OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CATHY BURNS, Petitioner v.

RICK REED

CASE NO: 89-1715

PLACE: Washington, D.C.

DATE: November 28, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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CATHY BURNS, :

Petitioner :

v. : No. 89-1715

RICK REED :

- - - - - - - - - - - - - - X

Washington, D.C.

Wednesday, November 28, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

MICHAEL K. SUTHERLIN, ESQ., Indianapolis, Indiana; on behalf of the Petitioner.

ROBERT S. SPEAR, ESQ., Chief Counsel, Office of Attorney General of Indiana, Indianapolis, Indiana; on behalf of the Respondent.

MICHAEL R. LAZERWITZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now on No. 89-1715, Cathy Burns v. Rick Reed.

Mr. Sutherlin.

ORAL ARGUMENT OF MICHAEL K. SUTHERLIN

ON BEHALF OF THE PETITIONER

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

The case of Kathy Burns presents the -- this Court with the opportunity to clarify and refine its holding in the landmark case of Imbler.

QUESTION: You are not say to (inaudible), just an opportunity.

MR. SUTHERLIN: An opportunity, yes, Your Honor.

For reason of public policy and practicality, I will respectfully urge upon the Court that a bright-line test can be established to help resolve the conflicts in the circuits and to clarify some of the ambiguities that are inherent in trying to discern conduct which is not essential to the initiation of filing formal criminal charges.

The bright-line test which I would respectfully urge the Court to consider is as follows. That only that conduct which is the exclusive prerogative of the

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prosecutor, such as the filing of formal charges and presenting the state's, case should be protected by absolute immunity. Conduct which precedes the filing of formal charges should be protected by the substantial protection of qualified immunity.

QUESTION: Excuse me, when you say the exclusive prerogative of the prosecutor, you mean under the particular State law in question. Suppose the prosecutor was the only one who could have issued an arrest warrant? Would that come within your -- in this particular State, would that come within your test?

MR. SUTHERLIN: Justice Scalia, I think that the functional approach and the review of the common law which suggests that that would be taken into account in a primary way. If the prosecutor of that jurisdiction were the only one who could file a petition or a request for a warrant, then that particular conduct, the exclusive prerogative of that office, would be deserving of the protection of absolute immunity. But in the case --

QUESTION: Well, I thought you were talking about the filing of charges? I thought one of your qualifications was that it had to be prior -- in conjunction with or after the filing of charges? Is that what you said?

MR. SUTHERLIN: In -- what I'm saying --

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QUESTION: Because if so, that would take care of Justice Scalia's question and, I assume, preclude absolute immunity for the filing of any -- through the application for any search warrant before formal charges are filed.

MR. SUTHERLIN: Justice Kennedy, I believe that the -- this Court's consideration in Malley v. Briggs suggested that the application of a search warrant was typically not a judicial act. But if the particular State prescribed the exclusive power of the prosecutor and gave to that prosecutor the exclusive power to seek a search warrant, then I think that under the functional test which the Court has employed in all types of immunity cases, that it would make no difference as to the other parties who may be involved in seeking a search warrant. But if the prosecutor were the only one, he would be entitled to absolutely immunity.

QUESTION: I understand that. So that departs somewhat from what I -- at least I thought I hear you say -- said that it has to do with reference to the filing of charges, and charges are not filed routinely with the application of a search warrant.

MR. SUTHERLIN: That is correct, Your Honor. I misunderstood Justice Scalia. I thought he said an arrest warrant. Maybe I misunderstood.

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QUESTION: I did say arrest warrant.

MR. SUTHERLIN: Yes. All right.

For reasons of public policy and practicality, the bright-line test which I have proposed would eliminate many of the problems which are addressed by the Seventh Circuit and many other circuits. The public policy considerations are essentially that any -- anything which will ensure and enhance the integrity of the judicial process promotes the common good and is to be preferred over the unfettered power of the prosecutor's office.

In the Seventh Circuit, there was the approach taken that giving advice would be protected by absolute immunity because the Court deemed that to be quasi-judicial. That approach does not resolve the continuing problem which would exist even if this Court were to adopt that. There would still be the very subjective debate, definitional debate, of what constitutes advice versus what constitutes investigation or directing an investigation.

