff was ultimately convicted on all counts and served the maximum sentence of 730 days in jail. On direct appeal, Plaintiff's conviction was reversed on the grounds that the court abused its discretion when it denied Plaintiff's for cause challenge of a juror. On remand, the prosecution dismissed the case instead of retrying it.

Plaintiff filed his original complaint in this action (ECF No. 1), on January 28, 2016 naming the City and County of Denver, the Second Judicial District, Mitch Morrissey, Joe Morales, Andy Shopneck, Douglas Pritchard, and Theodore Young as Defendants. Judge Gallagher ordered Plaintiff to file an amended complaint that comported with Rule 8 of the

[1] To the extent any additional information or allegations are necessary to the resolution of Plaintiff's Objection, they are set forth in this Order.

ATTACHMENT 1

Federal Rules of Civil Procedure and alleged the personal participation of each Defendant in an arguable deprivation of Plaintiff's constitutional or statutory rights.

Plaintiff filed his Amended Complaint (ECF No. 7) on April 28, 2016 asserting the following five claims for relief: (1) Malicious Prosecution; (2) Retaliation–Vindictive Prosecution; (3) Slander, Defamation of Character, Harassment; (4) Conspiracy to Violate Constitutional Rights; and (5) Supervisory Failure/Unconstitutional Law, Policy, or Custom. On May 31, 2016, the Judge Babcock dismissed claims (2) – (5) against all Defendants, and claim (1) was dismissed against all Defendants except Defendant Young and Defendant Pritchard. (ECF No. 8).

Defendant Pritchard filed a Motion to Dismiss the remaining claim on October 31, 2016. (ECF No. 41). Defendant Young filed a Motion to Dismiss the remaining claim on November 14, 2016. (ECF No. 45). Plaintiff filed Responses to both Motions respectively. (ECF Nos. 54, 55). Defendants each filed a Reply. (ECF Nos. 57, 58).

On June 12, 2017, Magistrate Judge Shaffer provided his Recommendation regarding Defendants' Motions to Dismiss. (ECF No. 60). Plaintiff timely filed an Objection to the Recommendation on June 26, 2017. (ECF No. 61). On July 10, 2017, Defendant Young filed a Response to Plaintiff's Objection. (ECF No. 62). With this background in mind, the Court addresses the Recommendation and Objection.

II. LEGAL STANDARD

A. Review of a Magistrate Judge's Report and Recommendation

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires the district court judge to "determine de novo any part of the magistrate judge's [recommendation] that has been properly objected to." In conducting its

review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). An objection is proper if it is filed within fourteen days of the magistrate judge's recommendations and specific enough to enable the "district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1059 (10th Cir. 1996) (quoting *Thomas v. Arn*, 474 U.S. 140, 147 (1985)). The district judge need not, however, consider arguments not raised before the magistrate judge. *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.").

In the absence of a timely and specific objection, "the district court may review a magistrate's report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also* Fed. R. Civ. P. 72 Advisory Committee's Note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."). And, where a claim is dismissed on two or more independent grounds, the plaintiff must contest each of those grounds. *See Lebahn v. Nat'l Farmers Union Unif. Pension Plan*, 828 F.3d 1180, 1188 (10th Cir. 2016). If the plaintiff fails to do so, the court may affirm on the ground which the plaintiff failed to challenge. *Id.*

B. Motions to Dismiss

1. Fed. R. Civ. P. 12(b)(6)

In evaluating a motion to dismiss under Rule 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *Brokers'*

Choice of America, Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1135–36 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). Conclusory allegations are insufficient. *See Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009). Instead, in the complaint, the plaintiff must allege a "plausible" entitlement to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–556 (2007). A complaint warrants dismissal if it fails "*in toto* to render plaintiffs' entitlement to relief plausible." *Twombly*, 550 U.S. at 569 n.14 (italics in original). "In determining the plausibility of a claim, we look to the elements of the particular cause of action, keeping in mind that the Rule 12(b)(6) standard does not require a plaintiff to set forth a prima facie case for each element." *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (citation, internal quotation marks, and alteration omitted).

C. Plaintiff's Pro Se Status

Plaintiff proceeds pro se; thus, the Court must liberally construe his pleadings. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The Court, however, cannot act as advocate for Plaintiff, who must still comply with the fundamental requirements of the Federal Rules of Civil Procedure. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

III. ANALYSIS

A. Malicious Prosecution

Plaintiff alleges that Defendants Pritchard and Young engaged in malicious prosecution in violation of his Fourth and Fourteenth Amendment rights by arresting him without probable cause and falsely testifying against him at his probable cause hearing and trial. (ECF No. 7 at 5-6, 8, 10-11).

