

21 - 6116

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

FILED
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OFFICE OF THE CLERK
SUPREME COURT

V

CHRISTOPHER COBB

On Behalf of Plaintiff

From the Eleventh Circuit Court of Appeals

Petition for Certiorari

Pro Se

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cc

Questions Presented

- 1) Whether the conflict between Mechanik and Bank of Nova Scotia invite arbitrary decisions from the lower courts.
- 2) Whether it was a mistake of fact to conclude that Mary Anne Gallagher's Oath of Office was lawfully destroyed when the law clearly forbids such destruction.
- 3) Whether the absence of an Oath of Office should be taken as "harmless error" or whether it is in fact a major Constitutional issue that fully invalidates all acts performed by an employee who fails to file an Oath with the agency of public employment.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v Mechanik, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed. 2d 50 (1986)

Bank of Nova Scotia v United States, 487 U.S. 250, 108 S.Ct. 2369, 108 L.Ed. 2d 228 (1988)

United States v Sigma Int'l, 244 F.3d 841, 853 (11th Cir. 2001)

Ticarilla Apache Nation v United States DOI, 613 F.3d 1112, 1119-20 (D.C. Cir. 2010)

Alexander v National Farmers Organization, 687 F.2d 1173, 1205-06 (8th Cir. 1982)

Linda R.S. v Richard D., 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1973)

United States v Foroman, 71 F.3d 1214 (6th Cir. 1995)

United States v Pignatiello, 1984 U.S. Dist. LEXIS 18135 (D.C. Mar 28, 1984)

United States v Vazquez-Botet, 2005 U.S. Dist. LEXIS 64476 (D.P.R. Dec. 15, 2005)

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United States v Vazquez-Botet, 2005 U.S. Dist. LEXIS 64476
(D.P.R. Dec. 15, 2005)

United States Constitution, Article VI, Clause 3

United States Constitution, Fifth Amendment

5 U.S.C. § 2906

The Merriam-Webster Dictionary

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5 USC § 2906

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U.S. Constitution, Article VI, (1.3)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

Decision Below

In the instant case, Cobb submitted a Motion to Unseal Grand Jury transcripts, citing Freedom of Information Act responses that showed that one Mary Anne Gallagher does not now have an Oath of Office on file with the Executive Office of the United States Attorney, as well as responses that show that other former AUSAs do still have their Oath of Office on file with the same Executive Office. The district court eventually denied the request on the grounds that, even though an error occurred, the error was harmless; citing United States v Mechanick, 475 U.S. 66, 106 S.Ct. 938, 89 L. Ed. 2d 50 (1986). Cobb then appealed, and the Eleventh Circuit deemed that Mechanick, rather than Bank of Nova Scotia v United States, 487 U.S. 250, 108 S.Ct. 2369, 108 L. Ed. 2d 228 (1988) controlled, even though one of the panel members had previously issued an opinion stating that Bank of Nova Scotia should always control concerning Grand Jury matters due to its abrogation of Mechanick.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 19, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 13, 2021, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Jurisdiction

The Supreme Court retains Appellate Jurisdiction under 28 U.S.C. § 2106 over "any judgment, decree, or order of a court..."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th Amendment to the U.S. Constitution provides that "No person shall... be deprived of life, liberty, or property without due process of law"

Article VI, Cl. 3 of the U.S. Constitution provides that "all executive... officers... shall be bound by Oath or Affirmation, to support this Constitution."

5 USC § 2906 (Oaths to be preserved)

Constitutional Provisions Involved

- A. The Fifth Amendment to the United States Constitution provides that "No person shall...be deprived of life, liberty, or property without due process of law"
- B. Article VI, Cl. 3 requires that "...all executive...officers...shall be bound by Oath or Affirmation, to support this Constitution..."

