No. 15-6384

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMY SANDERS,

Plaintiff-Appellee,

v.

LAMAR JONES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Tennessee at Jackson
No. 1:14-cv-01239—J. Daniel Breen, *District Judge.*

BRIEF OF THE INNOCENCE NETWORK, DAVID AYERS, AND CLARENCE ELKINS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AMY SANDERS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-6384 Case Name: Amy Sanders v. Lamar Jones

Name of counsel: Steven Art

Pursuant to 6th Cir. R. 26.1, The Innocence Network, David Ayers, and Clarence Elkins
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on February 11, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Steven Art

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICI CURIAE*

Amici curiae are the Innocence Network and two men wrongly convicted of crimes within the Sixth Circuit.

The Innocence Network is an association of more than sixty organizations working to address the causes of wrongful convictions, and providing *pro bono* legal services to convicted individuals seeking to prove their innocence. Members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. See Appendix A.

Members of the Network include: the Kentucky Innocence Project, a section of the Kentucky Department of Public Advocacy, established to provide incarcerated persons a resource through which their claims of innocence may be investigated and presented to Kentucky courts, which has helped 15 people obtain freedom; the Michigan Innocence Clinic at the University of Michigan Law School, which litigates cases on behalf of prisoners who have new evidence that may establish their innocence and has fully exonerated ten people and overturned convictions resulting in the release of four more; and the Ohio

Innocence Project, part of the University of Cincinnati College of Law, which has helped 23 people wrongly convicted of crimes obtain their freedom.

The Network is dedicated to improving the reliability of the criminal-justice system. Drawing on lessons from cases in which innocent persons were convicted, the Network promotes study and reform designed to enhance the truth-seeking function of the criminal-justice system and to prevent future wrongful convictions. Based on its experience exonerating innocent individuals and examining the causes of wrongful convictions, the Network has become keenly aware of the role that unreliable or improper evidence has played in producing miscarriages of justice.

David Ayers and Clarence Elkins were indicted, prosecuted, and convicted of crimes they did not commit based on evidence fabricated by police. They spent years behind bars, were exonerated, and successfully pursued civil claims in the Sixth Circuit. Understanding too well the costs of wrongful convictions, they have an interest in a functioning system of criminal justice.

Amici together have an interest in preventing future wrongful convictions, by ensuring that police are deterred from creating false evidence, and by ensuring courts provide relief to individuals who are prosecuted based on false evidence and reckless police investigation.[1]

SUMMARY OF THE ARGUMENT

Sanders v. Jones, No. 15-6384 (6th Cir. 2017), extends a rule of absolute testimonial immunity that bars malicious-prosecution claims in all cases involving an indictment, even where police fabricate evidence or investigate recklessly. In short, the panel imposes a judicial presumption of probable cause that cannot be rebutted.

This Court should grant the petition for rehearing and hold that an officer's grand-jury testimony does not categorically shield him from liability for malicious prosecution. The panel's contrary conclusion withdraws an important deterrent to prosecutions based on false evidence or reckless investigation. It denies a remedy to individuals suffering grave violations of their rights. And it undermines established

[1] No party or person—other than *amici* and their counsel—authored or contributed money to fund preparation or submission of this brief.

constitutional and common-law precedents and overrules a line of Sixth Circuit cases.

ARGUMENT

I. THE PROBLEM OF PROSECUTIONS BASED ON FALSE EVIDENCE AND RECKLESS INVESTIGATION

False evidence is a significant factor in wrongful convictions. The National Registry of Exonerations reports that 1,976 people convicted of crimes have been exonerated since 1989. Official misconduct contributed to 1,005 (51%) of those convictions. National Registry, *Exonerations by Contributing Factor*, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx. In an astonishing number of cases, police fabricated evidence implicating the innocent.[2]