1. Arrest without Probable Cause

Plaintiff claims that he was arrested without any evidence other than the false testimony by Defendants. (ECF No. 61 at 2). Plaintiff further claims that under Colorado's two year statute of limitations, the time begins to accrue after the underlying conviction has been reversed on direct appeal. *Id.* at 3-4. Therefore, Plaintiff believes he is within the two year statute of limitations and that his claim for malicious prosecution survives. *Id.*

As the Magistrate Judge correctly identified, seizures without legal process implicate false imprisonment claims, while seizures pursuant to legal process trigger malicious prosecution claims. (ECF No. 60 at 7-8). Plaintiff was seized without a warrant and allegedly without probable cause, therefore, his claim would more aptly be classified as one for false imprisonment rather than malicious prosecution.

This distinction is dispositive in Plaintiff's case because claims for malicious prosecution "do not accrue until the criminal proceedings have terminated in the Plaintiff's favor," while claims for false imprisonment begin "when the alleged false imprisonment ends." *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013). And "a false imprisonment ends once the victim becomes held pursuant to" legal process. *Wallace v. Kato*, 549 U.S. 384, 389 (2007).

Construing the facts in a light most favorable to Plaintiff and using the last possible date that he could have become aware that he was subject to legal process, Plaintiff would still be time barred from bringing a false imprisonment claim. Plaintiff's trial began in March 2012, at which time he would have been aware, if not already, that he was subject to legal process. Plaintiff's claim for false imprisonment expired in March 2014. However, Plaintiff did not file his action until January 26, 2016, well after the time period expired. (ECF No. 1).

Thus, Plaintiff's only saving grace would be providing facts sufficient to justify equitable tolling of the statute of limitations. The facts that trigger equitable tolling are limited to "situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or [where] truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts." *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1099 (Colo. 1996).

Plaintiff exclusively had the burden of providing facts that would justify equitable tolling. *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980). But as the Magistrate Judge correctly points out, Plaintiff failed to provide any facts that would justify such. (ECF No. 60 at 9). Plaintiff did not allege any wrongful conduct[2] on the part of the Defendants nor did he allege any "extreme circumstances." (ECF No. 60 at 9). And even if the Court widely interpreted Plaintiff's facts in his Complaint due to his pro se status, Colorado has never found sufficient facts that qualify as extraordinary circumstances justifying equitable tolling. *Brodeur v. American Home Assur. Co.* 169 P.3d 139, 150 (Colo. 2007).

Finally, Plaintiff claims that the December 12, 2016 Order in the case stated that "plaintiff's claim for malicious prosecution did not accrue until favorable termination of the conviction" and that the Court ruled the claim was timely filed. (ECF No. 61 at 4). However, Plaintiff misunderstands the Court's discussion regarding Plaintiff's claim. The Order, in an elaboration concerning why some of Plaintiff's claims were previously dismissed, lays out the authority regarding the statute of limitations for malicious prosecution claims and then states that the clock did not start *for a malicious prosecution claim* until favorable termination of the

[2] The "wrongful conduct" referenced refers to any alleged wrongful conduct by the Defendants that would have prevented Plaintiff from filing his petition or wrongful conduct that would otherwise justify equitable tolling. The Court is aware that Plaintiff alleged various instances of wrongful conduct by the Defendants in regards to the claim at issue.

ATTACHMENT 1

criminal proceedings. (ECF No. 53 at 3). The Court then states that because the proceedings terminated on January 27, 2014, Plaintiff's filing[3] on January 28, 2014 survived the time bar. *Id.*

However, Plaintiff mistakenly believes that the Court determined that his malicious prosecution claim was the correct claim to bring under Plaintiff's facts, had merit, and was timely filed. But the Court did not rule on the merits of Plaintiff's claim nor did it determine that malicious prosecution was the correct claim. Rather, while discussing why this particular claim survived the previous dismissal, the Court laid out the law regarding statute of limitations for malicious prosecution claims and then applied it facially to the claim Plaintiff titled "malicious prosecution." (ECF No. 53 at 3).

But, even after examining Plaintiff's alleged facts in a light most favorable to him, the Magistrate Judge correctly identified that Plaintiff's claim was wrongly titled and was, in fact, a claim for false imprisonment and subsequently time barred. Accordingly, the Magistrate Judge did not err in finding that Plaintiff's claim relating to his arrest without legal process is correctly classified as one of false imprisonment and is therefore time barred.

