ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: STEPHEN BUCKLEY, Petitioner v. MICHAEL FITZSIMMONS, ET AL.

CASE NO: 91-7849

PLACE: Washington, D.C.

DATE: Monday, February 22, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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STEPHEN BUCKLEY, :

Petitioner :

v. : No. 91-7849

MICHAEL FITZSIMMONS, ET AL. :

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Washington, D.C.

Monday, February 22, 1993

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

APPEARANCES:

GEORGE F. TAYLOR, JR., ESQ., Chicago, Illinois; on behalf of the Petitioner.

JAMES G. SOTOS, ESQ., Itasca, Illinois; on behalf of the Respondents.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-7849, Stephen Buckley v. Michael Fitzsimmons.

Mr. Taylor, you may proceed whenever you're ready.

ORAL ARGUMENT OF GEORGE F. TAYLOR, JR.

ON BEHALF OF THE PETITIONER

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

This Court has repeatedly held in conformance with common law that absolute immunity to public officials is exceedingly rare under section 1983. This case presents the question of whether prosecutors who direct and participate in a yearlong prearrest and preindictment investigation, who participate in manufacturing bootprint evidence, in interrogating witnesses, and in conducting a prejudicial publicity campaign, which includes a postindictment press conference which strayed far beyond the announcement of that particular indictment, whether those particular functions and acts by a prosecutor should be afforded such immunity.

Common law, public policy, and this Court's prior decisions in Imbler, in Burns, and also in Harlow

particularly dictate that such absolute prosecutorial immunity should not be afforded for these particular acts of these respondents.

QUESTION: Mr. Taylor, does acceptance -- would acceptance of your position require that we cut back at all on the opinion -- on our decision in the Imbler case?

MR. TAYLOR: No. We have raised the question in a final point in our briefs in terms of limiting Imbler, but that only goes to the malicious prosecution aspect of our case. In terms of the acts that I just outlined, it would not in any way cause a limitation on the holding in Imbler.

Common law, with regard to this particular set of acts and prosecutors and quasi-judicial immunity does not support the grant of absolute immunity here. You can take it as narrowly or as broadly as one might want to. Narrowly, you look at these acts and you see whether common law prior to and at 1871, which is, of course, when the statute was passed, when we have to look at it, that there was no exception for prosecutors or anyone else for these kinds of acts.

QUESTION: There was also no cause of action. Was there a cause of action at common law for fabricating evidence that is never used?

MR. TAYLOR: Not a cause of action, but in terms

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of the allegations here, in terms of false arrest, malicious prosecution, yes, there definitely were. And that's what I mean in terms of as broadly or as narrowly.

QUESTION: Now, wait. The malicious prosecution certainly is -- you're not saying that the act of prosecuting is not covered by the immunity, are you?

MR. TAYLOR: No. We're not saying that the act of prosecuting. We're saying if you look at this as disparate -- if you look at the function of the acts that are in question here --

QUESTION: I'm saying that if you take them apart, there isn't any liability if -- unless it leads up to the prosecution. The mere fact that you fabricate a piece of evidence which is never used in a prosecution -- there's no harm done, is there? I can fabricate as much evidence as I want if it's never used in a prosecution.

MR. TAYLOR: That's true in some ways, but on the other sense of it, the fact that the evidence was fabricated and then is introduced later time into this judicial process and causes injury should not be determinative of whether there's immunity because --

QUESTION: Isn't it the introduction that causes the harm. The point at which your client is harmed is when fabricated evidence is introduced against him at trial.

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MR. TAYLOR: That's where the harm -- that's where the injury takes place, but that isn't the analysis that necessarily follows in terms of determining whether the function that the particular police officer or the function that the particular prosecutor did in order to lead you to that introduction.

There is a distinction that can be made and should be made between the act and has been made both in Imbler and subsequently in Burns between certain acts that a prosecutor commits which are outside that penumbra of acts which are covered by prosecutorial immunity because they are not integrally associated with the judicial phase of the criminal process.

And so, in that sense, we're dealing not only with common law, but we're dealing with the holdings in Imbler, as well as policy considerations which lead to the conclusion that these particular acts are not the kinds of acts that were either covered under common law, are supported either by the policy of 1983 or the policy to protect prosecutors for those acts that are intimately associated --

QUESTION: Well, don't we have to, first of all, decide whether you've stated a claim in order to address the immunity issue?

MR. TAYLOR: Well, the Government --

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QUESTION: Isn't that part and parcel of the analysis?

MR. TAYLOR: Well, the Government raised that in its amicus for the first time. It has never -- and only as to the narrow question of the press conference and whether the press conference and the claim that flows or claims that flow from the press conference, in fact, raise a constitutional claim. The respondents have never raised it and, in fact, concede in their brief that there is a constitutional claim here, a fair trial claim. There has been no question with regard to any of the other allegations, whether in fact there are constitutional claims. Nobody --

QUESTION: Well, I'm just asking you whether, as a matter of procedure, when a claim is made, whether the Court doesn't have to first decide whether a claim has actually been stated or not. Don't we have to do that analytically?

MR. TAYLOR: For qualified immunity, it becomes a much closer question as the Siegert case raises because to decide whether a claim is clearly established, you have to decide whether there's a claim in terms of a constitutional violation.

Here they are separate issues. The defendant doesn't raise it. If it isn't pressed and passed upon

below, if, in fact, they concede it, as they do here, I don't think it's within the Court's purview to take it on.