Statement of the Case

This case presents a pressing and dire set of questions surrounding the conflict between two Supreme Court precedents that have already produced arbitrary rulings in the lower courts, as well as asking the level of importance to be ascribed to the Constitution's Oath of Office requirement. United States v Mechanik, 475 U.S. 66, 89 L. Ed. 2d 50, 106 S.Ct. 938 (1986) precludes dismissal of an indictment post trial, whereas Bank of Nova Scotia v United States, 487 U.S. 250, 260-61, 108 S.Ct. 2369, 101 L. Ed. 2d 228 (1988) declared that prosecutorial misconduct before a grand jury allows for post-conviction dismissal of an indictment. In the instant case, Cobb presented evidence that the person arguing before the grand jury in favor of indictment never filed an oath of office with the Executive Branch of the U.S. Attorney, and requested that the relevant portions of the grand jury transcripts where the unauthorized individual argued in favor of his indictment. The district court, after Cobb filed for a writ of mandamus, denied the request stating that although an error occurred, the error was harmless due to Mechanik's ruling. Cobb appealed to the Eleventh Circuit, pointing out that even in Mechanik, a specific exception was carved out where if the Government's attorney was the unauthorized individual, Rule 6 of Criminal Procedure requires dismissal. The Eleventh Circuit affirmed the ruling of the district court, stating that there was no error at all with the presence of Mary Anne Gallagher because the Freedom of Information Act Response stated that "pursuant to DOJ policy, your records have been destroyed" and therefore Gallagher's Oath of Office was merely destroyed according to policy. This despite the fact that it is illegal to destroy Oaths, and the fact that Cobb had provided ample evidence that Oaths of former Assistant U.S. Attorneys are not destroyed upon separation from employment. Cobb then sent a petition for rehearing, pointing out that one of the panel Circuit Judges (Tjoflat) had previously decided in a nearly identical case, that Bank of Nova Scotia, not Mechanik, controls in a case where there was prosecutorial misconduct before a grand jury. Judge Tjoflat even authored an opinion stating that he fails to see what, if anything, survives of Mechanik after Bank of Nova Scotia. Also, Cobb would like to point out that he has not sought dismissal of his indictment at any point of these proceedings. The entire time, he has merely been attempting to unseal grand jury transcripts. The district court speculated that his end goal was to obtain dismissal of his indictment. As such, he raises the question of whether either one of these cases can actually be said to control his original request, or if the lower courts have merely changed the nature of the issue before them in order to justify a denial. And finally, Cobb contends that the lack of a valid Oath of Office is a major defect in every action that Mary Anne Gallagher ever undertook in her official capacity, not the harmless error that the district court determined it to be; or the "not error" that the circuit court determined it to be.

Summary of the Argument

In the instant case, Cobb contends that Mechanik was improperly applied to his case, as the controlling case is clearly Bank of Nova Scotia. Also, he contests the conclusion that the lack of an Oath of Office on file for Mary Anne Gallagher was harmless. He argues that the lack of an Oath makes her a "private citizen" and that it is well settled that private citizens cannot bring criminal complaints before a grand jury. This lack, therefore is what makes the case unprosecutable before the district court - i.e. the district court lacked jurisdiction to hear the case after a private citizen argued for indictment due to "grave doubt" about the grand jury's independence and the lack of all due process guarantees.

Cobb also argues that the Eleventh Circuit's conclusion that the Oath in question was lawfully destroyed flies in the face of the very concept of "Rule of Law", as the Oath of Office is the only thing that grants the authority to act on behalf of the government in any capacity, for any job; and because of this, 5 U.S.C. § 2906 explicitly forbids the destruction of any officer's Oath. Also, Cobb presented to the district court evidence that the Executive Office of the U.S. Attorney does not destroy Oaths, yet the lower courts ignored this evidence in favor of an unsworn statement in one of the Freedom of Information Act Responses that Mary Anne Gallagher's Oath was destroyed. If such a destruction did occur, then it would be against the law. And Cobb argues that, as such, the lower courts were required to decide the issue of destruction in his favor, not the government's.

