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# **REHBERG AND THE UNINTENDED CONSEQUENCES OF IMMUNITY UNIFORMITY**

*William Crawford Appleby IV\**

## I. INTRODUCTION

In *Rehberg v. Paulk*,<sup>1</sup> the United States Supreme Court unanimously decided to grant absolute immunity to grand jury witnesses.<sup>2</sup> Absolute immunity is defined as “[a] complete exemption from civil liability, [usually] afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit.”<sup>3</sup> What the *Rehberg* holding means, essentially, is that a defendant who is indicted by a grand jury based on false witness testimony cannot bring a lawsuit against that witness for violating the defendant’s constitutional rights.

This Comment examines *Rehberg* in detail, approving of its result while pointing out the negative consequences of its rationale. Part II presents relevant immunity law, including its historical framework. Part III lays out the facts of the case that led to the Court’s decision. Part IV breaks down the Court’s holding, including the arguments presented by *Rehberg* for why grand jury witnesses should not receive absolute immunity. Part V analyzes the following questions raised by this case: How effective is the threat of a perjury prosecution at deterring false testimony? Will the outcome in

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1. 132 S. Ct. 1497 (2012).

2. *Id.* at 1510.

3. BLACK’S LAW DICTIONARY 818 (9th ed. 2009).

*Rehberg* help unscrupulous prosecutors bring trumped-up charges? Are adequate remedies still available to *Rehberg*? Finally, Part VI answers these questions by concluding that a potential perjury prosecution may not be very effective at deterring false testimony, unscrupulous prosecutors may use this holding to their advantage, and there are insufficient remedies available to plaintiffs like *Rehberg*.

## II. IMMUNITY LAW

Normally, a plaintiff can bring a lawsuit against a government agent for violating his or her constitutional rights under 42 U.S.C. § 1983.<sup>4</sup> This is a private right of action against someone who, while acting under color of law, deprives the plaintiff of “rights, privileges, or immunities secured by the Constitution and laws.”<sup>5</sup>

Section 1983 is a codification of the Civil Rights Act of 1871, commonly known as the Ku Klux Klan Act.<sup>6</sup> Following the Civil War, Congress outlawed slavery by enacting the Thirteenth Amendment, which led to an outbreak of violence in the South.<sup>7</sup> To address this problem, Congress first passed the Civil Rights Act of 1866, which was designed to defeat “attempt[s], under State laws, to deprive races and the members thereof” of their civil rights.<sup>8</sup> Then, after the enactment of the Fourteenth Amendment bolstered the federal government’s constitutional authority over the states, Congress readopted the 1866 Act by passing the Civil Rights Act of 1871.<sup>9</sup> Nevertheless, § 1983 remained largely dormant until the Court decided *Monroe v. Pape*<sup>10</sup> in 1961, at which time it became “the most important remedy for civil-rights violations by state and local officials.”<sup>11</sup>

Although § 1983 is broad, the U.S. Supreme Court determined that it was never supposed to stray too far from tort law and its

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4. 42 U.S.C. § 1983 (2006).

5. *Id.*

6. Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 268 n.17 (2006).

7. *Id.* at 268.

8. *Monroe v. Pape*, 365 U.S. 167, 228 n.41 (1961), *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

9. Johns, *supra* note 6, at 268.

10. 365 U.S. 167 (1961).

11. *Id.* at 269.

common law immunities.<sup>12</sup> This is supported by the fact that there is no evidence Congress meant to do away with all immunities when it enacted § 1983.<sup>13</sup> The Court consistently followed this belief from the 1960s to today when making decisions about immunity and § 1983.<sup>14</sup> Using this rationale, the Court extended absolute immunity to legislators, judges, prosecutors, and trial witnesses.<sup>15</sup>

Not all government agents receive absolute immunity for their actions; many receive only qualified immunity.<sup>16</sup> “[Q]ualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>17</sup> For example, “law enforcement officials who falsify affidavits . . . and fabricate evidence concerning an unsolved crime” receive only qualified immunity.<sup>18</sup> An important procedural difference exists between absolute and qualified immunity.<sup>19</sup> Under absolute immunity, if the scope of the immunity covers the agent’s actions, the civil suit is defeated at the outset.<sup>20</sup> The application of qualified immunity, however, is determined by the evidence at trial and depends upon the agent’s motivations and the circumstances surrounding the agent’s actions.<sup>21</sup>

In making a determination about which roles deserve absolute immunity, the Court applies a functional approach.<sup>22</sup> This means that it looks to the common law to figure out which governmental functions were historically vital to society and how severely their operation would be affected by the threat of civil litigation.<sup>23</sup> These government agents need to be shielded from personal liability so that they can freely and effectively perform their duties in service to the public.<sup>24</sup> Although the Court looks to nineteenth-century common

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12. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012).

