In the

ORIGINAL

Supreme Court of the United States

CARLISLE W. BRISCOE, CHRIS P. VICKERS, SR. AND JAMES N. BALLARD,	)	
Petitioners,	)	
v.	)	No. 81-1404
MARTIN LAHUE AND JAMES W. HUNLEY, ETC	)	

Washington, D. C.

November 9, 1982

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Washington, D.C.

Tuesday, November 9, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a.m.

APPEARANCES:

EDMUND B. MORAN, Jr., ESQ., Chicago, Illinois; on behalf of the Petitioners.

MS. HARRIET LIPKIN, ESQ., Bloomington, Indiana; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Briscoe against LaHue.

Mr. Moran, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF EDMUND B. MORAN, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

MR. MORAN: Mr. Chief Justice, and may it please the Court:

These cases were brought pursuant to Title 42 of the United States Code, Section 1983. The precise issue that is being presented to this Court for decision is whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under Title 42, United States Code, Section 1983.

It is the contention of the Petitioners that such absolute immunity should not be extended to police officers who have perjured themselves during state court criminal trials, and that there are four fundamental reasons why such absolute immunity should not be extended to police officers.

The first of these reasons is that qualified good faith immunity as opposed to absolute immunity has generally been observed by this Court to be the

predominant standard in civil rights actions where immunity questions are raised. The Court has recognized that qualified good faith immunity gives an opportunity to a civil rights defendant to defend the case, but at the same time, gives the civil rights plaintiff an opportunity to attempt to make a case out of a violation of his constitutional rights.

The Court has recognize that the qualified good faith immunity does apply to police officers.

Secondly --

QUESTION: May I interrupt you there, Mr. Moran?

How could an officer who committed perjury ever discharge the burden of proving that he did so in good faith?

MR. MORAN: I don't believe he can if, indeed, it has been shown that he committed perjury. In other words, Justice Stevens --

QUESTION: Then the good faith --

MR. MORAN: -- I do not think that if there is conclusive proof of perjury, that it could ever be assumed that it was given in good faith. I think the only significance that qualified good faith immunity has in this context would be where the police officer would be allowed to offer evidence in response to the charges

that he believed the statements he made at the criminal trial for the truth.

QUESTION: Then it wouldn't be perjury.

MR. MORAN: And that would not be perjury.

QUESTION: So that you are really saying that there is no defense to a complaint against a police officer that he committed perjury at a trial with regard to a relevant fact.

MR. MORAN: I would say that that would be true to the extent that good faith is not consistent with perjury.

QUESTION: So that there -- when you say there should be no absolute immunity, you really are also saying there should be no immunity, period.

MR. MORAN: In a sense, yes, except that a few courts that have viewed the situation have considered that perhaps there would be what they have characterized as a qualified good faith immunity in the sense that the police officer would be allowed to come forward with evidence to show that he believed the statements to be true. But I essentially agree with your position. I don't think -- I think the two are essentially mutually inconsistent.

QUESTION: Yes.

MR. MORAN: The second --

QUESTION: There is nothing very new about there being no remedy for something of this kind under the speech or debate clause, which of course is express. A Member of the Congress may make any statement he wants, false or whatever, and he is wholly immune, is he not?

MR. MORAN: That is true, Your Honor.

QUESTION: If he makes it within the framework of our interpretation of the clause.

QUESTION: The absolute immunity position under 1981, wouldn't bar criminal prosecution.

MR. MORAN: It would not, Your Honor.

QUESTION: Even if it barred an action for damages.

MR. MORAN: Excuse me?

QUESTION: Even if it barred an action for damages.

MR. MORAN: The parties have consistently taken the position that there would be an action present under Title 18 USC Section 242.

QUESTION: Yes, yes. That's quite -- that's pretty generally true about judicially-created immunity.

MR. MORAN: The Petitioners' position on that point, Your Honor, is of course that Section 1983 was

passed with the very idea that there would be a civil damages remedy for a constitutional violation, and as the Petitioners have attempted to show in their briefs, there are indications from studies that have been conducted with respect to criminal prosecutions under 18 USC 242 that there may not be in effect any true deterrent effect as a result of that, so that the recognized benefit attendant to Section 1983 actions, that there might be a deterrent effect through the bringing of those actions, would be enhanced by a finding by the Court that they could be brought.

