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Do Two Wrongs Protect a Prosecutor?

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Do Two Wrongs Protect a Prosecutor?

BY PETER A. JOY AND
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May a former criminal defendant bring a civil rights action against a prosecutor who fabricated evidence during an investigation and then introduced that evidence against the defendant at trial? The Seventh and Second Circuits have divided in answering this question. On November 4, 2009, the Supreme Court heard oral argument in an Eighth Circuit case raising this question, *Pottawattamie County v. Harrington*, 547 F.3d 922 (8th Cir. 2008), cert. granted, 129 S. Ct. 2002 (April 20, 2009), and many expected the Court to resolve the circuit split later this term. But on January 4, 2010, the Court dismissed the case and the lawyers announced a \$12 million settlement. Lower federal courts outside the Second and Seventh Circuits will thus continue to have to choose between two strikingly different approaches to the prosecutorial immunity question that was central to the *Pottawattamie* case.

Case Background

A jury convicted the plaintiffs in *Pottawattamie County* of the murder of a security guard at an Iowa car dealership, based largely on the testimony of a 16-year-old cooperating witness with a long criminal record. The trial judge sentenced the defendants to life imprisonment. In 2003, the Iowa Supreme Court overturned the convictions due to the prosecution's failure to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The state's primary witness recanted, saying he lied to gain reward money and avoid being charged himself with the security



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guard's murder.

Both the trial and appellate court opinions describe in detail serious allegations concerning the key witness's testimony. In regard to bias, he had several incentives to lie: a \$5,000 reward, avoiding being charged with murder, and receiving help from the prosecutor with other charges pending against him. He implicated the plaintiffs only after prompting by the defendant prosecutors. The witness also made many inconsistent statements, changing his "story" multiple times and implicating other people before implicating the plaintiffs. In regard to veracity, several of the statements he made prior to implicating the plaintiffs were known to be demonstrably false. In addition, he lacked knowledge of important details of the crime. For example, he first stated the guard had been killed with a pistol, then with a 20-gauge shotgun, and finally, after being told a 12-gauge shell had been found at the crime scene, with a 12-gauge shotgun. The plaintiffs alleged that, aware of these weaknesses, the defendants coerced this malleable witness into implicating the plaintiffs, both African American and neither local residents, and exonerating the initial primary suspect, a local white man. The defendant prosecutors then introduced the testimony at trial, resulting in conviction.

Ethics Provisions

Regardless of whether immunity shields a prosecutor from a civil rights suit, the misconduct alleged in such cases, if proven, typically violates a number of ethics rules. Fabricating evidence and counseling or assisting a witness to testify falsely violates Model Rule 3.4(b). Offering fabricated testimony knowing it to be false violates Model Rule 3.3(a)(3). Pursuing a case based on fabricated evidence violates Model Rule 3.8(a), and failure to reveal exculpatory evidence violates Model Rule 3.8(d).

In addition to these specific ethics rules, it is a violation of Model Rule 8.4(a) to violate an ethics rule by knowingly assisting or inducing another to do so, or to do so through the acts of another. Thus, a prosecutor who advises the police to falsify evidence is ethically culpable. Rule 8.4(d) prohibits a lawyer from engaging in conduct prejudicial to the administration of justice. Falsifying evidence or using false evidence could easily qualify as conduct prejudicial to the administration of justice.

Prosecutorial Immunity

A key issue in the *Pottawattamie County* case is whether the defendants are entitled to absolute immunity or qualified immunity in relation to the alleged fabrication misconduct. Absolute immunity, as the phrase suggests, insulates the prosecutor from civil liability even if the prosecutor engaged in the alleged misconduct. If absolute immunity applies, a case against a prosecutor is terminated at a very early point, often through summary judgment. Under qualified immunity, by contrast, the prosecutor has immunity only for discretionary actions that do not “violate clearly established statutory or constitutional rights of which a reasonable person would have known.” (*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).) If qualified immunity is applicable, a case is likely to proceed to discovery and possibly to trial to determine the factual issues presented by that defense.

The seminal Supreme Court case dealing with prosecutor immunity is *Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Imbler* and its progeny, the most recent of which is *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), the Supreme Court has held that whether a prosecutor has absolute immunity or qualified immunity depends both on the type of task the prosecutor is performing and when that task occurs. If the task entails *advocacy*, absolute immunity is granted. For example, in its recent *Van de Kamp* opinion, the Court stated that absolute immunity attaches “when a prosecutor prepares to initiate a judicial proceeding” or “appears in court to present evidence in support of a search warrant application.” (*Id.* at 861.)