13. *Id.*

14. *Id.*

15. *Id.* at 1503.

16. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

17. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow*, 457 U.S. at 818) (internal quotation marks omitted).

18. *Rehberg*, 132 S. Ct. at 1507 n.1 (citations omitted).

19. *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

20. *Id.*

21. *Id.*

22. *Rehberg*, 132 S. Ct. at 1503.

23. *Id.*

24. *See id.*

law for guidance, it also does not “mechanically duplicat[e] the precise scope of the absolute immunity that the common law provided to protect those functions.”<sup>25</sup> Therefore, in performing its immunity analysis, the Court recognizes that it must draw from both the past and the present in making determinations involving immunity.

For example, in *Imbler v. Pachtman*,<sup>26</sup> the Court held that prosecutors have absolute immunity from § 1983 suits for the actions they take to initiate a prosecution and present the State’s case.<sup>27</sup> The Court regretfully stated that it realized this would leave criminal defendants without civil recourse.<sup>28</sup> However, “qualifying a prosecutor’s immunity would disserve the broader public interest [and] . . . would prevent the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system.”<sup>29</sup> In addition, the Court pointed out that prosecutors are still subject to criminal punishment and professional discipline for misconduct.<sup>30</sup> Based on this, the Court chose what it believed to be the lesser of two evils: “[B]etter to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”<sup>31</sup>

In *Briscoe v. LaHue*,<sup>32</sup> the Court extended absolute immunity to trial witnesses.<sup>33</sup> The Court initially observed that a private party who provides testimony at trial is generally not subject to § 1983 claims because his actions do not fall under color of law.<sup>34</sup> But, the Court still felt it necessary to go beyond this analysis since “nongovernmental witnesses could act ‘under color of law’ by conspiring with the prosecutor or other state officials.”<sup>35</sup> Ultimately, the Court decided to extend absolute immunity to trial witnesses for the same reasons that it extended immunity to judges and

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25. *Id.*

26. 424 U.S. 409.

27. *Id.* at 431.

28. *Id.* at 427.

29. *Id.* at 427–28.

30. *Id.* at 428–29.

31. *Id.* at 428 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

32. 460 U.S. 325 (1983).

33. *Id.* at 345–46.

34. *Id.* at 329–30.

35. *Id.* at 330 n.7.

prosecutors.<sup>36</sup> The common law provided for witness immunity in 1871, and the principles used to justify immunity for judges and prosecutors applied equally to witnesses.<sup>37</sup> Even though they “perform a somewhat different function in the trial process[, their] participation in bringing the litigation to a just—or possibly unjust—conclusion is equally indispensable.”<sup>38</sup>

Although the Court resolved the question of trial-witness immunity in *Briscoe*, an open question remained: Should grand jury witnesses also receive absolute immunity? The role played by a witness before a grand jury is different from one at trial. A grand jury consists of a group of “people who are chosen to sit permanently for at least a month—and sometimes a year—and who, in *ex parte* proceedings, decide whether to issue indictments.”<sup>39</sup> During this proceeding, the prosecutor presents evidence to the grand jury and asks them to issue an indictment, formally charging the defendant with a crime.<sup>40</sup> The prosecutor is generally not obligated to present exculpatory evidence; evidence inadmissible at trial may be considered; and the defendant is usually not allowed to attend, much less present evidence, testify, or cross-examine the prosecution’s witnesses.<sup>41</sup> The Court took all of this into account when it decided *Rehberg*.

### III. STATEMENT OF THE CASE

According to an interview Charles Rehberg had with National Public Radio, the conflict began in 2003 when six doctors tried to open an outpatient surgery center in Albany, Georgia.<sup>42</sup> Rehberg was their business manager.<sup>43</sup> Phoebe Putney Memorial Hospital (“the Hospital”)—the largest hospital in the city—strongly opposed their plan, using its political connections to do so.<sup>44</sup> In response, Rehberg

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36. *Id.* at 345–46.