However, if it does, we're confident that the Court would find that we do -- have made several interrelated claims not only with regard to the investigative acts, such as the fabrication of the bootprint evidence and the coercive statements, but also with regard to the prejudicial publicity claim that the Government has challenged.

QUESTION: May I ask you whether the pretrial publicity issue was raised in the State criminal trial ever? Was that raised?

MR. TAYLOR: Yes, it was. It was raised in the State criminal trial on a motion for change of venue, among other things.

QUESTION: And was that resolved against the defendant?

MR. TAYLOR: It's interesting. In this particular case, it was resolved against the defendant. In subsequent cases when his codefendants were retried, venue was shifted, which is --

QUESTION: But in this case it was decided against.

MR. TAYLOR: It was. It was -- but --

QUESTION: Well, then is it res judicata under

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Allen against McCurdy?

MR. TAYLOR: I don't believe so because the question here, we're dealing with both a substantive and a procedural due process violation. Insofar as you're dealing with a procedural due process violation in a fair trial determination, I suppose that's a similar kind of question as to whether Parratt v. Taylor applies, which the Government has also raised.

I don't think that you can apply Parratt v. Taylor here when it is a State action and it is action by responsible officials, including someone who has conceded to be a policymaker for the county who is committing those acts. In other words, he's subverting the due process.

QUESTION: Well, to the extent that you're relying on procedural due process, are you -- is that not barred at present?

MR. TAYLOR: No. I don't believe so. By the determination of the venue?

QUESTION: By the determination of the pretrial publicity claim made in -- at the trial.

MR. TAYLOR: No, because the nature of what we're saying is that the process was infected by the publicity so that, therefore, the -- what the -- what he was deprived of, among other things, was an impartial decisionmaker.

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QUESTION: Wasn't that precisely the issue that the judge determined against you in the criminal proceeding?

MR. TAYLOR: Well, I -- you know, not being totally familiar with the change of venue motion and the record on that, I can't say for sure, but if in fact the venue motion was denied, he himself -- what we're saying is that the process including the judge was influenced by the prejudice and, therefore, both in the bond hearing and in the trial situation so that, therefore, the effect -- and you have to take our allegations as true at this point that the publicity infected the process, so that I don't see how it could be res judicata in terms of whether it was a fair trial. The judge determined as an initial --

QUESTION: Mr. Taylor, you're not entitled to process -- to fair process and you're not entitled to a fair trial. You are entitled not to be deprived of life, liberty, or property without a fair trial --

MR. TAYLOR: True.

QUESTION: -- or without due process. And what this decision held was that there was no effect on the conviction.

MR. TAYLOR: Well --

QUESTION: And, therefore, you had not been deprived of life, liberty, or property without due

process.

It seems to me you're trying to convert the constitutional guarantee into a guarantee that in the abstract, all processes will be fair, and that's not what the guarantee is. The guarantee is that your client won't be sent to jail or be deprived of property or life --

MR. TAYLOR: Well, that's --

QUESTION: -- on the basis of unfair process.

MR. TAYLOR: That's true, and in this case, I mean, I want to make a distinction, as I did earlier, between the claims that underlie all but the publicity. And then as we focus on the publicity, however, our claim does include that deprivation of life, liberty, or -- particularly liberty, 3 years of liberty. It is a substantive due process claim in the sense that it's arbitrary governmental action in the actions of the prosecutors that, in fact, regardless of the procedures, i.e., the fair trial --

QUESTION: Separate from the trial you claim so that there's no absolute immunity.

Let's assume a prosecutor decides he is going to fabricate evidence. He files the firing pin on a pistol so that it makes the kind of a -- of an imprint on the shell that the murder weapon made. All right? He does that at home. He never introduces it at trial. Does your

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client have a claim? Has there been any harm done?

MR. TAYLOR: No.

QUESTION: No claim at all.

MR. TAYLOR: Well, under those --

QUESTION: He can fabricate as much evidence as he likes. It's the introduction of it at trial, which --

MR. TAYLOR: Well, at trial. At -- what if he takes that and goes with his police associates and goes and gets an arrest warrant and arrests my client? Then the injury starts to accrue at that point.

Should there be any difference in terms of the act that he performs in filing that down if he goes and gets an arrest warrant, or if he goes to a grand jury and indicts, or if he gives it to another prosecutor and says, here, put this into evidence, or if it's a police officer, he carries it over and he then gives it to the prosecutor?

QUESTION: Once it gets --

MR. TAYLOR: The prosecutor then puts it into the process. My man gets 3 years in jail. In that situation, the police officer clearly under Malley doesn't have the absolute immunity and shouldn't have because of what he has performed.

If that's a prosecutor and we now make a clean distinction between that prosecutor and the one who

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introduces it, then in fact, that prosecutor should be treated like the police officer. That's what Imbler is all about. That's what Burns is all about, and that's -- with the imposition of Harlow and the progeny with Anderson and Davis and all the protections that that prosecutor now has that he didn't have back when Imbler was decided for qualified immunity, yes, that prosecutor has participated in a consitutional violation that is a -- that should be remedied with him as one of the participating defendants. And he shouldn't be allowed immunity for that particular act.

QUESTION: And what precisely is the constitutional violation in which he has participated?

MR. TAYLOR: Well, with -- are you focusing now on --

QUESTION: Well, I -- you said he has participated in a constitutional violation. I'm asking you what you meant.

MR. TAYLOR: False arrest without probable cause in this case, continued false imprisonment without probable cause, which is a -- changes then from a Fourth Amendment violation to a substantive Fourteenth Amendment violation. And then as it continues onward and the publicity comes in, you have a continuation of the substantive due process claim, as well as a fair trial

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claim.

