In the

Supreme Court of the United States

Paul Kern Imbler,

Petitioner,

v.

Richard Pachtman,

Respondent.

No. 74-5435

Washington, D. C.
November 3, 1975

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PAUL KERN IMBLER,

Petitioner,

v. No. 74-5435

RICHARD PACHTMAN,

Respondent.

Washington, D. C.,

Monday, November 3, 1975.

The above-entitled matter came on for argument at 10:53 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROGER S. HANSON, ESQ., 6265 Lubao Avenue, Woodland Hills, California 91364; on behalf of the Petitioner.

JOHN P. FARRELL, ESQ., Deputy County Counsel, 648 Hall of Administration, 500 West Temple, Los Angeles, California 90012; on behalf of the Respondent.

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-5435, Imbler against Pachtman.

Mr. Hanson, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROGER S. HANSON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HANSON: Mr. Chief Justice, and may it please the Court:

Presented before the Court today is the case of Imbler vs. Pachtman, which presents the issue which has been litigated many, many times at the Circuit Court level throughout the United States, and that is the question of the immunity or the liability which falls upon a public prosecutor under the 42 U.S.C. 1983 Civil Rights Act and statute, where, in this particular case, there has been an allegation in the complaint of knowing use of perjury; and also presents the rather unique set of facts that prior to the initiation of this lawsuit there's been continuous litigation throughout the California Supreme Court, through the United States District Court in Los Angeles, the U. S. Ninth Circuit, and so forth, where we have opinions which have determined and fixed that there was in fact knowing use of perjury and a writ of habeas corpus was granted under 22 U.S.C. -- 28 U.S.C. 2254 for this knowing use of perjury.

QUESTION: We also have opinions going the other way,

don't we, from the Supreme Court of California?

MR. HANSON: I'm glad you asked that question, Mr. Justice Rehnquist, because, in fact, the opinions of the California Supreme Court did not address themselves as thoroughly as the opinion of U. S. District Judge Warren Ferguson in Los Angeles.

This was due to a multiplicity of reasons. It was due to inadequate briefing, in my opinion, on the lawyers. It was due to, perhaps, an overt ignoring by the California Supreme Court of some of the things that took place in this case, within the meaning of Napue vs. Illinois --

QUESTION: Well, nonetheless, you can weigh the opinions the way you want, but what you have is seven Justices of the Supreme Court unanimously finding against your client on this point; one single federal District Judge upsetting the thing; and three judges of the Ninth Circuit affirming.

MR. HANSON: Plus a petition was made by the State of California to this Court to have that reviewed, and it was nine to nothing against voting any hearing in the case.

QUESTION: Well, how do you know that?

MR. HANSON: I know that because I opposed it. I was asked to file a petition in opposition.

QUESTION: Well, how do you know what the vote was in our conference?

MR. HANSON: Well, there were no votes that suggested

certiorari be granted.

QUESTION: Well, is that the test? Is that how you find out what the vote was at our conference?

MR. HANSON: Well, that's -- I know that some of the denials of certiorari are accompanied by: "Mr. Justice X and Mr. Justice Y would grant certiorari in this case." So I'm basing it on that.

I, of course, have no access to how the voting took place, other than that.

But I can assure this Court that within the meaning of 28 U.S.C. 2254, the same record was examined by the federal district judge in Los Angeles. There's no new evidentiary hearings took place. And based on that record, the opinion at 298 Fed.Supp. 795 was prepared, and that opinion is accurate, and accurately reflects what took place in this case.

Those findings by that district judge are more complete than the California Supreme Court and, in fact, are the accurate situation that occurred here.

And, you know, I can't force the California Supreme Court to make findings. And they also, when they granted an order to show cause in the California Supreme Court, they restricted the inquiry by certain questions, which narrowed down the scope that they were going to take a look at.

The significant Napue vs. Illinois situation that occurred in this case was really ignored by them; namely,

unquestionably the prosecutor in this case knew of certain false statements that were being made by his witness, and he chose not, for whatever reasons he had at that time, to correct them.

QUESTION: Mr. Hanson, while the minutes of the habeas corpus proceeding may have something to do with this case, the primary and cardinal question here is the extent of the immunity, if any, of the prosecutors, is it not?

MR. HANSON: I understand.

QUESTION: And I know that you take a backup position that even though there might be immunity in the normal situation, at the very least there should be an exception when a federal court has found that there --

MR. HANSON: Correct.

QUESTION: -- that there was a knowing use of perjured testimony.

But the first and basic question is the immunity of a prosecutor, quite apart from the merits of this case; isn't that correct?

MR. HANSON: That's correct. No question about it.

QUESTION: That's what I thought.

MR. HANSON: No question about it.

Now, as to that particular situation, there's no question that the national ballot, if you count up all the cases that have gone one way versus the other way, overwhelmingly

is against the petitioner in this particular case, just without question. However, there's been some, in my opinion, correctly made inroads out of the U.S. Sixth Circuit in Ohio, in the case of Hilliard vs. Williams, which again has been decided by them -- I don't have the new citation on it, but it went up on the damages the second time, and the U. S. Sixth Circuit again affirmed that line of reasoning and sent it back to the District Court to more correctly determine damages above the one-dollar limit that was awarded at the time of the trial by the District Judge.

So I think the situation boils down to: what type of case are we going to permit this in?

I don't ask the Court, and I don't think it's really necessary to ask the Court to say, Yes, the floodgates ought to be opened to allow any sort of lawsuit to be filed against the public prosecutor. I don't think that is the situation at all.

I think there are many safety valves that can be accorded here and still allow this suit to be filed on its merits. And among them are certainly pretrial hearings, whereby the district judge would inquire into the merits of the case and inquire into what I believe to be the four things that must really be inquired in:

No. 1, did he do a good-faith act?

No. 2, was his act within his discretion?

No. 3, was it within something provided by law?

And No. 4, was it within his jurisdiction?

And I suggest that --

QUESTION: Wouldn't the good faith be pretty much a question for the jury in every case, in their view?

MR. HANSON: Well, --

QUESTION: Subjective state of mind.

MR. HANSON: That's very possible. That's very possible. But the good-faith act would be within the jury's question; no question about it.

QUESTION: So that you'd have a jury issue, under your view, of what should be the rule in almost every case?

MR. HANSON: Well, I don't believe in almost every case. Certainly not in this case. Certainly not in this case that's before the Court now.

In other words, what I'm saying is, if there's an allegation of knowing use of perjury or something of that nature, which is clearly without the scope of his duty, without the scope of his jurisdiction, not provided by law, condemned by all the decisions of this Court, as well as the California Supreme Court and any court you want to pick up; that is something that I think has to stand. It has to go to the jury, they have to respond to. No question about it. If that is a factual issue.

QUESTION: In this case you have a finding by a court, a competent court, in a writ of habeas corpus. That's

your case. Why do you want to extend it beyond that?

MR. HANSON: Well, I don't necessarily want to. But I'm addressing myself to Mr. Justice Stewart, who said the broad question should be considered first: should the suit be filed, allowed to stand in general, are your allegations the same?

QUESTION: Well, your point, I assume, is that where there has been a finding in a court on a habeas corpus, that the conduct was thus-and-so; that at least entitles you to a hearing.

MR. HANSON: Yes. No question. In other words, I'm going on --

QUESTION: I just want to be sure you're not abandoning that.

MR. HANSON: Oh, no, not at all. I'm going generally on the type of analysis provided by Learned Hand in the Gregoire vs. Biddle decision, 177 Fed 2d, I think, at 579 is the citation on it. And certainly there's probably not more revered a judge than Learned Hand at the circuit level; and he said that if it were possible before the trial to ascertain which suits had merit and which didn't, it would be really tragedy to dismiss a suit that did in fact have merit.

And I suggest to this Court --

QUESTION: And he also said that even if the action was malicious, immunity was there. You don't want to adopt

that, do you?

MR. HANSON: He did say that, that's correct.

QUESTION: He sure did!

MR. HANSON: That's correct.

QUESTION: I would think that would be the last quotation you would want to make for your cause.

MR. HANSON: Well, I say that our case comes within that canopy, because we have come as close as we could to the situation with the grant of the Federal Writ of Habeas Corpus, because of that particular issue.

In other words, this man has had his preliminary hearing. The reason that --

QUESTION: Well, if he's had his preliminary hearing -- where?

MR. HANSON: He's had his preliminary hearing by virtue of this 22 U.S.C. -- or 28 U.S.C. 2254 granted writ of habeas corpus.