37. *Id.* at 345.

38. *Id.* at 345–46.

39. BLACK’S LAW DICTIONARY 767 (9th ed. 2009).

40. *United States v. Williams*, 504 U.S. 36, 51–52 (1992); SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE §§ 1:8, 4:17 (2d ed. 2011).

41. Brief for Petitioner at 26, *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (No. 10-788), 2011 WL 2310185, at \*26.

42. Nina Totenberg, *Supreme Court to Weigh Case of False Testimony*, NAT’L PUB. RADIO (Nov. 1, 2011), <http://www.npr.org/2011/11/01/141879836/supreme-court-to-weigh-case-of-false-testimony>.

43. *Id.*

44. *Id.*

undertook an investigation of the Hospital, uncovering its public IRS form.<sup>45</sup> He discovered that—even though the Hospital was a nonprofit—its CEO earned almost \$750,000 per year, it had a bank account in the Cayman Islands, it “was charging uninsured patients more than those covered by private insurance, Medicaid and Medicare, and it was aggressively taking poor patients to court when they couldn’t pay the full amount.”<sup>46</sup>

Next, Rehberg began sending anonymous faxes to local community leaders and businesses, which he called “Phoebe Factoids.”<sup>47</sup> These faxes exposed what Rehberg had learned about the way the Hospital was conducting business.<sup>48</sup> In response, the Hospital called the local district attorney, Kenneth Hodges.<sup>49</sup> Hodges and James Paulk, his office’s chief investigator, began to investigate Rehberg “as a favor to the Hospital.”<sup>50</sup> In addition, the Hospital hired its own private investigators.<sup>51</sup>

Hodges and Paulk began the investigation by subpoenaing Rehberg’s phone records from local telephone companies and his personal e-mails from his Internet service provider.<sup>52</sup> Paulk gave these records to the Hospital’s civilian private investigators, who paid the district attorney’s office and the subpoenaed parties for the information.<sup>53</sup> These civilian investigators “allegedly directed the substance of the subpoenas.”<sup>54</sup> Eventually, negative press coverage of Hodges’s relationship with the Hospital caused Hodges to recuse himself from the case, and Kelly Burke was appointed as special prosecutor in his place.<sup>55</sup> Hodges remained involved in the investigation after his recusal.<sup>56</sup>

Rehberg was first indicted by a grand jury in December 2005 for burglary, aggravated assault, and six counts of making harassing

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Rehberg v. Paulk*, 611 F.3d 828, 835 (11th Cir. 2010) (internal quotation marks omitted), *aff’d*, 132 S. Ct. 1497 (2012).

51. Totenberg, *supra* note 42.

52. *Rehberg*, 611 F.3d at 835.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

phone calls, with Paulk as the sole complaining witness.<sup>57</sup> In the indictment, Rehberg was accused of breaking into the home of Dr. James A. Hotz—a hospital doctor<sup>58</sup>—and suggesting to Hotz that he had a weapon.<sup>59</sup> When Rehberg contested the first indictment’s legal sufficiency, Burke dismissed the action.<sup>60</sup> Burke then indicted Rehberg on similar charges twice more between February and March of 2006, but these indictments were eventually dismissed.<sup>61</sup> Hotz testified during the second grand jury proceeding.<sup>62</sup>

Following the indictments, Rehberg brought an action against Hodges, Burke, and Paulk in federal court.<sup>63</sup> In his complaint, Rehberg stated that the charges were all false and that he had never been to Dr. Hotz’s house.<sup>64</sup> In addition, no police report had ever been filed for Rehberg’s alleged crimes, and the local police department was never involved in the investigation.<sup>65</sup> Paulk testified that the police were not involved because “of lack of confidence in the City police department to handle it.”<sup>66</sup> According to the complaint, Paulk later “admitted that he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary.”<sup>67</sup> Finally, when Judge Harry Altman dismissed the third indictment, he found that the faxes sent by Rehberg did not amount to harassing phone call violations under Georgia statutory law.<sup>68</sup>

Rehberg’s complaint contained ten counts,<sup>69</sup> and the four § 1983 counts were at issue on appeal.<sup>70</sup> The first and second § 1983 claims were against Hodges and Paulk for malicious prosecution and retaliatory prosecution.<sup>71</sup> In the first count, Rehberg claimed that

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57. *Id.*

58. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1501 (2012).