The factual assumptions are insupportable that would lead one to conclude that if absolute immunity were not extended to such conduct as giving advice that the prosecutor would be hesitant to give such advice and would be flooded with a deluge of litigation, civil rights litigation.

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The 14 years following Imbler suggest the contrary is true. The majority of circuits have interpreted Imbler in a rather restrictive way, allowing absolute immunity only for those essential prosecutorial functions and has not expanded the application or the availability of absolute immunity to other functions such as giving advice.

One could then argue, reasonably, that in those circuits, and the majority of them have been I think applying Imbler in a restrictive fashion, one could argue then that you would see a deluge or at least an imbalance of activity against prosecutors in those jurisdictions and that simply is not in evidence. There is no -- been no complaint and no dicta within these opinions which suggests that these circuits are handicapped or burdened with a number of prosecutional misconduct cases.

QUESTION: Well, what about -- well, maybe that's because prosecutors don't give advice in those circuits.

MR. SUTHERLIN: That is possible, Your Honor.

QUESTION: Well, I mean they're probably obeying -- they're probably avoiding a risk.

MR. SUTHERLIN: The idea of giving advice, Justice White, is certainly to be encouraged, and we're not suggesting that any ruling under Imbler or any

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clarification should impede that. But what we want to ensure is good advice, and to allow prosecutorial immunity or absolutely immunity --

QUESTION: Do you think qualified immunity is enough?

MR. SUTHERLIN: Yes, I do, Your Honor. Qualified immunity is a substantial protection. Under the holding of Harlow, the objective test would require that the prosecutor or any other advice giver, violate a clearly established principle of law before he would be liable. So, in practice, if the prosecutor asserts the, the affirmative defense of good faith and it is shown that his conduct did not violate any clearly established principle, the case if over as to him. And he is out of the process of litigation.

That substantial protection was reiterated in your concurring opinion in Imbler.

QUESTION: What -- why should anyone, judge or prosecutor at his core functions, why should he have absolute immunity? I suppose is to keep him out of litigation at all, isn't it?

MR. SUTHERLIN: The -- Your Honor, the public policy and functional assessment or analysis of that office has led this Court and traditionally has resulted in the belief that certain core, essential functions must

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be protected by absolute immunity --

QUESTION: Because?

MR. SUTHERLIN: Because they act as a judicial officer, making critical decisions.

QUESTION: Well, I know but that -- why should the judicial officer -- what's the purpose of giving him more than qualified immunity?

MR. SUTHERLIN: It would impede his ability to make impartial and objective judgements. He might be hesitant to rule on the merits and might be fearful of the outcome, seeing the potential of liability. And it's the judicial immunity that was found appropriate and was clarified in the case of Forrester, that is, if it's not an essential judicial function but an administrative function, then you do not need to protect that activity with absolute immunity, but only qualified immunity, which as I --

QUESTION: Oh, a judge -- perhaps a judge ought to know what clearly established law is, and he wouldn't be liable unless he violated it. So why does he need absolutely immunity or why does the prosecutor?

MR. SUTHERLIN: The -- Justice White, the prosecutor's office as sovereign -- as counsel for the sovereign is perhaps the most powerful office and his discretionary power requires him to make judgments, often

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close calls.

Qualify --

QUESTION: How can it be a close call in identifying what you've just said isn't too hard a thing, a clearly established law?

MR. SUTHERLIN: Oftentimes, it is difficult to discern on the spot what clearly defined law is. But if it is a close call under the objective standard, the prosecutor is protected. In other words, he's not cautioned to withdraw from the edge of what that clearly defined standard is.

QUESTION: It also keeps him out of litigation, absolute immunity does.

MR. SUTHERLIN: Well, absolute immunity would keep him out of litigation, but it would not promote the public good and would not serve any legitimate public policy interest.

What we want -- what is primarily in -- is to be protected in the prosecutor's office -- is his function of discerning those meritorious prosecutorial cases. As counsel for the sovereign in a representative government, acting on behalf of all the citizens.