QUESTION: Well, why is the respondent bound by that proceeding? He wasn't a party to it, was he?

MR. HANSON: Well, no, but the record is there, Mr. Justice Rehnquist, and he admitted -- he was called as a witness in this evidentiary hearing, and he admitted under oath that he had done these things. He admitted that he had --

QUESTION: Well, you could use his testimony against him, then, I presume; but if he's not a party, I would think

he wouldn't be bound.

MR. HANSON: Well, the U. S. Ninth Circuit said he was not bound. I tried to urge on the U. S. Ninth Circuit a type of res judicata, by virtue of the grant of the writ by the district court. They did not go along with that at all.

However, the point is simply that if you have done as extensive a litigation as we have done on this particular case, it then gets around the contention that they are being required to respond to a frivolous type of claim. It certainly is not a frivolous type of claim. It's a claim that has merit, by virtue of the fact that this was granted by the U. S. District Court.

And I can only tell this Court that it was granted because that district judge, at my urging and on my briefing, examined that record with due scrutiny, which was not done in the California Supreme Court. Or, if it was done, it was ignored.

QUESTION: That district judge has been reversed no less than three times by this Court since I've been a member of it.

MR. HANSON: Well, I don't know. I'm only talking about this case; only about this case. And this case was not reversed. The U. S. Ninth Circuit upheld his grant, and this Court denied certiorari. As far as I know, with no votes.

So there's no question in my mind that at least the

threshold showing has been made.

Now, in this particular case, as the Court perhaps knows, there has been numerous contentions made that it's going to open the floodgates to litigation. And I say again there are numerous safety valves that really militate against this.

I think the first one -- the first one is that usually people, like in the position of Mr. Imbler, are seeking substantial damages. They go to a lawyer and they say: I want to do this, and I want to bring this lawsuit. Usually the lawyer is not in a position, nor are they able to pay an hourly rate; so it's often done on a contingency basis.

I therefore would suggest to the Court that any lawyer would probably scrutinize, himself, the record; he would try to make inquiries to see if he's chasing a comet that has no merit at all. Just like a personal injury case that comes into the office of a lawyer, he would examine it with diligence to see.

And I think that there is an immense safety valve to the bringing of these lawsuits.

QUESTION: Do I understand correctly that this case came before the California Supreme Court twice?

MR. HANSON: In fact, three times.

QUESTION: Three times.

MR. HANSON: The first time was on the automatic appeal, which is provided under our Penal Code, because the

death sentence was imposed. At that time, none of this matter was brought before them, because it was not disclosed.

QUESTION: But was it not -- was it treated, to any degree at all, in the final disposition by the California Supreme Court?

MR. HANSON: The second opinion, Mr. Chief Justice, at 60 Cal. 2d 554, was as close as the California Supreme Court came to treating it, and it again ignored many of the issues.

QUESTION: Justice Traynor wrote both of the opinions?

MR. HANSON: He did. The first two opinions.

QUESTION: The first two.

MR. HANSON: I think he wrote all three opinions. The third opinion is at 61 Cal. 2d, and that came about because of a violation of the so-called People vs. Morse decision of the California Supreme Court, which said that the prosecutor could not comment to the jury that a life sentence in California really didn't mean a life sentence, that if you want to make sure this fellow is not out on the street again, you better execute him.

And they voted the death penalty against Mr. Imbler because of this comment, and that case was given director activity by the California Supreme Court, and so Mr. Imbler was able to take advantage of that, which generated the third opinion from the California Supreme Court.

And then the prosecutor elected not to try the penalty phase over again and stipulated to a life sentence as opposed to a death sentence. So that was the posture of it.

QUESTION: What are you asking for here, only damages? Any other kind of relief?

MR. HANSON: Only monetary damages, that's correct. In the district court lawsuit, that's correct.

Now, I think -- also, I think I alluded to this very briefly, that I know that one of the specters that is hanging over an attempt that is being made here by the plaintiff to allow him to bring this suit is that there's going to be felt that some national precedent is going to be set, and I would again say to this Court that, as happened in this particular case, certain pretrial hearings can be held whereby the plaintiff would be required to make a rather significant showing that he falls within the canopy that I'm urging on this Court, namely, it is something that has to be outside of the discretionary act of the prosecutor and ostensibly made with no good faith, and outside of his jurisdiction, and things of that nature.

QUESTION: But isn't good faith almost always a question for the jury?

MR. HANSON: Well, certainly it is probably always a question for the jury --

QUESTION: But then you wouldn't eliminate any case,

really, by your pretrial hearing, would you?

MR. HANSON: Well, I'm mentioning more than that alone, I'm mentioning whether it is a discretionary act or not. Certainly the bulk of these cases, I think, are correctly decided in granting immunity; because the bulk of the things that happen are within the discretion of the prosecutor.

For example, the metamorphosis in the Ninth Circuit starts off with a case that -- after this Act was passed, starts off with a case called Sires vs. Cole, I think. And Sires vs. Cole was a suit versus not only the prosecutor but also the judge, because the man was convicted of calf stealing, and he was sentenced for a felony as opposed to a misdemeanor.

Now, certainly, that probably was a mere mistake on the part of the judge, and was correctly thrown out, and that was a 1963 case.

The next time the U. S. Ninth Circuit examined this was in a case called Harmon vs. Superior Court, 329 Fed 2d 154, there it was a simple domestic relations squabble in State court. The plaintiff in the civil rights suit was disappointed, apparently, at the results that took place in his State court domestic relations matter and he brought a lawsuit against the prosecutor -- or against the State's district attorney who was seeking to make him pay child support.

Again, I think clearly, properly thrown out; it was something within his discretion, he was doing his day-to-day

job, doing what he had to do. But the knowing use of perjury is not that class of cases, not that class of thing.

QUESTION: Cases that have decided this issue against the theory that you're arguing have put it on the basis that, not of the risk of having a damage verdict, but against the dangers and the risks involving -- involved in having a prosecutor spend his time defending suits instead of carrying out his function of prosecuting cases. Isn't that the choice that's been made?

MR. HANSON: Well, I understand that that's the language that appears in many of the cases, there's no question about it; that's why I'm urging on this Court that where there has been extensive litigation, culminating in a successful grant of the writ by a district judge, upon examination of the record, as he has to do under Townsend vs. Sain. Then we are not dealing with something that is nonsubstantial, we are not dealing with frivolity, we're dealing with something that should be responded to.

Otherwise, it makes the decision of the district attorney the supreme law of the land; unreviewable by any court at all. And this Court, just last term, in a couple of cases, in the Scheuer vs. Rhodes decision, allowed a suit against the Governor of Ohio; in Wood vs. Strickland, a suit against a School Board.

Now, I would suggest that the language of Scheuer vs.

Rhodes again deals with the good faith, discretionary basis. That Governor ordered out the National Guard in Kent, Ohio, at that university, because he perceived he had to do something quickly, and --

QUESTION: You then, apparently, equate prosecutors and all other executive officers as being on the same level?

MR. HANSON: I do, I think that this so-called quasi-judicial immunity, which creeps into the decisions, is really a misnomer.

Surely, the Attorney General of the United States, the Attorney General of California, these are officers that are responding to the President of the United STates or the Governor or so forth, they're an arm of the Executive Branch. There's no question about that.

And the question -- or the reason that this has come into the cases, without a doubt, is because allegedly a prosecutor exercises discretion just like a judge does-

QUESTION: You think a Governor calling out the National Guard is exercising a quasi-judicial function?

MR. HANSON: No. I think he's exercising an executive function, as the chief law officer of the State.

QUESTION: Sure, executive.

MR. HANSON: But to insulate one side to a lawsuit, as they are attempting to do with the public prosecutor, from review by any type of civil rights action, by any type of a

federal judge, I think elevates him to a position where his decision becomes above the U. S. Constitution, becomes above review by anybody.

And I would also suggest that really there aren't that many of these suits. You can check through all the books and, compared with all the other suits, there really aren't that many.

QUESTION: Do you think there might be more of them if you prevail here?

MR. HANSON: No, I don't think so, Chief Justice Burger, because I think this Court can delineate certain guidelines that have to be followed, and I would hope that they would do so in allowing this suit to stand. I think that the Court can delineate guidelines in the way of some type of preliminary hearing, where, in fact, merit must be shown by --

QUESTION: You've mentioned that about three times during your argument, Mr. Hanson. Are you suggesting that these wouldn't be subject to the normal standards of pretrial hearings and the right of jury trial on contested issues of fact, that we would just carve out some exception to the Federal Rules of Civil Procedure for these kind of cases?

