No. 10-788

FEB 1 - 2011

In The

Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III, AND KELLY R. BURKE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PAULK'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented a compelling reason to grant the Petition, where no court including the Eleventh Circuit has addressed the issue of a complaining witness being directed to testify regarding matters unknown to him at the direction and control of the District Attorney.

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PROCEEDINGS BELOW

Petitioner filed a ten count civil action, *Rehberg v. Paulk*, No. 1:07-CV-22 (WLS) (M.D. Ga. Jan. 23, 2007), against two District Attorneys (Hodges and Burke) and an investigator (Paulk) employed and controlled by them. Petitioner sought Federal causes of action against Hodges and Paulk for alleged malicious prosecution under 42 U.S.C. §1983 and violations of his Fourth and Fourteenth Amendment rights (Count 6); retaliatory prosecution under 42 U.S.C. §1983 against Hodges and Paulk (Count 7); and conspiracy to violate those rights against Hodges, Paulk and Burke (Count 10). Petitioner also claimed causes of action against Paulk under Georgia law.

Respondent Paulk moved to dismiss the Federal claims pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court denied that motion. App. 83a. An interlocutory appeal was then pursued. The Eleventh Circuit reversed in part and dismissed Count 6 against Hodges and Paulk based upon testimonial immunity before the grand jury as well as qualified immunity; dismissed Count 7 based upon qualified immunity; and dismissed Count 10 as a matter of law. The Court failed to dismiss the retaliatory prosecution claim under Count 7 and remanded that claim as well as the state law claims for further proceedings. App. 44a.

STATEMENT OF THE CASE

Petitioner focuses narrowly on Paragraph 17 of the complaint, *Rehberg v. Paulk*, No. 1:07-CV-22 (WLS) (M.D. Ga. Jan. 23, 2007) as well as language in the Eleventh Circuit's opinion, App. 4a, for the proposition that Paulk was the complaining witness before the grand jury. He omits the allegations critical to the "compelling reason" for denying the *Writ of Certiorari*. Notably, the allegations reveal that Paulk had no prior knowledge of the specific charges against the Petitioner before appearing before the grand jury and "testified" as to the information provided to him by the District Attorney. Petitioner asserts:

> Mr. Paulk has admitted that he lacked "preparation and knowledge." He has admitted that he had no evidence that Mr. Rehberg had committed an aggravated assault, assault or burglary.

Compl. ¶ 105.

> In the original indictment for aggravated assault and burglary, Mr. Paulk is listed as the complainant. Mr. Paulk has admitted that he was the only witness who served in such a role before the grand jury in the original indictment for aggravated assault and burglary against Mr. Rehberg.

Compl. ¶ 112

> Mr. Hodges (District Attorney) knew or should have known that there was no probable cause to indict Mr. Rehberg on charges of aggravated assault and burglary, *yet he*

> *directed Mr. Paulk to appear before the grand jury and to attest to the truth of such charges.* Mr. Hodges is not entitled to absolute immunity for such actions. Mr. Hodges was not acting as a prosecutor or advocate for the state. He is not entitled to the protections of absolute immunity while functioning in such capacity.

Compl. ¶ 113.

> During the investigation of Mr. Rehberg before any grand jury had been impaneled and before Mr. Burke[1] was acting in his role as advocate for the State, Mr. Burke participated in fabricating evidence that Mr. Rehberg had committed an aggravated assault and burglary. There is no evidence that Mr. Rehberg ever committed a burglary or aggravated assault on anybody. Yet Mr. Burke in his investigation participated in fabricating such evidence.

Compl. ¶ 134

> *Mr. Burke then called Mr. Paulk to testify on short notice as the complaining witness before the grand jury and attest to the truth of the charges that Mr. Rehberg had committed a burglary and aggravated assault.* Mr. Burke knew that he and Mr. Paulk in conducting

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[1] The District Attorney of Dougherty County was Kenneth B. Hodges, III who recused himself from the investigation and indictment. District Attorney Kelly R. Burke was appointed as a special prosecutor by the Attorney General. App. 4a.

