BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

Note: Use the navigation button  at the top of your screen to get back to the home page.

6. PROSECUTORS

DA's Office vs. Individual Prosecutor - Immunity

DA'S OFFICE V. INDIVIDUAL PROSECUTOR IMMUNITY

Carter v. City of Philadelphia, 4 F.Supp.2d 380 E.D.Pa. 1998).

An arrestee filed a complaint against a city, police officers, and unidentified employees of the prosecutor's office after his conviction was vacated on appeal. The prosecutor's office moved to dismiss for failure to state a claim against the unidentified employees.

The motion was granted on a ruling that prosecutors' offices in the various counties of the state were immune from suit in federal court under the Eleventh Amendment, regardless of whether the office is prosecuting cases or developing policies to govern such prosecutions. The court said the prosecutor's office acts on behalf of the state, and acts free from interference by the county or city in conducting criminal prosecutions. Thus it is cloaked with Eleventh Amendment immunity.

'In deciding Eleventh Amendment questions with respect to some government officials, . . . courts must look more specifically at the office's particular function at issue in the case.' *Bibbs v. Newman***,** 997 F.Supp. 1174, 1178, (S.D.Ind. 1998) (citing *McMillan v. Monroe County, Alabama,* U.S. ___ 117 S.Ct. 1734, 1737, 138 LEd.2d 1 (1997)). In *McMillan,* the Supreme Court adopted a functional analysis in determining whether a county Sheriff was a state or local official for the purpose Of 1983 liability in a case such as the present, involving allegations of wrongful arrest and prosecution. The *McMillian* Court held that the issue of the Sheriffs status could not be determined 'in some categorical, "all or nothing manner," but only by asking whether the Sheriff represents the State or the county *when he acts in a law enforcement capacity.' 52()* U.S. at 117 S.Ct. at 1737 (emphasis added).

"McMillian's functional approach to the question of state or local status, as applied to locally elected prosecutors, is hardly novel.

[The case law weighs] strongly in favor of finding that the District Attorney's Office, when performing its historic functions of investigating and prosecuting crimes on behalf of the Commonwealth, is an arm of the State not subject to suit in federal court without its consent. The Court therefore concludes that Carter's claims against Roe in his official capacity are barred by the Eleventh Amendment to the United States Constitution.
[we conclude] that regardless of whether the District Attorney's Office is prosecuting cases or developing the policies to govern such prosecutions, it is an arm of the State protected from suit in federal court by the Eleventh Amendment."
As for the plaintiff's claim against the unnamed prosecutor for action taken in his personal capacity, that was barred by absolute immunity under the doctrine of Imbler v. *Pachtman, 424* U.S. *409* (1976).

Jury Trial Waiver "Harsher sentence if you want a jury trial"

JURY TRIAL WAIVER – "HARSHER SENTENCE IF YOU WANT A JURY"

People v. Godbold, 585 N.W.2d 13 (Mich.App. 1998).

Is a defendant's waiver of his constitutional right to a jury trial rendered involuntarily due to the fact that it was purportedly based on his defense attorney's representation that if he demanded a jury trial, he would receive a harsher sentence? This court said "no."

Counsel's advice was based on reality and was neither uncommon nor improper. Concessions to defendants who waive jury trial is not, the court pointed out, the flip side to penalties for those who exercise their right to a jury trial.

"The advice defense counsel gave defendant was based on reality and is neither uncommon nor improper. See, e.g., LaFave & Israel, Criminal Procedure (Hornbook Series, 2d ed.), § 22.1(h), p. 961 (noting with regard to waiver of a jury trial that jury waiver tends to vary depending upon the offense category, and the pattern is similar to that for guilty pleas. suggesting that the motivations are similar: the expectation of lesser sentence').

To be sure, informing a defendant that he is likely to be convicted in either a jury trial or a bench trial, that most judges, including the one presiding in the defendant's case, will provide a sentence concession to a defendant who elects a bench trial, and that the particular judge hearing the case will provide a fair trial, might, indeed, cause the defendant to waive the constitutional right to be tried by a jury. That advice, however, is not the equivalent of a warning that the defendant will be penalized for opting for a jury trial, and it does not render a resulting bench trial involuntary or the product of coercion. Such a waiver is informed, not 'coerced."

Prosecutor Commenting on Race and Ethnicity – Misconduct

PROSECUTION ARGUMENT RACE AND ETHNICITY MISCONDUCT

People v. Dizon, 697 N.E.2d 780 (Ill. App. 1998).

A prosecutor's comments on a murder defendant's race did not improperly inject race as an inflammatory issue in the case or rise to the level of prosecutorial misconduct. The court noted that the comments were invoked by the defense attorney's closing argument, which focused on the original police misidentification of defendant as Hispanic, when he was in fact Filipino, and were not racially biased. The court rejected defendant's argument that the comments were appeals to racial passion or references to race.

"With respect to defendant's argument that the State injected a race issue into the case to inflame juror passions, we disagree. True, the State commented on the Filipino nationality and the fact that it is comprised of a combination of Oriental and Latino influences. The argument, however, was proper. It was invited in response to defense counsels closing argument. which emphasized the discrepancy between the initial characteri7atjon of the offenders as Latino and the later characterization as Oriental. As such, we find inapposite those cases cited by defendant that dealt with racially biased arguments, appeals to racial passion or 'gratuitous' references to race, where race had nothing to do with the issues. None of these situations was present in the instant case."

