

No. 091322 APR 27 2010

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In the
Supreme Court of the United States

KARIM KOUBRITI,

Petitioner,

v.

RICHARD CONVERTINO,

Respondent.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

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April 27, 2010

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's substantive due process rights by procuring false testimony during the criminal investigation and then (2) introduced that same testimony against the criminal defendant at trial.

PARTIES TO THE PROCEEDING

Petitioner Karim Koubriti was a plaintiff in the district court and was the appellee in the Sixth Circuit. Richard Convertino was the defendant in the district court and the appellant in the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karim Koubriti respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., *infra*, 1a) is reported at 593 F.3d 459 (6th Cir. 2010). The district court's opinion (App., *infra*, 27a) is not reported.

JURISDICTION

The Sixth Circuit entered judgment on February 3, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

No person shall *** be deprived of life, liberty or property , without due process of law***

STATEMENT

This petition addresses a important issue of federal law related to prosecutorial immunity. The circuits are divided on this issue, and this Court previously granted certiorari to resolve the conflict. See

Pottawattamie County v. McGhee, 129 S.Ct. 2002 (2009).

The plaintiff in this case, Karim Koubriti was tried and convicted on June 3, 2003 of conspiracy to provide material support or resources to terrorists in violation of 18 U.S.C. § § 371 and 2339A. The prosecution of Koubriti and three co-defendants was the government's first terrorism prosecution in the aftermath of the September 11, 2001 terrorist attacks in the United States. The government accused the four men of comprising a "cell" or "sleeper cell" of an Islamic terrorist organization aiming to assist a transnational network of radical Islamists influenced by the Salafiyya religious movement.

On October 12, 2004, the trial court dismissed the terrorism charges against Koubriti, following motions filed by both the government, and Koubriti and his co-defendants, requesting this relief. The government subsequently filed a new indictment against Koubriti, charging him solely with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371.

The dismissal of the terrorism charges resulted from the government's conclusion that the Assistant United States Attorney who prosecuted the four defendants, Richard Convertino, had failed to disclose several pieces of material evidence contrary to *Brady v. Maryland*, 377 U.S. 83 (1963). These included documents confirming that the government lacked consensus about the significance of materials found at the defendants' home which the government described as "casing materials". The government also failed to disclose that Convertino had traveled to Jordan with FBI Agent Michael Thomas in late February 2002 to

visit the sites allegedly depicted in a day planner found at the defendants' home, and that he had directed the course of the investigation against the defendants.

One key facet of this nondisclosure concerned the prosecution's theory that the day planner contained sketches of Queen Alia Hospital in Jordan. At trial, it relied on the extensive and detailed testimony of SSA George to establish that the drawings, with the arabic words "American Airbase in Turkey under the Leadership of Defense Minister" and "Queen Alia Jordan" were casing sketches. The government later revealed that it had taken photos of the Queen Alia Hospital which would have rebutted the testimony that the site matched the sketch.

Instead, at trial, SSA Thomas testified that he had brought a camera to Jordan, but unfortunately did not take any pictures of the hospital or a dead tree which was prominently located near the hospital and was allegedly also present in the sketch. SSA Smith testified that he did not believe that he could have obtained photographs and that he "would have to get higher approval as high as the Ambassador" before obtaining photographs. In its brief concurring with Koubriti's request for a new trial, the government acknowledged:

- That Agents Thomas and Smith *had* taken the photographs of the hospital, which did not match with the sketch in the day planner, which they failed to provide to either the court or the defense.

- That agents visiting the hospital were unable to locate the alleged dead tree landmark.
- That there was no government consensus that one of the drawings represented the hospital.
- That there was no government consensus that the other drawing represented a hardened air shelter at Incirlik Air Base in Turkey.

The government also admitted that it had failed to reveal exculpatory evidence concerning the testimony of its star witness, Yousseff Hmimssa, including: 1) a letter from a prison inmate indicating that Hmimssa had bragged to him while they were both incarcerated that he had “fooled” the FBI and the Secret Service; 2) other documentation indicating that, contrary to his testimony, Hmimssa harbored deep-seeded anti-American views; and 3) that Convertino and other officials interviewed Hmimssa more than ten times prior to trial and that Convertino “made a deliberate decision not to have the FBI take any notes or prepare any memoranda of these sessions in order to limit defense counsel’s ability to cross-examine Hmimssa.”