This issue affects all federal prosecutions, and therefore this Court should take up this case in order to settle the conflict between Mechanik, and Bank of Nova Scotia; and to settle once and for all whether the Constitutional Requirement for "all executive...officers...shall be bound by Oath or Affirmation, to support this Constitution..." is truly a binding clause, or whether no AUSA actually needs to swear to uphold the Constitution.

Reasons For Granting the Petition

I. Conflicting Supreme Court Precedent Invites Arbitrary Decisions

A. Failure to Come to Grips With Conflicting Precedent is "An Inexcusable Departure From the Essential Requirement of Reasoned Decision Making"

In the instant case, neither of the lower courts addressed the applicability of Bank of Nova Scotia, 487 U.S. 250(1988) to the instant case, despite the fact that Circuit Judge Tjoflat had previously authored a decision discussing that Mechanik and Bank of Nova Scotia are inextricably entangled and that "[a]lthough Bank of Nova Scotia did not explicitly overrule Mechanik, we query what, if anything, remains of the Mechanik rule." United States v Sigma Int'l, 244 F.3d 841, 853 (11th Cir. 2001). Judge Tjoflat then goes on to admonish the district court in Sigma Int'l for not discussing Bank of Nova Scotia at all in its decision (at 853 and 853 n. 35). This was all in the Eleventh Circuit's order from a petition for rehearing.

Just as in Sigma Int'l, Cobb brought up the Bank of Nova Scotia decision, citing it in his petition for rehearing, and just as in Sigma Int'l, the district court below failed to address or even mention whether Bank of Nova Scotia applies in the instant case. Yet in Sigma Int'l the panel reheard the arguments, and reversed; ordering the grand jury transcript to be unsealed in its entirety for Sigma Int'l, but refused to do so for Cobb. The Eleventh Circuit panel even went so far in Sigma Int'l as order the overturning of the defendants' convictions and dismissal of their indictments. All over a violation of Federal Rule of Criminal Procedure 6.... just as Cobb has provided evidence of... Yet the panel in Cobb's case concluded that the Constitutional error of a prosecutor who does not have authority to argue before the grand jury does not allow for further proceedings. This in direct opposition to its earlier decision in Sigma Int'l; making the denial of Cobb's appeal "arbitrary" and a failure to come to grips with conflicting precedent, which is "an inexcusable departure from the essential requirement of reasoned decision making" Jicarilla Apache Nation v United States DOI, 613 F.3d 1112, 1119-20 (D.C.Cir. 2010). In the instant case, the prosecutor's lack of an oath (which Cobb has presented multiple items demonstrating to the lower courts), shows a violation of Rule 6(e), overbearing the grand jury's independence through a complete lack of constitutional protections afforded to the defendant at that time. As such, the procedural map laid out in Sigma Int'l by the the Eleventh Circuit should have been followed, but was not. Because of this, Cobb now requests that this Court settle the conflict between the two precedents, possibly by overruling Mechanik entirely.

B. Other Courts Have Done the Same Thing

A search of the (albeit extremely limited) version of LEXIS Nexis that inmates have

access reveals 13 "infobases" (as the system calls them) referencing Mechanik, in 55 cases. On the other hand, Bank of Nova Scotia is cited in 84 "infobases", and 2,850 cases. Given the disparity in citation, it seems that most courts consider Mechanik to have already been overruled. But this leaves a small number of cases where Mechanik is cited to support the existence of an error, yet the particular court at that time wishes to deny relief despite the violation(s). This Court should, therefore, grant certiorari review in order to resolve the discrepancies.