> the investigation of Rehberg had not found any evidence that Mr. Rehberg committed a burglary or aggravated assault. *While Mr. Burke's presentation of evidence to the grand jury may be entitled to absolute immunity as the prosecutor*, his role in investigating Mr. Rehberg and fabricating evidence of a burglary and aggravated assault are not entitled to absolute immunity. (Emphasis supplied)

Compl. ¶ 135.

While the complaint is indefinite on the issue, the allegations appear to claim two separate investigations: (1) the subpoena of telephone records from BellSouth, Alltel and Sprint by Paulk in an effort to determine the origin of unsolicited faxes, Compl. ¶ 37; and (2) the aggravated assault and burglary charges prepared by Burke and Hodges. Compl. ¶¶ 113, 134. Without any knowledge of the results of Burke and Hodges' investigation, Paulk was allegedly directed by both men to appear before the grand jury and present the results of their aggravated assault and burglary investigation. The complaint vividly illustrates this point:

> Mr. Paulk's negligent performance of his ministerial duties include, but are not limited to, the following: . . . (iii) on multiple occasions he attested to the truth of "facts" as a complaining witness before a grand jury to which "facts" he had no knowledge and concerning matters that he had never investigated.

Compl. ¶ 63.

While it is alleged that the two District Attorneys supplied Paulk with the false information that was presented to the grand jury, there is no contention that Paulk knew the information was false or committed perjury with its presentation. The Eleventh Circuit recognized this anomaly, but still addressed his immunity "even if" Paulk knew that his testimony before the grand jury was false. App. 12a. With the holding of absolute immunity for the "complaining witness" for false testimony before the grand jury, the Eleventh Circuit's immunity encompassed a witness offering what he believed to be truthful evidence supplied and directed by the District Attorney when that District Attorney also appeared as a witness. Paulk became the surrogate for alleged false testimony supplied by the District Attorneys and no circuit has squarely addressed that issue. Simply put, Petitioner has alleged a unique fact pattern wherein there are no "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

REASONS FOR DENYING THE PETITION

Petitioner advances two flawed arguments in his brief. He first contends that Paulk was the complaining witness and perjuriously initiated the false prosecution against the Petitioner (*See* Petition, p. 7). He also argues that the federal courts of appeal are deeply divided as to whether complaining witnesses are exempt from the absolute immunity enjoyed by

witnesses in grand jury and other judicial proceedings. Petitioner's arguments have little merit.

A. Paulk Did Not Commit Perjury Before the Grand Jury

Perjury is defined as the "willful assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding . . . and known to such witness to be false." Black's Law Dictionary revised 4th Edition. Under the Official Code of Georgia Annotated, §16-10-71,[2] the same knowing and willful requirement is mandated for that charge. The complaint demonstrates conclusively that if false testimony was provided by Paulk, it was neither willful nor knowing:

> Dougherty County and the District Attorney's Office knew or should have known that (1) it was the common custom and practice of investigators to serve as complaining witnesses, and that (2) County investigators were doing so without adequate supervision, notice, preparation or knowledge.

Compl. ¶ 148.

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[2] O.C.G.A. §16-10-71(a) A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement.

> Mr. Paulk has testified that it is "unfortunately" normal and common for him and other investigators employed by Dougherty County and working under the supervision of the District Attorney to testify without adequate notice, knowledge or preparation or personal knowledge of the facts being attested to as true.

Compl. ¶ 152

The facts presented to Paulk by the two District Attorneys may have been false, but being the conduit of that information to the grand jury fails to change his testimony into perjury.