2. False Testimony at the Probable Cause Hearing

Even if the Court proceeds under the notion that his claim survives the statute of limitations, Plaintiff's claim for malicious prosecution regarding Defendant Pritchard's alleged false testimony at the probable cause hearing fails as a matter of law. Police officers "on the witness stand perform the same functions as any other witness," which entitle them to absolute immunity from §1983 claims regarding testimony. *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). This absolute immunity extends to pretrial proceedings. *See Rehberg v. Paulk*, 566 U.S. 356 (2012); *Handy v. City of Sheridan*, 636 F. App'x 728, 742 (10th Cir. 2016); *see also PJ ex rel.*

[3] The Court, in its discussion, operated under the notion that Plaintiff was proceeding with a malicious prosecution claim. The Court did not examine whether this was the correct claim nor did it discuss what the statute of limitations would be for other claims.

Jensen v. Wagner, 603 F.3d 1182, 1196 (10th Cir. 2010). To be sure, Colorado classifies probable cause hearings as preliminary hearings,[4] so Defendant Pritchard is entitled to absolute immunity for testimony in the probable cause hearing.

The Magistrate Judge correctly pointed out that Defendant Pritchard would not be immune if he "prevaricat[ed] and distort[ed] evidence to induce prosecutors to initiate an unwarranted prosecution." (ECF No. 60 at 10). Plaintiff argues that Defendant Pritchard's alleged false testimony "was the only evidence utilized to obtain Plaintiff's conviction." (ECF No. 61 at 5). But Plaintiff mistakenly believes he can then interchange the word 'testimony' with the word 'evidence' to survive the immunity assertion. However, just because Plaintiff refers to testimony as evidence does not mean that he is entitled to toss aside precedent, which ensures absolute immunity for testimony, in favor of the more advantageous standard for fabricated evidence.

Further, although Plaintiff claims in one breath that he is not asserting a claim for perjury (ECF No. 61 at 5), he spends pages arguing that perjury is fabricated evidence and therefore, Defendant Pritchard's alleged false testimony would not qualify for absolute immunity. Again, Plaintiff cannot re-define legal terms and definitions nor can he interchange various different legal terms in order to fit whatever solution he deems is appropriate. Similarly, Plaintiff cannot single handedly overturn a plethora of case law, which clearly establishes that testimony is protected with absolute immunity, in order to craft his own theory that some testimony is carved out as unprotected.

Plaintiff continues the befuddling argument that false testimony translates into fabricated evidence and that he was deprived of his Due Process rights because there was no "evidence" or probable cause for his arrest. But Plaintiff does not offer any examples of what "fabricated

[4] *Hinman v. Joyce*, 201 F. Supp. 3d 1283 (D. Colo. 2016).

evidence" he refers to. Once the Court eliminates testimony from the discussion, Plaintiff does not mention a single other piece of evidence that supports his claim of fabrication. In fact, Plaintiff states that "[t]he only evidence is the false testimony of the defendants in this action." (ECF No. 61 at 6). Because Plaintiff does not offer any examples of fabricated evidence other than the alleged false testimony, the Magistrate Judge did not err in determining that Defendant Pritchard is absolutely immune from the malicious prosecution claim which stemmed from his testimony at the probable cause hearing.

3. False Testimony at Trial

In Plaintiff's Objection, he combines his argument for false testimony at the probable cause hearing and false testimony at the trial into one section and addresses them together generally. (ECF No. 61 at 5-9). During such, it appears once again that Plaintiff believes he can interchange "perjury" and "fabricated evidence" in order to defeat the absolute immunity protection. But as discussed *supra* in Section 2, any witness is "entitled to absolute immunity from §1983 claims with regards to his testimony." (ECF No. 60 at 11-12); *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). And if this Court determined testimony was protected at a pretrial level, then it is undoubtedly protected at the actual trial. As the Magistrate Judge correctly stated, Plaintiff's claim for malicious prosecution based on false testimony at trial cannot survive as a matter of law. (ECF No. 60 at 12).

4. Plaintiff Failed to Show He Had a Favorable Termination of His Case

Although the Magistrate Judge did not discuss the merits of Plaintiff's claim that his criminal case was terminated favorably,[5] the Court briefly addresses it now. In order to state a claim for malicious prosecution, Plaintiff must establish (1) the Defendants caused the Plaintiff's

[5] The Magistrate Judge did briefly recognize that both Defendants had argued that Plaintiff had not shown facts proving favorable termination of his criminal proceeding (ECF No. 60 at 4), but did not discuss the merits because the claim was dismissed for the other reasons mentioned throughout this Order.

continued confinement or prosecution; (2) the original action terminated in favor of the Plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the Defendants acted with malice; and (5) the Plaintiff sustained damages. *Wilkins v. Reyes*, 528 F.3d 790, 799 (10th Cir. 2008).