QUESTION: And what is the substantive due process claim?

MR. TAYLOR: It's the claim of the 3 years of deprivation of liberty without due process by the arbitrary acts of government officials.

QUESTION: Why isn't that a procedural due process claim, that you were deprived of liberty without due process of law?

MR. TAYLOR: Well, because even if you were given procedures here, if someone does a good job -- a good enough job of manufacturing evidence, it's such an arbitrary and shocks-the-conscience type of activity that regardless of whether you have the procedures or not, there's going to be a violation if there is a substantial violation of liberty interest --

QUESTION: This is the Rouchon against California Ball Park that you're talking about?

MR. TAYLOR: Well, I'm talking about Rouchon. I'm talking about --

QUESTION: It's a rather small ball park.

MR. TAYLOR: Well, if you look at Zinneman v. Birch, if you carry it through to that point and you carry Daniels v. Williams, they all set forward -- forth that liberty interest as a substantive due process interest.

But it is also a procedural due process interest, and it's also a Fourth Amendment search and seizure arrest, specifically, interest because there's no probable cause, that the probable cause was fabricated by the investigative acts of the prosecutor.

I think that what the court of appeals did in determining by the injury and working backwards and saying, well, if the injury happened in the judicial process, ipso facto, no liability for the prosecutor, in fact, broadly extended prosecutorial immunity, and was equating -- if we look now at the substance of the test that's found in Imbler, which is intimately associated with the judicial phase of the criminal process, what the court of appeals did was say, well, if it flowed from injury in the judicial process, then ipso facto, it's an act -- it came from an act that was intimately associated with the judicial phase.

QUESTION: Well, on your reading of Imbler, as I understand it, the only prosecutor who would retain absolute immunity for what he introduced in the course of the trial would be one who had had no role whatsoever in supervising the gathering of evidence. It would have to be the prosecutor who arrived at the courthouse on the day or trial and said to his witnesses, well, what have you got.

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MR. TAYLOR: No, that's not --

QUESTION: He'd have an Imbler immunity, but I don't see how anyone else would.

MR. TAYLOR: No, that's not our position as to the major acts in this case. We did take the position that, based on common law and the concurrence of Justice Scalia in Burns, that Imbler could -- should be limited.

But that isn't crucial to the acts that I laid out. Those acts you turn to and look at the nature of those, and there are four or five -- put flesh -- four or five things that put flesh on that intimately associated with the judicial phase of the criminal process. You look at timeliness. You look at how far removed it is in time from either the arrest or the indictment.

QUESTION: So, I mean, are you thinking of something as basic as whether the prosecutor gets in on the investigation the day after the murder or only 1 week before trial? I mean, are you suggesting a distinction like that?

MR. TAYLOR: I'm suggesting that's one of several factors that the courts, and particularly this Court, has looked at in suggesting when the act is one which is to be covered by prosecutorial immunity or not. Other factors are such as how actively -- was it a obtaining of evidence. Was it going out and getting that

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evidence, or was it evaluating evidence? Was it, in fact -- I think Justice Stevens in the Hampton decision, while he was still in the Seventh Circuit, noted that the distinction which was later accepted or at least referred to in the footnote in Imbler which was that preparation of perjured testimony, in distinction to what Imbler talked about, which was presentation of perjured testimony or manufactured evidence, that there can be a distinction there, that we're --

QUESTION: Well, may I just interrupt you and ask this question? I take it then in any case on your view, there will always be the possibility of a claim and, hence, I presume an evidentiary trial when -- against a prosecutor whenever there is a claim that there was manufactured evidence or perjured testimony or whatnot that he knew about.

MR. TAYLOR: No, I don't think so.

QUESTION: Why not? How are we going to find out?

MR. TAYLOR: Well, I think that the --

QUESTION: You say, gosh, he knew right from day one and he says, no, I didn't. So, we're going to have a trial, aren't we?

MR. TAYLOR: Well, I can't just say that. I have to have some proof, and that's what Butz talks about

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not playing dog in the manger and then you also have --

QUESTION: Well, let's assume there was perjured testimony. Let's assume you've got proof of that. You're -- as a practical matter, you're always going to have a trial as to when the prosecutor knew or should have known. Well, strike that. You're always going to have a trial about when the prosecutor knew. By the time you're through having those trials, there's not going to be much left of Imbler, is there?

MR. TAYLOR: Well, you're not going to have to have a trial if, in fact, the prosecutor -- you can't show on summary judgment that, in fact, he participated in an earlier stage in manufacturing this evidence rather than simply putting on evidence like in Imbler that he knew or should have known was either materially -- in Imbler, they don't even go as far as to say that he knew it was perjured testimony. They said perhaps the police officer in the courtroom might have known that it was -- I don't even think they used perjured. They use the terms of it was materially false in some manner or inconsistent.

I mean, that's a far different situation than a situation here where the prosecutor is out in the field, and he is actively manufacturing this bootprint evidence, and he's interrogating witnesses, and he's getting these witnesses to say certain things. That is a -- that's a

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police function.

QUESTION: You would agree I take it that your case is a lot stronger with respect to the -- your argument is a lot stronger with respect to the press conference than it is with respect to the manufacturing of evidence claim.

MR. TAYLOR: Well, there are three claims.

As far as the interrogation of witnesses, the respondents have conceded that that's not judicial -- that's not intimately associated with the judicial phase.

As far as the prejudicial publicity, the press conference, the Government has conceded that that's not intimately associated with the judicial phase of the criminal process.