Prosecutor Failure to Prosecute Cross-Complaints

CROSS COMPLAINTS

Myers v. County of Orange, 15 E3d 66 (2nd Cir. 1998); cert. *den., 64* CrL 216! (1999).

A policy implemented by a city's police department and the county's district attorney against entertaining criminal cross-complaints was held to hear no rational relationship to a legitimate governmental interest in impartial law enforcement, and thus violated the equal protection rights of an arrestee who was named as the perpetrator in an original complaint arising out of the commission of a crime. The court found that the assumption that the original complainant was the true victim caused the police to fail to investigate further, and the prosecutor to consider evidence potentially favorable to the arrestee. The court deemed the policy to be based on irrelevant and irrational considerations.

'[a] first come-first served policy also runs contrary to the objectives of law enforcement to protect the public, since it inhibits collection of the fullest possible information from all sources relating to a potentially criminal incident.' *[Myer v. County of Orange,* 870 F.Supp.] at 557. By undermining the ability of the police department and the DA to gather all available evidence, the cross-complaint policy creates an unnecessary risk that innocent persons will he prosecuted and possibly convicted. In sum, by severely distorting the ends of justice in an

attempt to resolve complaints efficiently, the cross-complaint policy serves no legitimate governmental interest. We note that Port Jervis conceded as much at oral argument.

"Orange County replies that 'prosecuting both cross.. . complaints simultaneously' would create 'the appearance of a conflict or impropriety' and cause unnecessary 'delay and expense.' The issue, however, is not whether a DA must *prosecute* cross-complaints simultaneously, but whether a DA and a police department must entertain cross-complaints on the same basis as original complaints, investigate all complaints based on the circumstances of the case rather than on the order in which they were filed, and on that basis determine who, if anyone, should be prosecuted. To fail to do so, we believe, distorts the even-handed pursuit of justice and violates the Equal Protection Clause."

Prosecutor Advising Police – Immunity

PROSECUTOR ADVISING POLICE IMMUNITY

Spivey v. Robertson, 197 E3d 772 (5th Cir. 1999).

Prosecuting attorneys were entitled to absolute immunity in a civil rights action brought by a photocopy business owner who at the prosecutors' suggestion, was arrested for injuring public records and unlawful use of a license, which charges were dropped shortly thereafter. The court found that the prosecutors acted as "advocates," rather than "complaining witnesses," since they did not create or manufacture new facts for the police officers to include in an affidavit for an arrest warrant, but merely suggested certain legal conclusions on the facts already given to them by the police. These facts indicated that the owner photocopied hundreds of driver's licenses belonging to minors who subsequently altered their original licenses with the photocopies in order to appear that they were of legal age to buy alcohol,

"The prosecutors were not creating or manufacturing new facts for the police officers to include in an affidavit for an arrest *warrant,* but suggesting legal conclusions on the facts already given to them by the police. Under *Kalina* v. *Fletcher,* 522 US. 118 (1997)], a prosecutor acts as an advocate in supplying legal advice to support an affidavit for an arrest warrant and is entitled to absolute immunity as long as a prosecutor does not personally attest to the truth of the evidence presented to a judicial officer, or exercise judgment going to the truth or falsity of evidence. Because the prosecutors were acting as advocates in supplying legal advice based on facts provided by police officers to support an affidavit for an arrest warrant, the prosecutors in the instant case are absolutely immune."

Prosecutor Advising Child Abuse Investigators Immunity

Michaels v. New Jersey, 50 F.Supp.2d 353 (D.N.J. 1999).

> A prosecutor was acting in an investigatory capacity when she initially interviewed five children who claimed that they were sexually abused by a day care worker, and gave legal advice to investigators working on the case. Accordingly, she was entitled only to qualified rather than absolute immunity in a civil rights action brought by the worker, claiming that she was convicted as a result of an unconstitutional investigation. The court said that absolute immunity did not attach until the prosecutors later decision to present the matter to the grand jury. The court also rejected a novel theory that the grand jury proceedings could be used to bootstrap the investigative activities into a quasi-judicial function.
>
> "Moreover, a prosecutor cannot, as Spencer-McArdle attempts to do here, invoke a later grand jury proceeding to retroactively recharacterize investigative activities as quasi-judicial. *See Buckley v. Fitzimmons* 509 1 IS. 259 (1993)1, 509 U.S. at 276, 113 S.Ct. 2606

('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 he 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.')."

Prosecutor Altering Transcript

United States v. Durham, 139 F3d 1325 (10th Cir. 1998).

Federal. A prosecutor's alleged request that a court reporter modify a transcript that had not yet been filed, without informing the court or opposing counsel, was ruled improper. The court held, however, that the alleged misconduct did not amount to plain error requiring reversal of a perjury conviction because it did not affect the defendant's substantial rights.

There were subsequent statements by the defendant in the record on the same subject addressed in the portion of the transcript at issue.

The government tells us that the Assistant United States Attorney assigned to this case noticed what he believed to be an error in the original transcript of the venue proceeding and brought it to the attention of the court reporter, Eldon Simpson. According to the government. Mr. Simpson then corrected the transcript' prior to filing it, but forgot to save the 'corrections' on his computer, thus leaving the defense with an erroneously non-conforming copy of the transcript. The government's request to modify the official transcript was made without informing the court or opposing counsel.

