SUING THE PROSECUTOR*

By

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I. INTRODUCTION

In 1975 the Supreme Court held in Imbler v. Pachtman, 424 U.S. 409 (1975), that a state prosecutor, sued individually, was absolutely immune from suit under the Civil Rights Act of 1871 (42 U.S.C. §1983), 1/ with respect to the discharge of his prosecutorial duties. It has become clear that the protection prosecutors believed they had been provided by Imbler is less than it first appeared to be. Prosecutors are not free from harassment by lawsuit. The prosecutors who stand to benefit least from Imbler are those who are heavily involved in investigative activities, particularly those involved in investigations of white collar crime.

The concept of prosecutorial immunity for D.A.'s does not exist in isolation. It is directly related to the general principles that govern government official's tort liability and the general principles that govern official immunity. This memorandum will outline recent developments in the law of prosecutorial immunity from civil suit, will discuss an emerging defense strategy of suing the prosecutor and will pose a number of issues that can be expected to flow from these developments.

II. SUMMARY OF APPLICABLE LAW

Suits against prosecutors in their individual capacities fall into one of three categories: suits against state prosecutors in state courts based on state common law tort claims; suits against state prosecutors brought in either state or federal court under the Civil Rights Act of 1871 (42 U.S.C. §1983); suits against federal prosecutors brought in federal court on a claim of a federal constitutional tort under the theory of Bivens v. Six Unknown Federal Narcotics Agents, 402 U.S. 38 (1971). As a practical matter, most suits against state prosecutors today are brought in the federal courts under the Civil Rights Act even where there is an available state tort remedy. Although there is pending legislation (S. 2117) which would provide for the United States to be substituted as a defendant for any individual federal defendants in tort claims cases, there is no existing substitute provision in the law and no indication that any will be proposed for state officials.

Most suits against prosecutors are not initiated until well after the related criminal case is over. However, there is growing phenomenon of the defendant in the criminal case suing the prosecutor during the course of an investigation or during the pendency of the criminal case. Since there is often an adverse effect on

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1/ The full text of §1983 is contained in Appendix I. The related conspiracy provision, 42 U.S.C. §1985, is also set forth in Appendix I.

the prosecutor's case flowing from the parallel civil proceeding, changes in the law of immunity can in turn have a major impact on white collar crime investigations.

In Barr v. Matteo, 360 U.S. 564 (1959), the Supreme Court held that a federal government official had absolute immunity, rather than qualified immunity, in a libel suit for damages challenging a discretionary action taken by him in the performance of his official duties. Barr rested on the notion that the threat of such suits "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" and that such suits "would consume time and energies which would otherwise be devoted to governmental service." 360 U.S. at 571. Many observors feel Barr v. Matteo simply was an exposition of the existing common law and an extension of Spaulding v. Vilas, 161 U.S. 483 (1896). In any event, Barr established the rule that a federal official was fully immune from suit if his discretionary actions 2/ were within the "outer perimeters" of his duties regardless of the malice which may have motivated them. Barr v. Matteo, 360 U.S. at 575.

The Barr doctrine of absolute immunity for federal officials is under challenge in Butz v. Economou, which has been argued in the Supreme Court and, at this writing, awaits decision. In Economou the Second Circuit held that absolute immunity did not exist for federal officials acting within the scope of their duties. The Court held that the lawsuit had to be defended on the merits with a good-faith defense available to the public officials. Economou v. U.S. Department of Agriculture, 535 F.2d 688 (2d Cir. 1976).

Two recent major Supreme Court decisions involving state officials have raised the question of whether Barr is still the law. In both cases the Supreme Court held that state officials sued for damages under the Civil Rights Act for actions taken as part of their official duties have only a qualified and not absolute immunity; i.e., they have immunity only if their actions within the scope of their official duties were taken in good faith and with a reasonable basis. Scheuer v. Rhodes, 416 U.S. 232 (1974) Wood v. Strickland, 420 U.S. 308 (1975).

The special issue of prosecutorial immunity was addressed by the Supreme Court in Imbler v. Pachtman, supra. The Supreme Court established the principle that a state prosecuting attorney acting with the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case is absolutely immune from civil suit for damages under Section 1983. In Imbler, the alleged conduct complained of was the knowing use of perjured testimony by the prosecutor. In defining the scope of conduct bathed in immunity, the Court refused to extend absolute immunity for a prosecutor to all of his actions.

> We hold only that in initiating a prosecution and in presenting a state's case, the prosecutor is immune from civil suit for damages under 1983. Id. at 431.