QUESTION: But our cases here indicate that Congress didn't really intend to nullify at least some of the common law immunities --

MR. MORAN: Well, that's --

QUESTION: -- including some absolute immunities.

MR. MORAN: That the cases have found --

QUESTION: What about that? What's the rule of common law about witnesses?

MR. MORAN: The rule, as I perceive the Court's cases with respect to absolute immunity, has revolved around the observation that immunities in general are accorded to government officials who are sued under 1983 when the level of their discretion is so

high that their day-to-day activities can be characterized as decision-making, indeed, that almost everything they do involves a decision. This Court has granted immunity to judges, to prosecutors, to legislators, as the Chief Judge pointed out, to administrative law judges and the President.

QUESTION: Yes, but we've held that -- we've held that Congress didn't intend to nullify the kind of -- those kinds of immunities.

MR. MORAN: That's true, but there are two observations that are critical to this case that relates to that. First of all, the Court has held that Congress did not intend to nullify an immunity if the legislative history of the 1871 Civil Rights Act were silent on that point. The Petitioners have taken the position that the 42nd Congress was not silent on the point of whether it considered perjury an act that should be condemned and should be actionable under the 1871 Civil Rights Act. Indeed, there are many comments throughout the legislative history to the effect that perjury was to be condemned, and that it indeed would be actionable under Section 1983.

Furthermore, with respect to the question of immunities not being automatically eliminated as a result of the passage of the act, the Court's recent

pronouncements have indicated clearly that a simple recognition of the fact that a common law immunity existed does not end the inquiry, but that the Court will consider the history of the particular immunity suggested and determine under modern day policy reasons whether that immunity should apply equally in the civil rights context as it would in the common law context, as it has been previous to the passage of the 1871 Civil Rights Act.

QUESTION: Can you suggest a reason why there should be a special rule for civil rights cases with respect to this very narrow matter?

MR. MORAN: I would think that the most significant reason why there should be a special rule underlies the passage of the 1871 Civil Rights Act, which was, I would suggest, the policy of Congress finding that in creating a new tort under Section 1983, there was in effect a much more serious aspect to that kind of a tort, and that the aspect that was so serious was that the tort was rendered by a governmental agent who was found to have had power that could not be wielded by the average person who might consider a common, or might perpetrate a common law tort.

In that particular instance, the Congress showed that it wanted to provide a damages remedy to a

victim of governmental overreaching.

In the decision of this Court in Monroe v. Pape, there was an explicit recognition by Justice Harlan to the effect that Section 1983 was significant in its effort to recognize that a constitutional tort was more significant than a common law tort. There Justice Harlan said, "The statute becomes more than a" judicial -- "jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and a deprivation of a constitutional act. This view, by no means unrealistic as a common-sense matter is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings."

I think it's clear that the reason that there can be and should be a special exception in this area relates to the fact that the 42nd Congress considered a tort committed by a governmental agent to be, indeed, a very serious situation that should be actionable even though it might not have been actionable under common

law.

The question of immunities that have been raised in the context of constitutional or civil rights litigation has been addressed several times by the Court in the last seven to eight years. In doing so, the Court seems to have taken the direction that absolute immunity will be considered to be the exception to the rule, and that qualified good faith immunity would be the predominant standard.

In Butz v. Economou, the Court was asked to decide the specific question of whether a civil rights plaintiff could sue a cabinet-level officer for an alleged defamation. He brought the action under a Bivens type action and asserted that he should be allowed to bring an action against the Secretary of Agriculture. The Secretary of the Agriculture brought to this Court's attention two prior decisions rendered by it, Spalding v. Vilas and Barr v. Matteo. Both of those actions were essentially common law defamation actions which eventually resulted in decisions by this Court to the effect that the defendants in those cases were absolutely immune from damages in a common law action.

When this Court was asked to extend the holding in Barr and Spalding to the constitutional tort

context in Butz v. Economou, the Court refused to do that and specifically indicated that if there was a common law immunity for the common law action of defamation, that immunity would not be extended to the Secretary of Agriculture in the constitutional tort context, and the Court upheld the right of the plaintiff to bring that action.

Thus, we have seen that there was specifically a contraction of immunities that were observed in common law but were considered -- but that the Court considered it necessary to contract the scope of those immunities in the constitutional tort context.