II. Federal Law Clearly Forbids the Destruction of Oaths of Office

A. 5 U.S.C. § 2906 Explicitly Forbids the Destruction of Oaths of Office

As presented in the lower courts, the destruction of Oaths of Office is specifically outlawed by 5 U.S.C. § 2906. The lower courts in this instance, however, determined that the Oath of Mary Anne Gallagher was "destroyed pursuant to Department of Justice guidelines" (Circuit Decision, at 3), despite the fact that if such a policy even existed, it would be in direct opposition to 5 U.S.C. § 2906. No policy can contradict statute, and where a document is deliberately destroyed, the court should "draw factual inferences adverse to the party responsible" Alexander v National Farmers Organization, 687 F.2d 1173, 1205-06 (8th Cir. 1982)(emphasis added). And, 18 U.S.C. § 2071(a) makes it a crime to destroy such, punishable by fine and imprisonment. Not that Cobb is attempting to put anyone in prison, he is just pointing out that it appears that the decision below is specifically to protect government employees from prosecution. In the instant case, both lower courts have made inferences in favor of the party who claims to have destroyed document(s) illegally. This is reversible in itself, and this Court should do so.

B. In Any Case, The Oath Was Not Destroyed - It Never Existed

The lower courts determined that the Oath in question was destroyed, which means that they completely ignored other relevant evidence that Cobb submitted along with his instant motions. One of which was the Oath of Office for another former AUSA - one Dan Fortune. The existence of former AUSA Fortune's Oath still on file shows that it is not DOJ policy to destroy Oaths of former AUSAs. Also, Cobb provided the documentation that the Executive Office of the U.S. Attorney sent him on a "wild goose chase" to find Gallagher's Oath. All other potential sources of the Oath in question kept leading him back to the Executive Office of the U.S. Attorney. If the Oath ever existed, it would have been filed at the EOUSA, and nowhere else. The lower courts ignored all of this evidence before them, concluding instead, and erroneously, that the Oath was lawfully destroyed. It is worth mentioning here (as Cobb has before the lower courts), that a

simple production of the Oath would prove dispositive of Cobb's position; but no such defense has even been attempted, and neither lower court mentions this possibility at all. That alone should prove telling as to the existence (or rather lack thereof) of the Oath itself.

Ignoring clearly relevant evidence placed before the lower courts was abuse of discretion. Placing greater weight upon a statement that the EOUSA broke the law in order to justify denial was likewise an abuse of discretion. Both of these abuses were committed by both lower courts, and implicate the "fairness and integrity" of judicial proceedings.

C. Failing to File an Oath of Office Denies Due Process to Every Defendant That an AUSA Prosecutes

Mary Anne Gallagher did not, Cobb avers, file an Oath of Office with the Executive Office of the U.S. Attorney, as required by law. This means that every time she conducted any act in her official capacity, she was a private citizen, and private citizens cannot argue in favor of indictment before a grand jury - see Linda R.S. v Richard D., 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1973). "Before [the Court] can consider the merits of [a claim/complaint] or the propriety of the relief requested, however, [Linda R.S.] must first demonstrate that she is entitled to invoke the judicial process" Id, at 540. Also, the fact lack of a valid appointment absolves any person from violations before a grand jury - see United States v Foreman, 71 F.3d 1214 (6th Cir. 1995); showing that Mary Anne Gallagher was not bound by the Constitution when she argued in favor of indictment. This seriously implicates the independence of the grand jury Bank of Nova Scotia, 487 U.S. at 256: "if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from substantial influence of such violations", then "dismissal if the indictment is appropriate" (cleaned up, quoting Mechanik, 106 S.Ct. at 938) (emphasis added). The whole point of requiring an Oath of Office is to guarantee that due process is followed; yet without the Oath that guarantee no longer exists at any proceeding in which Mary Anne Gallagher ever participated in. Doubt is defined as: "1) to be uncertain about; 2) to lack confidence in: distrust; 3) to consider unlikely" Merriam-Webster Dictionary (concise citation unavailable due to the fact that every dictionary in the law library has had the publication page torn out).

