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## **At Supreme Court: Can prosecutors be sued for framing defendants?**

**Two African-American men wrongly imprisoned for 25 years filed a lawsuit against prosecutors for fabricating evidence against them. The Supreme Court hears the case Wednesday.**

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### *WASHINGTON*

The US Supreme Court on Wednesday is set to consider an unusual question: Do Americans who have been framed by unscrupulous prosecutors for crimes they did not commit have a right to sue the prosecutors when the fraud is finally exposed?

According to the Obama administration, the answer is no.

Solicitor General Elena Kagan argues in a friend of the court brief that local, state, and federal prosecutors must enjoy absolute immunity from citizen lawsuits – even when they sent innocent men to prison for life by fabricating incriminating evidence and hiding exculpatory evidence.

Those are the allegations in a case from Iowa set for oral argument on Wednesday morning. According to legal briefs filed in the case, prosecutors in Pottawattamie County, Iowa, solicited false testimony implicating two innocent African-American teens in the murder of a recently retired police officer in 1977. At trial, the false testimony led to their convictions. They were sent to prison for life.

When the false testimony and other exculpatory evidence was discovered, the two innocent men, Curtis McGhee and Terry Harrington, were released after 25 years in prison. They filed a lawsuit against the prosecutors.

The question before the high court is whether the prosecutors can be held accountable in a civil trial or instead are entitled to absolute immunity from such lawsuits.

"If the allegations here are true, [the Iowa officials] engaged in prosecutorial misconduct of an execrable sort, involving a complete breach of the public trust," Solicitor General Kagan writes in her brief to the court. "But absolute immunity reflects a policy judgment that such conduct is properly addressed not through civil liability, but through a host of other deterrents and punishments."

## **ABSOLUTE VS. QUALIFIED IMMUNITY**

Lawyers for Mr. McGhee and Mr. Harrington argue in their briefs that police officers who fabricate evidence do not enjoy such absolute protection from a civil lawsuit. They say prosecutors who actively participate in the pre-trial investigation of a case must be held to the same standard as police officers, detectives, and agents, who can be sued if they violate clearly-established constitutional rights.

"When law enforcement officers fabricate evidence with an intent to use it to deprive innocent citizens of

their liberty, they violate the Constitution," writes Paul Clement, a former US Solicitor General who is arguing the case for McGhee and Harrington.

"The framing of innocent African-American citizens for a crime they did not commit, lies at the core of what Congress sought to prevent in the Civil Rights statutes," Mr. Clement says in his brief.

Lawyers for the two prosecutors counter that there is no constitutional right "not to be framed."

The critical question is whether the trial is fair, they say. The constitutional infraction occurs not when the false statements are first obtained, but when they are introduced at trial. Since prosecutors enjoy absolute immunity from lawsuits related to the actions they take at trial, any false testimony cannot form the basis of a lawsuit against a prosecutor, they say.

Attorneys general from 27 states and the District of Columbia filed a friend of the court brief urging the high court to embrace this broader view of absolute prosecutor immunity.

However, the National Association of Criminal Defense Lawyers, the Cato Institute, and the American Civil Liberties Union argue for a lower level of immunity that offers prosecutors protection from lawsuits except when they have violated a clearly-established constitutional right.

## CONFIDENCE IN JUSTICE SYSTEM

New Jersey-based group Black Cops Against Police Brutality also filed a friend of the court brief in the case.

"This case is not just about drawing a good lawyerly line between precedents," writes Chicago lawyer Mark Herrmann in a brief for the group. "The facts are that Terry Harrington and Curtis McGhee are black and once were young, and that [the murder victim] was white and had been a police captain. Together, these facts made it easy for [the prosecutors] and their accomplices to frame Harrington and McGhee for murder."

Mr. Herrmann writes: "We can imagine few rulings of this Court that would send a more negative message about American criminal justice than to permit white prosecutors to frame African-American suspects for the murder of a white police officer, admit the outrage, and then walk away with impunity, after their victims have wrongfully suffered twenty-five years in prison."

The case is Pottawattamie County, Iowa, v. McGhee and Harrington.

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