"Because neither defendant objected to the use of the altered transcript, we review the claim of prosecutorial misconduct for plain error. We may not correct the alleged error unless there is: (1) an error: *(2)* that is plain, and (3) that affects substantial rights. Johnson v. United States___ U.S. ___, ___, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997).

Even if those conditions are met, we will only reverse and remand if the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.' *Id.* (internal quotations omitted).

. . . . .we do not accept Durham's contention that such behavior requires reversal in the case before us because it did not affect substantial rights *Johnson,* U.S. at ' 117 S.Ct. at 1549. Indeed. upon review of the record, we see no possibility that the misconduct at issue affected the verdict. Both the original and modified transcripts indicate that Durham was initially confused about when he left the state of Oklahoma [at issue in the case]. In his testimony following the disputed section, however, Durham consistently maintained that the last time he had been in**.** Oklahoma was in 1990. . To the limited extent that the jury may have been able to infer a higher degree of confusion from the unaltered transcript, the role of that single comment is not significant in light of Durham 's subsequent, conclusive statements that he had not been to the state of Oklahoma since 1990."

Prosecutor Argument "Send a Message"

State v. Hawk, 327 N.J.Super 276, 743 A.2d 32~ (NJ.App. 2000).

A prosecutor's closing argument in a prosecution for drug offenses, that the jury should "send a message" to defendant and the community was deemed inflammatory and deprived the defendant of his right to a fair trial, even with an immediate curative instruction by the trial court, where the prosecutor also made an inappropriate comment in his opening statement.

Another statement to the effect that if the jury did not find defendant guilty, they were saying all the police in two counties were not doing their job, was considered a violation of fundamental restraints against prosecutorial excess and also deprived defendant of his right to a fair trial.

The court said a prosecutor may not suggest that police officers will suffer penalties if a jury is not convinced by their testimony. Such comments as. "there is a lot of harm that could come to him from lying," and "the police officer's career would be finished in a minute if the officer were to lie, were considered inappropriate and could result in an unfair trial.

"Police occupy a position of authority in our communities. Their purpose is to 'protect and serve' our citizenry, and thus ordinary citizens are more likely to believe them than a person on trial for distribution of drugs. The prosecutor's comments in the instant case had the effect of telling the jury that, if they did not find defendant guilty, they were saying that all the police in two counties were not doing their job. These comments were not specifically addressed by the court in its curative instruction. . . . It is doubtful a curative instruction would have been effective in this situation anyway."

The prosecutor was also directed not to repeat on retrial any of the improper comments to the jury, both those inappropriately made during opening as well as those in the closing.

Prosecutor Assisting Police With Arrest Warrant – Immunity

Aboufariss v. City of DeKalb, 713 N.E.2d 804 (Ill.App. 1999).

The actions of a county assistant state's attorney regarding the arrest of a father for child abduction fell within the traditional role of a prosecutor and were protected by absolute immunity from civil rights liability under 12 U.S.C. *S* 1983, where she advised a police officer to complete the investigation and attempt to locate the father, read the portions of a marital settlement agreement and a joint parenting agreement relating to custody and visitation, reviewed the child abduction statute, assisted in drafting the complaint for an arrest warrant and attended the probable cause hearing. The Court also ruled that on these facts the prosecutor was entitled to public official immunity from state claims.

"Here, Pauling's acts fell within the traditional roles of a prosecutor. . . . We believe that absolute immunity applies to protect a prosecutor when performing these functions.

Accordingly, absolute immunity operates to bar the section 1983 claims against Pauling.

"In addition to absolute immunity barring the federal claims, Pauling is also protected by public official immunity against plaintiff's state law claims. The doctrine of public official immunity affords state officials and employees full protection for acts performed within their official discretion. . . To he protected, a public official's actions must fall within the scope of the official's authority and should not be the result of 'malicious motives.'. . . A prosecutor acting within the scope of her prosecutorial duties enjoys immunity from civil liability, the same immunity afforded to the judiciary.

"Because we have already concluded that Pauling's actions fell within the scope of traditional prosecutorial functions and plaintiff's state law claims against Pauling were based on the same factual allegations contained in the section 1983 claims, public official immunity operates to bar the state law claims against Pauling. . ."

Prosecutor Breach of Grand Jury Secrecy After "No Bill"

People v. DiVincenzo, 183 Ill.2d 239, 700 N.E.2d 981 (111. 1998).

When prosecutors asked a grand jury, which had returned a "no bill" on a first degree murder charge, to reconsider the murder charge, and reinstruct grand jurors, after learning of their vote from a police officer who had spoken to a juror during a break, this was improper. It did not, however, warrant dismissal of the grand jury's subsequent indictment on the murder charge. The court said the mere request for reconsideration did not show that the grand jury's will was overborne by the prosecutors, especially in view of their repeatedly and accurately stating the pertinent law in their instructions to the grand jury.

Even though this was misconduct and breached the cloak of grand jury secrecy, to warrant a dismissal a defendant must ordinarily show that the violation of grand jury secrecy and any prosecutorial misconduct affected the grand jury's deliberations.

"Even if a prosecutor has engaged in misconduct and grand jury secrecy has been violated, this does not warrant dismissal of the indictment *per Se***.**

"In the instant case, the fact that the prosecutors asked the grand jury to reconsider is not sufficient, by itself, to warrant dismissal of the indictment. A determination of no probable cause carries no preclusive effect.. . . A determination of no probable cause does not generally prevent a subsequent consideration of probable cause. Standing alone, the prosecutors' request for reconsideration does not show that the will of the grand jury was overborne by the prosecutors.