QUESTION: Why doesn't that apply when he moves -- the magistrate for a search warrant before an arrest, before filing charges? In an official appearance before

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the court -- I mean, it seems to me that that's more like an appearance with reference to an arrest warrant than it is simply giving advice.

MR. SUTHERLIN: Justice Kennedy, I think that issue was addressed in Malley v. Briggs, in that if you apply the functional test it should make no difference what hat the person is wearing, but what the function under scrutiny truly is. And if a police officer can come in and apply for a search warrant and misleads the court or is found to be an inappropriate act, exposing him to liability under qualified immunity, then it is inconsistent and impractical to then say to the prosecutor but because of the hat you're wearing, we are going to give you absolute immunity. It would create in the public's mind an inconsistent outcome and would invite just --

QUESTION: (Inaudible) this fellow -- here's this person sitting behind the bench, issuing a search warrant who gets absolute immunity.

MR. SUTHERLIN: That is correct, Justice White, and that's as it should be because he is -- he is charged with being an impartial magistrate, determining whether or not a warrant should be issued --

QUESTION: Yeah, but the suit says he isn't. The suit says -- it might charge him with all sorts of

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things for which he would be immune.

MR. SUTHERLIN: In this country anybody can be sued for the cost of a filing fee. But the process of protecting that officer from being involved and protracted litigation would permit the motion to dismiss, the motion for summary judgment, and trial Rule 11 sanctions would caution any practitioner to be quite careful about his allegations.

There are adequate protections, but to extend absolute immunity to this particular prosecutor, Mr. Reed, for the conduct under scrutiny, would be to suggest that almost anything that a prosecutor does prior to filing formal charges would be protected.

QUESTION: Mr. Sutherlin, why -- let's explore that. I had thought that the only justification for carving out judges as an exception to the normal rule of just qualified immunity is that judges are more likely to be sued. There's nothing worse than a disappointed litigant, and that's the reason, although that -- we have no more need to be impartial than the Attorney General or a lot of public officers who are supposed to act in the public interest all the time. But we're more likely to be sued often.

Now, why can't you say the same thing about the prosecutor in everything he does, not just in the things

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that relate -- why does it have to be related to the judicial process? The only -- the only relevance of that is that that is what produces the likelihood of constant litigation.

MR. SUTHERLIN: Justice Scalia, in this particular case, all the conduct preceded any judicial involvement. The prosecutor gave permission to hypnotize Cathy Burns, contrary to the advice of the police officer which suggested by his training that it was improper and contrary to the prohibitions of the Fifth Amendment. This particular prosecutor then went down and viewed a videotape of the forensic hypnosis and by all accounts violated every professional and ethical protocol, including the post-hypnotic suggestion that she would not remember any of the activities under hypnosis and that she would cooperate fully with the police.

That conduct was followed by a discussion on whether or not to make the source of this so-called interpretation of a confession public. The following day, Mr. Reed, with Officer Scroggins, presented to the court a dishonest statement of the basis for seeking a search warrant. All of that preceded the filing of any formal charges. All of that without any judicial --

QUESTION: I understand that, and that's all terrible if it -- you know, if it occurred the way you

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say, but what also could have occurred is he could have -- he could have filed a -- an indictment that was just -- just a pack of lies for which he would have had absolute immunity. It would have been just as harmful, just as unconstitutional, whatever else you want.

MR. SUTHERLIN: That is correct, Your Honor.

QUESTION: Now why, is the one different from the other? I agree. Absolute immunity is a terrible thing, but why should we give it to them for the one rather than the other?

MR. SUTHERLIN: In most competing interests where one right could be, say, trampled by a governmental objective, there must be a balancing. And in this particular case, the balance would have resulted in a finding that if Mr. Reed had sought the authority of the court and had obtained an indictment, then from that point, that is, the filing of the indictment and from that point one his conduct would be absolutely immune, because we must tolerate those instances of egregious conduct in order to protect the judicial processes. We must tolerate cases such as this.