So, two out of the three major aspects of the case have been conceded by the other side. Now --

QUESTION: What's the third?

MR. TAYLOR: The third is the manufacture of the bootprint evidence. Now, what the respondents say is, of course, if that were planting evidence rather than the manufacture of evidence, then they would agree with us that that is not intimately associated with the judicial phase. Now, I -- to me that that kind of manufacture of evidence is very close to the planting of evidence.

And if you look at what happened in Burns, if

you look at the facts that this Court found in Burns, what the prosecutor there did, he wasn't involved in the taking of a hypnotic statement, but he advised that they could do that. He was one step removed even from the combination of the interrogation of that particular suspect and the manufacture of some hypnotic evidence which he then turned and introduced into two criminal proceedings. And it was only in the final criminal proceeding which was -- they were successful in, the motion to suppress, that she was let out after 4 years -- excuse me -- 4 months in -- I think they had committed her to a mental hospital -- out of her incarceration.

QUESTION: Mr. Taylor?

MR. TAYLOR: Yes.

QUESTION: Is there any claim that you make -- or let me put it another way. What claims do you make that do not depend at all on the respondents' decision to indict or on respondents' presentation of evidence in judicial proceedings either for bail or at the grand jury or at the trial?

MR. TAYLOR: If you put it that way, if you say don't depend at all, in the sense of that wasn't a necessary -- the way these prosecutors chose to approach it, they didn't go out like in Burns and get an arrest warrant and arrest first and then indict or charge. They

did it the opposite way. And in that sense, it's different, but it shouldn't be a difference with a distinction because, in fact --

QUESTION: Your answer is none.

MR. TAYLOR: Well, other than the out-of-court publicity, but that we concede in of itself --

QUESTION: Is not a constitutional violation.

MR. TAYLOR: -- is not a constitutional violation. So, in that sense, there is some -- all the injury either in part -- is -- or in toto is caused by its introduction into the judicial process.

But what we're saying here is that if the rationale extended, then we were talking about -- if a police officer manufactures that evidence and a prosecutor introduces it at trial and causes the kind of violation that we have here, a series of violations, then by the logic, then he should be immune as well. If a -- if we're dealing with the act and not the actor, we have to deal with what that particular person did and whether it's intimately associated with the judicial phase of the criminal process. And, in fact, here it's not.

It's clearly not by -- I started to lay out some of the factors I would look at and that the Court said in the past they should look at in terms of determining that, you know, well, it looks like it, it smells like, that

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kind of thing, it must be it. Some of those others, was he acting as an advocate? Was he acting as an officer of the court?

QUESTION: Well, suppose a prosecutor presents evidence to a grand jury that he knows is absolutely false and the indictment comes down. Is he absolutely immune?

MR. TAYLOR: That's a closer question.

QUESTION: Well, yes or no.

MR. TAYLOR: If he knows it's -- under Imbler, the answer would be no. I'm sorry. The answer would be yes because he presented -- he knowingly presented false testimony.

QUESTION: Well, he's immune.

MR. TAYLOR: Pardon me?

QUESTION: Would he be absolutely immune?

MR. TAYLOR: Yes, under Imbler he would be.

QUESTION: Yes, yes. And under Burns too.

MR. TAYLOR: Under Burns as well because that's an act in front of the judicial body.

QUESTION: Well, presenting knowingly false evidence is not very much different from manufacturing it, is it?

MR. TAYLOR: Well, I think there's quite a bit of difference in terms of the activeness of what you do. I mean, if you limit -- if you think of what the holding

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in Imbler is and you go back to the common law and you see that it's primarily premised on the defamation immunity, which is what happens in court, then once it gets farther and farther away from court, the action is less and less entitled to immunity.

QUESTION: Well, let's go back to the false -- presenting -- knowingly presenting false evidence. Absolutely immune for his actions before the grand jury.

MR. TAYLOR: Under Imbler, yes.

QUESTION: And then could you say that, nevertheless, that you can sue the prosecutor for false arrest which follows the indictment?

MR. TAYLOR: Under Imbler, if you're going to say he's immune, you'd have to say no, but if the act is different than the mere presentation, if in fact it's the act of acquiring it or manufacturing of it, that is a distinction. That is the difference.

QUESTION: So, indictment based on knowingly false testimony, arrest and continued arrest, all under Imbler would be absolutely immune.

MR. TAYLOR: For that prosecutor who got the indictment now. I don't mean for someone else who may have manufactured that evidence --

QUESTION: That's right.

MR. TAYLOR: -- whether he be a police officer

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or prosecutor.

QUESTION: That's right.

MR. TAYLOR: I'll save the rest of my time for rebuttal. Thank you.

QUESTION: Very well, Mr. Taylor.

Mr. Sotos, we'll hear from you.

ORAL ARGUMENT OF JAMES G. SOTOS

ON BEHALF OF THE RESPONDENTS

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

I would like to begin by focusing on the prosecutor's participation in acts which occurred prior to the indictment, specifically in terms of interrogations and the selection of expert witnesses. I'd like to conclude by discussing the petitioner's unfair trial claim against Prosecutor Fitzsimmons arising from the announcement of his criminal indictment.

Your Honors, we simply ask the Court to apply a rule which immunizes, accords absolute immunity to prosecutors who are accused of engaging in out-of-court investigation which culminates in constitutional wrongs only as a result of the decision to prosecute and to present evidence to judicial bodies.