The Court expressly refused to state whether absolute immunity would apply to grand jury presentations or the routine prosecutorial review and evaluation of evidence prior to bringing charges. At 424 U.S. 409, 431, footnote 33, the Court observed:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting

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2/ Where the actions of the official were ministerial, there is no immunity. There is a growing displeasure with this doctrine and suggestions that there be no immunity, except to the extent that the official performed duties at the instance of an official whose actions were discretionary. Davis, Administrative Law, §26.02.

> attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions but this case does not require us to anticipate them.

The limits of the Imbler rule have been addressed recently in two federal suits against federal prosecutors:

1. Helstoski v. Goldstein, 552 F.2d 564 (3rd Cir. 1977). In this action, former Congressman Henry Helstoski, a target in the federal grand jury corruption investigation, sued then U.S. Attorney for New Jersey, Jonathan Goldstein, alleging that Goldstein engaged in a series of acts of grand jury abuse amounting to a constitutional tort. Goldstein invoked the umbrella of absolute immunity of Imbler. The suit was dismissed by the District Court. On appeal, the Third Circuit reversed and held that Helstoski's complaint alleged "conduct which goes beyond the proper performance of the [administrative and investigative] aspects of a prosecutor's job." 552 F.2d at 566. The Court continued:

> We note, in particular, the several allegations of deliberate leaks by the prosecutor of false information concerning Mr. Helstoski in order to damage his political prospects. It would appear that such activity, if it occurred, would lie outside of the rationale for absolute immunity set forth in Imbler. At most, it could be subject to a qualified good-faith immunity. Id.

The matter was remanded to the U.S. District Court for New Jersey for proceedings on the merits.

2. Briggs v. Goodwin, ___F.2d ___ (D.C. Cir. 1977). In this case, a split panel (2-1) held that Department of Justice attorney Goodwin, who had represented the government before the court on a defense initiated motion regarding a grand jury investigation he was conducting, possessed only qualified immunity in a civil suit alleging he committed perjury when called as a witness during the motion's hearing. Over a strongly worded dissent, the majority concluded that Goodwin's alleged perjury was in connection with the performance of "administrative" duties rather than the advocacy duties of a prosecutor. The majority relied on a string of federal cases in which total immunity for prosecutors had been held to be unavailable. The D.C. Circuit denied the government's motion for rehearing en banc. The Department of Justice is expected to petition the Supreme Court for certiorari.

The sum of the law in brief is as follows: State and federal prosecutors enjoy absolute immunity under Imbler when discharging their function of initiating prosecutions and presenting the prosecution's case in court. Absolute immunity is not available to investigators and other prosecutive support personnel. It is unavailable to prosecutors when their activities are "administrative." For state prosecutors, to the extent that their duties might be regarded as "administrative," only a good-faith defense, under Scheuer v. Rhodes, would appear to be available. What is "administrative" is anything but clear. Administrative activities probably

include drafting warrants, participating in searches, contacts with press, and authorizing warrantless arrests or searches. 3/ Advocacy activities probably include presenting evidence to a grand jury, failure to produce Brady material and suppressing evidence. For federal prosecutors the fallback immunity under Barr v. Matteo is, for the moment, broader. However, the Supreme Court could in Economou adopt a federal standard of limited immunity similar to Scheuer v. Rhodes, as the Second Circuit in Economou has done.

III. USE OF SUITS AGAINST PROSECUTORS AS CRIMINAL DEFENSE TACTICS.

In recent years defendants have exploited new opportunities presented by FOI Acts, privacy legislation, and certain grand jury reform legislation and proposals. Defendants have used these as vehicles to achieve a number of tactical advantages in criminal investigations. The increased area of official liability presents a similar opportunity, particularly in light of the growing involvement of District Attorneys and federal prosecutors in investigative activities.

To the extent that a prosecutor does not possess absolute immunity, he will be required to defend a civil suit on the merits. The labor, time, expense and emotional investment required of the prosecution in such a suit is enormous. Most prosecutors' offices, with limited resources at best, do not relish taxing those resources to the limit in a war of attrition being waged by a deep-pocket defendant. This fact has not been lost on many members of the defense bar.