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[2] Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash.U.L.Rev. 1133, 1139–41 (2013) (Texas vacated 50 convictions obtained when agent falsely claimed he bought cocaine from 20% of black residents); Gross, *Exonerations in the United States*, 1989–2012 at 40 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (51% of wrongful convictions involve false accusations); *id.* at 80–84 (fabrications led to group exonerations in at least 1,100 cases); Saks, *Model Prevention and Remedy of Erroneous Convictions Act Preface*, 33 Ariz.St.L.J. 665, 673–74 (2001) (police misconduct contributed to 44% of wrongful convictions); Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*,

Police access evidence and witnesses before judges and prosecutors, search homes and citizens, call on laboratories for forensic evidence, and choose which leads to pursue. These powers used lawfully are essential to public safety. But as Judge Kozinski explained recently, these powers also give police "a unique opportunity to manufacture or destroy evidence, influence witnesses, extract confessions, and otherwise direct the investigation so as to stack the deck against people they believe should be convicted." *Criminal Law 2.0,* 44 GEO. L.J. ANN. REV. CRIM. PROC iii, x (2015). Fabricated evidence takes many forms, including false reports, physical evidence, confessions, and witness accounts.[3]

In *amici*'s experience, fabricated evidence and reckless investigation infect every stage of criminal proceedings and prevent all

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34 Loy. L.A.L.Rev. 545, 549 (2001) (describing perjury and planting evidence by L.A. police); Chin & Wells, *'Blue Wall of Silence,'* 59 U.Pitt.L.Rev. 233, 235 (1998) (Mollen Commission found "police falsification" in New York was one of "most common forms of police corruption facing the nation's criminal justice system").

[3] Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis.L.Rev. 35, 95-98; Giannelli, *Wrongful Convictions and Forensic Science*, 86 N.C.L.Rev. 163, 168-69 (2007); Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U.Chi.L.Rev. 1119, 1126-29 (2003); Slobogin, *Testilying*, 67 U.Colo.L.Rev. 1037 (1996).

actors in the system from doing their jobs. Fabrications cause investigators to pursue bad leads, leaving real perpetrators on the loose. Kozinski, *supra*, at xvi (Michael Morton exonerated after 25 years by DNA, which showed the real perpetrator had committed other murders). Pretrial proceedings are dominated by evidence provided by police, and bad evidence corrupts litigation on motions to quash, suppress, and dismiss. Slobogin, *supra*, at 1042-43. The same is true of plea negotiations, which account for the vast majority of convictions. Stern, *Regulating the New Gold Standard of Criminal Justice*, 52 Harv. J. Legis. 245 (2015). False evidence affects the judgment of judges, jurors, prosecutors, and attorneys involved in grand juries, trials, appeals, and post-conviction proceedings. Finally, false police investigations undermine community respect for police and adherence to law. Drash, *Killing of Laquan McDonald: Dashcam Video vs. Police Account*s, CNN (2015); Tyler, *Psychology of Procedural Justice and Cooperation*, ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (2013).

Examples of wrongful arrest, prosecution, and conviction based on false evidence and reckless investigation abound, in the Sixth Circuit and beyond. For example, David Ayers, a signatory here, spent 12 years

in prison for a murder he did not commit because of a false witness statement fabricated by police. *Ayers v. Cleveland*, 773 F.3d 161 (6th Cir. 2014). As Judge Kozinski notes, Ricky Jackson of Ohio "spent 39 years behind bars based entirely on the eyewitness identification of a 12-year-old boy who … failed to pick Jackson out of a lineup." Kozinski, *supra*, at xi. That boy was provided information about the crime by police and "hid the lies for years [because] detectives told him that if he mentioned what he did, they would put his parents in prison for perjury." Ohio Innocence Project, *OIP Gets Triple Exoneration*, http://www.law.uc.edu/oip/ricky-jackson. Clarence Elkins, another of *amici*, was convicted of murder and sentenced to life based on a false victim statement, where police knew the real perpetrator all along. *Elkins v. Summit County*, 615 F.3d 671 (6th Cir. 2010). In each case, police fabricated evidence and presented it at the grand jury and trial, securing indictment and conviction.