59. Joint Appendix at 4, *Rehberg*, 132 S. Ct. 1497 (2012) (No. 10-788), 2011 WL 2311880, at \*4.

60. *Rehberg*, 611 F.3d at 836.

61. *Id.*

62. Joint Appendix, *supra* note 59, at 8.

63. *Rehberg*, 611 F.3d at 836.

64. Joint Appendix, *supra* note 59, at 5.

65. *Id.*

66. *Id.* at 6.

67. *Id.*

68. *Id.* at 9.

69. *Id.* at 19–38.

70. *Rehberg v. Paulk*, 611 F.3d 828, 836 (11th Cir. 2010), *aff’d*, 132 S. Ct. 1497 (2012).

71. Joint Appendix, *supra* note 59, at 25, 30.



Hodges and Paulk violated his Fourth Amendment rights by conducting a “criminal investigation, indictment, and prosecution . . . induced by fabricated evidence and bad faith.”<sup>72</sup> In the second count, Rehberg claimed they violated his First Amendment right to freedom of speech by bringing charges against him with no probable cause in response to the “Phoebe Factoid” faxes he sent.<sup>73</sup> The third § 1983 claim was against Burke for evidence fabrication, alleging that Burke had called Paulk to testify before a grand jury even though he “had not found any evidence that Mr. Rehberg committed a burglary or aggravated assault.”<sup>74</sup> Finally, Rehberg’s fourth § 1983 claim was against Hodges, Burke, and Paulk for conspiracy to violate his constitutional rights in their above alleged actions.<sup>75</sup> The defendants made a 12(b)(6) motion<sup>76</sup> to dismiss these counts, claiming absolute immunity.<sup>77</sup> However, the district court denied their motion.<sup>78</sup>

Hodges, Burke, and Paulk then appealed to the Eleventh Circuit.<sup>79</sup> The court of appeals reversed the district court’s decision, refusing to find an exception to absolute immunity for the testimony of a complaining witness in front of a grand jury.<sup>80</sup> Drawing on the Eleventh Circuit’s earlier decision in *Jones v. Cannon*,<sup>81</sup> the court reasoned that “allowing civil suits for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings.”<sup>82</sup> The court went on to describe why criminal perjury charges—not civil liability—was the appropriate deterrent for false testimony.<sup>83</sup> Rehberg then appealed the decision to the U.S. Supreme Court.<sup>84</sup> The Court granted certiorari in order to resolve a conflict between the

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72. *Id.* at 26.

73. *Id.* at 31.

74. *Id.* at 32.

75. *Id.* at 37.

76. *See* FED. R. CIV. P. 12.

77. *Rehberg v. Paulk*, 611 F.3d 828, 837 (11th Cir. 2010), *aff’d*, 132 S. Ct. 1497 (2012).

78. *Id.*

79. *Id.*

80. *Id.* at 854–55.

81. 174 F.3d 1271 (11th Cir. 1999).

82. *Rehberg*, 611 F.3d at 840.

83. *Id.* (citing *Jones*, 174 F.3d at 1287 n.10).

84. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1500–01 (2012).

circuit courts over whether complaining witnesses in grand jury proceedings are entitled to absolute immunity.<sup>85</sup>

#### IV. REASONING OF THE COURT

The Supreme Court affirmed the Eleventh Circuit's ruling<sup>86</sup> and held that grand jury witnesses, just like trial witnesses, are entitled to absolute immunity.<sup>87</sup> In reaching this decision, the Court found that the same reasons that justified granting absolute immunity to trial witnesses applied equally to grand jury witnesses.<sup>88</sup> Without absolute immunity, grand jury witnesses might fear a retaliatory civil action against them for their testimony.<sup>89</sup> The Court felt that civil liability was not needed to deter false testimony in light of the threat of criminal prosecution for perjury.<sup>90</sup> As it had done in *Briscoe*, the Court refused to draw a distinction between lay witnesses and law enforcement witnesses for purposes of immunity.<sup>91</sup> The Court decided this despite arguments that false testimony from police officers is potentially more damaging and that immunity is unnecessary because officers would not be intimidated by the threat of suit.<sup>92</sup>