The Helstoski v. Goldstein suit typifies the problems a civil suit presents for activist prosecutors. Under grand jury investigation, the target Congressman sued the prosecutor, alleging leaks of grand jury information, among other things. He had little to lose. If Imbler applies in such circumstances, the prosecutor will continue the grand jury presentation unabated. However, if Imbler does not apply, the prosecutor will be required to defend on the merits at the same time he is conducting the grand jury investigation. Depositions can be taken (including the prosecutor's), interrogatories filed, records subpoenaed or ordered produced. Unless the civil action is stayed, there is little which the prosecutor can do to eliminate the second threatening front.* From the target's point of view, the threat of disruption is attractive. In addition, it holds the possibility of giving the defense premature discovery and legal rulings that may have a collateral estoppel effect in a criminal trial

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*(editor's note) The recent case of The Founding Church of Scientology of Washington, D.C. v. Kelley, et al ___ F2d ___ (DC Cir 1977) offers some hope to prosecutors. Plaintiff/movants brought suit, seeking damages and injunctive relief, claiming that a massive conspiracy had been maintained since 1955 to harrass and destroy the Church and to interfere with first amendment rights of Church members.

To obtain proof of harrassment, plaintiff/movants propounded interrogatories to defendants Clarence Kelley and Griffin Bell. The defendants responded that the information requested would interfere with an ongoing criminal investigation, since it concerned "privileged grand jury matters."

The court agreed with defendants and denied plaintiff/movants' motion to compel interrogatories. In its decision, the court noted that the Church's suit claimed twenty-two years of harrassment by nine defendants but that movants had attempted to acquire information from only two defendants regarding a mere two week period in 1977. Coincidentally, the defendants named were the same two responsible for a current grand jury investigation regarding information related to that same time span.

Concluded the court, ". . . while the plaintiff/movant's need is not so great at this stage of the litigation, the Government does have an urgent need in protecting its present investigative operations."

"Therefore, the Court believes that the government's interest in preserving the secrecy of the ongoing criminal investigation outweighs the plaintiff (movant's need for this information, in light of the vast period of time for which information relevant to the harrassment allegations could be sought."

Even in the context of a suit for damages following trial the disruptive effect can be enormous. Criminal defendants are increasingly coupling motions for a new trial with civil damage actions and freedom of information requests (and suits). Courts tolerate these parallel proceedings and often are helpless to prevent them.

The prosecutor has no absolute right to have the civil suit stayed pending resolution of the criminal proceeding. Whether a suit will be stayed rests in the sound discretion of the trial court. Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962). The usual practice of the trial court is to consider the separate discovery issues presented by a motion to stay and rule on these individually. In Campbell v. Eastland, the Fifth Circuit reversed the trial court for permitting a taxpayer-plaintiff in a tax refund suit to have access to the confidential report of the IRS Special Agent, since there was a pending grand jury investigation of the tax matter. The court held, however, that discovery via depositions, interrogatories and production of records and documents would be appropriate. See also United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (S.D.N.Y. 1966) and cases cited therein.

Another approach was followed in SEC v. Control Metals Corp., 57 F.R.D. 352 (S.D.N.Y. 1972). A target in a grand jury investigation, who was also a defendant in the SEC's related injunctive proceeding, noticed for deposition a key government witness. The SEC moved to stay discovery claiming the deposition was sought only to discover the prosecutor's evidence in the grand jury investigation. The court granted the SEC's motion subject to the express reservation that the SEC suit would be dismissed if the defendant could later show prejudice in that suit from having been barred from preserving the witness' testimony.

If anything, the normal dilemmas a court faces in resolving parallel proceedings problems would be amplified in §1983 suits against prosecutors because of the presence of sensitive federal/state issues. On the one hand, the failure to stay discovery in the §1983 suit could have the effect of introducing total chaos into the state criminal proceeding. Conversely, granting a stay of discovery in the civil suit could effectively gut the §1983 remedy. One can imagine the reluctance of a federal judge to be drawn into such acrimonious disputes.

IV. UNANSWERED QUESTIONS AND PRACTICAL STEPS.

The current uncertain state of the law and the uncertainties of liability raises numerous questions.

1. May a state prosecutor obtain a stay in a federal civil suit filed collaterally to pending criminal proceedings? Will issues decided in the parallel civil suit collaterally estop the prosecution on relevant issues in the criminal case? Will forum shopping to litigate issues (i.e., between state and federal courts) be encouraged? Will successful civil discovery efforts deter the prosecutor from investigative efforts in the criminal investigation? What is the consequence of a plaintiff in a §1983 suit taking the Fifth Amendment? What authority would a Federal judge have to stay discovery by plaintiff in a parallel proceeding?

2. On questions of good faith, is it relevant whether the prosecutor knew the act complained of was wrongful? Does the scope of a prosecutor's jurisdiction have any bearing on the availability of his immunity?