II. *SANDERS* CONFLICTS WITH CONSTITUTIONAL AND COMMON-LAW PRECEDENTS, REMOVES AN IMPORTANT DETERRENT, AND DENIES REDRESS TO VICTIMS

The panel decision bars an entire class of claims that allege violations of constitutional and common-law rights. The Supreme Court

has recognized repeatedly that the Constitution prohibits detention without probable cause following issuance of legal process. *Malley v. Briggs*, 475 U.S. 335 (1986); see also *Kalina v. Fletcher*, 522 U.S. 118 (1997), *Gerstein v. Pugh*, 420 U.S. 103 (1975). Malicious-prosecution suits under section 1983 are allowed routinely in federal courts. *Sanchez v. Hartley*, 810 F.3d 750 (10th Cir. 2016); *Webb v. United States*, 789 F.3d 647 (6th Cir. 2015); *Hernandez-Cuevas v. Taylor*, 723 F.3d 91 (1st Cir. 2013); *Swartz v. Insogna*, 704 F.3d 105 (2d Cir. 2012); *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012); *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012); *Grider v. Auburn*, 618 F.3d 1240 (11th Cir. 2010); *Pitt v. D.C.*, 491 F.3d 494 (D.C. Cir. 2007); *Gallo v. Philadelphia*, 161 F.3d 217 (3d Cir. 1998); *Freeman v. Santa Ana*, 68 F.3d 1180 (9th Cir. 1995).[4] These constitutional suits are grounded in bedrock common-law tradition. *Heck v. Humphrey*, 512 U.S. 477 (1994) (exploring roots of malicious prosecution); 3 Blackstone, *Commentaries*, at *126-27 (discussing royal writ trespass on the case). Despite these

[4] The Seventh Circuit's divergent view is before the Supreme Court in *Manuel v. City of Joliet*, No. 14-9496.

deep roots, the panel declares malicious prosecution a dead letter in cases where grand juries indict.[5]

The panel's bar to malicious-prosecution claims not only undermines constitutional and common-law precedents, it also removes a critical deterrent to misconduct. The Court has said "[i]t is almost axiomatic that the threat of damages has a deterrent effect." *Carlson v. Green*, 446 U.S. 14, 21 (1980); *Owen v. Independence*, 445 U.S. 622, 651 (1980) ("A damages remedy ... is a vital component of any scheme for vindicating cherished constitutional guarantees[.]")[6] Overturning the panel and allowing malicious-prosecution suits against officers who fabricate evidence or investigate recklessly—regardless whether they later testify before a grand jury—would make plain that false evidence has no place in our courts. It would deter police misconduct and protect the integrity of criminal proceedings occurring each day in this circuit.

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[5] A hypothetical shows the panel's rule has no limit: Officer Rogue fabricates the very fact that a killing occurred and testifies at a grand jury that Innocent Plaintiff committed the murder, securing an indictment. Months later, prosecutors discover Officer Rogue fabricated the crime and drop charges. The panel would deny Innocent Plaintiff a malicious-prosecution claim. Constitutional and common-law precedents cannot countenance that result.

[6] See also Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv.L.Rev. 1731 (1991); Standen, *The Exclusionary Rule and Damages*, 2000 B.Y.U.L.Rev. 1443 (2000).

The panel's bar to malicious-prosecution claims also leaves individuals who suffer grave violations of their rights without remedy. For examples of victims who may have been denied a remedy under the panel's rule, see *Webb*, 789 F.3d at 659; *Manganiello v. N.Y.*, 612 F.3d 149, 160–61 (2d Cir. 2010); *Pitt*, 491 F.3d at 511; *Hernandez-Cuevas*, 723 F.3d at 99–100. A malicious-prosecution claim is an essential remedy for seizures without probable cause during the pre-trial period.[7]

