

Prosecuting offices' immunity tested - USATODAY.com

WASHINGTON — [Americans](#) can sue almost anyone for almost anything. But they can't sue prosecutors.

Not when prosecutors hide evidence that could prove someone's innocence. Not when they violate basic rules designed to make sure trials are fair. Not even when those abuses put innocent people in prison.

Nearly 35 years ago, the U.S. Supreme Court ruled that prosecutors cannot face civil lawsuits over how they handle criminal cases in court, no matter how serious or obvious the abuses. Since then, courts have further limited the circumstances under which prosecutors — or their bosses — can be sued for civil rights violations.

Today, in a case involving a New Orleans man who came within a month of being executed for a murder he didn't commit, the Supreme Court is scheduled to consider another aspect of prosecutorial immunity: whether people who were wrongly convicted can take local prosecutors' offices to court. The court's answer could determine the extent to which prosecutors' employers are also shielded if they fail to make sure attorneys comply with their constitutional responsibilities.

"Prosecutorial misconduct is a serious problem, and nothing is being done to adequately address it," said Kathleen Ridolfi, director of the Northern California Innocence Project, which released a study Monday that found hundreds of instances of misconduct by state and federal attorneys. "Prosecutors know. .. they can commit misconduct with impunity."

IMMUNITY: Cases in which prosecutors were immune from civil suits

A USA TODAY investigation documented 201 cases since 1997 in which judges determined that federal prosecutors had violated laws or ethics rules. Although those cases represent a small fraction of the tens of thousands that are filed in the nation's federal courts every year, judges found that the violations were so serious that they overturned convictions or rebuked the prosecutors for misconduct. Some of the abuses put innocent people in jail.

Not one resulted in a successful lawsuit against a prosecutor.

The latest test of the extent of prosecutors' immunity began with a December 1984 murder and a separate carjacking three weeks later in New Orleans. John Thompson was convicted of both crimes and sentenced to die for the murder. A month before his execution date, his lawyers discovered that prosecutors had deliberately covered up a police lab report that showed he could not have committed the carjacking. Then they uncovered still more evidence that undermined his murder conviction.

Thompson was freed in 2003. He sued New Orleans [District Attorney](#) Harry Connick Sr. and his office for failing to train the prosecutors who covered up that evidence. Four years after Thompson got out of prison, a jury awarded him \$14 million; now the Supreme Court must decide whether he can keep it.

"The importance of (Thompson's) case is prosecutorial accountability — whether or not violations of constitutional rights make a difference, or whether the prosecutors can just walk away without any accountability, any liability, any punishment, for breaking the law," said [Pace University](#) law professor Bennett Gershman, an expert on misconduct by prosecutors.

In 1976, the Supreme Court decided, in a case called *Imbler v. Pachtman*, that prosecutors have absolute immunity from civil rights lawsuits for their work in the courtroom. The court acknowledged that its ruling "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," but said the alternative was worse: leaving prosecutors to fear a lawsuit, or even bankruptcy, every time they lose a trial.

Without immunity, prosecutors "would be gun-shy" about taking on difficult cases, former [U.S. attorney](#) general [John Ashcroft](#) said.

The Supreme Court has said that, instead of being sued, prosecutors who break the rules could be kicked out of the legal profession or even charged with a crime. Those outcomes are rare. Although USA TODAY's investigation documented misconduct in 201 cases, it did not find a single federal prosecutor who was disbarred. Only one, [Richard Convertino](#), was prosecuted. He was acquitted.

"Short of pointing a gun at a prisoner and pulling the trigger, the prosecutor can get away with just about anything," said Patrick Regan, an attorney for two Washington, D.C., men who spent decades in prison before a court overturned their convictions because prosecutors never turned over evidence that pointed to other suspects. The

men sued, but a court ruled the prosecutors had immunity and threw out their case.

John Thompson was a 22-year-old high school dropout and self-described "small-time weed dealer" when he was arrested in 1985 for the slaying of a New Orleans businessman. Days later, prosecutors also charged that he was responsible for an armed carjacking of three teenagers outside the Superdome.