When Cobb signed up for the Army, it was stressed to him that failure to properly file his oath would result in prosecution for fraud... yet AUSAs, according to the Eleventh Circuit, get a pass. This cannot be allowed to stand, as it removes all due process protections from ALL criminal prosecutions in the United States. This is a fundamental defect in the logic of the lower courts in this instance, and it affects every single

federal prosecution. Due to the fact that an AUSA, without an Oath on file, is not beholden to the Constitution at all, that same AUSA is not beholden to any standard of conduct before a court, or even a grand jury. This should, at the very least, allow for the unsealing of the grand jury transcripts; which is all that Cobb is asking for at this time. In Bank of Nova Scotia, the lower court ordered the unsealing of the full transcripts of the grand jury proceedings for prosecutorial misconduct before the grand jury. Cobb is merely asking for the same treatment here.

III. Whether the Absence of the Oath is "harmless" or A Major Constitutional Violation

A. Lack of Oath Has Previously Caused Dismissal for Lack of Jurisdiction

In United States v Pignatiello, 1984 U.S. Dist. LEXIS 18135 (D.C. Mar. 28, 1984), the court dismissed the indictment against the defendants due to the lack of an Oath of Office by the prosecuting attorney. To be sure, there was a flood of cases stating that Pignatiello was abrogated due to Mechanik. But all of that talk subsided completely after Bank of Nova Scotia. And in United States v Vazquez-Botet, 2005 U.S. Dist. LEXIS 64476 (D.P.R. Dec 15, 2005), the district court there went to great lengths to describe just how damaging a violation of Rule 6 actually is, AND how impossible it is to determine whether such a violation is harmless versus prejudicial. Vazquez also describes the impossibility of enforcing a violation of Rule 6 prior to conviction in most cases. Thus holding that a jury verdict renders all issues before a grand jury harmless means that prosecutors are not held to any standard before the grand jury, which is why Bank of Nova Scotia must be held to have overruled Mechanik.

B. This is Not A Case Where the Oath In Question Was Merely A Failure to Renew

There are many cases wherein a prosecutor was at one time validly appointed, but allowed the appointment to lapse, stood on behalf of the government, then renewed their Oath at a later date. In all such cases, it was held that the lapse does not prevent the attorney in question from performing the duties of a prosecutor. This makes sense, as that person was lawfully able to complete their duties at one time.

But here, no Oath has ever been filed for Mary Anne Gallagher. This distinguishes the instant case from all instances of a lapse of renewal. There has never been anything to renew here, and Mary Anne Gallagher never had the authority to stand before the grand jury in the first place. That lack should be held against the government's position, yet both lower courts in this instance have not only failed to do so, but have called it harmless. It cannot be harmless to allow a private citizen to act in an official capacity without an Oath of Office. To do so removes all Constitutional protections for defendants and fully negates all that our founding fathers shed their blood for.

CONCLUSION

It used to be well settled law that a violation of Rule 6 required dismissal of an indictment regardless of when the violation was discovered. Then came Mechanik, which issued an overly broad statement which was retracted by Bank of Nova Scotia; unfortunately, though, Mechanik was not overruled at that time. This has resulted in arbitrary decisions by lower courts wherein violations of Rule 6 can be determined to be in favor of either the defendant or called harmless depending on no more than whether the presiding court wishes to invoke Mechanik or Bank of Nova Scotia. Later caselaw is said to control; yet here the district court, and then the circuit court, determined that an older decision by this Court controls over the later decision. This should not be allowed to stand, particularly in this instant case. As doing so removes all Constitutional protections for a defendant in this nation. For if a prosecutor is not bound to follow the Constitution, then no person's liberty is secure.

Respectfully Submitted,



Christopher D. Cobb

9/12/21

Date

Certificate of Service

I, Christopher D. Cobb, hereby swear under penalty of perjury that the foregoing was placed in the hands of the FSL Jesup Legal Mail Representative on 9/12/21, and ask the Clerk of the Supreme Court to notify the United States Attorney's Office for the Northern District of Alabama of same.

Respectfully Submitted,



Christopher D. Cobb

9/12/21

Date