In 2007, Koubriti sued Convertino and Thomas, charging that they had violated his Fifth Amendment rights by “knowingly or recklessly fabricating evidence against him, by failing to disclose exculpatory evidence in his favor, and by obfuscating or misrepresenting the facts to the Grand Jury and at his trial.”

Convertino and Thomas moved for dismissal of all claims pursuant to F. R. Civ. P. 12(b)(8), arguing that they were entitled to absolute and qualified immunity.

In an opinion and order dated December 3, 2008, the district court issued an Order Denying Defendant's Motion to Dismiss for Failure to State a Claim. The district court held that some of Koubriti's allegations against Convertino fell within the absolute immunity protection: specifically, the allegation that Convertino failed to turn over government photographs of the Queen Alia Hospital as well as the claim that Convertino failed to disclose the opinions of government agents regarding alleged sketches of Incirlik Air Base. However, the court found that the rest of the allegations contained in Koubriti's complaint referred to activities by Convertino that were investigatory in nature and thus not entitled to absolute immunity, suggesting that Convertino would have only qualified immunity for these claims. The court did not actually analyze the claims under the qualified immunity standard, but ruled that "dismissal at this procedural juncture [would be] premature."

The district court ruled that Koubriti's Fifth Amendment due process claims were cognizable under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) because alternative remedies were insufficient to protect Koubriti's interests and because it did not believe that there were any special factors counseling against recognizing the cause of action in this case. It noted that Convertino "was not pursuing a legitimate interest" when it engineered a prosecution against Koubriti and his co-defendants by shaping the evidence against them to support a conviction. In *Bivens*, the Supreme Court recognized a cause of action against individual federal officers for violations of the Fourth Amendment's protection against unreasonable search and seizures, noting that "no

special factors counsel[ed] hesitation in the absence of affirmative action by Congress” and there was no “explicit congressional declaration that a person injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.” *Id.* at 396-97.

Convertino appealed the district court’s denial of his motion to dismiss to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit held that Convertino’s conduct was protected by prosecutorial immunity. It held that Convertino’s misconduct was limited to the withholding of exculpatory evidence, which was protected under the doctrine of absolute prosecutorial immunity. It rejected the district court’s conclusion that Convertino’s conduct had crossed the line from that of a prosecutor into that of an investigator, and in so doing lost the protections of absolute immunity.

The protection afforded to a prosecutor has been addressed at length by the various circuits, and has resulted in a deep division. Most recently, this Court granted certiorari in *Pottawattamie County v. McGhee*, 129 S.Ct. 2002 (2009). The question presented in that case was whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant’s “substantive due process” rights by procuring false testimony during the criminal investigation and then (2) introduced that same testimony against the criminal defendant at trial.

Denying the defendants' motion for summary judgment, the district court in *Pottawattamie County* held that the prosecutors were absolutely immune from liability based upon claims that they had failed to turn over exculpatory evidence. However, it denied immunity to the extent that the plaintiff's claims arose from allegations that defendants had coerced false testimony from witnesses that was later introduced at trial. It held that such allegations were "sufficient to state a substantive due process claim," and that a constitutional right against such conduct by a prosecutor was "clearly established". See *McGhee v. Pottawattamie County*, 475 F. Supp. 2d 862 (S.D. Iowa 2007).

The defendants in *Pottawattamie County* appealed to the Eighth Circuit, arguing that only the use of false testimony, not merely its procurement, could have violated the respondents constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. The Eighth Circuit rejected this argument. It affirmed the district court's analysis, holding that a prosecutor's procurement of false testimony "violates a [criminal defendant's] substantive due process rights." See *McGhee v. Pottawattamie County*, 547 F.3d 922 (8th Cir. 2008).

