

Contact | [Subscribe](#) | Site Search

Search

[Home](#)

[Subscribe](#)

[Contact Us](#)

[Reason Staff](#)

[Contributors](#)

[Print Archives](#)

[Cover Gallery](#)

[Hit & Run](#)

[Brickbats](#)

[Podcasts](#)

[RSS Feeds](#)

[Topics](#)

[About Us](#)

[Subscriber Services](#)

[Support Reason](#)

[Advertise](#)

[Reason Stuff](#)

[Events](#)

[Submissions](#)

[Reason on Facebook](#)

[Reason on Twitter](#)

[Reason on YouTube](#)

[Reason RSS](#)

Get Reason E-mail Updates!!

First Name

Last Name

Email

Submit

[Manage your Reason e-mail list subscriptions](#)

Site comments/questions:

[Mike Alissi](#)

Media Inquiries and Reprint Permissions:

[Chris Mitchell](#)

(310) 367-6109

Editorial & Production Offices:

3415 S. Sepulveda Blvd.

Suite 400

Los Angeles, CA 90034

(310) 391-2245

[Subscribe with RSS](#) | [Print This](#) | [Email This](#)

The Infallible Prosecutor

Should prosecutors who manufacture evidence be susceptible to lawsuits?

Radley Balko | September 28, 2009

A prosecutor manufactures evidence in order to win a conviction. After the convicted serves 25 years in prison, exculpatory evidence pointing to another perpetrator surfaces. The convicted is released. Should he be able to sue the prosecutor who concocted the false evidence used to convict him?

Believe it or not, it's still an open question. In November, the Supreme Court will hear arguments on *Pottawattamie v. McGhee* in order to resolve it. The facts of the case aren't in dispute. In 1978, a retired

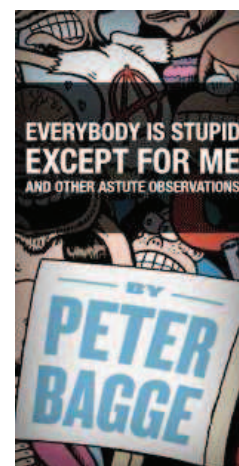
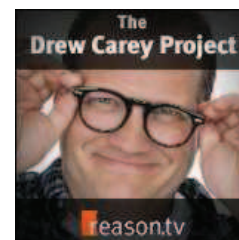
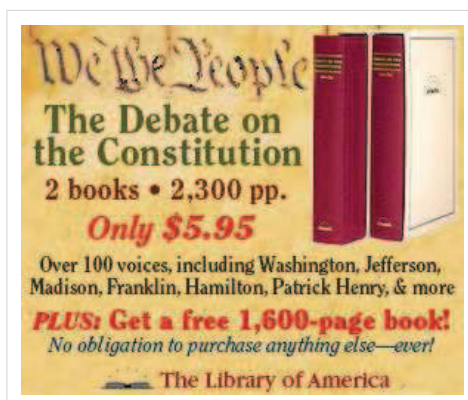
Iowa police captain was killed by a shotgun blast while working as a private security guard. Prosecutors Joseph Hrvol and David Richter then worked with local police to manufacture evidence against the two chief suspects, Terry Harrington and Curtis McGhee, Jr. The two men were convicted of the murder in separate trials, and each was sentenced to life without parole.

The Iowa Supreme Court set aside both convictions in 2003, citing exculpatory evidence pointing to another suspect that was withheld from defense counsel in both trials. Both men were eventually released from prison. Seeking damages for losing 25 years of their lives, they brought a civil rights suit against the police, prosecutors, and county that convicted them. Hrvol and Richter maintain that under the Supreme Court's decision in the 1976 case *Imbler v. Pachtman*, they have absolute immunity against such a suit.

In *Imbler*, the Supreme Court determined that a prosecutor who knowingly uses false testimony and withholds exculpatory evidence is immune from damages, even in cases where his misdeeds result in a wrongful conviction. The Court determined that subjecting prosecutors to the possibility of such suits would affect their judgment in determining what cases to bring. In another case involving a falsely convicted man attempting to bring a lawsuit, the Court extended absolute immunity to include district attorneys who poorly supervise their subordinates.