We acknowledge that in other cases investigative conduct is amply protected by the protections of qualified

immunity. We believe that the distinction can be drawn in a given case, in particular in this case, by simply focusing on the prosecutorial function to be inhibited or deterred if the suit is allowed to proceed and immunity is withheld. Applying that test to this case reveals quite readily that the petitioner's claims arising from the investigation are solely based upon the prosecutor's decision to present testimony to the grand jury and again at the petitioner's criminal trial. He has conceded that the only claims he has are -- occurred as a result of those decisions.

The petitioner's --

QUESTION: Mr. Sotos, do you draw a distinction between, case one, the prosecutor fabricates evidence by filing the firing pin on the pistol and it gets -- and then he introduces it; case two, it isn't the prosecutor that does it? You'd say in case one that he's immune. There's absolute immunity.

MR. SOTOS: If it was the prosecutor who did that?

QUESTION: Right.

MR. SOTOS: Yes, Justice.

QUESTION: Case two, it isn't the prosecutor that does it. It's the arresting officer. He has a grudge against the defendant. So, he fabricates it. The

prosecutor, either way, either innocently or knowing of the fabrication, introduces it. Is the arresting officer immune?

MR. SOTOS: The arresting officer would not be immune. There would be a distinction in that case.

We are not claiming that the prosecutor again has immunity for the act of manufacturing the evidence. It is his decision to introduce the evidence into the process.

Now, under this Court's functional approach, it's often said that we have to focus on the act and not the actor. And that's true, but it can be misleading because the key to the functional approach really is to focus on the nature of the prosecutorial function to be deterred if the suit is allowed to proceed.

QUESTION: Well, but there are two acts. There's the act of introduction, and there's the act of fabrication. Just as you can get the arresting officer separately for that separate act, why shouldn't you be able to get the prosecutor separately for that separate act?

MR. SOTOS: Because the prosecutor has to be protected from exposure to liability in that earlier act to the extent that he would be inhibited in terms of introducing that information into the process. This Court

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actually addressed that distinction in Malley where the police officer sought to analogize his position in seeking an arrest warrant to a prosecutor's efforts to obtaining a warrant -- to obtain an indictment.

This Court specifically rejected that analogy and stated that to expose the prosecutor to liability for even the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work so that the prosecutor might come to see later decisions in terms of their effect on his potential liability.

So, again, under the functional approach, you look at the -- the prosecutor exercises the functions that are essential to the operation of the criminal judicial process, the decision to prosecute, the decision to introduce testimony. And to the extent that liability on a claim that may have initially arose as a result of his involvement in the investigative process would impact on those decisions, the immunity has to apply to that claim as opposed to just focusing on the act.

If you simply focus on the preparatory act, then you run the risk of turning Imbler into a pleading rule which could be circumvented in every instance if a criminal defendant simply focuses on a preparatory act and uses that as the linchpin or the hook upon which to

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relitigate the criminal prosecution, which we believe is exactly what's happening here.

QUESTION: Mr. Sotos, what if what we have was the prosecutor manufacturing the evidence and obtaining an arrest warrant, the prosecution is later dismissed, but the defendant is arrested? Now, what kind of immunity does the prosecutor have --

MR. SOTOS: Under Burns v. Reed, the prosecutor would only be entitled to qualified immunity under that scenario. That function of participating in seeking an arrest is not so intimately associated with the prosecutor's decision to prosecute that it would be entitled to the rarer protection of absolute immunity.

QUESTION: Is there any problem in this case because of a peculiarity of the Illinois laws where the indictment serves also as the arrest warrant?

MR. SOTOS: Well, we believe --

QUESTION: What do we do about that?

MR. SOTOS: We believe that's the reason that the petitioner's false arrest claim should not be permitted to circumvent absolute immunity. Typically if the prosecutor again is participating in seeking an arrest warrant outside the grand jury, there would be no immunity. But again, under Illinois law, the judiciary is required to issue an arrest warrant immediately upon the

return of an indictment. And we know from several cases that a prosecutor is absolutely immune for his actions before the grand jury. So, to the extent that the false arrest claim could be allowed to circumvent immunity in this case, again Imbler would just be turned into a pleading rule because in every case where a criminal defendant was indicted, he would simply sue the prosecutor for false arrest.

QUESTION: Suppose that in the case of manufactured evidence an indictment is secured -- or fabricated evidence, and the prosecutor, knowing the evidence is fabricated, then announces to the public how strong the evidence is. And as a result, the defendant is fired from his job, and --

MR. SOTOS: Under those circumstances, Your Honor, that would be a claim where the petitioner was claiming a deprivation of liberty attributable to a prosecutor's participation in an administrative act. So, we would claim only the qualified immunity. The prosecutor would only be qualified immunity under that scenario.

QUESTION: There's only qualified immunity if the prosecutor gives a press conference outlining the evidence after there's an indictment?

MR. SOTOS: That's correct. You see, again, the

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difference between that scenario and what we have here is that the petitioner seeks to use the announcement of the criminal indictment as a way to litigate an unfair trial claim. And it's our position that in the same way that this Court has given prosecutors absolute immunity from malicious prosecution claims, regardless of what the triggering act is, it's that claim that he's immune from because it by nature targets the decision to indict in the same way an unfair trial claim by nature targets the prosecutor's conduct of the criminal trial.

QUESTION: Well, what's -- why is this press conference -- why is it -- why is the conduct in holding -- why is the prosecutor absolutely immune in this case for the press conference?

MR. SOTOS: Because to properly apply the functional approach, Justice White, the Court should focus on the entire claim, not just the act because, again, that runs the risk of Imbler being a pleading rule.

