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The success or failure of civil rights actions filed against government officials under the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), 42 U.S.C. § 1983 (1994) ("Section 1983"), often is determined by the availability of an immunity defense. The Supreme Court has held that Section 1983 implicitly recognizes two types of immunity: absolute immunity extended to legislators and judges and qualified immunity that applies to executive branch officials such as the police. While absolute immunity shields the government-official defendant even in cases of intentional misconduct, qualified immunity *(see* Glossary) protects the defendant only if his or her actions are reasonable and do not violate clearly established law. *Anderson v. Creighton,* 483 U.S. 635 (1987).

These distinctions prompt an obvious question: Which type of immunity ought to extend to prosecutors. This question, however, has proven difficult to answer.

The argument that prosecutors should share the absolute immunity of judicial officials is based on the belief that the fear of being sued would undermine a prosecutor's performance of his or her duties. While there is little dissent from this belief, opponents of absolute immunity point out that the modern prosecutor functions in both a judicial and investigatory capacity. Critics say that to allow prosecutors to operate behind a shield of absolute immunity while involved in the investigatory phase of the criminal process would allow them to engage freely in conduct that would result in liability if undertaken by a nonprosecutorial law-enforcement official.

The Supreme Court's first occasion to address absolute prosecutorial immunity came in *Imbler v. Pachtman,* 424 U.S. 409 (1976).

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LYNNE KALINA V. RODNEY FLETCHER
DOCKET NO. 96-792

ARGUMENT DATE:
OCTOBER 7, 1997
FROM: THE NINTH CIRCUIT

Case at a Glance

A state prosecutor is absolutely immune from suit for actions the prosecutor takes as the advocate for the state in a criminal prosecution. As an investigator, however, a prosecutor is like a police officer; the prosecutor-as-investigator is protected from suit only to the extent that his or her actions do not violate clearly established law. In this case, the Supreme Court decides the type of immunity to accord a prosecutor who files criminal charges and at the same time files a false sworn statement to secure the defendant's arrest.

There the Court held that a state prosecutor had absolute immunity from a Section 1983 suit arising in the context of initiating and pursuing a criminal prosecution. The Court reasoned that the common law in 1871 when Section 1983 was enacted contained a well-settled rule of absolute prosecutorial immunity and that "the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under Section 1983." 424 U.S. at 424. The Court, however, limited its holding by noting that absolute prosecutorial immunity did not extend to all actions but only to those "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430.

The Court since *Imbler* has had several occasions to define the line between a prosecutor's judicial functions, which are absolutely immune, and investigatory or administrative functions, which receive only the ordinary qualified immunity enjoyed by executive branch officials. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court refused to extend the absolute immunity afforded to prosecutors to a police officer who allegedly submitted false information in support of a criminal complaint coupled with a request for an arrest warrant. In *Burns v. Reed*, 500 U.S. 478 (1991), **ABA PREVIEW** 142 (Jan. 25, 1991), the Court held that a prosecutor's actions stemming from his participation in a probable cause hearing were protected by absolute immunity, but his giving of advice to the police on the propriety of hypnotizing a suspect and on the existence of probable cause to arrest was not. More recently in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), **ABA PREVIEW** 203 (Feb. 5, 1993), the Court declined to extend absolute immunity to prosecutors for statements made to the press or for actions undertaken while engaged in actual investigative work prior to a suspect's arrest.

In deciding prosecutorial absolute-immunity cases, the Court has used a functional test to determine which prosecutorial conduct is and is not protected by absolute immunity. In an oft-quoted phrase, the Court has stated that it looks to "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). Thus conduct relating to the investigatory process — essentially, a police function — is not protected by absolute immunity, while actions relating to the traditional prosecutorial function, i.e., when the prosecutor functions as an officer of the court or as the advocate of the state, are protected. Until this case, however, the Court had not addressed specifically the question of whether a prosecutor's securing of an arrest warrant is a judicial or an investigatory function for purposes of the absolute-immunity defense.

ISSUE

Is a state prosecutor entitled to absolute immunity from a Section 1983 lawsuit arising from actions taken to secure an arrest warrant in conjunction with filing criminal charges against a defendant?

FACTS

On November 30, 1992, the Seattle Police Department referred a completed investigation report regarding a burglary to the prosecuting attorney of King County, Washington. The report implicated the respondent here, Rodney Fletcher, in the theft of money and computer equipment from a private school in Seattle. The case was referred to deputy prosecutor Lynne Kalina, the petitioner, who determined that criminal charges should be filed against Fletcher.

Criminal prosecutions in Washington can be initiated either by grand jury indictment or by the filing of an information. In the latter procedure, which is used in the majority of felony prosecutions in Washington, the prosecuting attorney presents criminal charges against a defendant directly to the court. Consistent with office practice and State procedures, Kalina filed charging documents against Fletcher with the King County Superior Court on December 14, 1992.