Plaintiff periodically mentions different pieces of the required elements throughout his objection. (ECF No. 61 at 2, 4, 7). The Court focuses on Plaintiff's reference to element (2) in his argument that he is within the statute of limitations. Plaintiff repetitively asserts that the time for the cause of action does not begin accruing until favorable termination of the underlying conviction. (ECF No. 61 at 4). As such, Plaintiff believes that his time clock started on January 27, 2014, when his DUI conviction was vacated. Under this theory, Plaintiff's filing, which the Court deemed was on January 26, 2016, would not be time barred. (ECF No. 8 at 8). And while Plaintiff's claim was correctly classified as one for false imprisonment and would be dismissed as time barred under the statute of limitations for false imprisonment, the Court proceeds with the analysis of timing for a malicious prosecution claim. Even if Plaintiff's claim was re-classified as one for malicious prosecution and survived the time bar, it would still fail on the merits.

In his Responses to the Defendants Motions to Dismiss,[6] Plaintiff cites various reasons for which a criminal proceeding is not favorably terminated. (ECF No. 55 at 10-11). But Plaintiff does not cite any authority that supports his proposition that his case was favorably terminated. Moreover, Plaintiff fails to recognize that the list he cited previously is not exclusive.

In response to Defendant Pritchard's assertion that there was no favorable termination because the dismissal did not demonstrate reasons indicative of innocence, Plaintiff provides a

[6] While each Defendant filed a separate Motion to Dismiss, each Defendant requests Dismissal on generally the same grounds, and Plaintiff requested the Court incorporate his first response (to Defendant Pritchard's motion) in his response to Defendant Young. As such, the Court addresses the Motions and the Responses as one.

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confusing response about his right to a fair trial and probable cause. But Defendant Pritchard[7] was correct in that favorable termination "requires that the Plaintiff show the dismissal of the case was indicative of innocence, and not dismissed on purely technical or procedural grounds." *Wilkins*, 528 F.3d at 803. For example, a criminal case dismissed on speedy trial grounds was not indicative of innocence as the dismissal was based on technical, procedural grounds and not the merits of the case. *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016).

Here, Plaintiff's criminal case was dismissed on procedural grounds when the trial court erred in failing to strike a juror for cause at Plaintiff's request. (ECF No. 41-1 at 4-6). The termination of Plaintiff's case was not on the merits, but rather was on a technical, procedural ground. The prosecution's decision not to retry the case, after Plaintiff had already served his sentence, bears no indication on Plaintiff's innocence. And Plaintiff has not provided any evidence that the dismissal was indicative of innocence or resulted in a favorable termination. Therefore, Plaintiff cannot satisfy element (2) of a malicious prosecution claim. Not only should Plaintiff's claim be dismissed for exceeding the statute of limitations and as a matter of law, but on the merits as well.

IV. CONCLUSION

Based on the foregoing, the Court **ORDERS** as follows:

(1) That Plaintiff's Objection is **OVERRULED**;

(2) That the Recommendation and Order of United States Magistrate Judge Shaffer (ECF No. 60) is **ACCEPTED**;

(3) That Defendant Pritchard's Motion to Dismiss for Failure to State a Claim (ECF No. 41) is **GRANTED**; and

[7] The Court recognizes that Defendant Young also made the same arguments as Defendant Pritchard regarding favorable termination, but the Court refers to Defendant Pritchard's assertion exclusively for the sake of clarity. However, the Court's ruling applies to Defendant Young as well based on the same arguments and explanation.

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(4) Defendant Young's Motion to Dismiss (ECF No. 45) is **GRANTED**;

DATED this 27th day of December, 2017.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-00233-RM-CBS

DOUGLAS A. GLASER,

Plaintiff,

v.

DOUGLAS PRITCHARD,
THEODORE YOUNG,

Defendants.

RECOMMENDATION REGARDING DEFENDANTS' MOTIONS TO DISMISS

Magistrate Judge Shaffer

This matter comes before the court on Defendant Douglas Pritchard's ("Pritchard") Motion to Dismiss (Doc. #41), filed on October 31, 2016. Also before the court is Defendant Theodore Young's ("Young") Motion to Dismiss (Doc. #45), filed on November 14, 2016. Plaintiff filed Responses to Young's Motion to Dismiss and Pritchard's Motion to Dismiss on December 15, 2014. (Doc. #54 and Doc. #55 respectively). Defendant Pritchard then filed a Reply in support of his Motion on December 28, 2016, (Doc. #57), while Defendant Young filed a Reply in support of his Motion on December 29, 2016. (Doc. #58). These Motions were referred to the Magistrate Judge pursuant to the Order of Reference dated October 31, 2016 (Doc. #42) and memoranda dated October 31, 2016 (Doc. #43) and November 15, 2016 (Doc. #46). The court has carefully considered the motions and related briefing, the entire case file, and the applicable case law. For the following reasons, I recommend that Defendant Pritchard's Motion to Dismiss and Defendant Young's Motion to Dismiss be granted.