Overlooked as well by the Petitioner is the assertion that both District Attorneys were present in the grand jury with Paulk and presented this evidence and permitted the testimony to be heard by the grand jury. Since they were the guiding force and only they allegedly knew the information to be false, the issue is really one of absolute prosecutorial immunity pursuant to *Imbler v. Pachtman,* 424 U.S. 409, 96 S. Ct. 984 (1976) and *Burns v. Reed,* 500 U.S. 478, 111 S. Ct. 1934 (1991) since proceedings before the grand jury are considered to be "intimately associated with the judicial phase of the criminal process" *Id.* at 430. Both District Attorneys would have immunity for this conduct under existing law.

The evidence discovered by the District Attorneys prior to the indictments of the Petitioner has yet to be

fleshed out since only the barest allegations in a complaint are before the district court and discovery has yet to begin. With such a scant record there is no "compelling reason" to consider the issue at this juncture.

B. No Split in the Circuits Exists Where the Complaining Witness Testifies From the Facts Supplied by the District Attorney

Petitioner makes a significant overreach in his claim that the Eleventh Circuit's holding conflicts with the decisions of the Second, Fifth, Sixth, Seventh, Ninth, Tenth and the District of Columbia Circuits. He implies that each of these circuits has carved out the "complaining witness" exception for knowingly false grand jury testimony when only two circuits, the Second in *White v. Frank*, 855 F.2d 956 (1988) and the Ninth Circuit in *Harris v. Roderick*, 126 F.3d 1189 (1997) have done so. Indeed, in *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501 (5th Cir. 1992) and *Teko v. Hingle*, 318 F.3d 639 (5th Cir. 2003), the focus was on whether a prosecutor and a complaining witness had absolute immunity in a *probable cause hearing* rather than a grand jury proceeding. That court cited *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986) and *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502 (1997) and concluded that seeking an indictment is removed from the judicial phase of criminal proceedings.

In the Sixth Circuit case of *Vakilin v. Shaw*, 335 F.3d 509 (2003), Shaw was the complaining witness before a judge in an effort to obtain an arrest warrant. The Court saw Shaw as performing the same function as the prosecutor in *Kalina* and denied absolute immunity. While the term "complaining witness" was present, the grand jury was not. The cases of *Curtis v. Bembenek*, 48 F.3d 281 (7th Cir. 1995), *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) and *Edmond v. U.S. Postal Ser., Gen. Counsel*, 949 F.2d 419 (D.C. Cir. 1991) all recognize a distinction between a complaining witness and an ordinary witness, but the Eleventh Circuit was correct in its analysis that only the Second Circuit and Ninth Circuits have carved out a complaining witness exception to absolute immunity for false grand jury testimony. App. 14a, n. 9.

In contrast, the Third, Fourth, and Eleventh Circuits have confronted the "complaining witness" perjury issue before the grand jury directly and applied this Court's rationale for granting absolute immunity. *Knight v. Tortz*, 157 Fed. App'x 481 (3rd Cir. 2005) (*per curiam*); *Lyles v. Sparks*, 79 F.3d 372 (4th Cir. 1996); *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988); and *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999). The import of this analysis is the realization that the Eleventh Circuit has broken no new ground with its holding here since it relied upon its precedent of more than twenty years and reaffirmed that holding in *Jones* eleven years later. The last circuit addressing the issue directly occurred in 1997

in *Roderick*. No new circuit split has occurred in more than four years.

While there may be a split in the circuits regarding perjury of a complaining witness before a grand jury, there is no split regarding an individual appearing before the grand jury who merely reads a report or provides testimony supplied to him by the District Attorney. Indeed, no case cited by the Petitioner or discovered by Respondent directly addresses this issue. While it may be speculated that such may be the result of prosecutorial misconduct, this Respondent is not responsible for the actions of his employer.

At common law, prosecutors were immune to suits for malicious prosecution and for defamation. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976); *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934 (1991). When only the prosecutor is aware of the nature and accuracy of the testimony being offered, it is incongruous to fail to award that same immunity to the unknowing witness.

CONCLUSION

Based upon the foregoing, the Petitioner has presented no compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted, this 1st day of February, 2011.

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