MR. HANSON: I think that surely if you could not show that he was behaving outside of a discretionary act, it would be automatically subjected to dismissal. That's one of the issues.

QUESTION: Well, okay. Now, you say outside of a discretionary act. Now, supposing I'm a prosecutor, during the trial I'm confronted with the defense counsel's demand for Brady materials, and I make the best judgment I can, I act in good faith, I turn out to be wrong, the appellate court reverses me.

Now, is that a discretionary act on my part?

MR. HANSON: It's a harder decision, obviously, than the knowing use of perjured testimony; a harder decision.

QUESTION: Well, but even the knowing use of perjured testimony, you can end up with a finding to that effect on the basis of hindsight, but the question in the eyes of the prosecutor may be, you know, "Is this witness lying or isn't he? Can I, consistently with my constitutional requirements, put him on the stand?"

Those things don't always look black-and-white at the time they happen.

MR. HANSON: I understand. But in this particular case he admitted to knowing this, if it please the Court; he admitted to knowing the status of this man,that he had been committed to an insane asylum by a court. And he said, at the evidentiary hearing, "I decided to let the jury attempt to figure it out themselves."

QUESTION: And the Supreme Court of California upheld the prosecutor's position on the basis of that evidentiary

hearing.

MR.HANSON: Well, by ignoring that particular thing in its opinion, by ignoring that.

QUESTION: You mean Chief Justice Traynor ignored what you say is the heart of this case?

MR. HANSON: That's correct. That opinion -- if you place before, side-by-side, the two opinions of the California Supreme Court and the U. S. District Judge, they obviously consider different things. The U. S. District Judge considers many more factors.

Now, certainly I don't think my opponents are suggesting that that U. S. District Judge falsified any material that he put in that opinion. He certainly did not. He quoted directly from transcript material.

Now, I, of course, was not the lawyer before the California Supreme Court, so I can't say, "Gee, you know, I did a bad job there," but I have read all the briefs and there's a mountain of material that goes from the floor to the ceiling on this case. And they just simply did not get to the merits of the case, like the U. S. District Judge did, because --

QUESTION: If you were not there, how do you know what Judge Traynor had?

I assume, when you pass judgment on him, that you had argued the case.

MR. HANSON: No, I just read the opinion, Judge

Traynor's opinion.

QUESTION: So you just -- yours is all based on reading the opinion that brought this conclusion that he didn't know what he was talking about?

MR. HANSON: No, I've read the briefs and some of these materials were not properly briefed. Because there are some people that say, Well, unless there's actual overt perjury, it's different than the Napue vs. Illinois situation where he is required to change, or to call to the attention of the triers any known false statements.

Some people distinguish that in their mind.

QUESTION: My only point is I don't think you need to characterize a judge's actions in order to win your lawsuit.

MR.HANSON: Well, that's possible; that's possible.

QUESTION: Possible!? That's as far as you can go?

MR. HANSON: Well, I hope that I don't have to.

I think that, considering the Wood vs. Strickland analysis, where this Court accorded liability against an Arkansas School Board, if you rely on that type of thinking of this Court, then, a fortiori, this case ought to be allowed to stand.

QUESTION: You think their functions are quasi-judicial?

MR. HANSON: No, I don't, but I think that the -- the point I'm trying to make out of this is that a member of the

Arkansas School Board ostensibly has no training ground to become a member of the School Board. He may be the local grocer, he may be the postman or something, he may serve on the School board because it is a civic duty. He has probably very little knowledge about what the civil rights of those students are; but this Court said that, as to existing law that's well established in this country, the School Board should be held to know about it.

They're not going to be held to anticipate changes in constitutional law, but they're certainly going to be held to anticipate what the existing constitutional law is. And certainly, a fortiori, with the law school training of a prosecutor and his presumed knowledge of the canons of ethics, and his presumed knowledge of the decisions of this Court, from Mooney vs. Holohan to Napue vs. Illinois to Miller vs. Pate, to United States vs. Keogh, and the various decisions which have uniformly condemned this particular type of behavior, this man surely is put on knowledge that what he was doing not only is wrong biblically but is wrong legally.

QUESTION: On the other hand, in the case of a prosecutor, you have some corrective devices available, other than a 1983 action, don't you? You have the supervision of the trial judge, your right of appeal in the criminal case, and your right of habeas corpus, which you took advantage of here. That doesn't give you money damages, but it does offer

you a route by which you can correct the alleged prosecutorial misconduct.

MR. HANSON: That's correct. It gets him out, but this man did ten years for this crime: four years on death row, six more in maximum security, from the period of his life from about 39 to 49 he spent all this time while his children grew up, didn't see the children except when they may have come to the penitentiary. He was within seven days of being executed on one occasion, with 21 days of being executed on a second occasion.

Why should he not be able to get some monetary damages to attempt to rectify what may be --

QUESTION: Well, he really wasn't acquitted by a jury, was he? The State just decided not to re-try him.

MR. HANSON: That's correct. That's correct. But he stands --

QUESTION: It's not easy to re-try a man after ten, twelve years following the alleged murder, is it?

MR. HANSON: Well, probably not that easy; that's correct. Not that easy. But they -- from my experience with the prosecutors of the State of California, when they are looking for a witness, why, they have a lot easier time to get witnesses than the defense does. And they have a way of resurrecting these people. I don't know of any of them that are dead, and if this thing goes back to the district court, I

would suspect that these people would somehow come out of the woodwork to testify for the respondent in this particular case.

There's little doubt in my mind about that.

I would say that, in closing, to this Court, that at least -- at least -- this Court should allow this case to go to the jury. This case should stand at least by itself.

If the Court does not wish to allow the general type of allegations, at least this case, where there has been a decision by a United States District Judge, affirmed by the Ninth Circuit, and where cert has been denied by this Court, under the facts that have been set forth in that opinion, that satisfies the situation that he is not being required to respond to a frivolous type of contention. Far from it.

And I would urge on this Court the reasoning of the U. S. Sixth Circuit in the Hilliard opinion, that these cases stand on their own.

Otherwise, the few times that this happens is going to place the prosecutor above review by anybody. And I think that that not only is an intellectual non sequitur but a legal non sequitur, and a tragedy, more or less, in addition.

There's little doubt in my mind that this case ought to stand, and I think that this Court ought to delineate some guidelines for it, allow it to go to trial. And another safety valve, I think, is that in fact when it does go to trial, maybe the plaintiff may not be able to make out his claim.

Certainly when the Scheuer case went to trial in Ohio, they lost. But I think correctly they were allowed to at least stay in court and make their contention.

This type of thing certainly differs from Scheuer because this man, in his decision to use perjury in this case and failed to correct it, he is not faced with some decision that he has to exercise discretion on or where he has to call out a national guard in order to stop civil disorder. He's faced with something that --

QUESTION: Mr. Hanson, could -- were the acts involved in this case by the prosecutor arguably criminal under California law?

MR. HANSON: I would certainly say so, Justice White. Now, they have not done anything about them.

Another contention that's often made is --

QUESTION: But if the knowing use of perjured testimony, if that is a crime under California law, the prosecutor is exposed to criminal liability.

MR. HANSON: Potentially he would be. Nothing has ever happened to this man, he still occupies a significant role in the District Attorney's office in Los Angeles.

QUESTION: Well, I know, but is it clear that the knowing use of perjured testimony is a crime?

MR.HANSON: Yes. There's no question about it. I think my opponent, in his brief, has set forth some statutes

which set that up. Surely, that if the death penalty would have been carried out in this case, Mr. Pachtman himself would be subject to prosecution for murder. We have a statute that provides that. Had the death penalty been carried out against Mr. Imbler, Mr. Pachtman, himself, could be prosecuted for murder, in this particular case. Little doubt about it.

QUESTION: What about the damage suit under California law?

MR. HANSON: You mean could it be brought under California law?

QUESTION: Well, could this prosecutor be sued for what he did under California law, for damages?

MR. HANSON: We have a case before the California Supreme Court which is examining that right now, called the Horvath case. People -- or I forget the --

QUESTION: Well, isn't there apparently, then, the question of immunity under California law isn't settled?

MR. HANSON: Not fully, although the California Tort Claims Act, of course, does provide for suits against officers of the county, officers of the city, and so forth.

However, I think in that particular situation the California Tort Claims Act is also given a type of immunity. This would be the first case which opens that up.

QUESTION: This isn't a suit against the sovereign, this is a suit against the prosecutor personally.

MR. HANSON: But our Act provides that they will respond to damages for a successful suit against one of the employees.

