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NEVER HAVING TO SAY YOU'RE SORRY

The limits – if any – of prosecutorial immunity are the focus of a new Supreme Court case

By Julius (Jay) Wachtel. If the criminal justice system had "worked" the way that Orleans Parish prosecutors intended this posting wouldn't exist, as John Thompson would be rotting in his grave and his case would be long forgotten. But a few weeks before May 20, 1999, the day scheduled for Thompson to meet his Maker, a defense investigator happened across an extraordinary document.

It was a lab report, previously undisclosed to the defense, analyzing the blood found on the pants leg of one of the victims of an attempted armed robbery. This blood, which was indisputably the robber's, was type "B". That piqued the investigator's interest. You see, the robbery, which happened three weeks after the December 1984 murder for which Thompson got the death penalty, had also been pinned on Thompson. In fact, prosecutors took him to trial for the robbery first so that if he was found guilty they could use that conviction to impeach him at his murder trial. (He was, and they did.)

Yet they didn't use the blood evidence. Instead, they relied on shaky eyewitness testimony. Why? As it turned out Thompson's blood type was different. It was "O".

Fourteen years later, as the execution date approached, Thompson's lawyers presented indisputable evidence that prosecutors knew of the blood-type discrepancy but never let on. Not only was that a clear violation of *Brady v. Maryland*, which requires that the State share potentially exculpatory material with the defense, but a stunning moral breach as well.

Since Thompson's bogus robbery conviction was used to get jurors to go for the death penalty, a judge placed the execution on hold. Eventually both convictions were set aside. But prosecutors decided to retry Thompson for murder. This time, though, the defense had reams of exculpatory material, including previously withheld police reports that suggested a third party was the real killer. (This man, who had given officers conflicting accounts about the murder, was later shot and killed by a security guard.)

Jurors were out half an hour. Four years after his close brush with death, and eighteen after getting locked up for two crimes he didn't commit, Thompson was finally a free man.

He then sued Orleans Parish for violating his civil rights under 42 USC 1983. After winning a $14 million judgment in Federal District Court, then having it affirmed in the Fifth Circuit, Thompson must have been disappointed when the Supreme Court elected to hear the D.A.'s appeal, a move that is often a harbinger of reversal. (*Connick v. Thompson*, no. 09-571.)

The Court's grant of certiorari was hardly surprising. Three decades earlier, in *Imbler v. Pachtman*, justices unanimously ruled that "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" requires they be absolutely immune, even when a prosecutor's "malicious or dishonest action" leads to a wrongful imprisonment.

Like Thompson, Imbler had been convicted of murder and sentenced to death. He served nearly a decade before a Federal district judge found that the prosecutor, Pachtman, knowingly used false and misleading testimony and withheld evidence of Imbler's innocence. Imbler was released and the murder case was dropped. It was his lawsuit against Pachtman that eventually led the Supreme Court to grant prosecutors a Hail Mary pass so they could do essentially as they pleased.

Knowing full well how the Supreme Court felt about such things, Thompson's legal team sued the office, not the man. Turning to settled law (*Canton v. Harris*) they cited the duty of municipalities to properly train their employees (in this instance, to disclose potentially exculpatory information under *Brady*) and avoid being "deliberately indifferent" to the public welfare.

That wasn't a unique approach. In January 2009 the Supreme Court unanimously turned away Tom Goldstein's civil rights lawsuit against Los Angeles County prosecutors (*Van de Kamp v. Goldstein, no. 07-854*). Exonerated after serving 24 years for murder, Goldstein had been railroaded by the testimony of jailhouse informer Edward Fink (regrettably the man's true name), a notorious liar who sought to earn "discounts" for his own misdeeds.

Goldstein sued the D.A. for keeping derogatory information about Fink secret and for failing to train his staff about informers. But it was no dice: in a relatively brief decision that relied heavily on *Imbler*, the Court turned Goldstein away. (For more on the Goldstein case click here.)

Thompson's lawyers took pain to distinguish their case from Goldstein's. Their brief emphasizes that their target isn't an individual prosecutor but, as in *Canton*, a "municipality" (p. 51). Oral arguments took place four days ago. Things didn't go particularly well for either side. According to the AP the Justices were skeptical about Thompson's training remedy. On the other hand, an online legal source reported that the Court grilled Louisiana's lawyer about the *Brady* violations, which as one justice pointed out are inherently difficult to detect.

There are good reasons to reconsider *Imbler*. Many prosecutorial shenanigans have been uncovered in recent years. In a notorious 2008 example, a judge set aside the corruption conviction of the late Senator Ted Stevens when it turned out that the Feds had failed to disclose exculpatory material and apparently coached a witness to lie. DOJ has since embarked on a still-ongoing national probe of Federal prosecutorial practices. (Tragically, a career attorney who was under investigation for his role in the Stevens case recently committed suicide.)

Clearly not all is well in Federalville. "Misconduct at the Justice Department," a USA Today investigative series, discovered 201 instances since 1999 where judges accused Federal prosecutors of "flagrant" and "outrageous" legal and ethical breaches including hiding evidence, suborning false testimony and lying to courts and juries. Forty-seven defendants were freed or exonerated. But meaningful punishment seemed nonexistent. In a typical example, two Federal lawyers who admitted they purposely failed to turn over exculpatory evidence were suspended – for a day. Another, whose misconduct caused a man to be wrongfully convicted, was ordered to attend an ethics workshop. Reacting to the defendant's exoneration, the prosecutor said "it is of no concern to me."

And that's just the Feds. A just-released California study identified 707 instances of misconduct by state and county prosecutors between 1997-2009. Twenty percent led courts to apply remedies ranging

from excluding evidence to dismissing a conviction. Sixty-seven lawyers were named more than once. Only one is known to have been disciplined by the Bar.

When the Court suggested in *Imbler* that civil lawsuits were overkill and that errant lawyers could be controlled by Bar associations there was no DNA, hence little inkling that wrongful conviction was a serious problem. As the Justices well know, that has changed. Yet thanks to *Imbler's* safe-conduct pass the Court finds itself in a dilemma. Whether it hides behind its precedential cloak, finesses things to allow limited relief, or breaks free to chart a new course promises to be as consequential a decision for the prosecution function as *Miranda* has proven for policing.