Relying on a case from the Second Circuit, *Zahrey v. Coffee*, 221 F.3d 342 (2d. Cir. 2000), the Eighth Circuit further held that a prosecutor is not immune for procurement of false evidence "where the prosecutor was accused of *both* fabricating evidence and *then using the fabricated evidence at trial*," resulting in a post-trial "deprivation of liberty." 221 F.3d at 344, 349 (Emphasis added.) The Court acknowledged that this reasoning was, "in tension, if

not conflict, with,” the Seventh Circuit’s decision in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994) cert. denied 513 U.S. 1085 (1995). There, the Seventh Circuit held that procurement of false testimony by a prosecutor, without more, does not violate any of a criminal defendant’s constitutional rights. The Seventh Circuit further held that the *use* of such testimony in judicial proceedings is shielded by absolute immunity.

The Eighth Circuit in *Pottawattamie County* refused to stay its mandate, and the petitioners petitioned this Court for certiorari. This Court granted certiorari, and was scheduled to hear argument on the issue, when the parties settled just days before the scheduled argument.

The issue presented in *Pottawattamie County*, whether prosecutors were entitled to absolute immunity for procuring false testimony during an investigation and then using that testimony at trial, is the same issue presented to this Court in the instant case.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit in *Pottawattamie County* held that a prosecutor has no immunity from suit where he allegedly procured false testimony during an investigation, then introduced the same testimony at trial, resulting in a post-trial deprivation of liberty. It held that there exists a “substantive due process” right against procurement of false evidence. This holding is in concert with the Second Circuit’s holding in *Zahrey v. Coffee* that a prosecutor is not immune for procurement of false evidence “where the prosecutor

was accused of *both* fabricating evidence and *then using the fabricated evidence at trial*,” resulting in a post-trial “deprivation of liberty.” 221 F.3d at 344, 349 (Emphasis added.)

However, the Seventh Circuit in *Buckley v. Fitzsimmons* declined to limit a prosecutor’s absolute immunity, even to instances where he both fabricated evidence and then used the fabricated evidence at trial.

In the instant case, Koubriti has alleged—and the government has acknowledged—that Convertino traveled to Jordan with Agents Smith and Thomas, where they took photographs that conflicted with testimony later given by Smith and Thomas. Moreover, Smith and Thomas testified that they never took such photographs. Convertino elicited testimony from Smith and Thomas that the government agents in Jordan concurred that the day planner sketches represented Queen Alia Hospital and Incirlik Air Base, when in fact no such consensus existed.

Like *Pottawattamie County*, this case represents a situation in which the prosecutor not only fabricated evidence, he then used the fabricated evidence at trial, which resulted in a post-trial “deprivation of liberty”. Review by this Court is warranted to resolve a serious conflict among the Circuits concerning the extent to which a prosecutor should receive immunity from misconduct which occurred while he was acting as an investigator in marshaling false evidence to be used in a prosecution.

I. A Deep Division Exists Among The Circuits On The Issue Of The Extent to Which A Prosecutor Is Afforded Prosecutorial Immunity For His Misconduct During The Investigative And Trial Phase Of A Criminal Prosecution.

In *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994) cert denied 513 U.S. 1085 (1995), the Seventh Circuit addressed the critical question of whether a prosecutor: (1) may be sued on allegations that he procured false testimony, and then (2) face liability for a wrongful conviction because he introduced that same testimony at trial. In *Buckley*, the plaintiff, Stephen Buckley, alleged that prosecutors had violated his constitutional rights by coercing false statements from third parties through use of reward money, including co-defendant Rolando Cruz, then using this false testimony in Buckley's indictment and trial.

The Seventh Circuit declined to recognize liability for either the procurement of the false testimony or its subsequent use at trial. As to the former, the Court wrote:

Let us suppose the prosecutors put Cruz on the rack, tortured him until he named Buckley as his confederate, and then put the transcript in a drawer, or framed it and hung it on the wall but took no other step, or began a prosecution but did not introduce the statement. Could Buckley collect damages under the Constitution? Surely not; Cruz himself would be the only victim.

Id. at 795.

The Seventh Circuit reasoned further that if the prosecutor actually *used* such false testimony in judicial proceedings, then absolute immunity would shield him from a damages suit. *Id.*

In *Pottawattamie County*, the Eighth Circuit provided a much different analysis. *First*, it said that a prosecutor's procurement of false testimony, without more, violates a criminal defendant's "substantive due process rights." *Then*, drawing on the Second Circuit's *Zahrey* decision, the Eighth Circuit reasoned that a prosecutor has no immunity where a "deprivation of liberty * * * can be shown to be the result of [the prosecutor's] fabrication of evidence where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial. *Zahrey*, 221 F.3d at 344, 349.