QUESTION: Not in a federal case, necessarily.

MR. HANSON: That issue is going to be decided by the California Supreme Court in the Horvath matter.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Farrell.

ORAL ARGUMENT OF JOHN P. FARRELL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FARRELL: Mr. Chief Justice, and may it please the Court:

I'd like to respond, first, to a couple of factual matters.

As to the Horvath case, the issue there is whether a suit could be brought in the State courts under the Federal Civil Rights Act; and, if so, the application of the Tort Claims Act. Under the California Tort Claims Act, itself, there would be immunity for discretionary acts, and an absolute immunity for malicious prosecution.

And then in the California courts there would be the general common law defense as to defamation and use of testimony at trial.

But there is a special statutory remedy for a person convicted of a crime, who is later pardoned, and compensation

can be provided under statutory scheme for a portion of the sentence he served. So that's not a suit against the prosecutor, it's a suit, a claim filed with the State under Penal Code Section 4900. It's in our list of remedies that are available to a person.

So there is a monetary scheme available without a suit being maintained under the California law against the prosecutor.

QUESTION: Well, under California law, there is a damage remedy against this prosecutor if you can show he knowingly used perjured testimony?

MR. FARRELL: No, there's not a damage remedy against the prosecutor, there's a claim for monetary compensation for a person who is deemed to be unjustly convicted.

QUESTION: You mean out of State funds?

MR. FARRELL: Yes.

QUESTION: Well, how about suing the prosecutor?

MR. FARRELL: No. Under the Tort Claims Act he would have an absolute immunity from malicious prosecution; and under the Tort Claims Act, all common-law defenses as to the use of testimony would apply. And I would feel that that would clearly cover the matter.

Also there's a --

QUESTION: Are you suggesting that under the California statutes or the California common law there's a -- a prosecutor is absolutely immune?

MR. FARRELL: He's absolutely immune for malicious prosecution. That's specified clearly. He's immune for discretionary acts, together with other officials; and all common law defenses apply under the Tort Claims Act. And the common law defense for defamation or the use of testimony during trial, and the quasi-judicial immunity which we're arguing here would be also applicable under the California Tort Claims Act. There's a general common law. Quasi-judicial immunity would be applicable in the California Tort Claims Act.

And at present, certainly in the law of California, he could not recover. For the same reason that we're arguing here basically. That is the --

QUESTION: You mean there's an absolute immunity defense available to him under the Tort Claims Act?

MR. FARRELL: The quasi-judicial immunity under the common law --

QUESTION: Yes, but this prosecutor would be an absolute immunity, I take it?

MR. FARRELL: Right. The common law quasi-judicial immunity would apply and a statutory --

QUESTION: I know. What is the quasi-judicial immunity? It's an absolute immunity. Isn't that your position?

MR. FARRELL: Because it's absolute under the common law.

QUESTION: Would it be absolute if he suborned perjury?

MR. FARRELL: Yes, because the --

QUESTION: Because he's a prosecutor?

MR. FARRELL: Right. It's just as if --

QUESTION: Is there any other reason?

MR. FARRELL: Well, yes, there's a --

QUESTION: It's a crime; isn't that a crime in California?

MR. FARRELL: It is a crime, yes, in terms --

QUESTION: Could he be convicted of it?

MR. FARRELL: Yes, he could be convicted of it.

QUESTION: But he couldn't be liable in civil action.

MR. FARRELL: Right.

QUESTION: Now, if he's convicted of it, would he then be liable in a civil action?

MR. FARRELL: No, there's no -- at present cartainly there's no rule of that kind. The quasi-judicial immunity of a prosecutor --

QUESTION: Well, the only person that can do that in California, suborn perjury, and get away with it is the prosecutor.

MR. FARRELL: A judge could also do that.

QUESTION: Who else?

That's it.

MR. FARRELL: Well, right. That would probably -- a legislator, conceivably, if it were a legislative act. That

would be difficult to imagine.

QUESTION: Are there any California cases that define what a quasi-judicial officer is?

MR. FARRELL: Well, the California cases are pretty much along the line of the general national cases. A clerk, for instance, a probation officer, giving a sentencing report to a judge; a clerk of the court carrying out a directive of the judge. Typically, a sheriff or a marshal carrying out the directive of the judge.

I think quasi-judicial immunity has two branches. One branch is a person who is exercising a discretion that's similar to that exercised by a judge. And so quasi-judicial meaning is sometimes used by the Civil Service Commission, for instance. Because it's making a determination of facts like a judge.

The other branch --

QUESTION: Well, what is it the prosecutor does that's like a judge?

MR. FARRELL: Well, the decision to prosecute is like a judge.

QUESTION: That's done outside of the courtroom.

MR. FARRELL: Yes. That's taken outside --

QUESTION: What does he do in the courtroom?

MR. FARRELL: The decision on what evidence to present, weighing the evidence to present, weighing the --

QUESTION: Well, then, defense counsel does the same thing, doesn't he?

MR. FARRELL: A defense counsel, there's been several --

QUESTION: Well, is he quasi-judicial, too?

MR. FARRELL: Well, there's been several Court of Appeals decisions saying that a public defender, for instance, who has been sued under the Civil Rights Act, is quasi- --

QUESTION: I'm talking about a private lawyer. What he does in court he can't be sued for?

MR. FARRELL: No, he can't be sued for it. Basically he cannot be sued --

QUESTION: Well, why is a prosecutor so different in what happens in a courtroom?

MR. FARRELL: Basically, a private defense counsel could not be sued for what he did in a courtroom. If Mr. Hanson, for instance -- I have several factual errors, I'm sure he made in good faith; but if they were -- I could not sue him, or Mr. Pachtman could not sue him for what he argued here about the knowing use of perjury. For him calling Mr. Pachtman a perjurer. Because defamation is an absolute immunity for presentation at the courtroom, in the pleadings and in the argument to a court.

And the reason for that is it's --

QUESTION: I haven't said a word about defamation.

MR. FARRELL: Well, but that's an absolute immunity. That's what a private counsel --

QUESTION: Well, my absolute immunity I'm talking about is for somebody who suborns perjury. That's different from defamation.

MR. FARRELL: Well, I don't think there would be a civil suit for subornation of perjury against a private lawyer, only a government lawyer.

QUESTION: Why?

MR. FARRELL: Well, I can't think of the -- of any private action, unless perhaps some intentional or emotional distress. There's no action -- the remedy for subornation of perjury is criminal.

QUESTION: You're not familiar with any cases for lawyers for malpractice?

MR. FARRELL: But that would not be malpractice; it would be against the opponent. There would be no contractual relationship there.

I think under the common law a private counsel -- in fact, there would be no civil remedy that would be available to his opponent from the subornation of perjury. Because he couldn't get him for defamation or the use of testimony, and there would be no other action available.

QUESTION: So the only remedy is criminal action.

MR. FARRELL: And that's a very sufficient remedy.

QUESTION: And that criminal action here, that would be you would have to do it, wouldn't you? Instead of defending him here.

MR. FARRELL: No, I wouldn't do it.

QUESTION: Isn't that right?

MR. FARRELL: We're only civil counsel. We would not do that. We defend, and we do not prosecute. It would be the Attorney General, in all likelihood, would bring it. Or a federal prosecutor could bring him for violation of the criminal provisions of the Civil Rights Act.

There's certainly -- I think there's two branches, as we present it, of the Civil Rights Act, and you could view 1983 as,one,to enforce a standard -- to help enforce a standard of behavior; and, second, to provide some forms of redress.

Whereas to enforce a standard of behavior, there's a criminal action can be brought by the U. S. Attorney. We've presented all the criminal actions that can be brought by the State government against him. There's a judge sitting there, who, assumedly, is fair.

This matter, for instance, went all the way through the California courts, who upheld the prosecutor all along the way. Not only that, there was then the right to petition to this Court for certiorari, and there was the final right which was exercised of bringing a habeas corpus in a federal court.

QUESTION: Well, are you -- what if a prosecutor --

you say he's protected if he suborns perjury. If he bribes a witness to testify in a certain way.

MR. FARRELL: Well, no. I -- there may be -- well, first, he's not protected, certainly, criminally.

QUESTION: Well, he is -- no, but he's absolutely immune under 1983?

MR. FARRELL: Well, I'm not sure if he bribed a person, the act of bribery would not be taking place in the courtroom, and would be a separate action of transferring money.

I think as to the action of transferring money, that's not a prosecutorial act.

QUESTION: So you say he's not immune from that?