Thompson went on trial twice. Prosecutors tried Thompson for the carjacking first, and a jury convicted him. That set the stage for his murder trial several weeks later: Thompson decided not to testify because doing so would have opened the door for prosecutors to tell the jury that he had just been convicted of the carjacking. The jury found him guilty. When it was time to decide his punishment, jurors did hear about the carjacking, his first felony conviction, which enabled prosecutors to seek the death penalty. Jurors sentenced him to death.

Authorities scheduled Thompson's execution for the day before his son was to graduate from high school in 1999. Two Philadelphia corporate attorneys, Michael Banks and Gordon Cooney, had by then had taken on his case.

A month before his execution, an investigator working for them found a copy of a police lab report that upended the case. The report, based on blood found on the clothing of one of the carjacking victims, showed conclusively that Thompson had not committed that crime; the sample was blood type B, and Thompson's blood was type O.

That was enough for a court to throw out Thompson's carjacking conviction, and to overturn his death sentence. And it led to a series of discoveries — including inconsistent witness statements — that ultimately undermined Thompson's murder conviction as well. The district attorney's office in New Orleans had all that evidence when Thompson went on trial, but never disclosed it to his lawyers, as the law requires.

"It was a crazy, crazy feeling that you could be killed for something you didn't do," Thompson said last week.

He was retried in the murder case and acquitted. In 2003 — after 18 years in prison, 14 of them on death row — Thompson walked out of Louisiana's Angola penitentiary a free man.

Conduct 'grossly illegal'

Almost no one defends the way New Orleans prosecutors handled his case. Graymond Martin, now second in command of the district attorney's office, said the prosecutor who hid the lab report, Gerald Deegan, "violated every moral, ethical and legal obligation that he had," and said the violation was "grossly illegal." Deegan, who died before the defense attorneys learned of the lab report, had admitted to another lawyer what he'd done.

Kyle Duncan, the chief of appeals for Louisiana's attorney general, said it's "unquestionable that the prosecutors on his case did do wrong."

It's also unquestionable that Thompson can never sue the individual prosecutors for what they did during his trial. Two prosecutors who worked on his case still practice law but are immune from lawsuits.

Instead, Thompson sued the district attorney's office itself. His lawyers alleged that the office — which was run at the time of his trial by Connick, father of singer Harry Connick Jr. — didn't train its attorneys about their legal obligation to turn over evidence that could help defendants prove their innocence. As a result, Thompson's lawyers argued, prosecutors didn't know what evidence they had to share, and, in Thompson's case, kept it secret. A federal jury agreed.

That's when the real battle began. Prosecutors in Louisiana insist that unless the Supreme Court throws out the jury's verdict, prosecutors' offices will have to worry about civil lawsuits every time one of their attorneys makes a mistake, a prospect that could leave them reluctant to bring tough cases.

In a series of rulings, the Supreme Court has said that prosecutors — unlike police officers and most other government employees — can face civil rights lawsuits only under narrow circumstances. They can be sued when misconduct happens during an investigation but not in court proceedings. And the justices have suggested that prosecutors' offices — like other local government agencies — can be liable for not training their employees.

"We can't sue the prosecutor, but we can sue the [FBI](#) agent. That's absurd," said Ben Gonek, an attorney for Kamil Koubriti, one of the men Convertino prosecuted in the nation's first major terrorism case after [September 11](#). The [Justice Department](#)

dismissed the terrorism charges when it concluded that Convertino had concealed evidence. Nonetheless, courts ruled that Koubriti could not sue Convertino; the Supreme Court on Monday declined to hear the case.

The Supreme Court is scheduled to hear arguments in Thompson's case this morning; a decision is expected before the court adjourns next June.

After he was freed, Thompson opened a non-profit group in New Orleans to help others who were wrongly convicted readjust to society. Some of the men who have come through his door spent decades in prison. He helps them find housing and work.