The Eighth Circuit in *Pottawattamie County* let stand the district court's reasoning that "prosecutors should not be immune from § 1983 liability 'for their non-advocacy wrongful conduct if [a former criminal defendant] can prove that indictment and trial would not have occurred in the absence of the product of the wrongful conduct.'"

The division between the Seventh and Eighth Circuits is echoed by a similar division between the Second and Third Circuits. *Zahrey v. Coffee* involved a prosecutor who allegedly fabricated evidence against a New York City police officer for use in criminal and police disciplinary proceedings. The target of the proceedings, Zaher Zahrey, was indicted and arrested based on the false evidence, but was subsequently acquitted.

The Second Circuit in *Zahrey* held that there existed a “right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity.” 221 F.3d at 349. The Second Circuit reasoned that if a prosecutor fabricated evidence during the investigative phase of the proceeding, when he had only qualified immunity, then “it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that *Zahrey* would be indicted and arrested.” *Id.* at 354.

The Second Circuit began by recognizing the distinction between a prosecutor’s investigatory and prosecutorial conduct. It noted that the Supreme Court has upheld such a distinction:

Coffey has conceded, for purposes of this appeal, that he was acting in an investigating capacity, a capacity that entitles him, at most, only to qualified immunity. The Supreme Court’s rationale for according only qualified immunity to prosecutors who act in an investigating capacity is that their conduct in that capacity should be judged in the same manner as other investigating officers. “When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is ‘neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.’” *Buckley III*, 509 U.S. at 273 (quoting *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973)).

It then noted that, despite being protected by prosecutorial immunity, a prosecutor who knowingly

uses false testimony in a criminal trial has engaged in unconstitutional conduct. Because a person is responsible for the natural consequences of his actions, the Court concluded:

We think the right at issue in this case should not be defined at such a level of particularity as to be limited to a right not to be deprived of liberty as a result of an investigating prosecutor's fabrication of evidence. The right is appropriately identified as the right not to be deprived of liberty as a result of any government officer's fabrication of evidence. That right was clearly established in 1996, when Coffey's alleged acts occurred, and it was also then well established that for purposes of actions under section 1983 and Bivens, a person is "responsible for the natural consequences of his actions," *Monroe*, 365 U.S. at 187. Since a jury could find that Coffey would foresee that he himself would use the fabricated evidence and that a deprivation of Zahrey's liberty would result, Zahrey's claim survives Coffey's attempt to have the claim dismissed, as a matter of law, because of a qualified immunity defense. *Zahrey v. Coffey*, 221 F.3d at 354-55.

The Third Circuit, in *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), reached an opposite conclusion. There, a criminal defendant alleged that her constitutional rights were violated when a prosecutor and other investigators employed coercive techniques against witnesses, then used the evidence to obtain her indictment and conviction, which was later reversed. Relying on *Buckley*, the Third Circuit held that the techniques used to interview the

witnesses “did not violate [the plaintiff’s] constitutional rights” and that the prosecutor “was entitled to absolute immunity in offering the unreliable evidence.” *Id.* at 122.

In the instant case, the Sixth Circuit purported to rule against Koubriti on other grounds, holding that Koubriti’s claims against Convertino amounted to no more than “an attempt to seek damages for a traditional *Brady* violation, i.e. failing to disclose the contents of the various interviews in question.” However, as discussed at greater length in the following section, Convertino’s misconduct fell clearly into the role of an investigator and included the manufacture of false evidence and the presentation of that evidence at trial. Thus, it falls squarely within the *Buckley/Zahrey/Pottawattamie/Michaels* line of cases which is the subject of division among the Circuits.

II. The Sixth Circuit Failed To Recognize Convertino’s Misconduct As It Pertained To The Manufacture Of False Testimony And The Subsequent Introduction Of Such Testimony At Trial.