MR. FARRELL: I don't think he would be -- for the payment of a bribe, I don't think he would be immune.

QUESTION: Well, now, in a courtroom, what if he is cross-examining a witness and he just loses his temper and he goes and punches the witness in the nose?

MR. FARRELL: That's not a prosecutorial act.

QUESTION: You mean that's just not within the normal bounds of prosecutorial behavior.

MR. FARRELL: Right. I think a prosecutor --

QUESTION: Is that right or not?

MR. FARRELL: Well, that --

QUESTION: Is that what you're saying?

MR. FARRELL: No. I'm saying it is not the type of

action that is typically prima facie, disregarding motive, it is not a prosecutorial act to punch someone. If you were to ask questions --

QUESTION: All right. Now, the same prosecutor, though, the same prosecutor put the witness on the stand, knowing that he's perjuring himself. He knows it. And if upon proof of that, the conviction is going to be reversed, --

MR. FARRELL: Right.

QUESTION: -- because there's a deprivation of due process.

MR. FARRELL: Right.

QUESTION: Now, is that within the normal bounds of prosecutorial conduct, to put on the stand knowingly perjured testimony, any more than punching the fellow in the nose?

MR. FARRELL: No, it's not normal to do any evil thing. I think we can attribute --

QUESTION: No, I didn't say it was normal. Is it within the normal bounds of prosecutorial behavior?

MR. FARRELL: It's -- well, it is not normal prosecutorial behavior to do something evil and criminal. But the action of asking the question is normal prosecutorial behavior, and that is what is the key to it. Just as in judicial immunity and in legislative immunity. It's the form of the act, whether the act is normal behavior, disregarding motive, because there's nothing easier than alleging improper motives.

Certainly, nobody is going to bring a lawsuit of an act in alleged good faith.

QUESTION: So if you've threatened the witness -- if you've threatened the witness: "You either testify this way or I will prosecute your mother or brother or somebody", what about that?

And you ask the question in the courtroom, and the witness responds exactly the way you told him to respond under this threat. Now, is a prosecutor absolutely immune in those circumstances?

MR. FARRELL: I think he is as to asking the question in the courtroom. Definitely. The asking of the question in the courtroom is the normal action of the prosecutor, it could --

QUESTION: Well, now he brings -- there's a suit brought afterwards for convicting me from using false testimony, the knowing use of false testimony, which was obtained by a threat, issued by the prosecutor.

Now, that's a 1983 suit, precisely this kind of a suit, and the plea is of absolute immunity.

MR. FARRELL: There may -- there may possibly be separable the action of threatening, if that could be pinpointed as a separate location, as a separate action, which would not be a normal action of the prosecutor. But the action --

QUESTION: So you're suggesting, then, that we really

should divide up prosecutorial behavior into various categories, at least two: some that are really part of his prosecutorial acts and some that aren't.

MR. FARRELL: But not by characterization of motive and not by characterization of whether it's true or false. We don't know whether this testimony is perjured. The California Supreme Court held specifically it was not. The federal district court judge, reading the record of the California Supreme Court nine years later, or six years later, said it was false; he didn't say it was perjured.

QUESTION: Mr. Farrell, do I understand you to suggest, in your colloquy with Mr. Justice White, that were the prosecutor to bribe a witness to give certain testimony, he might be subject to a suit for damages?

MR. FARRELL: I think the act of bribery, the act of paying over the money would not be a normal prosecutorial function. It's --

QUESTION: Tell me, then, -- but I gather what is relied on here are the judicial immunity cases.

MR. FARRELL: Right.

QUESTION: Now, suppose a judge takes money -- and this has actually happened, as you know -- to sell decisions. He's immune, isn't he?

MR. FARRELL: He is as to decisions.

QUESTION: No, isn't he immune from damages for having

sold --

MR. FARRELL: I'm not sure that those cases -- I've read some of the cases, and they are usually suing him for rendering a verdict by virtue of bribery. Well, that's like saying knowingly soliciting perjured testimony. Rendering the verdict is what judges do.

QUESTION: Well, that's the way a fellow gets harmed, and he proves his damages by --

MR. FARRELL: Well, if he can prove the prior act.

QUESTION: Well, I just want to be clear.

In any event, you would make a distinction between the absolute immunity for a judge who sells a decision and -- which is absolute -- and would suggest it may not be absolute in the case of a prosecutor who bribes a witness to give certain testimony. Is that it?

MR. FARRELL: No, I'm trying to say that they are the same thing, that the act --

QUESTION: I know, but what about -- in terms of absolute immunity, I thought you said to Justice White earlier there would be no absolute immunity for the prosecutor who bribes a witness to give testimony?

MR. FARRELL: Not -- there would be for the soliciting of the testimony at the trial if there were alleged and proved the payment of money outside the court. That's a normal prosecutorial act. And I think that's subject to proof.

QUESTION: And then, so if someone else pays the prosecutor to bring the prosecution, and the prosecutor says, "Well, you have to give me some testimony, too." So he's paid to bring the prosecution, and he carries it off in the courtroom, using what he knows is absolutely false testimony. Is he immune, absolutely immune?

MR. FARRELL: He's immune as to the presentation, the production of the testimony at the trial. And I think that's --

QUESTION: But -- but -- how about the taking of the money?

MR. FARRELL: Well, if the taking of the money could be proved as a separate act, I think there is -- it doesn't fall within the --

QUESTION: And the taking of the money resulted in his bringing the prosecution, which resulted in damage.

MR. FARRELL: Well, you might be able to prove up some damages from that, but I think the act would have to be -- the act that would be the violation, that would not be immune, would be an act that was not within the normal scope of a prosecutor's function, disregarding allegations of motive.

QUESTION: That's the test: the conduct that is or is not normal prosecutorial function?

MR. FARRELL: Yes. And I think normally a prosecutor, for instance, files an information or whatever, in that jurisdiction; he files an information, he goes to court, he solicits

testimony, he makes a closing argument, he files reports to the Clemency Boards, he participates on appeals, he argues on appeals. As for those acts, in those acts he's acting within a quasi-judicial capacity. And if you alleged that he did those improperly, he did it criminally, he did it maliciously; as to those acts, he's immune.

Now, if you can say, Well, on his way here he took a witness and beat him up to keep him from coming, the act of beating up a witness doesn't, prima facie, appear to be a prosecutorial act. That's not what prosecutors normally do.

QUESTION: Well, on the way there he took some money to --

MR. FARRELL: If you -- the delivery of --

QUESTION: -- to put a witness on that otherwise he never would have put on in a hundred years.

MR. FARRELL: As to the delivery of money and acceptance of money, yes, that's not within the normal scope of --

QUESTION: Well, then if it causes somebody damage, he's going to be liable, you suggest?

MR. FARRELL: If you could prove up the -- you might well be able to prove --

QUESTION: Well, it's like proving that I got put in jail by that witness.

MR. FARRELL: Well, it's quite different, because it's

very easy. At the end of any trial, there's nothing easier than saying that a prosecutor maliciously misstated a fact. And in this case, that's the exact sort of things we have.

QUESTION: Mr. Farrell, I'm curious. All of the briefs, including the amicus briefs, cite any number of federal court decisions, largely courts of appeals, that address this question of prosecutorial immunity under 1983. But none of you seems to accept -- one of them, I think, cites an Oregon case; refers to any State cases that deal with this.

MR. FARRELL: The State cases are largely the same. I can't say for every State. But, in my own research, I went to the federal cases because of the Civil Rights Act, but the --

QUESTION: Because there have been some decisions of State courts that 1983 actions are maintainable in State courts.

MR. FARRELL: Yes, they are -- so far they are --

QUESTION: Well, don't you think it might be helpful to us to have a survey of what the State decisions are on this subject?

MR. FARRELL: Well, of course, the State -- this, of course, is still in a state of flux; but the State courts are following federal law in 1983 actions in the State courts; at least in California. But as to the State law in California, I feel quite confident that --

QUESTION: What is the State law generally, do you

know?

MR. FARRELL: I think it's --

QUESTION: Well, does the Prosser citation apply?

MR. FARRELL: It's the same -- well, Prosser was on the defamation immunity.

I think in general it's clear that the State law is the same as this Circuit Court of Appeals decision.

QUESTION: Not on the statute, is it?

MR. FARRELL: No, but I think if you looked into the matter you would find it would be very much like the --

QUESTION: Very much like the Prosser case, in the earlier decision.

MR. FARRELL: Yes. I think in Prosser we were on the defamation immunity, and cited the law of England as well. And the reason I want to --

QUESTION: [microphone off.]