The prosecutors repeatedly and correctly stated the pertinent statutory law and definitions. The prosecutors also provided the grand jurors with case law and told them where to find the statutory definitions of recklessness and other mental states. The transcript shows an independent grand jury that questioned the statements and suggestions of the prosecutors. The grand jury exercised its own independent will and was not overborne by the prosecution. We conclude that the prosecutors did not make fundamental misstatements of the law or exercise undue coercion

One judge dissented.

Prosecutor Bolstering Witness Credibility

Agard v. *Portuondo,* 159 F.3d 98 (2nd Cir. 1998).

A prosecutor's suggestion during closing arguments, that defendant's credibility as a witness on his own behalf was less than that of the prosecution witnesses in the case, solely because defendant had been present during the entire trial while prosecution witnesses were present only during their own testimony, was reversible error. The argument was not a factual one based on defendants testimony, but rather was a blatant bolstering of the prosecution witnesses' credibility at the expense of defendant's constitutional exercise of his right to he present during the trial.

The court rejected state arguments that the error was harmless and that it had established a new constitutional rule not addressable retroactively on collateral review: it granted habeas corpus relief.

"The prosecutor in the present case [argued] that unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses. is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. . . . That gives you a big advantage, doesn't it.' This was not a factual argument based on the defendant's testimony in this particular case but a generic argument that a defendant's credibility is less than that of prosecution witnesses solely because he attended the entire trial while they were present only during their own testimony. The prosecutor's argument was not based on the fit between testimony of the defendant and other witnesses. Rather, it was an outright bolstering of the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial. . . . [The constitutional issue here is somewhat similar to that in *Griffin v. California,* 380 U.S. 609, 613-15, 85 S.Ct. 1229. 14 L.Ed.2d 106 (1965) (disallowing generic argument based on a defendant's exercise of his Fifth Amendment right not to incriminate himself)."

Prosecutor Closing Argument Calls Defendant Liar and Criminal

State v. Hutcherson, 968 P.2d 1109 (Kan. App. 1998).

References by a prosecutor in closing argument referring to a drug defendant as a liar, a criminal, and a drug dealer were held to have so prejudiced the jury that defendant was denied a fair trial. The court said reversal of defendant's convictions was required because of the fair trial issue.

At oral argument on appeal the court was assured that the practice had ceased as a result of an earlier decision of the appellate court that took place after the trial in this case.

"Hutcherson is correct in asserting that such statements are improper. . . . However, the disposition of this issue depends on whether the statement so prejudiced the jury against him as to deny him a fair trial.

"In a very recent opinion, another panel of this court reversed a criminal conviction and remanded it for new trial based in part on the improper remarks made in closing argument by the same prosecutor in this case. *State v. Lockhart,* 24 Kan.App.2d i88, 947 P.2d 461 (1997). In *Lockhart,* this same prosecuting attorney called the defendant and defense counsel liars.

"We were assured by the State's attorney at oral argument that the prosecutor's office has ceased this practice as a result of the *Lockhart* decision. Unfortunately, the trial in the present case occurred before *Lockhart.*

"We conclude that Hutcherson did not receive a fair trial because of the improper remarks of the prosecutor in his closing argument."

Prosecutor Commenting on Honesty of Witnesses

State v.Mosley 965 P.2d 848 (Kan.App. 1998).

> A prosecutor's closing argument that his witnesses were telling the truth, that defendant was attempting to confuse the jury about the evidence, and that defendant would have accused the prosecution of conspiracy if the statements by the state's witnesses were all consistent, came "perilously close" to reversal, but were not so serious as to require that extreme action. The court considered the question of reversal, even though defendant had made no contemporaneous objection to the statement, and also gave a warning for counsel:

It is extremely dangerous to allow zealousness to be given too loose a rein. Fair comment on trial tactics and the interpretation of evidence is appropriate in argument to the jury. But, care must he exercised not to inappropriately denigrate opposing counsel or inject personal evaluations of the honesty of witnesses.

Prosecutor Exparte Communication To Confirm Co-D's Sentence

State v. Lotter, 586 N.W,2d 591 (Neb. 1998**).** State. A trial judge engaged in an ex parte communication with a prosecutor, wherein the prosecutor sought assurances from the judge that an accomplice would receive a life sentence in exchange for testifying against the defendant in a capital murder prosecution. The court ruled that the trial judge was not required to recuse himself because the defendant failed to request a recusal, even though he knew of the ex parte communication

> Although it appears that the ex parte communication at issue in the instant case might have posed a threat to the trial judge's impartiality, see *Bell* v. *State,* 655 N.F.2d 129 (Ind. App. 1995), we need not determine whether the trial judge should have

recused himself, since Loner did not request the judge's recusal, see *State v. Jenson,* 232 Neb. 440 N.W.2d 686 (1989). 'One cannot know of improper judicial conduct, gamble on a favorable result by remaining silent as to that conduct, and then complain that he or she guessed wrong and does not like the outcome.' *Id.* at 405, -140 N.W.2d at 688."

Prosecutor Failure To Disclose Witness' Criminal Record

Hollman **v.** *Wilson.* 158 F.3d 1998). 177 (3rd Cir.

