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Seventh Circuit Rules Prosecutor Can Be Sued For Abusive Investigation and Misconduct

1, January 29, 2014 by [jonathanturley](#)



In an important decision on immunity, the United States Court of Appeal for the Seventh Circuit has ruled that a prosecutor is not protected by immunity for allegedly coercing false testimony that sent a man to death row 17 years ago. Two prosecutors



were accused of egregious misconduct: Lawrence Wharrie

and David Kelley. Ironically, on the same day, I filed a final brief in the Sister Wives case on this very issue before Judge Waddoups in Salt Lake City, arguing that immunity does not protect the defendant — the county prosecutor — from liability under 42 U.S.C. 1983. That filing is linked below. The new opinion from the Seventh Circuit is *Fields v. Wharrie*, 2014 U.S. App. LEXIS 1333.

The case involved the conviction in 1986 of street-gang member Nathson Fields for two murders. He was sentenced to death but granted a new trial in 1996 (I will just note that for those who complain of the long appeals in these cases, this is an example of how those appeals reveal fundamental wrongdoing and injustice ten years later). The new trial was based on the disclosure that the trial judge, Thomas Maloney, had accepted a \$10,000 bribe from Fields' co-defendant, Earl Hawkins, for his own acquittal. Maloney — showing a misplaced or belated form of honesty — later returned the money after Hawkins' conviction (and disclosure of a



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federal investigation).

The second trial resulted in the acquittal of Fields after various witnesses recanted their testimony. That trial revealed misconduct and coercion by the prosecution to secure false testimony. Fields then sued Lawrence Wharrie and David Kelley for his then 17 years of incarceration. The prosecutors insisted that they had immunity and the district court agreed. However, later on reconsideration, the court stripped Wharrie of qualified immunity for his role in the investigation.

The matter went to a Seventh Circuit panel, which included conservative icon, Richard Posner. Writing for the majority, Posner held that it would be absurd to allow such prosecutors to claim immunity in such cases. Posner writes with his usual clarity and with some passion in rejecting immunity in a case of prosecutorial immunity:

“Wharrie is asking us to bless a breathtaking injustice. Prosecutor, acting pre-prosecution as an investigator, fabricates evidence and introduces the fabricated evidence at trial. The innocent victim of the fabrication is prosecuted and convicted and sent to prison for 17 years. On Wharrie’s interpretation of our decision in Buckley, the prosecutor is insulated from liability because his fabrication did not cause the defendant’s conviction, and by the time that same prosecutor got around to violating the defendant’s right he was absolutely immunized. So: grave misconduct by the government’s lawyer at a time where he was not shielded by absolute immunity; no remedy whatsoever for the hapless victim.

In discussing the Supreme Court’s 1993 decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), Posner added that “A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as ‘preparation’ for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial.”

The “breathtaking injustice” described by Posner however was not enough for Judge Diane Sykes who wanted to extend immunity to the prosecutor.

Putting aside Sykes’ dissent, many will likely find it surprising that a prosecutor still has immunity for outrageous acts like coercion and soliciting false testimony if it occurs at trial. I have long had difficulty with that shield of immunity in cases of knowing abuses, but this case reaffirms an important protection for pre-trial conduct.

You can access the opinion: [here](#)

Here is the Brown filing: [Response to Court Order-Docketed](#)

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18 Responses

samantha

on 1, January 29, 2014 at 1:03 pm

Hooray!



1seekingjustice

on 1, January 29, 2014 at 1:05 pm

THANK GOODNESS!! Putting these judges on our <http://www.seeking-justice.org> WALL OF FAME!! Delighted the Seventh is adding to what the Ninth has started in holding prosecutors accountable for their misconduct. It's way past due.



rafflaw

on 1, January 29, 2014 at 1:14 pm

Wow. Maybe this decision will help clean up prosecutorial abuse.

Professor,

I hope it helps you in the Sister Wives litigation. I can understand that the courts do not want prosecutors to be always looking over their shoulder's so the immunity is necessary. However, when it is proven that these kind of abusive and improper activities were undertaken by the prosecutors, how can a man go to death row on false evidence promoted and introduced by the prosecutors themselves. Amazing.



1seekingjustice

on 1, January 29, 2014 at 1:20 pm

Proved intentional misconduct should not qualify for any kind of immunity at any stage. As Judge Kozinski said recently in his dissent from denial of rehearing in Olsen, "There is an epidemic of Brady violations abroad in the land." Only our Judges can put a stop to it. Congress could also pass the Fairness in Disclosure of Evidence Act. Wait until you see the book coming soon—Licensed To Lie!



Dredd

on 1, January 29, 2014 at 1:33 pm

In one of the older Tort hornbooks that professor Prosser wrote, he made a statement "I can not understand how Americans allowed the doctrine of 'the king can do no wrong' to find its way across the ocean to reinfect us with the various forms of sovereign immunity we left in England" (paraphrased).