MR. FARRELL: Well, the reason I wanted to correlate the defamation immunity with this is -- and judicial immunity and legislative immunity is the legislative -- the rule in this Court has been that immunity under 1983 is really a question of statutory construction, and the statutory construction has always proceeded from the fact that what the immunity was at common law applies under 1983.

So this Court found that under the common law there was absolute judicial immunity and applied it under 1983. The

same thing with legislative immunity.

As to executive immunity, for instance peace officers, found that at the common law peace officers only had the defense of good faith and reasonable cause. And applied that under 1983.

And the same is true with Scheuer vs. Rhodes and the Strickland case; it was -- all of them cited common law tradition.

Well, in this case I think the Court of Appeals decisions which are overwhelmingly, perhaps, immunity, have in fact studied and they, themselves, cite a lot of State cases, the earlier ones in particular.

I think the Yaselli vs. Goff is probably the best of this entire string of decisions. And --

QUESTION: What Circuit is that?

MR. FARRELL: Yaselli vs. Goff.

QUESTION: Yes.

MR. FARRELL: Which is the earliest case, and it, itself, relates defamation immunity. And the reason why defamation immunity is also important is that defamation immunity intends to allow a counsel, in the presentation of his case, to be free from worrying about civil liability to ask himself personally. So it's defending the act of asking questions and presenting evidence at trial.

Now, if you're going to turn around and say 1983,

though, allows against State prosecutors, suits for the questions they ask and the evidence they present at trial, then you've undercut the defamation immunity. The only thing you can't be sued for is defamation. So if you are private counsel, you are home free and clear, basically, because there's no other cause of action will lie against you.

But if you're a State official, unhappily, you will be subject to suits for everything you say or present at trial, which means you can't argue at trial without worrying about the fear of suit. And I think this case is a good case; actually it was an eight-day trial, and the type of things Judge Ferguson found that were so terrible that Mr. Pachtman did were things where there was a statement that the witness said he voluntarily committed himself to a mental institution. And this was discussed by the California Supreme Court in 1962, at Appendix page 12 --

QUESTION: You're speaking now of the witness whose testimony is --

MR. FARRELL: Right.

QUESTION: -- alleged to have been presented improperly?

MR. FARRELL: Right. And this is just an example, is that the question of whether he was voluntarily or involuntarily committed. That's discussed at both page 12 and page 22, Footnote 3. And the California Supreme Court concluded at the trial, however, Costello apparently only meant that he voluntarily

pleaded not guilty by reason of insanity. And, in fact, that's what he says.

Now, this is an eight-day trial, and the prosecutor is supposed to pick up on the word "voluntarily". Mr. Hanson, I am sure in good faith, forgot that these particular provisions were in here when he said that the mental capacity wasn't discussed by the California courts.

It's easy to make a mistake in a half-hour argument on facts. Here is the prosecutor, on a 1961 trial, going to pick on questions like this.

Another claim by Judge Ferguson is that Costello said he hadn't seen mug shots but had seen a mug book of the -- of Imbler, before he identified him at the lineup. And he admitted he had seen twelve pictures, including Imbler's, in a mug book.

Judge Ferguson said that wasn't a mug -- therefore, he falsely testified he hadn't seen mug shots. Although he admitted, in the same line of questioning, that he had seen a mug book.

Now, these are the type of nit-picking questions, in an eight-day trial, that can be brought up in a civil case and called "knowing use of false testimony". When people --

QUESTION: You think it's nit-picking as to whether a man voluntarily put himself in an insane asylum, or he was thrown in?

Do you think that's nit-picking?

MR. FARRELL: It came as to credibility. He said he was --

QUESTION: What I'm saying is you're getting into the merits, and I didn't know the merits were before us.

MR. FARRELL: Well, I think this --

QUESTION: Are they?

MR. FARRELL: Well, I brought it up as an example.

QUESTION: Are they? Or are you going to give up your absolute immunity?

MR. FARRELL: No, I don't want to give up the absolute immunity. What I was saying is this is the type of thing that prosecutors will be exposed to. The person testified, as set out on page 23, that, roughly, "I entered a plea of not guilty by reason of insanity, and which caused me to be committed."

QUESTION: This case would not open that up, this case would be limited, as I see the facts, to the fact where a federal district court has held a habeas corpus thus-and-so, and the Court of Appeals affirmed it, and this Court has denied certiorari.

MR. FARRELL: Well, I'd like to, then, respond to that question.

QUESTION: Could it be limited to that?

MR. FARRELL: I don't think that could be -- from our point of view in general, say as County Counsel, I am sure we

would prefer that than a wide open attack on prosecutors.

QUESTION: You're just interested in having to pay the bill, aren't you?

MR. FARRELL: But --

QUESTION: Isn't that what the county is really interested in?

MR. FARRELL: Well, the county would not -- it's prohibited from paying punitives. There's a million and a half dollars in punitive damages sought.

QUESTION: Well, the county would have some money to pay, so that's a ground of interest, isn't it?

MR. FARRELL: The compensatory damages might well be paid by the county, that's a question that's being decided by this Horvath case, which is before the California Supreme court. It might or might not. To this point, the county has taken a position and paid compensatory damages in federal Civil Rights Act. So unless the California Supreme Court ruled otherwise, compensatory damages would be paid.

But as to the habeas corpus, it's an irrational determinant, because,first of all, people acquitted won't have a chance to have a habeas corpus decision; secondly, Mr. Pachtman was not represented at the habeas corpus hearing, only the Attorney General was there. We would be the civil attorneys --

QUESTION: Wasn't he there?

MR. FARRELL: No, he wasn't even there.

He had testified at the reference hearing in 1963, he didn't even know this was going on. He wasn't there. That's clear.

QUESTION: He didn't know the habeas was going on?

MR. FARRELL: He wouldn't normally know. He was just --

QUESTION: Well, the State could tell him, couldn't it?

MR. FARRELL: Well, they might, but --

QUESTION: They might.

MR. FARRELL: -- within the bureaucracy, it wouldn't be necessary, because Mr. Imbler was in the custody of the warden. When he's in the custody of the warden, the response is made by the Attorney General. And so there's no reason for either the District Attorney to be there or the County Counsel, who's the civil attorney for the District Attorneys.

But if this --

QUESTION: Are you telling me that the Attorney General didn't get in touch with the office?

MR. FARRELL: No, they would not normally do so. There are --

QUESTION: They would not normally get in touch with the office that prosecuted the case?

MR. FARRELL: They -- well, they wouldn't get in touch with County Counsel, definitely.

QUESTION: No, I'm talking about the county prosecutor's

office, the office that prosecuted the man.

MR. FARRELL: They might or might not. I don't know whether -- I could not honestly respond to whether it's normal or not. But there are 500 Deputy District Attorneys in the County of Los Angeles, and there are about 500 Deputy Attorney Generals /sic/ in the State of California. And I know, from handling habeas corpus, that we don't get in touch unless we feel we have to. There's just so much volume of matters coming in, that if we go over there on a matter, we don't get in touch with them until sometime later on.

So I don't know whether they did or not.

But, in fact, he was not present. He was not a witness and was not present at the habeas corpus hearing.

But, think of the impact on the writ of habeas corpus. I think we are weighing here an enormous impact it will have on the process of criminal justice against a private claim for monetary compensation. And if habeas corpus hearings are going to decide the right to monetary compensation, I think it would be only reasonable to assume a greater interest in habeas corpus hearings by the civil attorneys for the people who are going to be represented there. I have no doubt that the county counsel, for instance, would want to start being present, and the city attorney would want to start being present. And sometimes that might be to the good, but it certainly could slow up the habeas corpus writ, which has been

-- the purpose of habeas corpus has been to decide lawful custody.

We would then be converting the writ to decide lawful custody into a precondition for a civil suit, and you can't do that without having a ramification from the civil lawyers coming in.

And I think that, plus the fact that people acquitted won't have that benefit at all, would tend to eliminate writ of habeas corpus as a proper determinant for civil liability.

QUESTION: Mr. Farrell, on the damages requested here, --

MR. FARRELL: Yes.

QUESTION: -- suppose that declaratory and injunctive relief were requested; is your theory of immunity still the same?

MR. FARRELL: No, it is not. Certainly under the Civil Rights Act, while he was in custody, it would be probably improper under Preiser vs. Rodriquez, it would be a writ of habeas corpus. Now that he's out, I don't know what injunctive and declaratory relief might lie as to. That would be the only question. But I think, for instance, prior to the trial you would have a pending prosecution and you would have Younger vs. Harris. If there were something that declaratory and injunctive relief could, at this time, correct, I think it would lie -- I'm dubious that there are grounds for equitable juris-

diction, though. And I think that's going to -- that would be the problem with declaratory and injunctive relief.