The prosecution's failure to disclose to a defendant the full criminal history of a witness against him did not violate the constitutional disclosure rule articulated in *Brady v. Maryland,* 373 U.S. 83 (1963), where the omission was the result of a clerical error and the information was neither readily available to the prosecution nor constructively in its possession.

The court said even if there were *Brady* error, the defendant would not he entitled to a new trial in the absence of a reasonable probability that disclosure of the witness's criminal record, including a prior conviction for filing a false report of incriminating evidence with the authorities, would have led to a different result at trial. Looking at the record as a whole the court concluded that there was ample evidence for the jury to convict, even without the testimony **of** the witness whose full criminal record was not disclosed.

"Here we cannot say that the prosecutor should have—or even could have—known about, or searched for, the clerical error which resulted in Andre Dawkins being given two different criminal identification numbers. The cause of the failure is characterized by the parties as an administrative mistake. Without some record evidence that it was something more than a mistake, we cannot conclude that the government withheld information that was readily available to it or constructively in its possession. Accordingly, we find that the government did not withhold Dawkin's full criminal history and that the failure of the government to produce this material does not constitute a *Brady* violation.

We conclude that the additional impeachment material contained in the complete criminal record would have been merely cumulative. We find that even had defense counsel been provided with Dawkin's crimen falsi convictions, the additional impeachment evidence would not have put the whole case in such a different light as to undermine our confidence in the verdict.

Prosecutor Instructing Police To Prepare Arrest Warrant - Immunity

Sheehan v. Colangelo, 27 F.Supp. 2d 344 (D.Conn. 1998).

Federal In an action brought under 42 U.S.C. ~ 1983 it was held that a prosecutor was entitled to absolute prosecutorial immunity for instructing a police officer to prepare a warrant for the arrest of the plaintiff. In the absence of allegations that the prosecutor personally vouched for the truth of the facts set forth in the arrest warrant application, he was acting as an advocate, rather than as an investigator and, thus, was entitled to absolute immunity.

"Here, plaintiff argues that defendant Colangelo is not entitled to absolute prosecutorial immunity because he played a lead role in the investigatory phase of the arrest warrant process by instructing defendant Billingslea, a Norwalk police officer, to prepare the arrest warrant and leave out certain exculpatory information. Plaintiffs argument is without merit because a prosecutor's determination to file charges, and the selection of which facts to include in the affidavit that serves as the basis for the finding of probable cause, requires the exercise of the independent judgment of the prosecutor. *Kalina v. Fletcher,* 118 S.Ct. 502 (1997)1, 118 S.Ct. at 509. Defendant Colangelo's motivation in initiating the proceedings against plaintiff has no hearing because absolute immunity applies to virtually all acts, regardless of motivation. associated with [the prosecutor's] function as an advocate. *Dorry v. Ryan,* 25 F.3d 81, 83 (2d Cir. 1994).

"Plaintiff's argument that the facts in *Kalina* are akin to the facts presented here is unpersuasive. In *Kalina,* the prosecutor commenced criminal proceedings by filing three documents: (1) an unsworn information; (2) an unsworn motion for an arrest warrant; and (3) a 'Certification for Determination of Probable Cause.' In the Certification, the prosecutor set forth a summary of the evidence supporting the charge and swore to the truth of those facts under penalty of perjury. The Supreme Court held that the prosecutor's activities in connection with the preparation and filing of two of the three charging documents—the information and the motion for an arrest warrant—are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate's function as well.

Kalina, 118 S.Ct. at 509. Here, there are no allegations that defendant Colangelo personally vouched for the truth of the facts set forth in the arrest warrant application. Because plaintiffs complaint is completely devoid of any facts that would support a claim that defendant was acting as an investigator as opposed to an advocate, defendant Colangelo is entitled to absolute immunity from liability in this matter."

Prosecutor No Eleventh Amendment Immunity

No Information Available at This Time

Prosecutor Obtaining Defendant's Psychiatric Records

Schwenk v. Kavanaugh 4 F.Supp.2d 110 (N.I).N.Y. 1998).

A civil rights action was brought against two county prosecutors for allegedly wrongfully obtaining a defendant's psychiatric records. After nominal damages in the amount of $1.00 were awarded and a finding was made that the facts of the case warranted an award of punitive damages, the federal trial court ruled that the appropriate amount for a punitive damages award *w*as one dollar against each prosecutor.

The County had agreed to pay the award, thus eliminating the deterrent effect of a large monetary amount, and the court took judicial notice that a leading legal newspaper the New York Law *Journal,* had run a front page article reporting that the prosecutors had been found liable for punitive damages. This. the court said, created a deterrent effect at least as powerful as any monetary award of punitive damages.

"Appearing in an article discussing conduct which warrants punitive damages, with a wide circulation among the bench and bar, must be considered punitive to the attorneys whose conduct is the subject of the article. Further, the threat of appearing in another such article provides sufficient deterrence to these defendants. The deterrent effect of the New York Law Journal article is as powerful, if not more so, as any monetary award would be. Moreover, the deterrent effect of this type of article extends not only to the defendants in this case, hut literally across the country to all of the readership of the New York Law Journal."

The article appearing in the *Journal.* March 16, 1998, is reproduced in Appendix I to the court's opinion. pp. 119-120**.**

Prosecutor Offering Leniency For Testimony

United States V. Singleton, — F.3d —. 1999 WL 6i69. No. 97-3178 (10th Cir. 1999).