The Court has extended absolute immunity that was found in common law, in many instances in ages-old common law immunity situations. It has extended it to judges in Pierson v. Ray, to administrative law judges in Butz v. Economou, to prosecutors in Imbler v. Pachtman, to legislators in Tenney v. Brandhove, and to the President in Nixon v. Fitzgerald. However, the common thread through all of those decisions has been that if absolute immunity were not extended to the people who performed the functions attendant to those offices, indeed, the very functioning of the government insofar as it was embodied in the activities inherent in those offices, might be paralyzed, the basic idea being

that if a person were deterred from going ahead and making significant decisions through intimidation or harassment that might be attendant to a possible lawsuit brought against them for conducting those activities, that an immunity, an absolute immunity should attach to those activities.

It has been the Petitioners' contention throughout this lawsuit that there is no decisionmaking involved in testifying in a judicial proceeding, and that there, in fact, is no discretion in any material sense involved in testifying in that a witness is required to testify completely and truthfully to questions that are put to him during the judicial proceeding.

QUESTION: Well, in all of the absolute immunity cases, isn't the basic idea that the particular person should be relieved even from the burden of defending the lawsuits?

MR. MORAN: That is true.

QUESTION: That they can be harassed to the detriment of the performance of their duties simply by lawsuits, even if they win the lawsuits.

MR. MORAN: That has always been considered to be a countervailing factor with respect to civil rights lawsuits. There is no doubt about that. But the Court

has continued to recognize that even though there is, in essence, a down side to allowing civil rights plaintiffs to bring civil rights lawsuits against governmental agents, even in recognition of a detraction, so to speak, from the performance of their normal duties will be allowed so that the purposes behind Section 1983 will be advanced, and that a person who is a victim of constitutional violations can gain compensation for that act. And indeed, in the case of police officers, which is being presented to this Court now, in both Monroe v. Pape and Pierson v. Ray, the Court said that police officers would be held to only be qualifiably immune from civil rights actions for nearly everything that they had to do during the course of their duties.

It would be the Petitioners' contention that testifying by police officers is simply another one of their duties and that, indeed, although they might be interrupted from their duties and might be forced to come to court and defend their actions in such a lawsuit, this would be just considered the cost of going ahead and allowing a civil rights plaintiff to bring a proper 1983 action.

QUESTION: Mr. Moran, I am a little puzzled by your emphasis of these witnesses as police officers. They are not asserting their immunity because they are

police; they are asserting it because they are witnesses.

Isn't that a different approach?

MR. MORAN: That's true, Your Honor, they are asserting it because they are witnesses, and I think that it is the only way that they can approach the situation from the standpoint that, as the Court has indicated recently, the functional aspect of an analysis on this point is significant. However, it's also important to recognize that if the questioned activity is a constitutional violation and that it is performed under the color of state law, that it then will be actionable under 1983.

It's been the Petitioners' contention that this activity, even when characterized as being giving testimony during judicial proceedings, is given under the color of state law.

QUESTION: Mr. Moran, may I interrupt you on this -- on that point?

It is critical to your case that the perjury be a constitutional violation, as I understand your presentation, and as I understand the constitutional rule, mere perjury isn't a constitutional violation; it's the knowing use of perjured testimony.

Does that not require you to prove that the

prosecutor was a party to the perjury?

MR. MORAN: it is our petition that it would not so require, Justice Stevens. Of course, under this Court's holding, first in Mooney v. Hollahan, and later in Nappew v. Illinois and Giglio v. United States, it has been held by this Court that the knowing use of perjured testimony by government prosecutors will result in a due process violation.

However, the Petitioners would take the position that the general holding in those cases applies equally to the present cases.

QUESTION: Even if the prosecutor did not know of the alleged perjury.

MR. MORAN: Yes, and the reason that the Petitioners have taken that position consistently is that there is a knowing use by the state of perjured testimony when the perjuring witness is a representative of the state. In other words, we would suggest that it is only a logical extension of the holdings of the Court in, for instance, Nappew v. Illinois.

QUESTION: Well, does that mean that every criminal conviction in which the defendant could later demonstrate that there was some perjury committed by some state representative, is subject to collateral attack?