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PROCEDURAL HISTORY

Pro se Plaintiff Douglas A. Glaser ("Plaintiff" or "Glaser") seeks damages pursuant to *Bivens v. Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) ("*Bivens*") and 42 U.S.C. § 1983 ("§ 1983") on the basis that Defendants Pritchard and Young engaged in malicious prosecution by arresting him without probable cause and falsely testifying against him at his probable cause hearing and at trial. *See* Doc. 7 at 5–6, 8, 10–11. Plaintiff is currently serving a sentence in the custody of the Colorado Department of Corrections for an unrelated crime.

Plaintiff alleges the following facts in his Amended Complaint (Doc. #7). On April 19, 2008, Plaintiff's vehicle was surrounded by multiple federal agents from the Department of Homeland Security, including Defendant Pritchard, who "laughed and stated 'we have him now, he will never get out of jail this time.'" Doc. 7 at 5. Defendant Young, a Denver police officer, arrived on the scene shortly afterwards and arrested Plaintiff for driving under the influence ("DUI"). *Id.*

At Plaintiff's probable cause hearing on April 10, 2010, Defendant Pritchard testified that he pulled Plaintiff over with "no other agents present." *Id.* On the basis of Pritchard's testimony the court held that there was probable cause to arrest Plaintiff. *Id.* Two years later at Plaintiff's March 2012 DUI trial Pritchard changed his testimony and stated that "*multiple* agents from the Department of Homeland Security had surrounded and stopped Plaintiff's vehicle." *Id.* at 6 (emphasis added). Young also allegedly testified falsely at trial by stating that "Plaintiff's eyes were red and watery." *Id.* at 11. Plaintiff was convicted on all counts and served the maximum sentence of 730 days in jail. *Id.* at 7. On direct appeal Plaintiff's conviction was reversed on the grounds that the court abused its discretion when it denied Plaintiff's for cause challenge of a

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juror. *Id.*; Doc. 41-1 at 6–7.[1] The prosecution then dismissed the case on remand rather than retrying it. Doc. 7 at 7; Doc. 41-2 at 1.

Plaintiff filed his original Complaint in this action (Doc. #1) on January 28, 2016, naming the City and County of Denver, the Second Judicial District, Mitch Morrissey, Joe Morales, Andy Shopneck, Douglas Pritchard, and Theodore Young as Defendants. Plaintiff simultaneously filed a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 (Doc. #2), which Judge Babcock denied on February 2, 2016. (Doc. #4). A month later, Judge Gallagher ordered Plaintiff to file an amended complaint that comported with Rule 8 of the Federal Rules of Civil Procedure and alleged the personal participation of each Defendant in an arguable deprivation of Plaintiff's constitutional or statutory rights. (Doc. #6).

Plaintiff filed his Amended Complaint (Doc #7) on April 28, 2016 asserting the following five claims for relief: (1) Malicious Prosecution[2]; (2) Retaliation—Vindictive Prosecution; (3) Slander; Defamation of Character; Harassment; (4) Conspiracy to Violate Constitutional Rights;

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[1] This court may consider public records associated with Plaintiff's underlying criminal conviction without converting the motions to dismiss to motions for summary judgment because:

> A court may, Sua sponte, take judicial notice of its own records and preceding records if called to the court's attention by the parties. Further . . . federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue. . . . Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it.

St. Louis Baptist Temple v. FDIC, 605 F.2d 1169, 1172 (10th Cir. 1979) (citations omitted). *See also Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) ("Ordinarily, consideration of material attached to a defendant's answer or motion to dismiss requires the court to convert the motion into one for summary judgment and afford the parties notice and an opportunity to present relevant evidence. However, facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment.") (citations omitted).

[2] Specifically, Plaintiff alleges (somewhat unclearly) that Defendants "knowingly and with reckless disregard violated Plaintiff's constitutional rights by personally participating, approving, condoning, or acting with deliberate indifference, an illegal arrest and continued confinement without probable cause, fabricated evidence, and perjured testimony." Doc. 7 at 10–11. A close examination of the Amended Complaint and Plaintiff's Reponses, however, reveals that Plaintiff only provides facts to support his claims that Defendants arrested him without probable cause and falsely testified against him. Doc. 7 at 5–6, 8; Doc. 54 at 2–4; Doc. 55 at 3–4. Despite his multiple references to the "fabrication of evidence," Plaintiff never asserts what these alleged fabrications were. Doc. 7 at 10–11; Doc. 54 at 4; Doc. 55 at 9, 16. Consequently, Plaintiff has not sufficiently alleged facts that support a fabrication of evidence claim.