Hrvol and Richter contend that prosecutorial immunity gives government officials the right to coerce witnesses to lie, withhold evidence pointing to a suspect's innocence, and work with police to manufacture false evidence of guilt, then use that evidence to win false convictions that send two men to prison for 25 years. Their motivation for making this argument is obvious; they'd rather not pay for their misconduct. But **they're supported in amicus briefs** filed by the U.S. Solicitor General, the National District Attorneys Association, and the attorneys general of 27 states and the District of Columbia. Notably, Cook County, Illinois, home to a number of wrongful convictions, also filed its own brief in support of the prosecutors.

The Court has put one small dent in the absolute immunity shield enjoyed by prosecutors. In the 1993 case *Buckley v. Fitzsimmons*, it ruled that prosecutors who act as investigators in a case are subject to the more limited **qualified immunity** afforded to police officers with respect to the actions they take as investigators. Qualified immunity is still a high hurdle; it doesn't exactly open prosecutors up to a barrage of lawsuits. A claimant must show that a state actor violated his "clearly established statutory or constitutional rights," as those rights are understood by a "reasonable person" (as distinguished from a legal professional). Under *Buckley*, prosecutors who





violate the clear constitutional rights of a defendant while serving an investigatory role can be sued, but once they assume the role of a prosecutor, they're immune.

In *Buckley*, the defendant was incarcerated for three years while the state attorney concocted forensic evidence against him. But by the time he was tried, a new state attorney had been elected. The first jury was unable to reach a verdict. Buckley was eventually released and all charges against him were dropped. He then filed suit against multiple parties. It was his suit against the state attorney that made it to the U.S. Supreme Court. Hrvol, Richter, and the government entities supporting them split hairs to distinguish their case from *Buckley*: In *Buckley*, they point out, the prosecutor who tried the case wasn't the same person who manufactured the evidence. Since Hrvol and Richter were a full-service operation—manufacturing evidence *and* trying the case—they argue that they should be immune from a lawsuit. They say that the rights of Ghee and Harrington were violated when they were *convicted* based on the false evidence, not when the evidence was actually manufactured. Under that interpretation, Hrvol and Richter were acting as prosecutors when the civil rights violations occurred, so they have absolute immunity.



It's a stunner of an argument. If the Supreme Court buys it, it would mean that prosecutors who invent evidence to convict innocent people would only be susceptible to a lawsuit if a prosecutor other than themselves ends up using that evidence in court. If they argue the evidence, they can't be touched. Among other things, these rules create a double standard: Prosecutors acting as police investigators would enjoy more protection than actual police investigators. In fact, the argument removes prosecutors from virtually all civil accountability or liability.



Supporters of extending absolute immunity argue that prosecutors are held accountable in other ways—by appellate courts, bar associations, and legal disciplinary boards. But **an amicus brief filed by** the Cato Institute, the American Civil Liberties Union, and the National Association of Criminal Defense Attorneys cites studies of wrongful convictions in California, New York, and Chicago, all of which found that though prosecutorial misconduct contributed to a sizable majority of cases that sent innocent people to prison in those states, the misbehaving prosecutors were almost never sanctioned.



If the Supreme Court rules for Hrvol and Richter, it would essentially overturn *Buckley* and give prosecutors complete immunity, even when they conspire to convict an innocent person from the earliest stages of an investigation. The vast majority of prosecutors would never engage in such reprehensible conduct, of course. But it's curious why professional district attorney organizations and government agencies want to protect the lowly few who would.

Radley Balko is a senior editor at Reason magazine.

Discuss this article online.

Podcast Reason Articles

Help Reason celebrate its next 40 years. [Donate Now!](#)



Send this article to: [StumbleUpon](#) [Digg](#) [Reddit](#) [Fark](#) [Facebook](#)

Try Reason's award-winning print edition **today!** Your first issue is **FREE** if you are not completely satisfied.




Free video calls with Skype.

Here's how

→ replay

Current Issue Available!



- Would a President McCain obey the law?
- What part of legal immigration don't you understand?
- Cloning dogs for fun and profit

Purchase an online edition of this issue immediately!