Next, the Court responded to each of Rehberg's arguments requesting that it deny absolute immunity. First, Rehberg pointed out that precedent, namely *Kalina v. Fletcher*<sup>93</sup> and *Malley v. Briggs*,<sup>94</sup> established that complaining witnesses do not get absolute immunity.<sup>95</sup> "In those cases, law enforcement officials who submitted affidavits in support of applications for arrest warrants were denied absolute immunity because they performed the function of a complaining witness."<sup>96</sup> Based on these outcomes, Rehberg argued that certain grand jury witnesses also were not entitled to absolute immunity.<sup>97</sup> However, the Court determined that Rehberg

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85. *Id.* at 1501.

86. *Id.*

87. *Id.* at 1510.

88. *Id.* at 1505.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1505–06.

93. 522 U.S. 118 (1997).

94. 475 U.S. 335 (1986).

95. *Rehberg*, 132 S. Ct. at 1507.

96. *Id.* (internal quotation marks omitted).

97. *Id.*

had misunderstood the true definition of a “complaining witness,” which was not one who testifies but instead one who initiates criminal prosecutions and procures arrests.<sup>98</sup> Thus, police officers who testify before grand juries are not comparable to complaining witnesses since they do not make the decision to prosecute.<sup>99</sup> In modern times, that responsibility falls on the prosecutor.<sup>100</sup> The Court also pointed out the difficulty in determining who the complaining witness was when multiple grand jury witnesses testified, thereby showing how Rehberg’s argument was impractical as well.<sup>101</sup>

Second, Rehberg asserted that grand jury proceedings are different from criminal trials because the defendant is not present and therefore cannot testify, present evidence, or cross-examine witnesses, and the prosecutor generally does not have to include exculpatory evidence.<sup>102</sup> Since these procedural factors leave defendants with less protection than they have at trial, Rehberg argued that civil liability was more critical to deter false testimony in a grand jury proceeding.<sup>103</sup> However, the Court disagreed. First, it reminded Rehberg that grand jury witnesses would probably testify again at trial anyway.<sup>104</sup> It also decided that grand jury secrecy should trump these concerns.<sup>105</sup> If the identities of grand jury witnesses could be determined through civil discovery, it would allow criminal defendants an opportunity to retaliate against them outside of court.<sup>106</sup> This could scare away potential grand jury witnesses.<sup>107</sup>

Finally, Rehberg argued that giving absolute immunity to grand jury witnesses would “create an insupportable distinction between States that use grand juries and those that do not.”<sup>108</sup> Twenty-six states allow for felony prosecutions via information<sup>109</sup> instead of

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98. *Id.*

99. *Id.*

100. *Id.* at 1508.

101. *Id.* at 1508–09.

102. Brief for Petitioner, *supra* note 41, at 26.

103. *Rehberg*, 132 S. Ct. at 1509.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. An information is “[a] formal criminal charge made by a prosecutor without a grand-jury indictment.” BLACK’S LAW DICTIONARY 849 (9th ed. 2009).

grand jury proceedings.<sup>110</sup> The Court responded by stating that an analogy between grand jury witnesses and preliminary hearing witnesses was more appropriate, since both proceedings involve testimony.<sup>111</sup> In addition, “lower courts have held that witnesses at a preliminary hearing are protected by the same immunity accorded grand jury witnesses . . . and [Rehberg did] not argue otherwise . . . .”<sup>112</sup> Therefore, the Court found none of Rehberg’s arguments against granting grand jury witnesses absolute immunity to be convincing.

## V. ANALYSIS

The Court was correct to decide that grand jury witnesses and trial witnesses should have identical immunity. Denying grand jury witnesses the same immunity enjoyed by trial witnesses would be inconsistent and make little sense. Just as it would with trial-witness testimony, the fear of subsequent liability would surely have a negative impact on the testimony of a grand jury witness. In addition, the secrecy of a grand jury proceeding is vital to its proper functioning. Allowing a criminal defendant to undermine this secrecy by obtaining the names and contact information of grand jury witnesses through civil discovery would make witnesses even less likely to testify. For these reasons, the Court was correct to grant absolute immunity to grand jury witnesses. To hold otherwise would undermine grand jury proceedings in a way that could render them almost totally ineffective.