In reversing the district court’s holding that Koubriti had stated a claim for a violation of his § 1983 rights, the Sixth Circuit held:

In the relevant portion of Koubriti’s complaint, Koubriti alleges that he is entitled to *Bivens* relief because “Defendant Convertino...withheld exculpatory evidence...by:...B. Failing to disclose that [Convertino, Thomas, and Smith] could not establish which site or sites the sketches

established (if either) after their respective trips to Jordan.” As stated, this is nothing more than an accusation that Convertino failed to disclose exculpatory evidence. As such, the claim fits squarely in the framework set out by *Imbler* and *Jones* and is thus covered by absolute immunity.

Later in its opinion, the Sixth Circuit stated again: “There is no claim here of evidence fabrication, and it is not the evidence that resulted from the trip of which Koubriti complains.”

This is a mischaracterization of Koubriti’s claims against Convertino. It is true that Convertino failed to disclose a plethora of evidence that undermined nearly all of the government’s alleged evidence that Koubriti was guilty of terrorism, including direct evidence that severely undermined the testimony of the government’s star witness, Yousseff Hmimmsa.

Moreover, Koubriti alleged, and the government acknowledged, that Convertino contravened government procedure by ordering the FBI not to take any notes of their interviews with Hmimmsa in order to limit defense counsel’s ability to cross-examine him. It is therefore also likely that no one will ever know the extent to which Convertino and/or other government agents shaped or corrupted Hmimmsa’s testimony.

But Koubriti alleged that Convertino’s misconduct went beyond a mere failure to disclose exculpatory evidence. In his brief to the Sixth Circuit, Koubriti alleged that Convertino secretly traveled to Jordan with Agents Thomas and Smith, a fact that he did not

reveal to the court or the defense. While there, the agents took photos of Queen Alia Hospital in Jordan, and found that these photographs rebutted their theory that the photos would match the sketch found in the day planner. However, Agents Thomas and Smith testified that they had *not* taken any photos of the hospital, because they had not obtained approval to do so. Agents Thomas and Smith also testified that there was consensus among government agents that one of the drawings in the day planner depicted the hospital, and one depicted Incirlik Air Base in Turkey, when in fact there was no such consensus. Finally, they testified that there was consensus that the videotape found at the defendants' home constituted terrorist "casing materials", when in fact, there was no such consensus.

Convertino's misconduct went far beyond that of a prosecutor who fails to disclose evidence that might damage his case. Here, he acted as an investigator when he traveled to Jordan to gather evidence in support of the prosecution. However, in this role he acted improperly, and unconstitutionally, by gathering only evidence that supported his case, and suppressing and withholding evidence that conflicted with his theory. He did not simply gather evidence and allow the evidence to speak for itself and guide his theory of the case. He developed a theory and selectively gathered and manufactured evidence that fit within this theory, while purposefully suppressing and hiding the evidence that suggested that his theory was wrong.

Then, *after* perverting the evidence against Koubriti and his codefendants in this manner, he knowingly elicited the false testimony from Smith and Thomas that no photos of the hospital had been taken,

and that there was consensus concerning what was represented in the day planner sketches and other alleged “casing materials”.

To pretend as if Convertino acted as an ordinary prosecutor in this case is to ignore his extraordinary level of involvement in the case from its inception. This is not a case in which agents investigated claims against the defendants, gathered evidence, and then handed the case off to Convertino where he could make a decision as to what the evidence established and how it should be presented at trial. In such a situation, even if Convertino had deliberately elicited false testimony from Smith and Thomas at trial, or withheld exculpatory evidence, his misconduct would be protected under the doctrine of prosecutorial immunity.

However, that is not what occurred here. Convertino surreptitiously traveled to a foreign country, collected evidence, directed witness interviews, and molded all of what he gathered to fit within his theory that Koubriti and his co-defendants comprised a terrorist “sleeper cell”. *Only then* did he put on his prosecutor’s hat, and engage in the prosecutorial misconduct of failing to disclose exculpatory evidence and knowingly eliciting false testimony from his witnesses.

Like the defendants in *Zahrey* and *Pottawattamie County*, Convertino’s misconduct consisted to two distinct acts: 1) Fabricating evidence and 2) Using the fabricated evidence at trial. As noted in previous sections of this petition, a deep division exists within the Circuits as to whether such misconduct by a prosecutor should be protected by the doctrine of

prosecutorial immunity. Review by this Court is warranted to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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