No. 22-6799

IN THE

SUPREME COURT OF THE UNITED STATES

EMEKA DOMINIC OKONGWU — PETITIONER
(Your Name)

vs.

COUNTY OF ERIE, ET AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

EMEKA DOMINIC OKONGWU
(Your Name)

2200 MAIN STREET, #2
(Address)

BUFFALO, NEW YORK 14214
(City, State, Zip Code)

(716)533-9042
(Phone Number)

QUESTION(S) PRESENTED

1. DID THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERR BY AFFIRMING THE DISTRICT COURT WHEN THE DISTRICT COURT ERRED IN REFUSING TO ALLOW THE PETITIONER TO AMEND HIS COMPLAINT TO RAISE ISSUES THAT WERE NOT PREVIOUSLY RAISED BECAUSE THE FACTS SUPPORTING THE ISSUES WERE NOT AVAILABLE TO THE PETITIONER?

2. DID THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERR BY AFFIRMING THE DISTRICT COURT WHEN THE DISTRICT C0URT ERRED IN VACATING ITS ORDER IN ORDER TO ENTERTAIN PETITIONER'S MOTION FOR RECONSIDERATION OF PREVIOUSLY ENTERED ORDER?

3. DID THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERR BY AFFIRMING THE DISTERICT COURT WHEN IT ERRED IN GRANTING SUMMARY JUDGMENT?

LIST OF PARTIES

[X] 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

THERE ARE NO RELATED CASES THAT PETITIONER IS AWARE OF IN THIS COURT

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES | PAGE NUMBER

STATUTES AND RULES

OTHER

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

[X] For cases from **federal courts**:

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

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[X] is unpublished.

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

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[X] is unpublished.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

12

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 11/28/2022, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTIONAL PROVISIONS INVILVED ARE THE DENIAL OF RIGHTS TO DUE PROCESS OF LAW AND TO THE SIXTH AMENDEMENT RIGHTS TO A CRIMINAL TRIAL

STATUTORY PROVISIONS INVOLVED ARE THE DENIAL OF RIGHT TO FILE AN AMENDED TO A CIVIL COMPLAINT

STATEMENT OF THE CASE

This case stems from Petitioner's long imprisonment due to his false arrest and malicious prosecution for sex crimes against his two daughters.

A. Claims:

In 1984, Petitioner and his "traditional Nigerian wife," Doris Agbala, had twin daughters. After suffering medical problems, Agbala returned to Nigeria, leaving Petitioner in charge of raising his daughters. Petitioner relied on babysitters to help take care of his daughters. One babysitter alleged that Petitioner sexually abused his toddler-age twins. In 1988, Petitioner was exonerated of these allegations after a trial in Erie County Family Court. Petitioner's daughters were then placed in foster care.

The girls' foster mother, Ollie McNair, subsequently reported to the police "that once she came into the children's room and observed them playing on top of each other, and that when questioned what they were doing, they allegedly said that it was a simulation of what Daddy did to them when they visited him." A criminal Petitioner action was initiated solely based on these allegations. Petitioner was ultimately indicted on multiple criminal counts. Petitioner stated that Erie County Sheriff Timothy Howard failed to properly investigate the claims against him. In his proposed Third Amended Complaint which he sought leave to file but was unsuccessful, Petitioner further stated that the district attorney, Frank Sedita, and others in his office, dictated to Buffalo police officers and Erie County deputy sheriffs what kind of evidence to collect.

Petitioner stated that Sheriff's deputies, police officers, and assistant district attorneys all coached and coerced his daughters to testify falsely against him, threatening them with deportation to Nigeria if they did not cooperate. Petitioner stated that all of these practices were part of policies of the District Attorney's office and Buffalo Police Department. Petitioner was convicted in New York state court of rape in the first degree, sodomy in the first degree, incest, sexual abuse in the first degree, endangering the welfare of a child, and harassment. (People v. Okongwu, 71 A.D. 3d 1393 (App. Div. 4th Dep't.), District Docket No. 66-11 at p. 2.) He was sentenced to 35-107 years. (District Docket No. 74-3, ¶ 28.) On March 19, 2010, the New York Appellate Division, Fourth Department, vacated his conviction and sentence. In documents submitted opposing Erie County's motion for summary judgment, Petitioner's conviction was overturned on the basis of ineffective assistance of counsel. (Erie County Statement of Material Facts, See District Docket No. 66-2 at p. 2; Petitioner Statement of Undisputed Facts, District Docket No. 69-1 at p. 2.) The Fourth Department found that due to Petitioner's counsel's failure to proffer favorable evidence or call an expert-combined with the inconsistent testimony of his young daughters-there was "reasonable evidence that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (People v. Okongwu, 71 A.D. 3d 1393, District Docket No. 66-11.)

