



## ABSOLUTE IMMUNITY *for* PROSECUTORS

### HISTORY *and* BACKGROUND

In 1976, the Supreme Court decided that prosecutors have absolute immunity—and so cannot be sued—for misconduct related to their advocacy in the courtroom. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Court expressed concern that if prosecutors could be sued for decisions they make, they may start second-guessing themselves: “[It is] better 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.” *Id.* at 428. That means prosecutors cannot be sued for injuries caused by their own misconduct—for example, coercing witnesses to lie, hiding evidence of innocence, or fabricating evidence of guilt—even when they’ve intentionally violated an individual’s constitutional rights or caused a wrongful conviction.

This absolute protection for prosecutors was made up wholesale by judges; it does not appear in the Constitution or in any law passed by Congress. In fact, Section 1983 (the Civil Rights Act) expressly says “every person” who violates the rights of another “shall be liable to the party injured.” 42 U.S.C. § 1983. But courts have read in a special exception for prosecutors. In other words, judges (all of whom are lawyers and many of whom are former prosecutors<sup>1</sup>) decided that prosecutors should have complete immunity from suit, no matter how *intentionally* wrongful their conduct. By comparison, qualified immunity for police officers protects an officer only if his conduct was not clearly wrong.

**Here’s a non-exhaustive list of the type of misconduct for which prosecutors are entitled to absolute immunity because these actions purportedly relate to their role in the judicial process:**

- **Falsifying evidence**
- **Coercing witnesses**
- **Soliciting and knowingly sponsoring perjured testimony**
- **Withholding exculpatory evidence and/or evidence of innocence**<sup>2</sup>
- **Introducing evidence known to be illegally seized at trial**

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<sup>1</sup> A recent study of the federal judiciary determined that “the federal judicial is massively tilted in favor of former prosecutors,” with judges who were formerly prosecutors outnumbering former criminal defense attorneys four to one. See Clark Neily, *Are A Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INSTITUTE (Sept. 18, 2019),

<https://www.cato.org/publications/studies/are-disproportionate-number-federal-judges-former-government-advocates#procedure-findings>. There has also been a “threefold increase in the number of former prosecutors on the [Supreme] Court” since 1974, with six of the current nine Justices having prior prosecutorial experience. Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, MINN. L. REV. 100, no. 5 1985, 1992 (2016), [http://www.minnesotalawreview.org/wp-content/uploads/2016/06/Crespo\\_Online1.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2016/06/Crespo_Online1.pdf).

<sup>2</sup> Under the Supreme Court case *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have a constitutional obligation to turn over evidence that’s favorable to a defendant—including evidence of innocence—or evidence that discredits a state’s witness—for example, evidence that witness is receiving a deal in exchange for testimony.

- **Initiating a prosecution in bad faith (in other words, for personal reasons or with knowledge that the individual didn't commit the crime)**

Absolute immunity for prosecutors is especially dangerous as the current system already incentivizes prosecutors to secure convictions at all costs, with promotions, re-election, and elevation to higher office often contingent on procuring as many convictions as possible. Prosecutors enjoy an immense amount of power: they decide about charges, plea deals, even when to seek the death penalty, yet given absolute immunity they're more shielded from liability and accountability than even police officers. We *should* want prosecutors to think twice about pursuing unlawful conduct in pursuit of a conviction, but because of absolute immunity there's no deterrent under the law against overzealous prosecutors crossing the line. In theory, prosecutors can be held accountable in other ways (for example, through disciplinary actions by the bar) but that pretty much never happens.<sup>3</sup> Indeed, a study by the Innocence Project of 75 DNA exonerations—where the defendants were found to be unquestionably innocent—found that prosecutorial misconduct contributed to almost half of those wrongful conviction, yet none of those prosecutors faced any serious professional sanctions.<sup>4</sup>

Not only do individual prosecutors enjoy absolute immunity, but the Supreme Court in *Connick v. Thompson*, 563 U.S. 51 (2011), held that a district attorney's **office** cannot be sued for failing to train prosecutors on their duty to disclose exculpatory evidence (like evidence of innocence). The plaintiff John Thompson spent 18 years wrongfully incarcerated—14 of those on death row—even though prosecutors had a report showing that the blood type of the true perpetrator did not match Thompson's. After he was exonerated, Thompson brought a civil case against the Orleans Parish District Attorney's Office to seek damages for the 18 years he spent wrongfully incarcerated. The jury found the DA's office failed to properly train its prosecutors about their constitutional duty to disclose evidence and awarded Thompson \$14 million. But the Supreme Court *reversed* that award and removed yet another avenue for holding prosecutors accountable. Notably, one of the prosecutors in Thompson's case was responsible for sending five other men to death row—of those six men, five ended up having their convictions reversed because of prosecutorial misconduct. But none can bring a lawsuit against that prosecutor individually or his office.<sup>5</sup>