3. Can, or should, a state prosecutor's office defend its own federal §1983 suits or should outside counsel be sought? Does the state have the authority (or funds) to hire outside counsel? Where there may be multiple defendants in the civil suit, is it likely that there may be conflicts requiring separate counsel? Can ex-District Attorneys be defended with public funds for their actions while in office?

4. Can a state, by statute, provide indemnification for any personal liability of its prosecutors? Can the state subsidize private malpractice or tort liability insurance? Should individual prosecutors arrange for their own insurance plans?

5. What would be the effect of an amendment to the Federal Tort Claims Act in which the federal government was substituted as defendant for the individual defendants? Could states adopt similar legislation which would be effective in §1983 suits?

6. Are the following "administrative" functions of a prosecutor: drafting warrants; participating in the execution of warrants; rendering legal advice to agents and investigators who are executing warrants; handling extraditions; issuing grand jury subpoenas; handling subpoena returns other than before a grand jury; declining to prosecute other officials being sued under §1983; making disclosures of confidential information to the press, or to employers; interrogating arrested subjects; interviewing witnesses; obtaining financial records without providing required statutory notice of the issuance of subpoenas for financial records?

7. What types of precautionary steps should be taken to minimize prospects of civil liability? Should an office adopt written guidelines concerning the activities of its prosecutors, investigators, staffs, and volunteers? Will guidelines and a trail of memos to file help on the issue of "good faith"? Should new prosecutors receive, as part of their training, a briefing on civil liability?

Virtually none of the foregoing questions can be answered with any precision. However, it is evident that a prudent prosecutor's office should consider adopting certain safeguards and should approach civil suits, particularly those brought under §1983, with substantial caution.

It is evident each prosecutor's office should evaluate the protection it provides its deputies, staff and investigators from the perils of civil suit. It should address the questions of internal guidelines, 4/ insurance coverage, agreements for indemnification and policies regarding representation for deputies. The office should determine, for example, whether deputies will participate in searches

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4/ The term "guidelines" refers to a developing practice in many prosecutor's offices (particularly the United States Department of Justice and U.S. Attorney's offices) of establishing a written set of rules spelling out what prosecutors may or may not do in discharging their duties. They cover such diverse topics as plea bargaining limitations, conduct of grand jury proceedings, participation in searches and arrests, communications with the media, etc. The pluses of guidelines are that they tend to bring about uniformity of conduct among prosecutors. In the context of potential civil liability, they can be a standard of "good faith" in circumstances where Imbler immunity is absent. The minuses are that the guidelines will inevitably be broken and, in those instances, the civil plaintiff will have a stronger argument that the conduct was tortious and unworthy of immunity. Obviously, any guidelines must be drafted to minimize such a possibility.

and arrests and, if so, on what terms.5/ Specific policies on participation in investigative activities should be adopted.

Once sued, the prosecutor must move swiftly and effectively to his own defense. A decision must be made whether to retain special counsel or utilize the facilities of the office or other government attorneys.6/ The complaint must be answered in a timely manner and skillfully. A stay of the civil suit should be sought. The most able available civil litigator (inhouse or retained) should be used to handle the suit.

The overall strategy of defending such a suit must be to get the case decided on pleadings, if possible. Failing that, the next priority should be to obtain summary judgment. Because the law of prosecutorial immunity is unclear, it would be unwise ever to concede that there is no absolute immunity. It would also be unwise to concede that the case cannot be decided for the defense on the pleadings in cases where qualified immunity applies.

In instances where a court orders a §1983 suit to proceed on the merits, the prosecutor-defendants should aggressivly seek discovery, including the deposition of the prospective criminal defendant and his key witness. The object, in such a situation, should be to force the prospective criminal defendant to elect between successfully suing the prosecutor and exercising his Fifth Amendment rights, since the §1983 suit will be impossible to maintain in the face of a refusal by the plaintiff to testify.

5/ The specific question of participation by a Deputy District Attorney in a search poses an unusual problem. The activity is clearly investigative. However, under certain circumstances, the presence at or near the search scene of an attorney, or legally sophisticated lay person, is a practical necessity. Such a situation existed in Andresen v. Maryland, 427 U.S. 463 (1976). Agents executed two search warrants on the offices of an attorney suspected of fraud in connection with land transactions. The warrants contained an extensive list of documents. In addition, the warrants contained a clause authorizing seizure of "other fruits, instrumentalities and evidence of crimes at this [time] unknown." 427 U.S. 479, 480-481 n10. That clause, in effect, required an on-the-spot legal judgment as to what constituted evidence of a crime. How that judgment was exercised, in fact, became critically important. The court, in passing on the conduct of the search, observed with approval that the officers were exceptionally well-trained and competent. Id. at 483.