After Petitioner's conviction was overturned, Erie County Assistant District Attorney Michael Cooper kept him in jail for an additional 2 years while attempting to convince Appellant's daughters to testify against him again. (Docket No. 74-3, ¶ 49.) While Petitioner was being held in the Erie County Holding Center ("ECHC"), Appellant was assaulted by a fellow prisoner. When Petitioner was released, ECHC did not return his paperwork, including legal documents and personal mementos.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED BY AFFIRMING THE DISTRICT COURT WHEN THE DISTRICT COURT ERRED IN REFUSING TO ALLOW THE PETITIONER TO AMEND HIS COMPLAINT TO RAISE ISSUES THAT WERE NOT PREVIOUSLY RAISED BECAUSE THE FACTS SUPPORTING THE ISSUES WERE NOT AVAILABLE TO THE PETITIONER.

A district court abuses its discretion when its ruling "rests on an error of law" or "cannot be located within the range of permissible decisions." ***See Zervos v. Verizon N.Y., Inc.***, 252 F.3d 163, 169(2d Cir. 2001), ***See also Williams v. Citigroup, Inc.*** 659 F.3d 208(2011). In the ordinary course of, the Federal Rules of Civil Procedure provides that courts "should freely give leave" to amend a complaint "when justice so requires." See Federal Rules of Civil Procedure, Rule 15(a)(2). The Second Circuit says that "[t]his permissive standard is consistent with our 'strong preference for resolving disputes on the merits.'" ***See Williams v. Citigroup, Inc***, @ 213. ***See also, New York v. Green***, 420 F.3d 99, 104(2d Cir. 2005).

The Second Circuit observed that as a procedural matter, "[a] party seeming to file an amended complaint post judgment must first have the judgment vacated or set aside pursuant to [Rules] 59(e) or 60(b). ***See Williams v. Citigroup***, @214. The Second Court has also observed that it is important to recognize the need for finality of a case. In the same vein, this Court stated that "[o]ur precedents make clear, however, that considerations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of

judgment." Id. The Second Court further counseled that "in view of the provision in rule 15(a) that 'leave [to amend] shall be freely given when justice so requires,' it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment.'" Id, @ 214. In essence, the Second Court is saying that a district court could vacate a previously entered judgment in order to allow for an amendment of a complaint after ***taking into account the nature of the proposed amendment.*** *Id.*

In the case at hand, the district court abused its discretion in denying motion for leave to amend. The district court stated as follows: "[a]fter a careful reading of his proposed Third Amended Complaint, which is based on this new evidence, this Court does not discern any new facts that would undermine this Court's finding, at the summary judgment stage, that Okongwu did not establish a genuine issue of material fact regarding a county policy or custom of failing to train Sheriff's deputies. It contains nothing new regarding a county custom of failing to train Sheriff's deputies in preparing witnesses for trial." See District Court Docket #82 issued on October 1, 2021. Here, when the district court took into account the nature of the proposed amendment, it was looking at it to negate the facts the district court had to deal with in arriving at its decision to grant the summary judgment. That is not what amended complaint is supposed to do in a given case. The amended complaint is supposed to cure any deficiency in the complaint or add causes of action that was either mislead

or missing that can be related back to the complaint, not to negate or undermine the issues of discussion on a pending summary judgment motion.

The district court further pointed out that "[t]he new evidence this Court can discern includes the ***details of other alleged abuses by the City of Buffalo, specifics of how the prosecutors from the District Attorney's office collaborated with Buffalo police detective Marcia Scott and unnamed Sheriff's deputies, and some details about his assault in ECHC and Barbara Leary's alleged failure to protect him.*** There are other changes from the Second to the Third Amended Complaint, but these appear to be more attempts to re-plead his causes of action based on the Court's prior orders. For example, after repeatedly stating that district attorneys coached his daughters regarding their *testimony at trial*, ***Okongwu now alleges that [the prosecutors] gave his daughters false statements to memorize during their investigation of the case.*** This appears to be a rewriting to avoid the doctrine of prosecutorial immunity, not the result of the discovery of new facts." But this is not a rewrite to avoid the doctrine of prosecutorial immunity, because it can be proven. Buffalo police detective Marcia Scott was not known to have coerced Petitioner's daughters under the direction of the prosecutors, nor was she known to have been told by the prosecutors how to proceed in obtaining coerced testimony from Petitioner's daughters until in the proposed amended complaint. The complaint against the Erie County jail did not have the detail earlier because those facts were not available to Petitioner earlier. It was the district court who dismissed all those now-named

defendants, stating that Petitioner did not articulate what they did. Now, the proposed amended complaint has cured all the deficiencies the district court earlier noted in dismissing and denying Petitioner the opportunity to proceed.

The district court then stated in its final analysis that "[f]inally, reopening this issue after Erie County has in good faith sought and been granted summary judgment would impose a hardship on Erie County, and even more so on the other parties who were dismissed in 2016 and 2017."