### EXAMPLES of PROTECTED PROSECUTORIAL MISCONDUCT

*Bernard v. County of Suffolk*, 356 F.3d 495 (2d Cir. 2004): in this case, prosecutors were found to be entitled to absolute immunity for their decision to prosecute town officials regardless of whether the prosecution was initiated solely because of illegitimate political motivations. The court held that, “[c]ertainly, racially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity....[R]egardless of defendants' political motives, absolute immunity shields them from suit pursuant to § 1983.” *Id.* at 504. *Kulwicki v.*

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<sup>3</sup> See Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013), [https://www.huffpost.com/entry/prosecutorial-misconduct-new-orleans-louisiana\\_n\\_3529891](https://www.huffpost.com/entry/prosecutorial-misconduct-new-orleans-louisiana_n_3529891), discussing “a growing body of empirical data showing that the legal profession isn't really addressing prosecutorial misconduct at all.” For example, USA Today conducted a six-month investigation of 201 cases involving misconduct by federal prosecutors and found that only one was prosecutor was barred even temporarily from practicing law for misconduct.

<sup>4</sup> See Balko, *supra*. For another example, see INNOCENCE PROJECT NEW ORLEANS, *Overburdened Prosecutors = Cursory Process*, <https://ip-no.org/what-we-do/advocate-for-change/overburdened-institutions/prosecutors/>, finding that of the 29 Louisiana exonerations since 1990 where the prosecutor withheld exculpatory evidence, only one prosecutor has ever been disciplined.

<sup>5</sup> You can read John Thompson's story in his own words here: John Thompson, *The Prosecution Rests, But I Can't*, N.Y. TIMES (Apr. 9, 2011), <https://www.nytimes.com/2011/04/10/opinion/10thompson.html>.

*Dawson*, 969 F.2d 1454 (3d Cir. 1992), is a similar case; there, the prosecutor brought a case against his former political rival based on personal motives but was protected from suit by absolute immunity.

***Cousin v. Small***, 325 F.3d 627 (5th Cir. 2003): in this murder case, the prosecutor intentionally suppressed evidence that the key eyewitness initially told police she couldn't see anything and wasn't wearing her contact lenses the night of the murder and so could only make out patterns and shapes, not faces (completely undermining her later identification of Shareef Cousin). Cousin also maintained that the prosecutor coerced another witness to falsely implicate him. Cousin spent over a year on death row before his conviction was overturned for prosecutorial misconduct. When he tried to sue the prosecutors for damages, the Court dismissed his case based on absolute immunity: "The need for vigorous and fearless performance of the prosecutor's duty justifies its regrettable but necessary cost, namely, that it may sometimes bar the courthouse door to potentially meritorious claims." *Cousin*, 325 F.3d. at 636; *see also State v. Cousin*, 710 So. 2d 1065 (La. 1998) (vacating Cousin's conviction based on prosecutorial misconduct).

***Mark Soderston's case***: Soderston was convicted of murder in Tulare County, CA in 1986. The DDA on his case, Phil Cline, intentionally withheld an extremely exculpatory audiotape of a witness interview. The tape was so exculpatory that the judge who heard it decades later (after it was uncovered) wrote that "an innocent man might be convicted." Tragically, Mr. Soderston had already passed away in prison. Cline was not only absolutely immune from suit for failing to turn over the tape, he was even never disciplined and was elected District Attorney in 1992. He won reelection even after the court opinion. The other prosecutor in Soderston's case went on to become a judge. *See* Radkley Balko, *Jerry Brown Vetoes*

*Bill Aimed at Holding Prosecutors More Accountable*, WASHINGTON POST (Oct. 1, 2014) (<https://www.washingtonpost.com/news/the-watch/wp/2014/10/01/jerry-brown-vetoes-bill-aimed-at-holding-prosecutors-more-accountable/>).

***Dory v. Ryan***, 25 F.3d 81 (2d Cir. 1994): in this case, the prosecutor intentionally conspired with a police officer to coerce a key witness to testify falsely against the defendant. According to the coerced witness, it was the *prosecutor*—not the police officer—who pressured him. But because the prosecutor was protected by absolute immunity, the court dismissed all claims against him, while the lawsuit could proceed against the police officer (who was entitled only to qualified immunity). The court cited *Imbler*, observing that "absolute immunity protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate. This would even include, for purposes of this case, allegedly conspiring to present false evidence at a criminal trial." *Id.* at 83.

## RECOMMENDATIONS

Here are a few key recommendations to ensure prosecutors are held accountable for their misconduct:

- First and foremost, federal and state legislatures should pass laws abolishing absolute immunity for prosecutors who engage in misconduct and prosecutor offices that have systemic issues so affected individuals can seek justice.
- Second, the legal establishment must hold prosecutors meaningfully accountable for their bad acts through direct and personal sanctions by courts and professional sanctions by bar associations, including revoking the bar licenses of prosecutors who violate their ethical duties.
- Third, prosecutors who withhold exculpatory evidence or engage in egregious misconduct that results in wrongful convictions should themselves be prosecuted for obstruction of justice.

Other important steps include creating oversight boards for prosecutor offices to monitor, censure, and report misconduct and eliminating elected prosecutorial positions.

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