Even though the Court’s holding in *Rehberg* was correct, the decision still raises a few questions: How effective is the threat of a perjury prosecution at deterring false testimony? Will prosecutors who intend to bring trumped-up charges be able to use this holding to their advantage? Finally, are defendants like Rehberg left with an adequate legal recourse? Each of these questions is addressed in the sections that follow.

### A. *Perjury as a Deterrent*

In responding to Rehberg’s arguments, the Court stated that “the deterrent of potential civil liability [was not] needed to prevent

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110. *Rehberg*, 132 S. Ct. at 1509.

111. *Id.*

112. *Id.* at 1510.

perjurious testimony” mainly because the threat of a subsequent perjury prosecution would discourage false testimony.<sup>113</sup> In support of its rationale, the Court cited to *Briscoe v. LaHue*,<sup>114</sup> in which it granted absolute immunity to trial witnesses and relied upon perjury as a deterrent to false police officer trial testimony.<sup>115</sup> But will the threat of prosecution for perjury adequately deter grand jury witnesses from testifying falsely?

One commits perjury “if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.”<sup>116</sup> Perjury began as a common law crime but is now governed by statute.<sup>117</sup> For example, perjury committed before a federal grand jury is controlled by 18 U.S.C. § 1623.<sup>118</sup> In order to convict someone of perjury, the prosecutor must establish, beyond a reasonable doubt, that the defendant knowingly made a false statement of material fact while under oath and before a competent tribunal.<sup>119</sup> When a false statement is made before a grand jury, it “must be material ‘to a matter that the grand jury has the power to investigate.’”<sup>120</sup>

Although the Court relied on the threat of a perjury prosecution to deter false testimony, there are several reasons why this may not be as effective as it appears. First, perjury is very difficult to prove. The requirements of proof are some of the most stringent in all of law.<sup>121</sup> One reason for this is the “two-witness rule,” which states that the defendant cannot be found guilty for perjury based on the testimony of a single uncorroborated witness.<sup>122</sup> The prosecutor must prove his or her case using at least the “testimony of two independent witnesses or one witness and corroborating circumstances.”<sup>123</sup> Prosecutors also will have difficulty demonstrating criminal intent or that the defendant knew his or her testimony was false. Knowledge

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113. *Id.* at 1505.

114. 460 U.S. 325 (1983).

115. *Id.* at 342.

116. MODEL PENAL CODE § 241.1 (1985).

117. 60A AM. JUR. 2D *Perjury* § 1 (2003).

118. 18 U.S.C. § 1623 (2006).

119. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

120. 60A AM. JUR. 2D *Perjury* § 6 (2003).

121. *State v. Olson*, 594 P.2d 1337, 1338 (Wash. 1979).

122. *Weiler v. United States*, 323 U.S. 606, 607–09 (1945).

123. *Id.* at 607.

and intent can only be inferred from the surrounding circumstances of the case,<sup>124</sup> which makes proving these elements difficult. In addition, if the defendant gave a false answer due to confusion, faulty memory, honest mistake,<sup>125</sup> inadvertence,<sup>126</sup> or a belief that what he or she was saying was true,<sup>127</sup> then the statement is not perjury. For these reasons, the bar to convict for perjury is set very high.

Second, a defendant has no control over whether a witness will be charged with perjury. In fact, there is usually no civil action for perjury,<sup>128</sup> and generally, only a prosecutor can decide whether to pursue a criminal case for perjury.<sup>129</sup> As mentioned above, Paulk is the chief investigator for the district attorney's office in which the alleged perjury was committed.<sup>130</sup> If members of that same office collaborated with Paulk to bring trumped-up charges against Rehberg, it is unlikely that those colleagues would hold Paulk accountable. In similar situations, there is equally little chance that criminal investigators who commit perjury on the stand will be prosecuted or even charged. With such stringent requirements of proof and a low incentive to prosecute in cases like *Rehberg*, the threat of a perjury prosecution alone may not effectively dissuade future witnesses from lying on the stand.