MR. MORAN: I don't think I could respond in blanket fashion to that question. I think it would depend on a case-by-case analysis. I think there is the potential for that, but I still think that the Court would have to examine the particular facts relating to the state witness that would be -- who would have perjured himself or herself and would be in question.

I certainly have taken the position that that would be true if the state witness is a police officer and has met the other conditions that we have suggested would be necessary to meet the under --

QUESTION: Well, suppose it's a non-official, he's not a police officer, he's not a state official, it is a criminal prosecution prosecuted by the state, and a lay witness, let's call it, perjures himself. Would you have a 1983 suit?

MR. MORAN: Against the lay witness, Your Honor?

QUESTION: Yes.

MR. MORAN: The only time that there might be the potential for a 1983 suit against a lay witness would be if there were allegations of conspiracy with government officials.

QUESTION: No, he's not. This is -- he on his own perjures himself and later it is discovered that he

has, and the convicted defendant brings a 1983 suit, could he maintain it, just against the lay witness?

MR. MORAN: Assuming that the -- there was no showing of any state action --

QUESTION: Yes.

MR. MORAN: With respect to the -- no.

QUESTION: It would be because there's no state action.

MR. MORAN: Yes.

QUESTION: Not because of absolute immunity?

MR. MORAN: The easy answer is that there's no state action. That's the threshold answer.

QUESTION: How can the --

MR. MORAN: The question of no state action obviously would perhaps remain, but it certainly wouldn't be presented to the Court in the Section 1983 context.

QUESTION: Here you have, in this case, the only exception is a state officer perjures himself.

MR. MORAN: In this case, yes.

QUESTION: Well, is that the rule you want?

I mean, you've got five witnesses and five of them perjure themselves. One is a policeman and the other four are fellow thugs like the one that's being tried, and they all perjure themselves, the only one

that is actionable is the police officer.

MR. MORAN: Under Section 1983, yes, and assuming non-involvement with any state officials, yes.

QUESTION: Now, Mr. Moran, the -- at common law, in the hypothetical I put to you, the lay witness, I take it, would have had an absolute immunity, would he not?

MR. MORAN: I believe that would be true, Your Honor.

QUESTION: And so I gather the burden of your position is that 1983, where the perjurious witness is a police officer, gives you a cause of action against the police officer who has no immunity because Congress, when it enacted 1983 in 1971, intended that 1983 should provide such a cause of action without the officer having any immunity, is that right?

MR. MORAN: That would be our position, Your Honor, that specific reference in the legislative history to the condemnation that Congress thought should be brought against perjury in state court judicial proceedings, it would be our position that that legislative history would suggest that there would not be absolute immunity for perjury.

QUESTION: And I gather, going -- when you got the civil action under 1983 against the police officer,

the Plaintiff would have to prove only that the officer perjured himself, and the officer would have no defense whatever except that I did not perjure myself, is that right?

MR. MORAN: I think that would be a fair statement. He clearly would have the defense that he could offer evidence that indeed his statement was not false, and at least not intentionally false --

QUESTION: Well, that isn't my purpose -- that he did not perjure himself. He would have no other defense.

MR. MORAN: None that I'm aware of.

QUESTION: Mr. Moran, might he have a defense that he didn't act under color of state law because of our decision in Polk County v. Dodson?

MR. MORAN: Your Honor, I do not believe that under the decision of Polk County v. Dodson that he would have a defense as to that point. I think he might have a defense that he was not acting under color of state law under certain circumstances. We have posited that certain requirements beyond a simple recognition of the fact that it was a police officer who was testifying, would have to be met to show that his testimony was given under the color of state law, such things as that he was called by the state, that the

evidence that he was giving was supporting the prosecution, that it was his duty to come forward and to give testimony.

QUESTION: Doesn't every citizen have a duty to come forward to testify when required to do so?

MR. MORAN: If a subpoena has been served on any citizen, yes, he would be required to respond to the subpoena, but the question of the word "duty" takes on particular significance with respect to a police officer. It has been the Petitioners' position consistently that in the case of police officers, it is a duty in the sense of a job responsibility, that routinely and systematically the police officers have to come to court in order to testify as to the results of their investigatory activities.

It is in that sense that it is a duty of the police officer to respond --

QUESTION: Well, I suppose public defenders have a duty to come forward into court and defend the defendants whom they are appointed to represent, but the Court didn't find that that made it acting under color of state law.