Searches for documents place a premium on sophisticated analyses. In many instances, the only parties capable of making that judgment may be the prosecutor. Without his participation, the search could prove defective.

6/ Assuming a District Attorney's office has the time, manpower and experience to handle a §1983 suit, there is, nevertheless, the issue of whether there is a conflict of interest in representing a sued Deputy. If the Deputy was acting under instructions from superiors, he may have a third party action against those superiors or the office. If the case is particularly unappealing on its facts, the overall interest of the office might be to not press certain issues. That course might be in the interests of the office, but certainly does not advance the cause of the sued Deputy. Office policies, such as not contesting improper service, may be appropriate for government business, but are probably totally inappropriate in representing an individually sued Deputy District Attorney. Needless to say, any Deputy District Attorney undertaking to represent a colleague should be adequately covered by malpractice insurance, particularly if the litigation is to be conducted in the presence of the above problems.

V. CONCLUSION.

It is unlikely that we will see in the near future any major clarification of the "administrative-advocacy" distinction announced in Imbler. Given the growing use of this type of lawsuit, no prosecutor's office can afford the luxury of continuing to ignore the issues that such litigation will present.

Some detractors contend that the likelihood of being sued is as remote as being struck by lightning. The analogy is probably appropriate. Though lightning strikes human beings infrequently, the result is usually disastrous. And it strikes as infrequently as it does only because of the care and precautions we ordinarily take. Those similarities cannot be ignored.

APPENDIX I

FEDERAL CIVIL RIGHTS ACT

42 USC 1983, 1985

§1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§1985 CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS--PREVENTING OFFICER FROM PERFORMING DUTIES

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grant or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering,

obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose or preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States, or to injure any citizen in person or property on account of such support or advocacy, in any case of conspiracy set forth in this section, of one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX II

Both before and after Imbler v. Pachtman, 424 U.S. 409 (1975), a number of Federal Circuit opinions have considered the "administrative" function -- "prosecutive" function distinction. The following is a listing of cases dealing with this issue.

1. Investigative Stage

(i) Prosecutors planning raid, incuding drafting of search warrant, to obtain evidence -- HELD investigative function - no absolute immunity. Hampton v. City of Chicago, 484, F.2d 602 (7th Cir. 1973).

(ii) Prosecutor obtaining search warrant based on perjured testimony -- HELD investigative function. No absolute immunity. Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974).

(iii) Prosecutor authorized seizure of films -- HELD immune under Civil Rights Act, even though films found not obscene, since acting within scope of jurisdiction. Cambist Films, Inc. v. Duggan, 475 F.2d 887 (3rd Cir. 1973).

(iv) Alleged Leak of Grand Jury information by prosecutor -- HELD administraitve. No absolute immunity. Helstoski v. Goldstein, 552 F.2d 564 (3rd Cir. 1977).

(v) Alleged perjury by prosecutor during motion's hearing at grand jury stage -- HELD administrative. No absolute immunity. Briggs v. Goodwin, ___ F.2d ___ (D.C. Cir. 1977).

(vi) Allegation that prosecutor in concert with police entrapped a drug supplier -- HELD, by Bell. J., that actions immune since no allegations activities outside jurisdiction of D.A. Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974).

(vii) Presenting evidence to Grand Jury -- HELD immune. Fine v. City of New York, 529, F.2d 70 (2nd Cir. 1970).

(viii) Absolute immunity not available to prosecutor (the Attorney General of the United States) alleged to have initiated arrest and prosecution of May Day demonstrators. Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974).

2. Trial Stage

The following cases hold the prosecutor absolutely immune from liability for the described acts: Hilliard v. Williams, 540 F.2d 220 (6th Cir. 1976) (knowingly withheld from defense material evidence and used deceptive and misleading evidence). See also 516 F.2d 1344 (6th Cir. 1975); Kaufman v. Moss, 420 F.2d 1270 (3rd Cir. 1970) (knowing use of perjured testimony); Bruce v. Wade, 537 F.2d 64 (5th Cir. 1976) (presenting evidence and testimony to Grand Jury, at trial and in habeas corpus proceedings); Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975) (failure to dismiss promptly after learning of retractions by eyewitnesses); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961) (using perjured testimony and suppressing evidence).

APPENDIX III

For further information concerning prosecutorial immunity, see Criminal Justice Quarterly, Vol. V, No. 4, Winter 1977, pages 105 - 119.

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