The charging documents included: 1) an information charging Fletcher with second-degree burglary; 2) a Certification for Determination of Probable Cause in which Kalina summarized the case against Fletcher and attested that the police report contained sufficient information to warrant formal charges (the "warrant request"); and 3) a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of an Arrest Warrant, and Fixing Bail. The trial court found probable cause that Fletcher committed the crime charged and issued an arrest warrant for him that same day.

Fletcher was not arrested until September 24, 1993. After examining the charging documents, Fletcher's attorney complained that Kalina's warrant request contained a number of inaccurate statements. A month later, the prosecuting attorney reviewed the evidence and then dropped all charges against Fletcher.

Fletcher subsequently filed suit in federal district court under Section 1983, charging that Kalina violated his civil rights, specifically his right to be free from unlawful arrest as guaranteed by the Fourth Amendment. In his complaint Fletcher accused Kalina of seeking an arrest warrant without probable cause and attesting to facts implicating him that she knew, or should have known, to be false. In particular Fletcher alleged that Kalina knew that no eyewitnesses linked him to the burglary, though she said in the warrant request that there were such eyewitnesses. Fletcher also alleged that Kalina knew that he was authorized to enter the school, though she cited the presence of his fingerprint at the scene as linking him to the burglary. Fletcher's lawsuit, however, did not challenge the propriety of filing the information itself, conduct that he implicitly concedes is protected by absolute immunity.

Kalina denied Fletcher's allegations pertaining to false statements in the warrant request. She also filed a motion for summary judgment *(see* Glossary), asserting that she was entitled to absolute prosecutorial immunity in this case.

The district court denied the motion, and Kalina immediately appealed to the Ninth Circuit. The appeals court affirmed, holding that Kalina's actions in signing and filing the warrant request were entitled to only qualified immunity. 93 F.3d 653 (9th Cir. 1996).

The Ninth Circuit's decision is now before the Supreme Court which granted Kalina's petition for a writ of certiorari. 117 S. Ct. 1079 (1997).

Case Analysis

The decision in this case turns on the proper characterization of Kalina's arrest-warrant request, a request made under oath by way of her supporting affidavit. If Kalina's warrant request is viewed as part of the judicial phase of the criminal proceeding against Fletcher, absolute immunity will attach; if it is seen as part of the investigatory process, a different result — qualified immunity — is the likely outcome. To decide which characterization is appropriate, the Court must decide whether to treat Kalina's warrant request as an action separate and apart from her other actions taken on December 14, 1992, the day she filed criminal charges against Fletcher.

In declining to accord absolute immunity to Kalina's warrant request, the Ninth Circuit focused solely on the request and found the logic of *Malley* controlling. In rejecting Kalina's argument that filing the warrant request simultaneously with the information made her actions those of an advocate, not an investigator, the appeals court saw no meaningful difference between a false affidavit sworn by a police officer in support of an arrest warrant and false one sworn by a prosecutor. While acknowledging that it is standard practice in Washington for the prosecutor to prepare the warrant request at issue, the Ninth Circuit noted that Washington rules do not require that the document be presented in that form. Consequently, the appeals court reasoned, if a police officer or a complaining witness attested to the warrant request, neither would be protected by absolute immunity. According to the Ninth Circuit, to allow Kalina to claim such immunity for the same action would be inconsistent with the functional analysis that the Supreme Court has applied in prosecutorial-immunity cases.

Kalina argues that the Ninth Circuit's focus on the warrant request alone was improper and misstated the prosecutor's role in Washington's criminal justice system. Since the warrant request in this case was made in conjunction with filing an information, she insists that it was clearly part of the prosecutorial, rather than investigative, process. Kalina maintains that the prosecutor's filing of a warrant request is no different than a prosecutor's appearance at a probable cause hearing, conduct held to be protected by absolute immunity in *Burns v. Reed.* In both situations, argues Kalina, the prosecutor is providing the court with a factual basis for a probable cause determination and is in no way attesting independently to the accuracy of statements presented.

If the Court is inclined to reverse the Ninth Circuit's holding, it could do so on broad or narrow grounds. A few courts in the past have found that a prosecutor's conduct in securing an arrest warrant always is subject to absolute immunity regardless of the circumstances. *See, e.g., Lerwill v. Joslin,* 712 F.2d 435 (10th Cir. 1983); *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1949).

More recent cases have followed *Imbler* and have suggested that when the prosector's participation in the request for an arrest warrant is active and occurs *prior to* bringing formal charges, the conduct is not protected by absolute immunity. *See, e.g., Ireland v. Tunis,* 113 F.3d 1435 (6th Cir. 1997); *Kohl v. Casson,* 5 F.3d 1141 (8th Cir. 1993).