MR. MORAN: That is true, Your Honor, but in the decision in Polk County v. Dodson, the Court recognized the basic nature behind the public defender's

duties as being, not so much residing in the fact that he was an agent of the state or an employee of the state or county, that the traditional lawyer-client relationship is the predominant standard by which a public defender's actions would be determined.

Thus, you have a very different qualitative situation in the relationship between activities of the public defender representing an indigent criminal defendant and a police officer who does not have any direct fiduciary relationshp with a criminal defendant but indeed is trying to procure a conviction against him. That's a direct adversary relationship rather than a fiduciary relationship.

QUESTION: But, Mr. Moran, suppose his defense was that the events which -- about which he testified falsely occurred when he was off duty?

MR. MORAN: Excuse me, Justice Brennan. Suppose --

QUESTION: Suppose his defense was the events about which I testified falsely all happened while I was off duty?

QUESTION: And the testimony was given when he was off duty.

May I add that in as a factor?

QUESTION: Yes.

MR. MORAN: Well, that certainly throws a couple of balls up in the air that I don't think we have in hand in this case.

It might call for -- it certainly would call for re-examination of the position that the Petitioners have taken in this case because we have asserted that those missing elements are present in this case.

QUESTION: Mr. Moran --

QUESTION: Wait a minute. Excuse me. Go ahead.

QUESTION: Supposing there's a prosecution of a criminal defendant in Rock Island, Illinois and a police officer from Davenport comes over -- Davenport, Iowa, comes over and testifies. Now, is that police officer from Iowa testifying in the Illinois proceeding treated as a government witness from your point of view? It only would have to be shown that he perjured himself and that the prosecuting attorney didn't know about it?

MR. MORAN: I would think that he would be treated the same way, Justice Rehnquist, if the other preconditions were shown, that indeed his testimony was the result of cooperation with the prosecution in an attempt to forward the efforts to procure a conviction, an that they were given as part of his job

responsibilities or duties. So I would not see a distinction between those two situations.

QUESTION: Mr. Moran, on the state action point, aren't you -- to make it state action, aren't you really required to say that his telling a lie knowingly was state action?

It may be -- the state certainly isn't -- the policy of the state certainly isn't to have police officers get on the -- to get on the stand and perjure themselves, and if he did it, he did it on his own.

MR. MORAN: Of course, that --

QUESTION: Now, do you think there is no case in our, on the books that indicates that you -- that you -- that something that, an official acting contrary to policy is outside the realm of state action?

MR. MORAN: The way I would respond to your question, Justice White, is this. Inherent in Section 1983 litigation is the observation that an actionable activity was not authorized --

QUESTION: Right.

MR. MORAN: -- specifically by the state, and that there is a departure between actual authority and perhaps apparent authority which has been abused, but the Court has consistently held that an abuse of apparent authority that is vested by the state is

actionable under Section 1983.

Of course, Petitioners aren't suggesting that the state is encouraging perjury.

QUESTION: Do you see a paradox in the fact that the prosecutor might be shown in such a case to have induced and planned all of this perjured testimony, and then the policeman takes the stand and testifies falsely pursuant to that arrangement, the prosecutor has absolute immunity, does he not, civil immunity?

MR. MORAN: Yes, he does, Your Honor. The --

QUESTION: He could be criminally prosecuted, removed from office and a lot of other things, couldn't he?

MR. MORAN: Yes, that's true. The --

QUESTION: But he cannot be sued civilly.

MR. MORAN: That is true, but the answer to Your Honor's question as to the paradox presented by that situation is given by this Court's decision in Dennis v. Sparks where a state court judge was said to have corruptly conspired with parties during a state court judicial proceeding in order to obtain an injunction against the later civil rights plaintiff. When that plaitiff brought the civil rights action, the parties, the private parties who were said to have

conspired with the state court judge, then said that they should be immune because the judge was immune, and that there should in fact be derivative immunity granted to them throgh the judge, this Court explicitly recognized that the state court judge indeed was immune under Pierson v. Ray, but said that that did not close the question, and that indeed the parties who were said to have corruptly conspired with the judge could be sued under 1983.

QUESTION: Mr. Moran, the Court of Appeal did not reach the under-color-of-state-law issue, did it?