The district court held that hardship would be imposed on Erie County defendant because it has in good faith completed discovery and filed a motion for summary judgment. These reasons are not covered in what could allow denial of leave to amend. First, having conducted discovery cannot cause the Erie County defendant hardship that the district court would deny leave to bring forth clarification of facts that show that Petitioner was indeed injured by violation of his constitutional rights and malicious prosecution which he could not have presented and proven without repleading his complaint as he finally did when the district court refused to allow the amendment. Furthermore, there are defendants which the district court dismissed because it stated that Petitioner did not state what they did wrong; those putative defendants were never served because the district court did not allow them to be served, and now that Petitioner has finally properly pleaded what they did wrong, putting then and the district court on clear notice as to why they should be charged in the complaint, the district court could not say that they would be prejudiced when they

had never even be allowed to be summoned in the first place. Furthermore, the issue of finality of the district court's dismissal order had not concluded before Petitioner's motion to vacate and leave for amended complaint.

These are proper matters of an appropriate amendment to a complaint, and because the district court was expecting an amended complaint to address the issue already pled and facing a summary judgment ruling, it has abused its discretion in deciding not to grant leave to amend the complaint.

The district court's refusal to allow the amendment and the Second Circuit's affirmance of same is an abuse of discretion and an error that a remand is in order.

2. THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED BY AFFIRMING THE DISTRICT COURT WHEN THE DISTRICT C0URT ERRED IN VACATING ITS ORDER SO AS TO ENTERTAIN PETITIONER'S MOTION FOR RECONSIDERATION OF PREVIOUSLY ENTERED ORDER.

Without an evidentiary hearing, the district court stated that Petitioner was lying when he stated that he came across legal documents he used for filing his motion for reconsideration as follows: "[i]t stretches credulity that there was no way for Okongwu to contact this person and request these documents at any point before the entry of this Court's order granting summary judgment to Erie County. At any rate, Okongwu offers no explanation for the timing of his receipt of the evidence." ***See district court Oct. 1, 2021 ruling. Slip Op.***

There is no basis for the district court to call the Petitioner a liar without conducting an evidentiary hearing and subjecting the Petitioner to questioning and cross examination under oath. Accordingly, the district court abused its discretion when it denied Petitioner's motion for reconsideration.

3. THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERR BY AFFIRMING THE DISTERICT COURT WHEN IT ERRED IN GRANTING SUMMARY JUDGMENT.

The law is clear that summary judgment is appropriate only when there is no material issue of facts in dispute. The issue of material facts in dispute would only be left within the parlance of the jury to decide. As such, the district court should not bother itself with any fact-issue in deciding a motion for summary judgment. In this case, the district court took on the analysis that should have been left for the jury. The district court stated as follows: "[t]o establish liability under this theory, Okongwu would have to demonstrate both that constitutional violations occurred, and that the County was aware of them and failed to remedy them, thereby tolerating them. This argument fails, apart from the fact that ***the examples do not implicate coercion of false testimony by sheriff's deputies, because it is not clear that Erie County was aware of these actions such that it tolerated a custom.***' See order of March 23, 2021. The district court made this decision of facts which would have been the jury to make. The matter at hand is material that it would have impacted the overall outcome of Appellant's case, as such, a remand of this case is warranted so that the district court should allow the jury to make this fact questions.

The district court also abused its discretion plus made an error of law when it decided that the jury was the entity to decide who the policymakers were. The district court stated as follows: "[r]egarding the second theory of Monell liability, Okongwu does not provide evidence of any acts by policymakers. He asserts that unnamed sheriff's deputies coached his daughters to testify falsely against him. In his deposition, when asked to identify the particular actors who did this, he stated "all the sheriffs in Erie County." (Okongwu Deposition, Docket No. 66-7 at p. 7.) His daughters' affidavits state that "law enforcement officials" coached and bribed them to testify falsely. (See, e.g., Affidavit of Nnedi Okongwu, Docket No. 66-10 at pp. 5-7.) ***Taken together,***

this is insufficient evidence from which a reasonable jury could conclude that the officers who "coached" his daughters were policymakers." Id. It is clear that the district court is the one tasked with deciding who the policymakers are. See ***Jeffes v. Barnes***, 208 F. 3d 49(2nd Cir. 2000) (Whether the official in question possessed final policymaking authority is a legal question). The ***Barnes*** Court further held that "[t]he matter of whether the official is a final policymaker under state law is 'to be resolved by the trial judge *before* the case is submitted to the jury.'" Id. Because of this error of law, the decision in the summary judgment is erroneous and should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, Dominic

EMEKA DOMINIC OKOYOGWU

Date: February 13, 2023

APPENDIX A

COURT OF APPEALS ORDER AFFIRMING THE DISTRICT COURT'S ORDER