But, no, this is a historic common law immunity as to damages, and as to other forms of redress, that's still open to the person. He can still get his usual remedy for a criminal prosecution. The district attorney certainly is under severe restrictions, for instance by the trial judge, jury instructions, mistrial granted. And the difference -- what characterizes the difference between this and the executive, say, in Scheuer vs. Rhodes, is basically the Sixth Amendment. And that is the distinction: that what the prosecutor does in presenting cases at trial is subject to all the restraints of the Sixth Amendment. There's an adversary there, there's an impartial judge, there's an impartial jury, there's a public trial. It's all taking place in public. He's subject to public censure.

So the Sixth Amendment characterizes the difference between a prosecutorial act and an executive act.

QUESTION: What provision of the Sixth Amendment are you talking about?

MR. FARRELL: Well, the right to counsel. What he does at trial, why it's different than when an executive does it; an adversary sitting right --

QUESTION: Well, he's an executive, a prosecutor is an executive. There's no gain in saying that.

MR. FARRELL: He's executive --

QUESTION: He's part of the Executive Branch.

MR. FARRELL: He's an executive in one form or another. In California he is an independently elected officer, he's not appointed by the Governor, the Attorney General or the District Attorney. So he's an independent executive officer, who doesn't -- basically does nothing but judicial matters.

So he's not an executive in the sense he responds to an executive power directly. But what he does is done internally --

QUESTION: Does the Attorney General of California have any power, jurisdiction over the local prosecutor?

MR. FARRELL: Yes, he supervises district attorneys under the California Constitution, and he can prosecute them, and if there's a conflict he can come in, and he's to enforce the law against them as well. And the grand jury is to enforce the law against him.

But what the prosecutor does in the courtroom, what he does in indictments, is subject to the constant review of the court due to the Sixth Amendment. He has an adversary, and that is, I think, the great distinction.

Well, thank you very much.

QUESTION: You said -- you started to say earlier that the quasi-judicial has two meanings. You never were able to elaborate or finish that because I think you were interrupted.

MR. FARRELL: Yes. What I was --

QUESTION: You told us what your concept was of the first meaning, somebody like a magistrate or somebody who,--

MR. FARRELL: Right.

QUESTION: -- at least at times, performs what seemed to be judicial functions and duties.

MR. FARRELL: Yes.

QUESTION: That's the first meaning. What was the second? You never finished it.

MR. FARRELL: Right, the first emphasis is on discretion, which is similar to a judge, and the second meaning is on a person closely identified and subject to the control of the judge. And quasi-judicial immunity, for instance, has been given to marshals and sheriffs and clerks carrying out the orders of the court, where there's no great discretion, but it's identified with the judicial process.

QUESTION: Supporting personnel in a courtroom.

MR. FARRELL: Supporting personnel, and people who are acting under their control. And I think -- I was trying to say the district attorney is both exercising the discretion which is similar to a judge and he's there, when he's arguing a case, when he's presenting evidence to the court, is subject to the constant control of the court. And so he falls under both ends of quasi-judicial definition.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. BORK: Mr. Chief Justice, and may it please the Court:

The United States is interested in this case because the outcome of it will quite likely affect the scope of the immunity for federal prosecutors and may, in some sense, control it.

I think the main points have been well canvassed by counsel. The problem of harassment that may occur to a prosecutor, I think, is illustrated in some ways by this case because we have seven judges on the California Supreme Court, who thought that conduct here did not deny petitioner's constitutional rights, and we have two federal courts who thought it did.

And I think it's fair to say that when judges differ that substantially about the nature of this conduct and what it did to petitioner's rights, it is fair to say that nobody can be confident of the outcome of a jury case.

QUESTION: But that goes to the merits, does it not, Mr. Solicitor General?

MR. BORK: Well, I wasn't going to the merits in the sense, Mr. Chief Justice, that I meant to imply that either court was right or wrong. I was merely illustrating the degree of uncertainty that exists in all of these kinds of

cases.

QUESTION: But that doesn't go to the main issue of the risk of harassment of prosecutors and the diversion of their time from their basic function?

MR. BORK: I meant it to go to that point, Mr. Chief Justice, because I think it's --

QUESTION: Well, Mr. Solicitor General, there's always been a tension between State courts, I can say from personal experience, and federal habeas corpus.

MR. BORK: I'm sure there is.

QUESTION: There's nothing new about that.

MR. BORK: No, no.

QUESTION: This happens all the -- and I don't -- I suggest, on the issues that we're dealing with today, I don't see that the tension helps us.

MR. BORK: Well, in that case, I will not pursue the point. I think it's -- I was trying to put it somewhat differently, but it's not one of my main points, in any event, so I'll pass it.

What I would like to discuss is the conceptual framework of the absolute immunity, and the qualified immunity, and why I think this particular process requires an absolute immunity.

Petitioner's counsel has objected to this being called a quasi-judicial immunity because a prosecutor is an

Executive Branch officer.

But I think the -- there's no anomaly there -- the categorization doesn't come from the question of which branch of government you're employed by, it comes from the process in which you're engaged, the nature of the process in which one is engaged. And this happens to be an Executive Branch employee who was intimately involved in the judicial process, and it's the appropriate immunity for -- is shaped by the needs of the process.

And I think that's why this is called a quasi-judicial immunity, and that's why that absolute immunity which adheres to judges has properly been held to adhere to prosecutors in Yaselli v. Goff.

QUESTION: Mr. Solicitor General, at the actual trial of the case, I still haven't got it clear in my mind, the difference between the prosecutor and the defense counsel, as to who is a quasi-judicial officer. This is during the trial, in asking questions.

MR. BORK: I don't see, Mr. Justice Marshall, that should a defense counsel suborn perjury that he would be liable to anyone in a damage action.

QUESTION: Well, I mean, is he a quasi-judicial officer?

MR. BORK: I assume he is.

QUESTION: Hunh?

MR. BORK: I assume he is.

QUESTION: So there's no difference, he also is a quasi-judicial officer.

MR. BORK: I think the people engaged in this process or --

QUESTION: That's all the counsel?

MR. BORK: Pardon me?

QUESTION: All the counsel that are --

MR. BORK: I believe so.

QUESTION: Well, is a privately retained defense counsel an agent of the State for purposes of 1983?

QUESTION: No.

MR. BORK: Oh, no, no, no. I would --

QUESTION: That's not the question.

MR. BORK: The question was, in general, can the defense counsel be regarded as performing a quasi-judicial function, and within the terminology which we're using now, I think the answer is yes.

Now, of course, there would be no State action.

QUESTION: That's right.

MR. BORK: Under 1983 -- in a 1983 suit.

QUESTION: Unless he was a public defender, publicly paid, and then there would be --

MR. BORK: Something of that sort.

But the -- I think it's the -- we are saying that

this nature of the process defines the immunity of the judge and of the prosecutor, and, indeed, that the prosecutor's immunity is symmetrical with the judge's immunity.

Now, it is --

QUESTION: But even if we say that the public defender is paid by the public, are you sure that that makes that State action, in light of your definition, that it isn't the category or class in which we put him, but the function that he performs?

MR. BORK: I'm not sure it is State action, Mr. Chief Justice. I had not addressed the question of the State action of a public defender.

QUESTION: At any rate, we don't need to worry about the defense counsel here, in this case.

MR. BORK: No, I don't think so.

No, we don't have to worry about him. He was -- it was merely a question of whether this idea of quasi-judicial aspect covered defense counsel as well, I think as a general concept it does.

But I think that has nothing to do with this case. And the point I wish to make here is that I think the immunity which a prosecutor has is symmetrical with that which a judge has, because they are both essential to the judicial process.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, Mr. Solicitor General.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may continue.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE -Resumed

MR. BORK: Mr. Chief Justice, and may it please the Court:

I ended on the note that the immunity was defined by the process, and for that reason that the prosecutor's immunity was appropriately the same size as the judge's immunity, and that would mean that a case parallel to this would be the case of a judge who was reversed for misconduct of the trial, during which he had denied a litigant his constitutional rights.

I take it that Pierson v. Ray and Yaselli v. Goff -- or Pierson v. Ray means that that judge would, nevertheless, have an absolute immunity.

QUESTION: Well, the analog would be a judge who had done so deliberately and intentionally and knowingly.