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While the Court could extend or deny absolute immunity in all situations involving prosecutor-attested arrest warrants, the Court instead likely will focus on the specific situation presented here — a prosecutor executing an affidavit providing probable cause to arrest and filing the affidavit simultaneously with an information or request for indictment. This is the focus taken in the wake of the Court's *Imbler* decision by all of the circuit courts of appeals except the Ninth Circuit in this case. Under this approach, Kalina would prevail. *See, e.g., Joseph v. Patterson,* 795 F.2d 549, 555 (6th Cir. 1986) ("decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in initiating a prosecution which is protected under *Imbler*"); *Roberts v. Kling,* 104 F.3d 316, 320 (10th Cir. 1997) (absolute immunity appropriate because "the act of obtaining an arrest warrant in conjunction with the filing of a criminal complaint is functionally part of the initiation of a criminal proceeding, and therefore prosecutorial in nature").

Unless the Supreme Court fears that extending absolute immunity to this situation would create too great of an opportunity for prosecutorial abuse, which is one argument advanced by Fletcher, it likely will adopt the foregoing reasoning. Indeed in *Imbler* and subsequent cases, the Court has emphasized that certain "actions preliminary to the initiation of a prosecution and actions apart from the courtroom" are entitled to absolute immunity. 424 U.S. at 431, n. 33. As the Court said in *Buckley,* "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protections of absolute immunity." 509 U.S. at 273. Since the filing of the information by Kalina clearly is protected by absolute immunity and since common sense suggests that often it will be difficult to implement a prosecution without an arrest, the challenged procedure in this case would seem to fall within the category of absolutely protected conduct described by the Court in its previous opinions.

The attention the *Imbler* Court devoted to historical immunities of prosecutors suggests that the arguments in this case would have homed in on the question of whether or not prosecutors were absolutely immune from prosecution for false arrest when Section 1983 became law in 1871. However neither party addresses this issue, and history did not appear to be a factor in the Ninth Circuit's decision.

The absence of a historical argument may be due in part to the fact that Section 1983's historical record is very sketchy on the issue of prosecutorial immunity in the context of arrest warrants. The first reported case in anyway directly related to this issue did not occur until a quarter century after Section 1983 was adopted. *Griffith v. Slinkard,* 44 N.E. 1001 (Ind. 1896). At the very least it can be argued that the absolute immunity from suits for defamation and false prosecution enjoyed by prosecutors under the common law extended to false arrest as well, as one commentator of the day noted. M.L. Newell, A TREATISE ON THE LAW OF FALSE IMPRISONMENT AND THE ABUSE OF LEGAL PROCESS (1892).

SIGNIFICANCE

This case has generated a great deal of interest on the part of prosecutors and other government lawyers. Friend-of-the-court briefs on behalf of Kalina have been filed by the United States Department of Justice and the attorneys general of 28 individual states, among others.

Kalina and her supporters are concerned that if the Supreme Court limits the immunity of prosecutors in cases like this one, prosecutorial efforts will be hampered, particularly in close cases. Given that approximately one quarter of all felony indictments and informations in the United States ultimately are dismissed, this may not be an idle concern. Of course the problem of prosecutorial liability following a decision against absolute immunity in the arrest context could be addressed in a number of ways, e.g., using police officers or complaining witnesses to sign probable cause affidavits, scheduling probable cause hearings, or placing greater reliance on grand jury indictment. But these and other approaches are expensive, time-consuming, and would tax the resources of already overburdened criminal justice systems.

The Court's decision has the potential to resolve a broad range of questions pertaining to the limits of prosecutorial immunity, particularly should the Court elaborate on, or decide to restate, the standards developed in *Imbler, Burns v. Reed,* and *Buckley.*

Attorneys of the Parties

For Lynne Kalina (John W. Cobb, Senior Deputy Prosecuting Attorney of King County, WA; (206) 296-8820).

For Rodney Fletcher (Timothy K. Ford; MacDonald, Hoague & Bayless; (206) 622-1604).

Amicus Briefs

In support of Lynne Kalina

Joint brief: Maryland, 27 other states, Guam, and the Virgin Islands (Counsel of Record: Andrew H. Baida, Maryland Assistant Attorney General; (410) 576-7055);

Joint brief: National Association of Counties, National Governors' Association, National League of Cities, U.S. Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association (Counsel of Record: Richard Ruda; State and Local Government Center; (202) 434-4850);

Joint brief: National District Attorneys Association and California District Attorneys Association (Counsel of Record: Roderick W. Leonard, Deputy in Charge, Professional Responsibility Unit for the County of Los Angeles, CA; (213) 974-5911);

United States (Counsel of Record: Walter Dellinger, Acting Solicitor General; Department of Justice; (202) 514-2217);

Joint brief: Adams County, Washington, and 38 other Washington counties (Counsel of Record: Pamela Beth Loginsky, Senior Deputy Prosecuting Attorney for Kitsap County, WA; (360) 876-7174).