On July 1. 1998, a three judge panel of the Tenth Circuit Court of Appeals, 144 F.3d 1343 (10th Cir. 1998), ruled that under 18 U.S.C. § 201(c)(2). which prohibits giving, offering, or promising anything of value to a witness for or because of his testimony, it was illegal for a federal prosecutor to offer leniency in exchange for a witness's testimony. The decision caused an immediate uproar in prosecution and defense circles, as it would severely limit prosecutors' traditional ability to make plea arrangements with criminal accomplices in exchange for testimony.

The 10th Circuit, acting *en banc.* has now reversed the panel decision by a 9-3 vote. Only the three judges from the original panel dissented (Kelley, Seymour, Ebel).

Judge John C. Porfilio, writing for the en *banc* majority, stated that the original decision, that it was bribery for prosecutors to offer witnesses leniency in exchange for their testimony, was "patently absurd."

Judge Porfilio said:". . . the defendants argument is: In a criminal prosecution, the word 'whoever' in the statute includes within its scope the United States acting in its sovereign capacity. Extending that premise to its logical conclusion, the defendant implies Congress must have intended to subject the United States, like any other violator, to criminal prosecution. Reduced to this logical conclusion, the basic argument of the defendant is patently absurd."

Prosecutor Holding Searching Defense Attorney

Conn v. Gabbert, No. 97-1802 (1998), 1998 WL 248490, appeal from 131 F.3d 93 (9th Cir. 1997).

The United States Supreme Court has granted *certiorari* in this case to determine whether prosecutors violated the due process rights of a defense attorney in having him held and searched pursuant to a warrant in a separate room at a courthouse while his client was appearing before a grand jury as a witness. The prosecutors believed that the defense attorney had a letter from a defendant instructing his client-witness to testify falsely at a prior trial. The attorney was prevented from conferring with his client during the grand jury proceedings because of the detention and search. His claim is that he was denied due process by the prosecutors in not being able to practice his profession by consulting with his client during the grand jury proceedings. The timing and motivation for the search are alleged to have been for this purpose.

The case will likely be decided early in 1999 and will he reported in *C(X73.*

Prosecutor's Reference to Defendant's Failure to Testify

State v. Lyons, 718 A.2d 1102 (Me. 1998).

A closing argument by a prosecutor in a sexual misconduct case in which he asked the jurors what evidence had been offered which would cause them to doubt the victim's testimony, was not considered an improper comment on defendant's failure to testify and, therefore, was not reversible error per se. The court considered the comment as referring to trial evidence in general presented by both sides in the case.

Even if the argument were considered a comment on defendant's failure to testify. it was harmless error. The court said the comment refuted defendant's assertions that the victim had a motive to lie, and the evidence in the record of defendant's guilt was substantial.

In light of the substantial evidence pointing to Lyons' guilt, it is clear beyond a reasonable doubt that, absent the comment, an average jury would have found every element of the crimes charged and returned a guilty verdict. . . . Even if a jury could reasonably construe the State's ambiguous comment to refer to Lyons' failure to testify, it is clear beyond a reasonable doubt that an average jury unexposed to the comment would still have returned a guilty verdict. . . . Therefore, the State's improper ambiguous comment constituted harmless error."

Prosecutor Threatening Defense Witness

United States v.*True,* 179 E3d 1087 (8th Cir. *1999).*

Even though a prosecutor may have had good reason to believe that a potential defense witness' testimony would have been false, her comments to the witness' attorney constituted an impermissible, coercive threat designed to prevent the witness from testifying where. rather than giving a simple admonition against perjury, she told the witness' attorney that she could and would prosecute the witness for perjury or making a false statement to a peace officer if he testified contrary to his prior statement implicating the defendant. Still, defendant was not prejudiced where possible state charges that could be brought against the witness were the likely cause for his invocation of his Fifth Amendment privilege at defendant's trial, rather than the threat.

"Standing alone, Needles' comments regarding perjury and false statement charges are impermissible. Rather than a simple admonition against perjury, Needles stated that she could and would prosecute Oakland for perjury and/or making a false statement to a peace officer. While Needles may have had reason to believe that Oakland's testimony would have been false, her comments constituted an impermissible, coercive threat designed to prevent him from testifying. In response to the threat, the district court Solicited full briefing from the parties regarding the misconduct. The district court held a hearing to examine the basis for Oakland's invocation of the Fifth Amendment and determined that, in addition to possible charges of perjury and false statements, the possibility of state prosecution on drug charges constituted a basis for his silence. We do not believe that the district court committed clear error when it determined that possible state charges counseled Oakland's invocation of the Fifth Amendment. Accordingly, we conclude that the record does not support the conclusion that Needles' comments caused Oakland's silence. True was not therefore prejudiced."

Prosecutor's Argument "He's Already Got a Break"

Leaks v. State**,** 5 S.W.3d 448 (Ark. 1999).

A prosecutor's closing argument in a murder case referring to premeditation, with a suggestion that the defendant had already been given a break by the prosecution's decision to charge him with first-degree murder instead of capital murder ['He's a lucky man. He's already been given a break when he wasn't charged with the premeditated killing of Mr. Littlejohn. . . But, the decision was made right or wrong not to charge him with capital murder and not to seek the death penalty. We charged him with murder in the first degree. So, he's already been given a break in that regard.']. was ruled a "highly improper" reference to an offense outside the charges and the evidence in the case.