If the prosecutor’s task when the alleged misconduct occurred involves *investigation* or *administration*, then qualified immunity applies. As examples of conduct to which qualified immunity applies, the *Van de Kamp* Court pointed to a prosecutor making statements to the press or acting “as a complaining witness in support of a warrant application.” (*Id.*)

Timing helps distinguish advocacy from investigation and administration and thus is a factor in marking the line between absolute and qualified immunity. The Court has indicated that advocacy cannot occur prior to the establishment of probable cause to arrest. “A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.” (*Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).)

Policy Concerns

A major theme in the *Imbler* line of cases is the array of pragmatic policy concerns raised by immunity for prosecutors. The possibility of being held personally liable would create a conflict of interest for prosecutors, tempting them not to prosecute valid cases out of fear of being subjected to a later lawsuit. Without immunity, limited public resources in the form of prosecutor time and energy would be diverted from pursuing criminals to defending themselves in lawsuits. Another concern is that without immunity, the number of invalid cases raising spurious claims of wrongdoing might overwhelm prosecutorial resources.

In response, those hostile to prosecutorial immunity point out that absolute immunity leaves those genuinely wronged by prosecutor misconduct without compensation for often substantial injuries. Prosecutorial immunity also undermines specific and general deterrence of prosecutorial wrongdoing, the frequency and severity of which have been illustrated by many highly publicized wrongful convictions in recent decades. Prosecutorial immunity may also discourage supervisory prosecutors from monitoring the conduct of line prosecutors.

Proponents of prosecutorial immunity counter the claim that absolute prosecutorial immunity undermines deterrence of prosecutorial wrongdoing by arguing that the threat of ethical disciplinary sanctions fills the deterrence gap. Critics of prosecutorial immunity respond by pointing to the dramatic under-enforcement of ethics rules against prosecutors across the country. The plaintiffs in the *Pottawattamie County* case, for example, pointed out in their Supreme Court brief that, despite the fact that the Iowa Supreme Court found that the defendants in the case had violated their duty under *Brady v. Maryland*, and thus violated Iowa’s version of Model Rule 3.8(d), the prosecutors were not even investigated for ethical discipline much less disciplined.

Investigation or Advocacy?

The distinction between advocacy and investigation is central to resolution of the central question posed in the *Pottawattamie County* case. On which side of this line does the plaintiffs’ fabrication charge fall? The trial court found that qualified immunity applied to the defendants’ conduct *prior to the filing of charges*, but that absolute immunity applied to the allegations that they failed

to disclose exculpatory evidence and coerced additional “jailhouse informant” witnesses *after the filing of charges*. (McGhee v. Pottawattamie County, 475 F. Supp. 2d 862 (S.D. Iowa 2007).) The Eighth Circuit affirmed both of these conclusions. (McGhee v. Pottawattamie County, 547 F.3d 922 (8th Cir. 2008).)

The Eighth Circuit’s affirmance is consistent with the Second Circuit opinion of Judge Jon O. Newman in *Zahrey v. Coffee*, 221 F.3d 342 (2d Cir. 2000), and at odds with the Seventh Circuit opinion of Judge Frank Easterbrook in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994). Despite the fact that the alleged fabrications in *Zahrey* and *Buckley* took place while the prosecutors were acting as investigators, the cases disagree on whether such a fabrication constituted a constitutional violation. Judge Easterbrook found that it did not, while Judge Newman found that it did.

Judge Easterbrook offered several arguments in support of his conclusion in favor of the defendant prosecutors in *Buckley*. He noted that “the exchange of money for information” as well as police and prosecutors making “promises to go easy” with witnesses in return for cooperation are commonplace and do not in and of themselves violate the Constitution. He also noted that coercion of a witness violates the witness’s constitutional rights, but not the rights of another person whom the coerced witness implicates. The implicated person’s rights are violated only if and when such coerced testimony is used against the defendant in a judicial proceeding. Such use by a prosecutor at trial constitutes advocacy and qualifies for absolute immunity. When the same prosecutor creates fabricated evidence during an investigation and then uses it at trial, Judge Easterbrook placed the “location” of the constitutional violation in the advocacy phase of the case and thus subject to absolute immunity.

In support of this “location” assessment, Judge Easterbrook offered a causation analysis. If a prosecutor fabricates evidence in the investigative phase and then introduces that evidence at trial, Judge Easterbrook saw the subsequent wrongful use at trial as a superseding act breaking the chain of causation between the investigative fabrication and the plaintiff’s ultimate loss of liberty. Easterbrook found that this break in the causal chain effectively insulates the prosecutor from liability for the original fabrication while absolute immunity shields the prosecutor from liability for

using the fabricated evidence at trial. In essence, in Judge Easterbrook’s view, a second wrong of using fabricated evidence at trial protects a prosecutor from liability for a prior wrong of fabricating the evidence.