III. THE PANEL OVERRULED SIXTH CIRCUIT PRECEDENTS

This Court has long recognized a "constitutionally cognizable claim of malicious prosecution under the Fourth Amendment, which encompasses wrongful investigation, prosecution, conviction, and incarceration." *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). The panel overruled precedents permitting malicious-prosecution claims where police present false evidence to grand juries. Slip op. at 2 ("The issue compels us to revisit the test applied in *Webb* ... and other

[7] The panel distinguished *Coggins v. Buonora*, 776 F.3d 108 (2d Cir. 2015), noting that *Coggins* involved fabricated evidence, while Sanders did not allege fabrication. Slip op. at 18. But the panel's rule that an indictment irrefutably establishes probable cause logically applies equally to claims based on fabricated evidence.

Sixth Circuit cases requiring an indicted plaintiff to present evidence that the defendant provided false testimony to the grand jury.").

Webb recently permitted a malicious-prosecution claim to proceed to trial, concluding correctly that the judicial presumption of probable cause can be rebutted with evidence that defendants lied to the grand jury. 789 F.3d at 663. The officer's false grand-jury testimony was used in *Webb* for the limited purpose of showing at summary judgment that the indictment did not conclusively establish probable cause. The officer's liability at trial will be based on evidence that probable cause was lacking or that false evidence was fabricated prior to the grand jury, not on the grand-jury testimony.

Webb's approach comports with *Rehberg v. Paulk*'s grant of immunity for testimony at the grand jury, but also *Rehberg*'s explicit denial of immunity for police misconduct prior to the grand jury. 566 U.S. 356, 370 n.1 (2012). *Webb* also adheres to the Supreme Court's teaching that absolute immunity is a rare exception to the principle that police misconduct is governed by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Finally, *Webb*'s approach confirms the rule that absolute immunity is a protection from liability for particular

misconduct, and not a doctrine that renders evidence of that misconduct inadmissible for all purposes. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (absolute immunity did not bar evidence of misconduct used for other purposes); *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979) ("[Absolute] immunity does not require the exclusion of ... acts from evidence but merely protects ... from liability for those acts."); *Avery v. Milwaukee*, 2017 WL 396578, *7-8 (7th Cir. 2017). Litigants can use evidence about what occurred at a grand jury to rebut a judicial presumption that an indictment demonstrates probable cause, even if testimonial immunity prevents that evidence from being used as the basis for liability at trial.

Many of this Court's past cases, which like *Webb* allowed malicious-prosecution claims to proceed despite an indictment, are overruled by the panel decision. *Ayers*, 773 F.3d 161; *Mott v. Mayer*, 524 Fed. App'x 179 (6th Cir. 2013); *Gregory v. Louisville*, 444 F.3d 725 (6th Cir. 2006); *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999). As are past cases allowing such claims to proceed despite findings of probable cause at preliminary hearings. *Sykes*, 625 F.3d 294; *Hinchman v. Moore*, 312 F.3d 198 (6th Cir. 2002); *Darrah v. Oak Park*, 255 F.3d 301 (6th Cir.

2001). These cases recognized that probable cause must be examined *de novo* in the face of evidence that a prior finding of probable cause was procured by false evidence. *Id.* at 311.

The panel concluded it was "not bound by these prior circuit decisions because, unlike in those cases, the defense of absolute immunity is squarely before us." Slip op. at 17; *id.* ("None of [the past] cases … cited *Rehberg* or even mentioned the issue of absolute immunity[.]"). But past cases did discuss and reject absolute immunity defenses. *Gregory*, 444 F.3d at 738 ("This Circuit … has held that absolute testimonial immunity does not relate backwards to protect a defendant for any activities he allegedly engaged in prior to taking the witness stand for his testimony."); *Spurlock*, 167 F.3d at 1001 (same); *Hinchman*, 312 F.3d at 205 (same). And they adhered to *Rehberg*'s teaching that police who fabricate evidence do not enjoy immunity simply because they later testify. 566 U.S. at 370 n.1 (2012); *Royse v. Wilbers*, 2016 WL 5682710 (6th Cir. 2016) (distinguishing claims based solely on grand-jury testimony from those based on misconduct outside of the grand jury).