The court ruled that the trial court's failure to sustain a defense objection was not harmless, even though defendant did not receive the maximum sentence for first-degree murder and even if the evidence of his guilt on either first-degree or second-degree murder was overwhelming, in light of the possibility that the improper argument might have affected the deliberations in favor of a first-degree murder conviction.

Based on this record, we cannot say that the prosecutor's improper suggestion of a third and more serious charge, capital murder, did not result in jury deliberations that included not only the charged offense of first-degree murder and the lesser-included offense of second-degree murder, but also a third uncharged offense of capital murder, thereby causing the deliberation to be skewed in favor of first-degree murder. We, therefore, hold that the trial court's error in failing to sustain Mr. Leaks's objection to the prosecutor's highly improper remarks was not harmless .

Prosecutor's Argument – "He's Bad to the Bone"

McGilberry v. State, 41 So.2d 894 (Miss. 1999).

Closing argument by a prosecutor in the guilt phase of a capital murder prosecution that defendant was "bad to the bone" did not warrant a mistrial, in light of defendant's insanity defense, and his attempt to blame the victims, his family members, for his problems.

The court reiterated the usual admonition that a prosecutor should not indulge in personal abuse or vilification of the defendant, but said that even if the reference were improper, a mistrial would not be warranted, where the evidence against defendant was overwhelming.

Prosecutor Immunity Setting Up Sting Operation

Smith v. Garretto, 147 F.3d 91(2nd Cir. 1998); *Lomaz v. Hennosy,* 151 F.3d 493 (6th Cir. 1998).

In *Smith* the court ruled that a prosecutors activity in setting up a sting operation designed to catch a housing authority employee accepting a bribe *w*as "investigatory conduct that was not entitled to absolute prosecutorial immunity. The court focused on the fact that the prosecutor was not preparing for the presentation of an existing case, but was in reality doing "police work" in hope that his target would succumb to temptation and thereby furnish evidence on which a prosecution could he based.

This placed his conduct outside the strict function of a prosecutor and made the prosecutor eligible at most for qualified immunity in a civil rights action under *42* U.S.C. *S* 1953.

"Although all investigative activity could be considered in some sense to be 'preparing for the initiation of judicial proceedings,' *Buckley* 509 U.S. at 2~3, 113 S.Ct. *26o6.* the Supreme Court has sought to draw a line between those preparatory steps that a prosecutor takes to be an effective advocate of a case already assembled and those investigative steps taken to gather evidence. The Court has identified 'evaluating evidence and interviewing witnesses' as falling on the absolute immunity side of the line, leaving 'searching for the clues and corroboration' that might lead to a recommendation for an arrest on the qualified immunity side. *See' id.* The Court has also identified 'planning and executing a raid' as another example of action enjoying only qualified immunity. *See Id.* at 274, 113 S.Ct. 2606.

. . . . .in the pending case, Garretto's [prosecutor] action in orchestrating a sting designed to catch Bodak accepting a bribe is decidedly on the investigation side of the line. In no sense was Garretto preparing for the presentation of an existing case: he was doing police work in the hope that his target would succumb to temptation and thereby furnish evidence on which a prosecution could be based. Such conduct is not shielded by absolute immunity."

But In *Lomaz* the court ruled that prosecutors were protected by absolute immunity in each of their actions in obtaining and executing a search warrant, and their actions relating to the evidence seized pursuant to that warrant, for purposes of a businessman's *§*1983 action alleging that the prosecutors had engaged in a scheme to drive the businessman out of a fireworks business, for their own personal gain. In this case the investigative work had already largely been done by law enforcement officials and the prosecutors' activity was deemed equivalent to preparing for initiating a prosecution.

"We hold that Plough and Myers were protected by absolute immunity in each of their actions having to do with the search warrant and its execution. There is no question that the prosecutors were acting as advocates for the state when they appeared in front of Judge DiPaulo with the affidavit and search warrant. Prosecutors are entitled to absolute immunity for 'initiating a prosecution and . . . presenting the states case. I*mbler v. Pachtman,242* U.S. 409 (1976)1. 424 U.S. at 430, 96 S.Ct. 984. The act of initiating and presenting the state's case includes appearances before a judge to establish probable cause for a search warrant. *See Burns [v. Reed,* 500 U.S. 478 (1991)), 500 U.S. at 496, 11 S.Ct. 1934, It would seem anomalous, therefore, to say that they were not acting as advocates during die preparation of the affidavit and search warrant for presentation in

court, particularly where, as here, the undisputed facts demonstrate that when the defendants prepared the affidavit and the warrant, the undercover foray into Lomaz's facility had already revealed the presence of the evidence listed in the warrant, and the marshals had already determined that this evidence, among other things, provided probable cause for prosecuting Lomaz. The purpose for which they sought the warrant, therefore, was not primarily investigative, but was to obtain and preserve the evidence. We think that under these circumstances, the prosecutors were clearly 'preparing for the initiation of judicial proceedings.' *Buckley v. Fitzsimmons* 509 U.S. 259 (1993)], 509 U.S. at 273, 113 S.Ct. 2606.