Judge Newman, writing for a unanimous Second Circuit panel, disagreed both with Judge Easterbrook’s reasoning and the result to which it leads, as had Judge Fairchild of the Seventh Circuit in dissenting from Judge Easterbrook’s opinion in *Buckley*. Both Judge Newman and Judge Fairchild concluded that a defendant does state a constitutional claim if he or she can show that the prosecutor’s investigatory fabrication caused the defendant to be charged and tried.

Judge Newman found that “the manufacture of false evidence” by any governmental official is a due process violation. Citing the language of the Fifth and Fourteenth amendments, he agreed with Judge Easterbrook that such a due process violation is not actionable unless it causes a deprivation of liberty.

Unlike Judge Easterbrook, though, Judge Newman did not find that the prosecutor’s use of the fabricated evidence at trial broke the causal chain from the earlier fabrication and insulated the prosecutor from liability for that fabrication. In deciding that a prosecutor’s use of fabricated evidence does not break the chain of causation in this situation, Judge Newman emphasized that such subsequent use was not a truly independent act and that it was foreseeable by the prosecutor at the time the evidence was fabricated. He relied heavily on cases from the Fifth and Second Circuits, each of which had rejected the sort of causation reasoning adopted by Judge Easterbrook.

Thomas v. Sams, 734 F.2d 185 (5th Cir. 1984), involved a mayor who was also an ex officio magistrate and municipal court judge. Acting as mayor, the defendant investigated and in bad faith signed a complaint against the plaintiff. The mayor then issued an arrest warrant pursuant to which the plaintiff was arrested. The mayor acted in a judicial capacity and was thus entitled to absolute immunity for issuance of the arrest warrant. But the Fifth Circuit concluded that he could nonetheless be held liable for his earlier nonjudicial investigative acts and swearing out of the criminal complaint, neither of which were within absolute immunity. The *Thomas* court specifically rejected the defendant’s argument that his immunized ju-

dicial act of issuing the arrest warrant broke the causal chain between his bad faith swearing out of the criminal complaint and the plaintiff's arrest. Because both acts were done by the same person, there was no "independent decision" of the sort that may break a causal chain. In short, the court found that the defendant "may not inculcate" his earlier wrongful conduct by a "pen stroke" in issuing the arrest warrant.

White v. Frank, 855 F.2d 956 (2d Cir. 1988), presented the same causation question of whether the causal chain between a government official's wrongful conduct and a plaintiff's loss of liberty is severed by a later wrongful act by the same official. In *White*, a police officer provided false testimony as a complaining witness, then repeated that false testimony as an ordinary witness. He had absolute immunity as an ordinary witness, but not as a complaining witness. The Second Circuit in *White* rejected the argument that the officer's immunized testimony broke the causal chain stemming from his earlier wrongful con-

able. Judge Newman reasoned that "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty." (*Zahrey v. Coffee*, 221 F.3d at 353.)

Our View

We hope federal courts that confront this issue in the future recognize the analysis and reasoning of Judge Newman in *Zahrey* and Judge Fairchild's dissent in *Buckley*, as well as the analogous reasoning and analysis of the Fifth Circuit in *Thomas* and the Second Circuit in *White*, as both more persuasive and more pragmatic than that used by Judge Easterbrook in *Buckley*.

The prosecutor who intentionally fabricates evidence in the investigative stage is clearly blameworthy and dangerous. If that prosecutor then knowingly uses that fabricated evidence to indict and convict a defendant, the prosecutor commits

The prosecutor who intentionally fabricates evidence in the investigative stage is blameworthy. If he or she then uses that evidence to convict, that prosecutor is dangerous.

duct. The court refused to allow the defendant in *White* effectively "to transpose the immunity" of an ordinary witness onto his prior acts as a complaining witness.

In rejecting the Easterbrook causation analysis, Judge Newman in *Zahrey* noted that a government official who fabricated evidence—whether a police officer or a prosecutor—would *not* escape liability if he or she then provided that fabricated evidence to an unsuspecting prosecutor who in good faith used it to wrongfully convict someone. Under the Easterbrook analysis, a prosecutor acting in bad faith as an advocate who uses fabricated evidence the prosecutor previously created could insulate himself or herself from liability for the investigative misconduct while the police officer or prosecutor who handed fabricated evidence to an unsuspecting prosecutor would remain li-

additional blameworthy and dangerous acts. Prosecutors argue every day at sentencings throughout the country that repeated criminal acts are more deserving of punishment and show greater need for deterrence than isolated crimes. Similarly, the use of fabricated evidence in cases such as *Pottawattamie County* aggravates the prosecutor's blameworthiness and danger, increasing both the retributive and deterrent justifications for imposing monetary liability. Under Judge Easterbrook's approach, though, the blameworthy and dangerous acts of using fabricated evidence to indict and again to convict has the odd effect of insulating the prosecutor from civil liability for the earlier wrongful conduct of fabricating evidence. If two wrongs don't make a right, neither should they protect a prosecutor from answering for wrongdoing. ■