The Sixth Circuit's approach to malicious prosecution prior to *Sanders* properly interpreted long-standing Supreme Court precedents, concurred with sister circuits, and upheld critical constitutional and common-law protections for individuals prosecuted based on reckless police investigation and fabricated evidence. The full Court should grant rehearing and ensure that malicious-prosecution claims are not categorically barred following an indictment. Doing so will promote fairness in our criminal-justice system.

CONCLUSION

For these reasons, this Court should grant the petition for rehearing.

RESPECTFULLY SUBMITTED,

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APPENDIX A

The following are member organizations of the Innocence Network:

- The Actual Innocence Clinic at the University of Texas
- After Innocence
- Alaska Innocence Project
- Association in Defense of the Wrongly Convicted (Canada)
- Arizona Innocence Project
- Boston College Innocence Program
- California Innocence Project
- Center on Wrongful Convictions
- Committee for Public Counsel Services Innocence Program
- Connecticut Innocence Project
- Downstate Illinois Innocence Project
- Duke Center for Criminal Justice and Professional Responsibility
- The Exoneration Initiative
- Georgia Innocence Project
- George C. Cochran Mississippi Innocence Project
- Griffith University Innocence Project (Australia)
- Hawaii Innocence Project
- Idaho Innocence Project
- Illinois Innocence Project
- Innocence and Justice Project at the University of New Mexico School of Law
- Innocence Institute of Point Park University
- Innocence Network (United Kingdom)
- Innocence Project Arkansas
- Innocence Project of Florida
- Innocence Project of Iowa
- Innocence Project of Minnesota
- Innocence Project at UVA School of Law

APPENDIX A (cont.)

- Innocence Project New Orleans
- Innocence Project New Zealand (New Zealand)
- Innocence Project Northwest Clinic
- Innocence Project of South Dakota
- Innocence Project of Texas
- Irish Innocence Project at Griffith College (Ireland)
- Justice Brandeis Innocence Project
- Justice Project, Inc.
- Kentucky Innocence Project
- Life After Innocence
- Medill Innocence Project
- Miami Innocence Project
- Michigan Innocence Project
- Mid-Atlantic Innocence Project
- Midwestern Innocence Project
- Mississippi Innocence Project
- Montana Innocence Project
- Nebraska Innocence Project
- New England Innocence Project
- New York Law School Post-Conviction Innocence Clinic
- North Carolina Center on Actual Innocence
- Northern Arizona Justice Project
- North California Innocence Project
- Office of the Public Defender (State of Delaware)
- Office of the Ohio Public Defender
- Wrongful Conviction Project (State of Ohio)
- Ohio Innocence Project
- Oklahoma Innocence Project
- Oregon Innocence Project

APPENDIX A (cont.)

- Osgoode Hall Innocence Project (Canada)
- Pace Post-Conviction Project
- Palmetto Innocence Project
- Pennsylvania Innocence Project
- Reinvestigation Project (Office of the Appellate Defender)
- Resurrection After Exoneration
- Rocky Mountain Innocence Center
- Sellenger Centre Criminal Justice Review Project (Australia)
- Texas Center for Actual Innocence
- Texas Innocence Network
- Thomas M. Cooley Law School Innocence Project
- Thurgood Marshall School of Law Innocence Project
- University of Baltimore Innocence Project Clinic
- University of British Columbia Law Innocence Project (Canada)
- University of Leeds Innocence Project (UK)
- Wake Forest University Law School Innocence and Justice Clinic
- Wesleyan Innocence Project
- West Virginia Innocence Project
- Wisconsin Innocence Project
- Wrongful Conviction Clinic at Indiana University

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(G)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b) because this brief is 2,598 words in length, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1). In addition, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because this brief has been prepared in using Microsoft Word 2010 and is set in Century Schoolbook typeface, 14-point font.

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