In 2005, Louisiana set aside a pool of money for people who were wrongly convicted. The payments are capped at \$150,000. Thompson's attorney Banks said Louisiana officials fought Thompson's claim for four years before finally sending him a check in September.

Questions of training

For years, some judges have faulted the Justice Department for doing too little to train and supervise its prosecutors. Last year, for example, the chief federal judge in [Massachusetts](#) became so frustrated with continuing violations of defendants' rights that he set up a training program for prosecutors and defense attorneys there.

The move by U.S. District Judge Mark Wolf came after prosecutors failed to turn over evidence that defense lawyers could have used to challenge a police officer's testimony in a routine gun possession case. Wolf berated officials from the U.S. attorney's office in Boston for "a dismal history of violations" that have a "powerful impact on individuals entitled to due process and a cancerous effect on the administration of justice."

The Justice Department has recently overhauled its own training program, in response to the collapse of its corruption case against former Alaska senator [Ted Stevens](#); prosecutors had wrongly concealed evidence about the government's star witness. As a result, every federal prosecutor must now get regular training about his or her duty to turn over evidence to defendants.

The Justice Department has not taken a position on Thompson's case. The federal government cannot be sued for failing to train its employees the way local governments can be.

Still, a group of former Justice Department officials has urged the Supreme Court to uphold the jury's \$14 million verdict. In a brief by former solicitor general **Paul Clement**, they noted that "prosecutors face no threat of legal consequences for depriving criminal defendants of their rights" in cases where they have concealed evidence. Unless their offices face some form of liability, Clement said, "the question really does become whether there's any deterrent for a violation."

Absolute immunity shields prosecutors from lawsuits

A sampling of cases in which federal courts ruled that prosecutors were immune from civil suits though they had violated the rights of defendants or committed other transgressions:

Case: *U.S. v. Wilson*

- Former CIA officer **Edwin P. Wilson** spent 20 years in prison for smuggling tons of plastic explosives to Libya. At his 1983 trial, Wilson said he was still working for the CIA when the shipments were made. The government said that the CIA had no contacts with him at the time. Wilson sought to vacate his conviction after his lawyers learned that CIA officials and the prosecutors had misled the court and that, in fact, there were more than 80 contacts between Wilson and the CIA.
- **Outcome:** In 2003, a federal judge threw out Wilson's conviction and blasted both the CIA and the Justice Department, writing that "in the course of American justice, one would have to work hard to conceive of a more fundamentally unfair process. .. than the fabrication of false data by the government, under oath by a government official, presented knowingly by the prosecutor in the courtroom with express approval of his superiors in Washington." Wilson was released from prison in 2004 and now, at 82, rents a room from his brother in Seattle. "Even McDonald's wouldn't hire me," he said. He tried to sue the government, but the suit was dismissed because of the prosecutors' immunity. "I lost my family, lost my property. But more important, I lost my good name," Wilson said.

Case: *U.S. v. Eastridge*

- Defendants **Joseph Wayne Eastridge** and **Joseph Sousa**, both members of a white motorcycle gang, were convicted in the 1974 slaying of a black man outside a Washington, D.C., bar. Eastridge served 29 years in prison, Sousa 20 years. In 2005, a U.S. District Court threw out their convictions, in part because prosecutors had failed to turn over evidence that could have implicated other men in the crime.
- **Outcome:** The federal court ultimately exonerated both Eastridge and Sousa, saying: "Based on the full record, no reasonable juror would now find petitioners guilty beyond a reasonable doubt. The court finds that this is the rare case in which petitioners can prove their 'actual innocence' of the crime as well as violations of their constitutional rights." They sued the prosecutors, but a court threw out their lawsuit because of the prosecutors' absolute

immunity. The only legal avenue left open is a pending U.S. Court of Federal Claims lawsuit against the government. Filed in January, the lawsuit seeks payment under a statute enacted by Congress 10 years ago to compensate those who were wrongly imprisoned. The law pays up to \$50,000 per year of imprisonment. The case is scheduled for trial in January 2011.

Source: USA TODAY research

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