MR. BORK: Yes, Mr. Justice Stewart, that is correct. A judge who had --

QUESTION: Not just because of ignorance or --

MR. BORK: No. With malice -- we've all seen vindictive judges from time to time.

QUESTION: Unh-hunh.

MR. BORK: And so that would be the analog to this case. And I think if that judge would have an absolute immunity, and indeed I think he would, from a damage suit, I think so a prosecutor should.

And I think the perception and the differences between the Governor's decision-making range and what is at stake here is what accounts for the difference between this case and Pierson v. Ray, and the case of Scheuer v. Rhodes.

And the greatest difference, which I think --

QUESTION: Mr. Solicitor General, I gather -- the [sic] question I put to Mr. MacLaughlin, a judge who sells a decision would have the absolute immunity, wouldn't he?

MR. BORK: From a damage suit, I believe, yes, sir.

QUESTION: Yes. I mean from a damage suit.

Now, do you agree with him that perhaps one prosecutor who bribes a witness would not?

MR. BORK: No, I don't think I'd be willing to say that the --

QUESTION: You carry the absolute immunity even to that prosecutor?

MR. BORK: A great deal of what a prosecutor does is done outside of the courtroom.

QUESTION: Yes.

MR. BORK: And I don't really see that in the performance of his prosecutorial function that it makes that much

difference whether he happens to be standing in the hall or in his office or in the courtroom.

QUESTION: Yes.

QUESTION: Of course, Mr. Solicitor General, the decision the Court affirmed in Goff, Yaselli, would affirm the judgment of the Court of Appeals that saw no difference between judges and other executive officers.

MR. BORK: Well, there may be. There has been a doctrine of absolute immunity for other executive officers.

QUESTION: Which the Court of Appeals in Yaselli espoused.

MR. BORK: Yes. But I think that Scheuer indicates, and Wood v. Strickland indicates some difference, and I'm suggesting for executive officers, at least in the State context -- and I'm suggesting that that difference between that case and Pierson v. Ray or Yaselli v. Goff is justified by the difference in the process. And one of those differences is, as was said in the Scheuer opinion, quoting from Mr. Chief Justice Hughes, that were there not judicial review in a damage suit, there would be no way to test the Governor's performance in a courtroom.

And the fiat of the State Governor would be the Constitution, and not the Constitution, it's be the supreme law.

That is not true here. A prosecutor's behavior is

testable in the courtroom, before the jury, and testable on appeal, it's testable on collateral attack; indeed, it's testable ultimately, if one gets to that stage, upon a petition for commutation of sentence or pardon.

QUESTION: Are you familiar with the Ninth Circuit's holding on Ronan v. Robichaud?

MR. BORK: I don't believe I am, Mr. Justice Rehnquist.

QUESTION: Well, that was a case where the prosecutor had apparently collaborated, or it was alleged he had collaborated in kind of third-degree methods in interrogating a witness.

Would you extend absolute immunity that far?

MR. BORK: There are cases that I think we need not reach for purposes of this case, in which a prosecutor does what is regarded as essentially a police function, as in directing a raid, orin interrogating a witness. And it's possible to draw that line.

I would be hesitant to draw it very easily, because the connection between what he is going to do in the courtroom and what he does outside of the courtroom is so close.

There may be cases in which that line can be drawn.

QUESTION: A so-called investigative function, isn't it?

MR. BORK: That is true.

QUESTION: At least three Circuits have thought there

was a distinction.

MR. BORK: And there may be. I don't think we need address that distinction for the purposes of today's case.

QUESTION: And do those decisions say that he then has the immunity of a policeman, or he then has no immunity at all?

MR. BORK: It becomes a qualified immunity, I believe, --

QUESTION: The immunity of a policeman, if he's acting like a policeman.

MR. BORK: Yes, Mr. Justice Stewart.

QUESTION: Is that what the cases say?

MR. BORK: I believe so.

But the one thing I want to stress here is that in this case, unlike the case of a Governor or a school official, the prosecutor's action is subject to repeated review and repeated collateral attack, which would not be true of the Governor in Scheuer v. Rhodes, and would not be true of the school official in Wood v. Strickland, were it not for their not having abolute immunity.

It's been mentioned that besides the other safeguards for the defendant, there are sanctions available against a prosecutor, which are not available against the Governor, such as --

QUESTION: What about the executive officer who directs

a prosecutor to prosecute?

MR. BORK: Well, if the executive -- you mean a Governor who directs an executive officer to prosecute? That would be a somewhat difficult case, because at that point the Governor, I take it, is exercising his function to make sure that the laws are executed, and --

QUESTION: So he's acting like a prosecutor?

MR. BORK: He's acting like a prosecutor.

QUESTION: Rather than -- and the prosecutor isn't acting like a Governor.

MR. BORK: That, I think, is true.

But we're talking about a Governor calling out the National Guard, we're talking about a situation in which there is no way to get judicial review of that action, if there is not a 1983 suit available.

QUESTION: Is it not true that in most of the States neither the Governor of the State nor the Attorney General has any final control over the actions of a prosecutor?

MR. BORK: That is, I believe, true in a few States.

QUESTION: The Governor can remove him, or suspend the prosecutor temporarily for cause, but overwhelmingly the prosecutor elected in a particular jurisdiction is autonomous; is that not so?

MR. BORK: I think that's quite true, Mr. Chief Justice. It may be that my answer to Mr. Justice White was

somewhat tempered by my knowledge that the Attorney General can direct prosecution --

QUESTION: In the federal system.

MR. BORK: -- in the federal system, and our interest, of course, is in the federal system.

QUESTION: And even if they can't, it often happens in the States that they, nevertheless, listen, --

MR. BORK: They may well do, I'm not that familiar with State systems.

QUESTION: -- as a matter of practicality.

MR. BORK: But I think also it is true that the judicial process that we're trying to protect with this kind of immunity is a more vulnerable process. It is quite true that prosecutors have to bring very many cases. They have antipathy from many defendants, and there are categories of defendants who, if they were able to sue, would do their best to bring the process to a halt, or at least to damage the process by bringing actions.

QUESTION: Mr. Solicitor General, I notice that your brief has given us a rather comprehensive review of all the federal court decisions, addressed to this question, but you make no reference at all to any State court decisions. Is there any reason for that?

MR. BORK: No. We didn't, Mr. Justice Brennan, because we think, at least as to the federal prosecutor, he

is governed by federal law.

Now, perhaps -- I don't know if these gentlemen wish to file the brief I thought you were asking about this morning.

QUESTION: Well, there's a good deal of State law on this, too.

MR. BORK: Well, shall I ask these gentlemen if they --

QUESTION: Well, I'll leave that to them.

MR. BORK: -- care to brief the issue.

QUESTION: Well, the State decisions would be construing 1983, I presume. What we have -- the only reason we have this case is because it involves a federal question of the construction of a federal statute.

MR. BORK: I think Mr. Justice Brennan is interested in more than 1983, he's interested in --

QUESTION: I am, indeed. I'm familiar with --

QUESTION: Well, any State can do whatever it wants about this, as a matter of its own State tort law.

MR. BORK: That's true. I think --

QUESTION: Pierson v. Ray, and those cases, called on the historic privilege under common law.

MR. BORK: That's true.

QUESTION: In construing 1983.

MR. BORK: But we have --

QUESTION: Yes, but -- so the question is: what may be the common law may be of some relevance in the various

States.

QUESTION: Well, don't let me hold you now.

MR. BORK: All right. I think --

QUESTION: You can debate it in the halls later.

MR. BORK: All right.

It should also be noted that the prosecutor has to establish his case beyond a reasonable doubt to a unanimous jury. Should he be reversed on appeal for having done something or acted collaterally, he will be sued under a standard by which a majority of the jury may hold him liable on a preponderance of the evidence.

And I think that's bound to have a deterrent effect, as the prosecutor decides whether or not to go forward with the case.

And, finally, I think it may be worth noting, and I think it's true that some courts would be a little loath, in a close case, to decide that a defendant had been denied his constitutional rights by a prosecutor, if that court knew that by doing so he was exposing the prosecutor to a lawsuit for damages.

So that it's not all clear that removing the absolute immunity would help defendants; it might, in fact, hurt some defendants on their habeas corpus proceedings.

In any event, for these reasons, we think the absolute immunity, which a court has, a judge has, properly --

and a juror has -- properly belongs to a prosecutor as well. There are other sanctions, other safeguiards in the judicial process, not available elsewhere.

And for that reason, we think the judgment of the Court of Appeals should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:10 o'clock, p.m., the case in the above-entitled matter was submitted.]

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