MR. MORAN: Your Honor, in Footnote 4 in the Court of Appeals decision, the Court addressed the under-color-of-law question and expressed an opinion that if they were to go ahead and decide that issue directly on the merits, that they would find that such an argument, that the testimony wasn't given under the color of state law, would not call for a dismissal of the case, and they said that if evidence could be adduced to the effect that it was part of the duties of a police officer to testify, that the under-color-of-law requirement would be met. They did not make -- they offered that almost in an advisory capacity, but they said they were not required to specifically reach that decision because of their finding on the immunity

question.

QUESTION: Which -- and if they would have come out that way, it would be contrary to the way the District Court ruled.

MR. MORAN: Yes, it would have been contrary.

QUESTION: Thank you, Counsel.

Ms. Lipkin?

ORAL ARGUMENT OF HARRIET LIPKIN, ESQ.,

ON BEHALF OF RESPONDENT

MS. LIPKIN: Thank you.

Mr. Chief Justice, and may it please the Court:

Petitioners argue that police officers, when acting as witnesses, are entitled to only a qualified immunity from liability pursuant to 42 USC Section 1983. We respectfully submit that all witnesses, including police officers, are entitled to absolute civil immunity for their testimony.

This Court has long held that the broad language contained in 42 USC Section 1983 providing a remedy to individuals deprived of rights by every person acting under color of law was not intended to be applied as stringently as it reads. This Court has developed a two-part test that has applied when a government official has claimed entitlement to immunity from 1983 liability.

First, this Court has examined the common law history of the claimed absolute immunity. Second, this Court has balanced competing policy considerations in order to determine what the public policy is best served by continuing this grant of immunity from Section 1983.

As a result of the application of this two-part test, this Court has granted judges, legislators and prosecutors absolute civil immunity because these individuals were granted absolute immunity at common law, and because public policy was best served by continuing this grant of immunity in the 1983 context.

QUESTION: Do you think that in 1871 the Congress meant to punish perjurers when it passed the Ku Klux Klan Act of 1871?

MS. LIPKIN: Your Honor, there is certainly evidence in the legislative history that Congress was concerned about perjury when it was --

QUESTION: There was a lot of evidence, wasn't there?

MS. LIPKIN: Yes, there was evidence of that, Your Honor.

QUESTION: Not just some, there was a lot.

MS. LIPKIN: However, Your Honor, what we would do is to turn to an analogous situation. There is

also substantial legislative history indicating that the 42nd Congress was very concerned about the corruption of state court judges, and this legislative history is very clearly discussed by Justice Douglas in his dissenting decision in Pierson v. Ray.

However, although this legislative history was there, this Court noted that immunities well grounded in history and reason were not intended to be abrogated by the covert language contained in Section 1983.

QUESTION: So you're saying that the Ku Klux Klan Act does not mean what it says or what its legislative history indicates.

MS. LIPKIN: Your Honor, I'm saying that this Court has previously stated time and time again that Congress never intended to abolish wholesale all common law immunities.

QUESTION: How about any?

MS. LIPKIN: Certainly this Court has discussed some common law immunities it has not adopted.

Witnesses, like judges and prosecutors, were granted absolute civil immunity at common law. For example, in 1772, Lord Mansfield stated the proposition that neither party, witness, counsel, jury or judge shall be put to answer civilly or criminally for words

spoken in office. Most American courts have adopted the English rule of absolute witness immunity, tempered with the requirement that the witness' statements be pertinent and relevant to the court's inquiry.

In addition, this position was also taken by Professor Prosser and by the restatement of torts, and this Court similarly noted in Imbler v. Pachtman that witnesses are absolutely privileged for words spoken during the course of a judicial proceeding.

Public policy requires that all witnesses, including police officers, be granted absolute civil immunity for their testimony. The primary reason for granting witnesses absolute civil immunity is the concern that witnesses will be intimidated and harassed and will not speak freely if their testimony may become the subject of future civil litigation.

In addition, the courts may become a forum for vexacious and repetitive litigation.

QUESTION: Then you're saying that even in 1872, a perjurer was not covered by 1983.

MS. LIPKIN: Oh, no, Your Honor. It is our position that -- I'm sorry, Your Honor. I'm not sure I understand the question, but it is our position that Congress never intended to abolish the common law history of absolute witness immunity.

QUESTION: Even with respect to perjury in a case arising in 1872?