### B. Charging Instrument

The *Rehberg* holding also has the potential negative effect of giving prosecutors an effective tool to bring unsubstantiated charges against defendants. As mentioned in *Rehberg*'s brief, twenty-six states allow the prosecutor to decide the way in which the defendant will be charged for *all* crimes.<sup>131</sup> In all but two states, "prosecutors have their choice of charging instrument—indictment or information—when prosecuting at least *some* classes of crimes."<sup>132</sup>

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124. *State v. Boratto*, 404 A.2d 604, 608 (N.J. 1979).

125. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

126. *United States v. Martellano*, 675 F.2d 940, 942 (7th Cir. 1982).

127. *United States v. Rose*, 215 F.2d 617, 622–23 (3d Cir. 1954).

128. *W. G. Platts Inc. v. Platts*, 438 P.2d 867, 871 (Wash. 1968). "Maine is the only state that recognizes a civil action for perjury." *Spickler v. Greenberg*, 644 A.2d 469, 470 n.1 (Me. 1994).

129. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); 4 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 13.2(a) (3d ed. 2007).

130. *See supra* Section III.

131. Brief for Petitioner, *supra* note 41, at 23–24.

132. *Id.* at 24 (emphasis added).

Therefore, prosecutors generally have quite a bit of freedom when selecting the charging mechanism.

As described above, if the prosecutor chooses to charge by indictment, then a grand jury will ultimately decide whether there is probable cause to support the charges.<sup>133</sup> Since the prosecutor alone presents evidence to the grand jury, and because grand juries usually return indictments, critics refer to this charging instrument as a mere “rubber stamp” for prosecutors.<sup>134</sup>

Generally, once the grand jury returns an indictment, an arrest warrant for the defendant is automatically issued.<sup>135</sup> This is because an indictment satisfies the Fourth Amendment’s requirement of “probable cause, supported by Oath or affirmation.”<sup>136</sup> For example, Rehberg was arrested as a result of the indictments against him.<sup>137</sup> Even though Paulk’s testimony served as the basis for the grand jury to indict Rehberg, Rehberg cannot sue Paulk because Paulk has absolute immunity from civil liability for his testimony.<sup>138</sup> However, if Paulk had instead submitted a false sworn affidavit in support of bringing charges against Rehberg, he would only be granted qualified immunity.<sup>139</sup> This would allow Rehberg to bring an action against Paulk under § 1983.

As Rehberg’s brief to the Supreme Court states, this creates an inconsistency in criminal procedure among states.<sup>140</sup> However, it is even more worrisome that unscrupulous prosecutors can now use the grand jury charging mechanism to bring fabricated charges. Since grand jury witnesses and prosecutors both receive absolute immunity from civil liability, they have nothing to fear from bringing false charges except a subsequent perjury prosecution. However, as

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133. See *supra* Section II.

134. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 29 (2002).

135. *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997); LAFAVE ET AL., *supra* note 129, at § 11.2(b) n.48.7.

136. *Kalina*, 522 U.S. at 129.

137. *Rehberg v. Paulk*, 611 F.3d 828, 836 (11th Cir. 2010), *aff’d*, 132 S. Ct. 1497, 1510 (2012); Brief for Petitioner, *supra* note 41, at 4.

138. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1510 (2012).

139. See *Kalina*, 522 U.S. at 129–31; *Malley v. Briggs*, 475 U.S. 335, 340–45 (1986).

140. Brief for Petitioner, *supra* note 41, at 9–10 (“A person victimized by malicious falsehoods could bring a claim in a State in which written affidavits were sufficient to instigate a prosecution, but absolute immunity would bar a claim from an identically situated person in a State in which an indictment was required.”).

explained above,<sup>141</sup> the threat of prosecution for perjury may not be much of a deterrent to witnesses like Paulk.

### C. Remaining Remedies

Following the Supreme Court's decision, the Eleventh Circuit remanded *Rehberg* back to the district court with only the retaliatory prosecution claim against Paulk intact.<sup>142</sup> Rehberg's state law causes of action against Paulk for negligence and invasion of privacy—consisting of counts one through four<sup>143</sup>—were not at issue on appeal.<sup>144</sup> Therefore, out of the ten causes of action stated in Rehberg's complaint, only numbers one through four and seven remain.