And this claim is two-dimensional. There's a claim that the press conference deprived him of a fair trial. Now, we concede that with respect to the press conference, that that's an administrative act for which the prosecutor would typically only be entitled to administrative immunity under Justice Kennedy's hypothetical concerning a loss of job.

But in order to prove this claim, he has to show that he was deprived of a fair trial, and to expose the prosecutor to an unfair trial claim -- by illustration, if that prosecutor was wrestling with the decision of whether to go forward and present the case to the jury, if he was denied immunity on this type of claim, his thinking would be something like this. If I don't go forward, I can't be sued because I haven't done anything to this point to violate anyone's constitutional rights. But if I do go forward with this case and I don't get a conviction or if the case ends in a hung jury, then I can be sued for deprivation of a fair trial if the petitioner uses the announcement of the press conference as the linchpin on which to achieve the relitigation of the criminal case.

And, Justice, I think I can give you a more specific example of how allowing this type of claim to go forward would interfere with the --

QUESTION: Well, what if he sued the prosecutor for libel?

MR. SOTOS: That would be a claim that would not circumvent the problems he would have with Paul v. Davis.

QUESTION: So, it would be just qualified immunity.

MR. SOTOS: To the extent that it was an immunity analysis, it would just be qualified immunity.

That's correct.

Let me give the Court a specific example of how allowing this press conference claim or this unfair trial claim to go forward would interfere with the prosecutor's decisions in the future.

In a high profile, highly charged case like this, a criminal defendant's motion to transfer venue is a typical and a common occurrence in a criminal trial. At the time that motion is made, that prosecutor has to decide whether to oppose that motion or to concede to a transfer to a different venue, and that decision is supposed to be made based upon his independent evaluation as to the extent to which the publicity has infected the trial process.

If immunity were withheld, when the prosecutor was sitting down to make that decision, he would be more inclined to just concede to a transfer because of a fear that if he successfully opposed the motion, but didn't win the trial, that he could be sued for deprivation of a fair trial for opposing the motion.

And when you really look at this claim, that's what the petitioner is doing here. He's suing the prosecutor for opposing his motion to transfer venue at the criminal trial. And if you take it to the next --

QUESTION: Is that a fair summary of the press

conference? I mean, isn't the claim that the press conference itself generated some of the prejudice that supported the motion?

MR. SOTOS: That is the claim.

QUESTION: So, it isn't just his opposing the motion. It's his creating the grounds for the motion.

MR. SOTOS: But again, Your Honor, that would only be half of the analysis. And the prosecutor would still be deterred from making inflammatory announcements of an indictment because he is only entitled to administrative -- excuse me -- to qualified immunity depending on the nature of the claim. Again, under Justice Kennedy's hypothetical, if the claim was that, Prosecutor, by virtue of the way in which you announce my indictment, I lost my job, well, then there would only be qualified immunity.

But we have to protect -- under the functional approach, we have to protect the prosecutor's decision to go forward and those decisions that are made in connection with the conduct of the criminal prosecution specifically in terms of do I oppose this motion, do I concede to the motion. And again, ultimately this claim is really based upon his opposition to the judge's decision to deny the motion to change venue.

Thank you, Judges.

QUESTION: Do you support the reasoning of the Seventh Circuit?

MR. SOTOS: We do support the reasoning of the Seventh Circuit, Justice Kennedy. We think that really what the Seventh Circuit was doing was just coming up with a convenient method of applying the functional approach, which is what we're attempting to do today. The Seventh Circuit's approach helps the Court to focus on the function of the prosecutor that's deterred if the claim is allowed to go forward.

QUESTION: May I just be sure I understand one other point? If the press conference had been conducted by the chief of police and the same damage claim were made, you'd agree only qualified immunity in that situation.

MR. SOTOS: Yes, Justice Stevens, we would because under that scenario the chief doesn't have a later -- he doesn't have -- by statute he doesn't have the responsibility to determine whether to prosecute or whether to present the State's case.

QUESTION: No, but I would think in terms of what the prosecutor decides later, I assume probably that the police chief would be indemnified by the county and he'd also -- to the extent your argument is valid, it seems to me it would influence his prosecutorial decision

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in the same way because the damage liability -- technically it's against one officer rather than the other, but I guess his real client would pay the bill in either event.

MR. SOTOS: That the chief's exposure would influence the prosecutor's --

QUESTION: Yes.

MR. SOTOS: -- decision to go forward? That's perhaps a possibility, but again, the line has to be drawn somewhere, and absolute immunity has traditionally been drawn with the line that you focus on the individual's own exposure. And the theory is the --

QUESTION: And what if the -- what if it was an assistant prosecutor who did not thereafter participate in the trial? Does he get qualified immunity or absolute immunity?

MR. SOTOS: That again would present a more difficult question.

QUESTION: And he had a lawyer who did a lot of press relations work and made all the public announcements and so forth, but very rarely participated in the trial.

MR. SOTOS: My first --

QUESTION: Immunity or -- qualified immunity or absolute immunity?

MR. SOTOS: My first response to that would be

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that that's a more difficult question that isn't presented here. Secondly, I --

QUESTION: Maybe it would be governed by our decision in the case is why I'm curious about your answer.

MR. SOTOS: I would state in response to that that the possibility of -- I guess, it's kind of an investigative prosecutor who didn't have prosecutorial responsibility seems to me to be something of a misnomer. Prosecutors are assigned by statute with the responsibility to commence and prosecute criminal actions.