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and, (5) Supervisory Failure/Unconstitutional Law, Policy, or Custom. On May 31, 2016, Judge Babcock, *sua sponte*, dismissed claims (2) – (5) against all Defendants and dismissed claim (1) against all Defendants besides Defendant Pritchard and Defendant Young. (Doc. # 8). Judge Babcock reasoned that claims (2) – (5) were barred by the applicable statute of limitations, and that Plaintiff failed to allege specific facts that would support an arguable malicious prosecution claim against Defendants other than Pritchard and Young. Doc. 8 at 5, 9.

Defendant Pritchard then filed his Motion to Dismiss the remaining claim on October 31, 2016. (Doc. #41). Defendant Young filed his Motion to Dismiss the remaining claim a few weeks later on November 14, 2016. (Doc. #45). Both Defendants argue that they are entitled to qualified immunity with regards to their actions and absolute immunity with regards to their testimony and that dismissal of Plaintiff's malicious prosecution claim is therefore appropriate. *See* Doc. 41 at 6; Doc. 45 at 4. Both also argue that Plaintiff has not sufficiently made out a claim for malicious prosecution insofar as he has not shown that he received a favorable termination in the criminal proceeding against him. *See* Doc. 41 at 7–10; Doc. 45 at 5–7. In his Responses Plaintiff reiterates the claims in his Amended Complaint and includes additional facts[3] but does little to effectively address these arguments.

STANDARD OF REVIEW

Federal courts, as courts of limited jurisdiction, must have a statutory basis for their jurisdiction. *See Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994) (citing *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994). Pursuant to Federal Rule of Civil

[3] For example, Plaintiff provides more details about the arrest itself and about Defendants' testimony at the probable cause hearing and at trial. *See* Doc. 55 at 3–4, 6; Doc. 54 at 2. Because the motions before the court are motions to dismiss, however, the court cannot consider these additional facts. *See, e.g.*, *Burnham v. Humphrey Hospitality Reit Trust, Inc.*, 403 F.3d 709, 713 (10th Cir. 2005) ("On a Rule 12(b)(6) motion, a court's factual inquiry is limited to the well-pleaded facts in the complaint").

Procedure 12(b)(1), the court may dismiss a complaint for lack of subject matter jurisdiction. The determination of a court's jurisdiction over subject matter is a question of law. *Madsen v. United States ex. U.S. Army, Corps of Engineers*, 841 F.2d 1011, 1012 (10th Cir. 1987). "A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Under 12(b)(6) a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations ... and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). However, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). As the Tenth Circuit explained in *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007), "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." "The burden is on the plaintiff to frame 'a complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atlantic Corp.*, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to

relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

Because Mr. Glaser is appearing *pro se*, the court "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States Govt*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, a court may not assume that a plaintiff can prove facts that she has not alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *See Gallagher v. Shelton*, 587 F.3d 1063, 1067 (10th Cir. 2009) (court's role is not to act as the *pro se* litigant's advocate); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). Furthermore, the court may, at any time and of its own accord, dismiss any action that is frivolous or which fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(i)-(ii); Fed. R. Civ. P. 12(b)(6); *Hall v. Bellmon*, 935 F.2d 1106, 1108-10 (10th Cir. 1991).

ANALYSIS

Plaintiff alleges that Defendants Pritchard and Young engaged in malicious prosecution in violation of his Fourth and Fourteenth Amendment rights by arresting him without probable cause and falsely testifying against him at his probable cause hearing and at trial. *See* Doc. 7 at 5–6, 8, 10–11. Because Plaintiff has brought the same constitutional claims against both Defendants[4]—and both Defendants argue for dismissal on the same grounds—this court will jointly evaluate Defendants' motions to dismiss.

[4] The fact that Plaintiff's claims against Young are being brought pursuant to § 1983 while his claims against Pritchard are being brought pursuant to *Bivens* makes no difference. *See, e.g.*, *Stonecipher v. Valles*, 759 F.3d 1134 (10th Cir. 2014) (applying the *Wilkins* malicious prosecution framework to a *Bivens* action). Both actions are merely ways of remedying constitutional violations committed by state

As an initial matter this court must consider whether it has jurisdiction to entertain Plaintiff's claims because:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been *reversed on direct appeal*, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. . . . Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.

Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (emphasis added). As the Tenth Circuit has explained, "[t]he purpose behind *Heck* is to prevent litigants from using a § 1983 action, with its more lenient pleading rules, to challenge their conviction or sentence." *Butler v. Compton*, 482 F.3d 1277, 1279 (10th Cir. 2007). Here it is clear that Plaintiff's claims are not barred by *Heck* since his conviction was reversed on direct appeal. *See* Doc. 7 at 7; Doc. 41-1 at 6–7.[5] Even though Plaintiff has overcome the *Heck* hurdle, his claims should still be dismissed for the following reasons.