The *Federal Court of Appeals for the Fifth Circuit* put it this way:



The Government presents an impressive array of theories which would preclude it from any liability ... we ... hold that the Government should escape unscathed ... It is often said that the doctrine of sovereign immunity is a derivative of the common law maxim "The King can do no wrong." But conceptually it is far older. Zeus himself carried an



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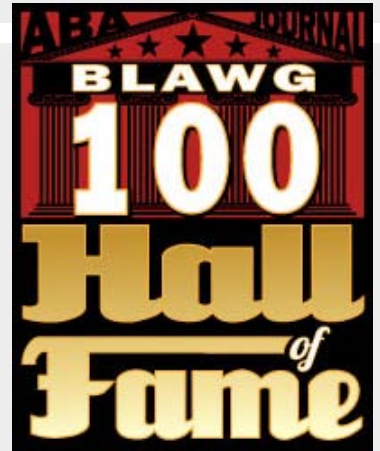


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aegis or breastplate, a buckler, and a thunderbolt which made him, the mythological sovereign, immune from all that could beset him. And common law provided its sovereign with the immunity of Zeus ... The tide of history is running clearly against the concept of sovereign immunity. The disfavor into which the doctrine has fallen was observed as far back as ... 1939 ... [and] this Court pointed out that the assault upon the citadel of immunity continues presently apace.

([The Battle of Immunities & Diseases](#)). Well, the people did not let it back into our culture, the judiciary did.

They should fix it because it brings much evil into our culture.

Richard M Nixon (Deceased)

on 1, January 29, 2014 at 1:40 pm

Reblogged this on [Dead Citizen's Rights Society](#).



SovereignMary

on 1, January 29, 2014 at 2:04 pm

Oh boy do I like this decision! I wish it could be made retroactive! Many notorious abuses have been made by prosecutors in my county jurisdiction.



nick spinelli

on 1, January 29, 2014 at 2:18 pm

Judge Diane Sykes was on the Wi. Supreme Court. She was appointed to the 7th Circuit by W. Judge Sykes has never impressed me as a judge in Wi. I know attorneys who have been before her in both venues. She's not bad, for the most part, although her opinion on this is really bad. The consensus is she's a ham n'egger. She was married to a conservative Milwaukee talk show host, Charlie Sykes. Hurrah for Posner!! Boo for Sykes.



99guspuppet

on 1, January 29, 2014 at 2:35 pm

Why shouldn't prosecutors have to look over their shoulder ? Other professionals have to.....



Anonymously Yours

on 1, January 29, 2014 at 2:38 pm

I want to see what the cop and psych have to say..... But... I think that this is a good decision and start..... The opinion didn't go far enough to strip immunity..... Of known perjured testimony.....and the active concealment.....



Mike Appleton

on 1, January 29, 2014 at 3:12 pm

The public policy underlying immunity is not served when falsified

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evidence is intentionally submitted to the court. Immunity is not intended to be a shield against perversion of the judicial process. Accordingly, no benefit is derived by protecting this sort of misconduct. To the contrary, it undermines public confidence in the justice system, and it is that confidence that provides the courts their moral, as opposed to merely functional, authority.

Having said that, what happened to the single Mulligan rule?

nick spinelli

on 1, January 29, 2014 at 3:13 pm

Clinton would used about 10 mulligans a round.

Justice Holmes

on 1, January 29, 2014 at 3:16 pm

A good first step but not far enough! When will the criminal charges be filed?

rcampbell

on 1, January 29, 2014 at 3:28 pm

A ruling like this could empty Texas' jails.

mespo727272

on 1, January 29, 2014 at 4:19 pm

There's our rules and then there's their rules. We get hit hard for the most minor of infractions; they get coddled for the most egregious of wrongdoing.

And they say we overthrew the king in 1783. I think he just changed clothes.

mespo727272

on 1, January 29, 2014 at 4:48 pm

For those students of the language interested in the word "sophistry," here's some reasoning from the dissent seeking to give the prosecutors a pass because of the timing of their malfeasance:

Constitutional rights—and the corresponding duties imposed on governmental actors—are not like the generalized rights and duties imposed by negligence law. They are implicated at specific times and in specific circumstances. As relevant here, Fields's due-process rights came into play after he was charged; the Brady disclosure duty is an aspect of the right to a fair trial, as is the broader right not to have the trial process subverted by the knowing introduction of falsified evidence. See Serino, 735 F.3d at 592; Newsome, 256 F.3d at 751–52; Buckley, 20 F.3d at 796–97. So Wharrie's act of extracting a false statement from Sumner during the investigative phase of the case did not violate Fields's due-process rights. A prosecutor who commits this kind of misconduct has behaved deplorably but has breached no constitutional duty and thus committed no constitutional wrong.



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Certainly, a government actor who intentionally seeks out false evidence to convict an innocent man has no constitutional exposure for his deeds pre-charging. That little part about not being being “deprived of life, liberty, or property, without due process of law” is just a little puffery, of course. Nothing to see there, move along.

Part of due process of law is having honest and ethical people bringing criminal charges based on real evidence and not fabricated evidence. It’s the whole process we’re after not just the part at the courthouse. You can check with Ernesto Miranda if you don’t believe me.

That’s also the founders view. Here’s a quote you might recognize on the topic:


“A single zealot may commence prosecutor, and better men be his victims”

~Thos. Jefferson

Dale

on 1, January 29, 2014 at 4:54 pm

Sue them! Heck, let’s prosecute them and lock their asses up!



BarkinDog


on 1, January 29, 2014 at 6:07 pm

Let us distinguish, when we employ the word or concept of “immunity”, between a civil suit against a state prosecutor under section 1983, and a criminal prosecution against a prosecutor.

Posner is overall a good judge. He did right here. The other judge ought to rethink some things. Perhaps someone on the blog here will send her the posts. She could attend constitutional law courses at John Marshall or the University of Chicago while she is in Chicago on the bench.

I think it would be just to prosecute this prosecutor and his co conspirators in criminal court. He should do the same amount of time as the victim here.

When his time comes to meet his maker he will not be able to talk his way out of these sins. I would hate to have to share a cell in Hell with a perp like him.



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