To the extent that a prosecutor would solely have an investigative function, I don't know that that's a realistic prospect. For the most part, prosecutors' offices do hire investigators, but they're not lawyers who are, again, assigned by statute with the responsibility to prosecute criminal actions.

Going one step further, it seems to me that when the prosecutor did make that decision to prosecute, he would still be looking at the -- that decision in terms of his office's exposure to a civil suit. So --

QUESTION: But you could have -- I mean, I think maybe even in this case you have a change of -- some new prosecutor is elected. Prosecutor A made the press conference. Prosecutor B is the one who went ahead and made the decisions. Are both A -- that's not, it seems to

me, so unreasonable to have that happen.

MR. SOTOS: Well, factually prosecutor A, Respondent Fitzsimmons, was responsible for the decision to indict and to initiate the prosecution. It was later on, when the case actually went to trial --

QUESTION: But I'm concerned about prosecutor B being the one who has to resist the motion for change of venue. He's the one whom you say would be influenced by potential liability. And my question is what if A had the press conference and B takes over thereafter and resists the motion for change of venue and so forth.

MR. SOTOS: Again, Your Honor, it would be the prosecutor's assessment of the office's exposure to a civil lawsuit as a result of that trial --

QUESTION: So, you'd say A is immune even though actually B is the one who actually makes the decision.

MR. SOTOS: To the extent that it was a prior prosecutor, yes, I would.

QUESTION: Thank you, Mr. Sotos.

Mr. Minear, we'll hear from you.

ORAL ARGUMENT OF JEFFREY P. MINEAR

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

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

I would like to turn first to petitioner's contention that the prosecutors are subject to a section 1983 damages action based on the preindictment activities, such as evaluation of the evidence and selection of expert witnesses.

This Court's decision in Imbler squarely holds that a prosecutor is immune for actions taken in initiating a prosecution and in presenting the State's case. The prosecutor's preindictment actions in evaluating the evidence is part of that process. Indeed, his evaluation is an essential step in determining whether to bring a prosecution. It follows that a prosecutor cannot be sued on the basis of his review of the evidence and selection of expert witnesses where the only injury the plaintiff alleges is the commencement of a criminal prosecution.

At bottom, the issue here does not differ at all, or at least in no significant respect, from the issue in Imbler. The petitioner seeks damages for what he alleges was a wrongful prosecution. Petitioner attempts to distinguish his suit by characterizing his claim as a challenge to the prosecutor's investigation, but he does not allege that this investigation injured him in any way apart from what happened in court. Imbler, accordingly, bars his claim.

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As the court of appeals put it, it would be a hoax to proclaim immunity for presentation of testimony. In court the person aggrieved by that testimony may attack its preparation. Immunity is not limited to unprepared events at trial. Yet, that is exactly the result that petitioner urges here.

Indeed, the plaintiff in Imbler made very similar claims with respect to the prosecutor's preparation of his case in that particular instance. This Court, nevertheless, held that the prosecutor was immune in Imbler.

The court of appeals was also correct in concluding that the former prosecutor Fitzsimmons is not subject to suit for his out-of-court public statements that allegedly injured petitioner in the subsequent criminal proceedings.

We will not characterize that issue, however, as a matter of absolute immunity. Petitioner's suit is defective because it fails to state a cognizable section 1983 claim. Taking petitioner's factual allegations as true, Fitzsimmons' public statements did not, as a matter of law, deprive petitioner of any constitutional right. First --

QUESTION: Now, was this point raised by the respondents in the lower courts?

MR. MINEAR: I don't know if it was raised specifically by the respondents in the lower courts, but the courts below both said that it is a necessary consideration whether there is an actionable harm, that that is a subsidiary issue in determining the question of immunity. So --

QUESTION: So, you say the lower courts have passed on this question?

MR. MINEAR: They passed on it, and I would point to pages 89 and 90 of the court -- first court of appeals opinion, pages 105, 106, and 108 of the joint appendix.

QUESTION: Did the respondent rely on it in its brief -- his brief here?

MR. MINEAR: I don't believe that he relied on it specifically, but again, I think it's a matter of characterization of the argument here. In essence, the court of appeals said that the absolute -- absolute immunity applies here because there was no cause of action without the mediation of a judge. We think that it's wrong to call that a question of absolute immunity. What the gist of that argument really is there's no constitutional injury here unless the complaint also challenges the judicial decision that was made in this case and takes into account the procedures that are

available to prevent a deprivation of liberty without due process.

QUESTION: Do you agree with Mr. Sotos' conclusion that there would be only qualified immunity if, say, the person lost his job and that was the injury from the fabricated evidence? Say the prosecutor announced he's going to go ahead with the indictment and the trial because of the strength of the evidence and the person loses his job. My understanding Mr. Sotos' analysis was that in that case, there's only qualified immunity.

MR. MINEAR: I think that --

QUESTION: Do you agree with that?

MR. MINEAR: We agree with that, but I would also note there's an underlying question of whether there would be a section 1983 cause of action in those cases also.

QUESTION: Yes.

MR. MINEAR: But to the extent that the prosecutor is entitled to qualified immunity, we do agree.

QUESTION: And --

QUESTION: I take it you also agree with the Seventh Circuit's analysis in this case?

MR. MINEAR: I think we agree with it in part, although we disagree with its characterization of this issue as an issue of absolute immunity. As I said before,

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I think the problem here --

QUESTION: -- press conference.

MR. MINEAR: With respect to the press conference, that's right. We do agree with the court of appeals analysis with regard to the preindictment activities. We do believe that is correct.