A. Arrest without Probable Cause

Since Plaintiff was seized pursuant to a warrantless arrest, his claims relating to the arrest itself are properly characterized as claims for false imprisonment, not malicious prosecution. *See Sanchez v. Hartley*, 810 F.3d 750, 757 (10th Cir. 2016) ("Our case law distinguishes between seizures based on whether they are imposed with or without legal process. Though both types of seizures implicate the Fourth Amendment, seizures imposed pursuant to

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and federal officers respectively. *See Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 305–06 (1986) ("We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution.") (internal quotations and citations omitted); *Carlson v. Green*, 446 U.S. 14, 18 (1980) ("*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official").

[5] *See supra* note 1.

legal process generally trigger claims for malicious prosecution, while seizures imposed without legal process generally trigger claims for false imprisonment."). This distinction is dispositive of these claims because false imprisonment claims and malicious prosecution claims do not accrue at the same time, despite being subject to the same two year statute of limitations.[6] *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013). While "[a] claim of malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor," "[a] claim of false imprisonment accrues when the alleged false imprisonment ends." *Id.* Moreover, "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." *Wallace v. Kato*, 549 U.S. 384, 389 (2007) (emphasis in original).

While Plaintiff should have been aware that he became subject to legal process at the time of his probable cause hearing in April 2010, he was certainly aware that he was subject to legal process by the time his trial began in March 2012. *See Young v. Davis*, 554 F.3d 1254, 1257 (10th Cir. 2009) ("Because there was a judicial determination of probable cause on [date], [Plaintiff] became lawfully detained pursuant to legal process at that point and the statute of limitations began to run on his false arrest/false imprisonment claim."); Doc. 7 at 5, 6. This action was not mailed to the court for filing until January 26, 2016, however. *See* Doc. 1-1 at 2. Consequently, there were more than two years between the accrual of Plaintiff's false imprisonment claim and his Complaint alleging this claim.

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[6] Claims under § 1983 are governed by the forum state's statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The forum state in this case, Colorado, provides a two-year statute of limitations for personal injury claims. Colo. Rev. Stat. § 13–80–102(1)(a). The same statute of limitations also applies to the extent that Plaintiff is asserting his claims against Pritchard pursuant to *Bivens*. *See Industrial Constructors Corp. v. U.S. Bur. Of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994) ("A *Bivens* action, like an action brought pursuant to 42 U.S.C. § 1983, is subject to the statute of limitations of the general personal injury statute in the state where the action arose.").

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Moreover, while the statute of limitations is an affirmative defense, *see* Fed. R. Civ. P. 8(c)(1), "where a complaint shows on its face that the action is barred by the statute of limitations, the defense can be raised by motion to dismiss." *Gossard v. Gossard*, 149 F.2d 111, 113 (10th Cir. 1945); *see also Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) ("[W]hen the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute. Statute of limitations questions may, therefore, be appropriately resolved on a Fed. R. Civ. P. 12(b) motion.") (citations omitted). Plaintiff does not present any factual circumstances that would justify equitable tolling, however. Since "state law governs the application of tolling in a [federal] civil rights action," *Alexander v. Oklahoma*, 382 F.3d 1206, 1217 (10th Cir. 2004), "an equitable tolling of a statute of limitations is limited to situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts." *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1099 (Colo. 1996). Plaintiff has not alleged that Defendants' wrongful conduct prevented him from filing his claims in a timely manner and the Colorado Supreme Court "has never found [extraordinary] circumstances to exist." *Brodeur v. American Home Assur. Co.*, 169 P.3d 139, 150 (Colo. 2007). Therefore this court recommends that Plaintiff's claims relating to his arrest without probable cause be dismissed as barred by the applicable statute of limitations.

B. False Testimony at the Probable Cause Hearing[7]

As Plaintiff correctly alleges,[8] the fact that Pritchard did not initiate or prosecute the criminal case against Plaintiff does not inherently insulate him from liability for his testimony at

[7] This claim only implicates Defendant Pritchard since Defendant Young did not testify at the probable cause hearing. *See* Doc. 7 at 5.

the probable cause hearing. *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). The Tenth Circuit has made clear that any person who "prevaricates and distorts evidence" to "induce prosecutors to initiate an unwarranted prosecution" may be held liable for malicious prosecution. *Pierce*, 359 F.3d at 1296 (holding a forensic analyst liable under § 1983 despite the fact that probable cause existed for the underlying arrest). Moreover, the fact that the initial arrest was warrantless does not preclude a malicious prosecution claim against Pritchard. *See Wilkins v. DeReyes*, 528 F.3d 790, 798 (10th Cir. 2008) ("If arrested without a warrant . . . a plaintiff can challenge the probable cause determination made during the constitutionally-required probable cause hearing."); *see also Sanchez*, 810 F.3d at 757 ("Our holding in *Wilkins* forecloses the defendants' argument that [plaintiff] is confined to a false imprisonment claim because he was arrested without a warrant."). Nonetheless, Plaintiff cannot prevail on his malicious prosecution claim because there is a fundamental difference as a matter of law between fabricated *evidence*—which can at best entitle an officer to qualified immunity—and fabricated *testimony*—which can entitle an officer to absolute immunity.