Retaliatory prosecution claims require the plaintiff to “show an absence of probable cause for the prosecution” and “a ‘but-for’ causal connection between the retaliatory animus of the non-prosecutor and the prosecutor's decision to prosecute.”<sup>145</sup> The Eleventh Circuit held that the allegations in Rehberg's complaint were sufficient to establish a prima facie case for retaliatory prosecution, which means that the burden shifts to Paulk on remand.<sup>146</sup>

Even though Rehberg still has counts one through four and seven against Paulk, these remedies are insufficient. First, Hodges should be just as liable as Paulk for retaliatory prosecution, but the Eleventh Circuit held that Hodges is protected by absolute immunity.<sup>147</sup> Under *Hartman v. Moore*, retaliatory prosecution claims cannot be brought against the prosecutor involved but are instead brought against the non-prosecutor “who may have influenced the prosecutorial decision but did not himself make it . . . .”<sup>148</sup> The district court denied absolute and qualified immunity

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141. See *supra* Section V.A.

142. *Rehberg v. Paulk*, 682 F.3d 1341, 1342 (11th Cir. 2012) (per curiam). Hodges has absolute immunity from the retaliatory prosecution claim but Paulk does not. *Rehberg*, 611 F.3d at 855.

143. “Rehberg withdrew Count 5 against Dougherty County in response to its claim of sovereign immunity,” and the district court dismissed count nine. *Id.* at 837 n.4. Counts five and nine were not at issue on appeal. *Id.*

144. *Id.* at 836 n.3.

145. *Id.* at 848–49.

146. *Id.* at 849–50.

147. *Rehberg*, 611 F.3d at 849.

148. *Id.* at 848 (quoting *Hartman v. Moore*, 547 U.S. 250, 261–62 (2006)).



to Paulk, a decision that the Eleventh Circuit affirmed.<sup>149</sup> It is patently unfair to hold only Paulk accountable for a retaliatory prosecution that was allegedly started and orchestrated by Hodges.

Second, Paulk is the only defendant left in all of Rehberg's remaining causes of action. As explained above, none of the remaining counts are against Hodges and Burke. What this means, essentially, is that Hodges and Burke are untouchable and will not be held accountable for their actions in *Rehberg*. They are immune from any civil legal recourse available to Rehberg simply because they are prosecutors. In addition, if Paulk had only provided false testimony to the grand jury and had not engaged in any of the other alleged illegal activities surrounding the investigation, Rehberg might have been left with no causes of action at all. Because Rehberg's remedies are limited and he can only sue Paulk, Rehberg's remedies for the severe violations of his constitutional rights are insufficient.

On a side note, the Eleventh Circuit pointed out how "Hodges and Paulk generally would not receive absolute immunity for fabricating evidence, because investigating and gathering evidence falls outside the prosecutor's role as an advocate."<sup>150</sup> Although this cause of action would be helpful if there were physical evidence, a false affidavit, proof that a witness was convinced to testify falsely, or other forms of evidence from the investigation,<sup>151</sup> this was not the case in *Rehberg* and it is unlikely to be the case in future actions of a similar nature. If the only fabricated evidence is testimony before a grand jury, then a fabrication of evidence claim does not apply.<sup>152</sup>

## VI. CONCLUSION

In deciding to extend absolute immunity to grand jury witnesses in *Rehberg*, the Court created immunity uniformity between trial and grand jury witnesses. Although this decision was necessary to protect the secrecy of grand jury proceedings as well as to protect grand jury witnesses from subsequent defendant retaliation, the holding creates a serious concern. Because prosecutors and grand jury witnesses are immune from civil liability in cases like *Rehberg* and because perjury may not be an effective deterrent to false testimony, there is

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149. *Id.* at 850, 855.

150. *Id.* at 841.

151. *See id.* at 842 & n.10.

152. *Id.* at 842.

no real deterrent in place to prevent this kind of behavior in the future.

As Judge Learned Hand famously wrote, “[a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.”<sup>153</sup> Unfortunately for Charles Rehberg, his ability to seek retribution and defend his constitutional rights currently sits on the side of the scale carrying the greater of two evils. Indeed, until a more effective deterrent to preventing false testimony during grand jury proceedings emerges, trumped-up charges may continue to be brought against innocent people. The threat of criminal prosecution for perjury is simply not enough to dissuade prosecutors and witnesses immune from civil liability.

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153. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