QUESTION: I was just going to say I take it your position is that if the defendant had been working for the prosecutor and the prosecutor fired him and then gave a press conference, there might be section 1983 liability, but if that were not the case and the prosecutor just libeled him and somebody else fired him, you would not concede that it was 1983 liability.

MR. MINEAR: That is correct. The former case is more like Forrester v. White, for instance.

Now, turning to what actually happened in this case, Fitzsimmons' statements plainly provide no basis for petitioner's Fourth Amendment claim because the grand jury indicted petitioner prior to the press conference, and the indictment itself provided probable cause for the arrest.

Second, Fitzsimmons' statements cannot support petitioner's defamation claim because, as this Court has repeatedly held, mere injury to reputation by itself does not amount to a constitutional injury.

With respect to Fitzsimmons' statements and how

they affected the claim relating to pretrial release, petitioner, to be sure, has a liberty interest in freedom from confinement, but his interest is invaded only if he is detained without due process of law. Here an Illinois court detained petitioner pursuant to Illinois bail law, and petitioner has not alleged that the Illinois court's bail decision violated the due process. In fact, petitioner has not challenged or mentioned the adequacy of Illinois bail laws at all. In the absence of such a challenge, petitioner has no due process claim against anyone.

QUESTION: Does that mean that even if the -- if it had been a police officer who fabricated evidence and all the rest, there would be no claim?

MR. MINEAR: That is correct as to the prosecutor. The question here again -- the due process -- I take it your question is --

QUESTION: As I understand your argument, on its face the procedures are all fair so that the fact that fabricated evidence was used doesn't really make any difference insofar as there's a procedural due process claim, and it wouldn't matter then whether it was a prosecutor or a police officer who fabricated the evidence.

MR. MINEAR: That's right with respect to the

due process claim --

QUESTION: Right.

MR. MINEAR: -- because, again, our focus here is on the procedures that were used to deprive him of liberty.

Finally, I would turn to the claim that Fitzsimmons' statements deprive petitioner of a liberty interest based on the outcome of his criminal trial. Petitioner was not convicted. The jury failed to reach a unanimous verdict, and the resulting mistrial did not curtail petitioner's liberty interest in any constitutional sense.

In any event, petitioner again cannot state a due process claim against anyone without a colorable challenge to the Illinois procedures, such as voir dire and change of venue rules, that are available to prevent prejudice from pretrial publicity. Petitioner has made no claim that the Illinois procedures are defective, and as a result, he has failed to satisfy the requirements for stating a due process claim.

In sum, even if petitioner's allegations are true, they fail to state a section 1983 claim.

If there are no further questions.

QUESTION: Thank you, Mr. Minear.

Mr. Taylor, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF GEORGE F. TAYLOR, JR.

ON BEHALF OF THE PETITIONER

MR. TAYLOR: When the question of two prosecutors, or police doing the act rather than the prosecutor, comes up in both of the contexts of both the manufacture of the evidence, the interrogation of the witnesses, and the prejudicial publicity, we see the basic fallacy of their argument because what they're doing here and what the court of appeals is doing is -- has a premise and a principle which extends prosecutorial immunity to all those kinds of actions. And that is the premise that's faulty here.

Now, the court of appeals -- he says that he -- excuse me -- the Government says that they agree with the court of appeals decision in part. Well, they can't agree with it in part in terms of the injury analysis. They're saying that they're conceding that it's only qualified immunity for the press conference. Well, but they're saying that it's absolute immunity with regard to the other, the manufacture of evidence.

Well, both of those are premised on the idea that the injury happened within the judicial process. That's what Judge Easterbrook premised his analysis on. So, if you -- you have to see absolute immunity for both or absolute immunity for neither. The Government's

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argument is completely inconsistent on that position.

And it also shows the basic mistake of that court of appeals decision, that its overreaching nature of looking at the injury rather than the act. And that is the basic mistake of that decision, and that's how it distorts Imbler and allows one to ignore the holding there which the -- is that the act has to be intimately associated with the judicial phase of the criminal process. And that is why we say that the Seventh Circuit was in error and that, in fact, qualified immunity should be afforded here rather than absolute immunity.

QUESTION: Mr. Taylor, I thought that the concession of qualified immunity liability with respect to the press conference was a concession of qualified immunity as to injuries other than the injuries that are produced through the trial, that is, qualified immunity for any libel.

MR. TAYLOR: That's not the way they stated it in the brief. They stated it in an absolute way both in their summary of argument and in their argument itself that it's not a question of absolute immunity, and I think they say specifically that it's because it's not intimately associated with the judicial phase of the criminal process. And so, in that sense, that concession -- they may not -- they may have backed up from it a bit

after we filed our reply brief, but it is clear what that concession entails in the -- in their original amicus brief.

And I -- their statement that it was passed on by the court of appeals is -- borders on the ridiculous. If you go and look at those pages, the court of appeals, as far as it extended immunity, was not dealing with constitutional violations. It was never an issue. The defendants have never raised it. They have -- they still concede that, in fact, there were constitutional violations alleged here. The court did not need to reach it. It wasn't briefed, and it wasn't argued, and it wasn't decided.

And if you look most recently at this Court's decision in Bray v. Alexandria, it was a very similar situation where the respondent wanted to argue an additional claim on reargument I believe, and this Court rejected that because of those factors.

Thank you very much.

QUESTION: Thank you, Mr. Taylor.

The case is submitted.

(Whereupon, at 11:53 a.m., the case in the above-entitled matter was submitted.)

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Stephen Buckley, Petitioner v. Michael Fitzsimmons, et al

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BY Lora M. Mayo

(REPORTER)