While Plaintiff does allege that Pritchard "fabricated evidence" as well as testimony, he provides no support for this claim other than a bald assertion in the "claims" section of his Amended Complaint. *See* Doc. 7 at 10. Nowhere in his Complaints or Responses does Plaintiff provide any facts that even suggest that Pritchard fabricated evidence; instead Plaintiff focuses solely on what Pritchard said before the court, i.e. Pritchard's *testimony*. *Id.* at 5–6; Doc. 55 at 3–4, 8.[9] This distinction is critical because the Supreme Court has unambiguously held that grand jury witnesses are entitled to absolute immunity, and heavily suggested that *all* preliminary hearing witnesses are entitled to the same immunity. *See Rehberg v. Paulk*, 566 U.S. 356 (2012)

[8] *See* Doc. 55 at 15–16
[9] *See also supra* note 2.

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(rejecting the distinction between complaining witnesses and non-complaining witnesses for absolute immunity purposes in the pre-trial context).

Moreover, the Tenth Circuit, like the majority of circuits, has explicitly held, albeit in an unpublished decision, that courts "must afford defendants . . . absolute immunity for their preliminary-hearing testimony." *Handy v. City of Sheridan*, 636 F. App'x 728, 742 (10th Cir. 2016); *see also PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1196 (10th Cir. 2010) (holding that a "witness is absolutely immune from civil liability based on any testimony the witness provides during a judicial proceeding 'even if the witness knew the statements were false and made them with malice'") (quoting *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983)); *Curtis v. Bembenek*, 48 F.3d 281, 284 (7th Cir. 1995) (explaining how "[t]he majority of the circuits have afforded absolute immunity to witnesses, including police officers, charged under § 1983 for their allegedly perjurious testimony at various types of pretrial proceedings" and listing supporting cases). In addition, it is clear that probable cause hearings are properly categorized as preliminary-hearings. *See, e.g.*, *Hinman v. Joyce*, 201 F. Supp. 3d 1283 (D. Colo. 2016) (holding that a police detective was absolutely immune from any liability flowing from his testimony at a probable cause hearing). Consequently, any witness who testifies at a probable cause hearing, including a law enforcement officer like Pritchard, is entitled to absolute immunity with regard to that testimony. Therefore this court recommends that Plaintiff's claim relating to Pritchard's false testimony at the probable cause hearing be dismissed as barred by absolute immunity.

C. False Testimony at Trial

Plaintiff also alleges that Defendants engaged in malicious prosecution by presenting false testimony about the arrest at trial. *See* Doc. 7 at 5–6, 8, 10–11. These claims are easily dismissed, however, since "a police officer on the witness stand performs the same functions as any other witness" and is therefore entitled to absolute immunity from § 1983 claims with

regards to his testimony. *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983); *see also Miller v. Glanz*, 948 F.2d 1562, 1570 (10th Cir. 1991) (affirming that "all witnesses—police officers as well as other lay witnesses—are absolutely immune from civil liability under § 1983 based on their testimony in a prior trial."); *Spielman v. Hildebrand*, 873 F.2d 1377, 1382 (10th Cir. 1989) (reasoning that this immunity is supported by the "public policy of preserving the truth finding process from distortions caused by fear of suit."). Moreover, every trial witness is absolutely immune "even if the witness knew the statements were false and made them with malice." *Briscoe*, 460 U.S. at 332. Consequently, neither Defendants' testimony at trial can sustain Plaintiff's malicious prosecution claim as a matter of law, even if Plaintiff's assertion that their testimony was false is accepted. Therefore Plaintiff's claims relating to Defendants' false testimony at trial are barred by absolute immunity.

CONCLUSION

For the foregoing reasons, this court RECOMMENDS that Defendant Pritchard's Motion to Dismiss (Doc. #41) and Defendant Young's Motion to Dismiss (Doc. #45) be GRANTED.

Advisement to the Parties

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's

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report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

DATED at Denver, Colorado, this 12th day of June, 2017.

BY THE COURT:

s/Craig B. Shaffer
United States Magistrate Judge

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