MS. LIPKIN: Your Honor, it's our position that Congress never intended to put witnesses on trial for their statements made during the course of a judicial proceeding, that Congress understood that there were ample safeguards to encourage a witness to tell the truth. For example, a witness was subject to the rigors of cross examination, were subject to criminal penalties for perjury --

QUESTION: So all of this -- all of this legislative history about concern about perjurers is down the drain; the Congress really didn't pay any attention to it?

MS. LIPKIN: Well, Your Honor, I believe Congress was concerned about many things when it enacted the Civil Rights Act. However, of course, perjury was one of them, but we do not believe that Congress ever intended to abolish the common law, absolute witness immunity that to some extent has been carried on by this Court and through other courts in its language consistently.

Petitioners argue that police officers are entitled to only a qualified immunity for their testimony pursuant to this Court's ruling in Pierson v.

Ray. We submit that this argument is misguided and must fail.

First, it must be noted that Pierson only discussed the qualified immunity granted to police officers when acting as arresting officers. This Court's decision in Pierson was based upon the common law history of immunity granted to arresting officers when they act reasonably. Therefore, Petitioners' argument ignores the functional analysis that this Court has applied in its immunity decisions. It is the function of a 1983 defendant, rather than his official title, that will determine whether he is to be granted absolute civil immunity.

Thus, pursuant to this Court's decision in Pierson, a police officer, when functioning as an arresting officer, is entitled to a qualified immunity, and we would assert that a police officer, when functioning as a witness, is entitled to absolute civil immunity.

This Court has previously noted that 1983 defendants may be granted various degrees of immunity, depending upon the specific function performed. For example, a prosecutor, when functioning as an advocate for the government, has been granted absolute immunity pursuant to this Court's decision in Imbler. However,

this Court has also noted that prosecutors may be granted only a qualified immunity when functioning as administrators or as investigative officers.

There are also special policy considerations that compel this Court to grant all witnesses, including police officers, absolute civil immunity for their testimony. Initially, it must be noted that if police officer witnesses are not granted absolute civil immunity, that the result will be a retrenchment from the functional analysis that this Court has applied in its previous immunity decisions.

As we have stated previously, it is the function of the 1983 defendant rather than his official title, that will determine whether he is to be granted absolute civil immunity.

Thus, in the case of the police officer who testifies, he acts as a witness because in a courtroom he is treated like any other witness.

In addition, if police officers are not granted absolute civil immunity for their testimony, there will be a virtual retrial of the criminal offense in a new forum, even though post-trial relief is available. Such suits could be expected with great frequency, for a defendant will often transform his resentment at being prosecuted into a claim that the

police officer had submitted perjured testimony.

In addition, if police officers are not granted absolute civil immunity, they may become the only witnesses not granted absolute witness immunity, and of course, the American courts have never created distinctions between witnesses.

In the alternative, if police officers are granted only a qualified immunity for their testimony, the result may be an extension of this qualified immunity to other government witnesses, such as medical examiners, court-appointed psychiatrists or county surveyors. In any event, as Judge Wilke observed in his dissenting opinion in Briggs v. Goodwin, if the principal of absolute witness immunity is rejected, a patchquilt of underlying immunities varying from witness to witness and subject matter to subject matter will result.

Further, a ruling that police officers are ewntitled to only a qualified immunity would stand in a way to ignore the special features of the judicial system, which include the administration of an oath, the availability of cross examination and impeachment, the potential for criminal penalties for perjury and post-trial relief, and the responsibility of a trial judge to exclude inadmissible and inflammatory

testimony.

Petitioners suggest --

QUESTION: Has your legal department ever prosecuted a policeman for perjury?

MS. LIPKIN: Your Honor, we are only civil attorneys. We are not criminal attorneys.

QUESTION: Well, have you -- do you know of anyone that has ever been prosecuted in the State of Indiana?

MS. LIPKIN: In the State of Indiana, I am not aware of any.

Petitioners suggest that even if this Court agrees that witnesses are entitled to absolute civil immunity, that police officers should be distinguished and granted only a qualified immunity for their testimony. We respectfully submit that Petitioners' argument creates artificial and irrelevant distinctions between police officer witnesses and all other witnesses.