"Turning to Defendant Plough's role in executing the warrant, we conclude that his action is entitled to absolute immunity as well. The Supreme Court held in *Burns* that 'advising the police in the investigative stage of a criminal case is [not] so intimately associated with the judicial phase of the criminal process that it qualities for absolute immunity, ~ *Burns.* 500 I'S. at 493, 111 5Cc 1934. Plough, however, was not advising the marshals in the investigative stage of this case. Rather, he directed Ethel Director of the Department of Commerce to continue seizure. first, because all of the items listed in the warrant were necessary to the judicial proceedings, and second, because the execution of the warrant could not be begun again if it were discontinued. We conclude that, like the preparation of the affidavit and the warrant, this action was part of the prosecutors' 'preparing for the initiation of judicial proceedings.' *Buckley,* 509 U.S. at 273, 113 S.Ct. 2606. The district court did not err in concluding that these actions were protected l)y absolute immunity."

Prosecutors Investigator Has Free Speech

No Information Available At This Time

Prosecutor Mentions Polygraph – Reversible Error

People v.. Eaton, 718 N.E.2d 1020 (Ill. App. 1999).

A prosecutor made an improper reference to polygraph evidence during his closing arguments in a trial for attempted murder of two police officers by noting that defendant "said he wasn't guilty" and then asked, "Why didn't they put him on a polygraph?" He followed this up with the remark, "If they would have just put him on a polygraph." The court ruled that although the comments did not explicitly reference the results of a polygraph examination, the inference to be drawn from the comments was that defendant was afraid to take the test for fear his guilt would be shown. The court rejected the state's argument that the prosecutor's comments had been invited by defense counsel. The conviction was reversed and remanded for a new trial.

"The results of a polygraph examination, in any manner and at any stage of the defendant's trial, are inadmissible as proof of guilt or innocence. . . . The rationale is that polygraphy is not sufficiently reliable, and the quasi-scientific nature of the test may lead a trier of fact to give the evidence undue weight....

The State contends that defense counsel invited the prosecutor's remarks by arguing that neither the police nor the assistant State's Attorney ordered a gunshot residue test or established any other 'scientific evidence' of defendant's guilt. We disagree. The scientific evidence referenced by defense counsel, specifically, the gunshot residue test and fingerprint and firearms evidence, was reliable and admissible. Defense counsel's references to such evidence did not invite the prosecutor's remarks on unreliable, inadmissible polygraph evidence."

Prosecutor's Argument Reasonable Inference

Harris v. State, 996 S.W.2d 232 (Tex. App. 1999).

A prosecutor's argument in an aggravated sexual assault prosecution regarding the victims anxiety while awaiting the results of medical testing and testing for Acquired Immune Deficiency Syndrome (AIDS), which the jury was instructed to disregard, was not so extreme or manifestly improper as to require a reversal.

A prosecutor is afforded wide latitude in drawing inferences, if reasonable, and may strike hard blows, hut not foul. Appellant had just been convicted in this trial of two brutal rapes. Appellant further admitted to a prior conviction. May a prosecutor reasonably argue the angst of the victim M.S., while she faces the possibility of awaiting the results of medical or AIDS testing? We conclude, yes.

"Appellant testified in the punishment phase he had been convicted of solicitation of prostitution. He had just been convicted of two vicious rapes. One could in good faith infer cautionary health screens, including AIDS testing, after being raped by appellant, particularly in light of the admission of his attempted sexual liaison with a prostitute.

. . . . we hold the prosecutor's remarks were not so extreme or manifestly improper to merit reversal . . .

Prosecutor's Argument "Give Defendant What He Deserves"

No Information Available at this Time

Prosecutor Vindictiveness Adding Charges

State v. Johnson, 605 N.W.2d 846 (Wis. 2000)

In a case of first impression, the Supreme Court of Wisconsin ruled that no presumption of prosecutorial vindictiveness arose where a prosecutor added additional charges during plea negotiations following a mistrial caused by a hung jury. This was despite the defendant's claims that he was in the same position as a defendant on remand after reversal of a conviction on appeal and that he caused the retrial by exercising his constitutional right to a jury trial. The court said the retrial was necessary because of the jury's inability to reach a verdict, not because of the exercise of rights by the defendant.

The case involved a child sexual assault prosecution. Defendant failed to prove actual prosecutorial vindictiveness as to the additional charges added during plea negotiations after the hung jury, despite an alleged "lack of any legitimate reasons" for the new charges and a letter from the prosecutor offering to withdraw the amended information in exchange for a guilty plea. The court said the prosecutor's belief that sufficient evidence existed to support a conviction justified the filing of the additional charges, and the letter itself suggested a non-vindictive reason for the prosecutor's strong motivation to obtain a plea, *i.e.,* to spare the child victims from testifying at a second trial.

[The] United States Supreme Court cases have applied a presumption of prosecutorial vindictiveness to the filing of in creased charges after a successful appeal, but have not extended this presumption to the pretrial context. The Court has never considered a vindictiveness claim in the mistrial context.

[We] conclude that the fact that the prosecutor filed the additional charges during plea negotiations does not create a realistic likelihood of vindictiveness. As the federal courts have noted, *Bordenkircher* v. Hayes*,* 434 U.S. 357 (1979)1 confirmed the legitimacy of plea bargaining and found no element of retaliation in the give-and-take of plea negotiations. *Bordenkircher* 434 U.S. at 363, 98 S.Ct. 663. The government's interest in persuading the defendant to enter a guilty plea therefore does not justify a presumption of vindictiveness before trial. . . . We find no reason that a different rule should apply after a mistrial caused by a hung jury.