For example, Petitioners argue that police officers testify regularly, thereby eliminating the concern that a police officer may be intimidated or harassed. However, it is the fear that a witness' testimony may become the subject of future civil litigation that creates this intimidation or

harassment. In addition, many other witnesses, such as court-appointed psychiatrists or medical examiners, also testify regularly.

Petitioners also argue that police officers testify with a badge of authority, creating a likelihood that they will be believed, even if they present testimony that is neither true nor credible. However, many other witnesses, such as physicians or psychologists, also testify with a badge of authority because they have received many graduate degrees or are recognized as experts in their field.

Of course, it is the responsibility of the trier of fact to sift through conflicting testimony in order to resolve the dispute based in part upon the credibility of the witnesses, regardless of whether the witness is a government witness or has received many graduate degrees.

Petitioners also argue that a qualified immunity will not place an undue burden upon the police officer witness because he is already accustomed to civil rights liability in his other functions. Of course, this argument ignores the functional analysis that we discussed previously.

In addition, Petitioners argue that civil rights claims may be disposed of quickly through the use

of motions to dismiss or for summary judgment. However, where the good faith or reasonableness of a witness is in question, a trial will probably be necessary in order to resolve the dispute.

In addition, a qualified immunity could create civil rights liability for other witnesses allegedly jointly engaged with the police in the presentation of perjured testimony.

We would also like to note that the thrust of Petitioners' argument is that absolute immunity will be used as a cloak behind which the clever and deceptive witness will hide, enabling him to lie without fear of civil liability. However, we must assume that the vast majority of all police officers testify honestly. The average, honest police officer must be granted the same absolute civil immunity granted to every other witness.

As Judge Learned Hand observed in Gregor v. Biddle, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery, because it is not possible to confine such complaints to the guilty. Public policy and the effective functioning of our judicial system compels that police officer witnesses be granted absolute civil immunity.

In conclusion, we respectfully request that

this Court affirm the decision of the Court of Appeals and grant all witnesses, including police officers, absolute civil immunity from liability pursuant to 42 USC Section 1983.

QUESTION: May I ask you one question before you sit down?

MS. LIPKIN: Certainly, Justice Stevens.

QUESTION: Do you think on the record before us that in any case there is a showing of perjury?

MS. LIPKIN: No, Your Honor, I do not.

QUESTION: I wonder if you really need the absolute immunity defense then.

MS. LIPKIN: Your Honor, when the District Court decided, it held that there was not perjury. It also held that this would not be actionable because witnesses were entitled to absolute civil immunity, that the action was not taken under color of law, and that there was no deprivation of rights. Petitioners took the entire case up on appeal, and the Court of Appeals addressed the immunity question, finding it to be paramount, and did not reach the other issues.

QUESTION: But it is only in the case where there really is perjury that you need the immunity.

MS. LIPKIN: No, Your Honor, because in either way --

QUESTION: Where there is a prima facie showing of perjury.

MS. LIPKIN: Well, Your Honor, in either way, what we would suggest is that a trial would be necessary in order to resolve the dispute. In addition, there would be the constant dread of retaliation that Justice Learned Hand talked about.

QUESTION: Well, but not in this particular case. I mean, the fingerprint witness, pretty clear he didn't perjure himself, isn't it?

MS. LIPKIN: I would say so, Your Honor.

QUESTION: Even on the record before us.

MS. LIPKIN: Your Honor, what we are trying to do here is, obviously, to have the decision of the Court of Appeals affirmed, but in addition, we would suggest that absolute witness immunity is necessary because police officers should be treated as any other witness and granted absolute witness immunity.

QUESTION: And at the outset of the case have the complaint dismissed if what it claims is liability for perjury.

MS. LIPKIN: Yes, Your Honor.

QUESTION: Merely the claim, the claim that perjury was committed invokes automatically the witness privilege, does it not?

MS. LIPKIN: Yes, Your Honor.

QUESTION: That's your theory.

MS. LIPKIN: Yes, Your Honor.

CHIEF JUSTICE BURGER: Very well.

Thank you, Counsel.

MS. LIPKIN: Thank you.

CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 11:41 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

CARLISLE W. BRISCOE, CHRIS P. VICKERS, SR., AND JAMES N. BALLARD

v. MARTIN LAHUE AND JAMES W. HUNLEY, ETC #81-1404

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pine Hammond

(REPORTER)