If they had been filed, if the conduct had occurred after the filing, but because the conduct occurred all prior to the filing, because the dishonesty to the court in seeking the search warrant occurred prior

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to the filing, because Cathy Burns was detained for 8 days before there was a formal filing of the charge, because in seeking the warrant for arrest, there was still no mention of the search warrant.

All of this conduct is so reprehensible that to extend absolute immunity to this kind of conduct would be to create more confusion and more conflict in the circuits. There would be inevitably a difficult subjective process of trying to discern whether the conduct of the prosecutor is investigative or whether it is simply advisory as the Seventh Circuit held. It may be both. But you would be forced -- or the trial court would be forced to defer to a fact finder.

In the proposed bright-line test which I have recommended to the Court, most of those problems would be eliminated. If the conduct was the exclusive and an essential prerogative of the prosecutor's office, then that could be easily determined. But if the conduct were advisory or investigative prior to the filing of formal charges, then you wouldn't have to distinguish, as the Seventh Circuit tried to do, whether or not there was an active participation or passive advising activity.

It is important to realize that if the prosecutor is going to continue to give advice to police, whether it be at the local level or at the Federal level,

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that he must reserve some caution and some respect for the Constitution and the rights of the individual. If he is simply going to be allowed to shoot from the hip and give bad advice, then no public policy is well served, no common good is advanced. What is encouraged by the allowance of qualified immunity is to encourage that prosecutor, or any legal advisor for that matter, to use caution, to take an informed position, to reflect before he advises the police on their actions which may in fact infringe upon a liberty interest.

QUESTION: Of course, there's a third alternative, too, isn't there, and isn't that that if the immunity is only qualified, any prosecutor who has the option is not going to give advice at all. He's simply going to say to the police, you're on your own. Or he's going to do whatever he can to encourage the police to have their own lawyers, so that he is simply off the hook for this possible source of liability entirely.

MR. SUTHERLIN: Justice Souter, if -- that is a possibility of course, and I suppose it might depend on each individual's propensities to give advice and to involve themselves in --

QUESTION: Well, if you had the choice and you knew that by giving no advice, you had nothing to worry about. You could come in after the judicial stage was

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reached, and whatever might happen to the case, at least it would be no risk of liability on you.

And the other alternative was to give no advice -- was to give advice and assume the risk of such liability as might common qualified immunity. You'd take the first alternative, wouldn't you?

MR. SUTHERLIN: If I may answer this way, Justice Souter. Applying the functional approach would not require somebody to look at the particular hat of the person giving advice. So if a sergeant were to give advice or a legal advisor who is an attorney or may not be an attorney would give advise and that advise would lead to a violation of one's constitutional rights, then under -- and if the plaintiff met his burden of proof under 1983, that person would be held liable.

QUESTION: That -- that's right, but your rule would in fact encourage that the situation in which the advice would be coming from the sergeant rather than coming from a prosecutor whom one hopes might have some detachment and perhaps a greater fund of legal knowledge.

MR. SUTHERLIN: Well, if -- if the public policy to be served is to protect the integrity of the judicial process, that is, the integrity of the discretionary power of the prosecutor to file charges of not, then other activities of the prosecutor, which perhaps might make him

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less objective and might draw him into being a part of the investigative effort, that might cause him to jeopardize his impartiality and his objectivity.

But absolute immunity would encourage just the opposite. Absolute immunity would encourage the giving of bad advice freely without fearing consequences. And what public policy in this matter should, I think -- should predominate would be that the prosecutor would reflect and be cautious. And if he isn't truly acting on the, on the office as he's been entrusted with -- properly, he would give the proper advice. And even in a close call, he would be protected by the substantial protection of qualified immunity.

It is only when the conduct is so egregious that it violates clearly established law is the prosecutor going to be found liable for this conduct that precedes the filing of formal charges.

And that is consistent with the Court's holding in, in Malley. It's consistent with the Briscoe case, which said that a witness, a police officer, who gives false testimony after the filing of formal charges, is absolutely immune. Because at that point the State's immense power has now been brought to bear on an objective of obtaining a prosecution. And if -- if that's the line of demarkation, then from that point on the prosecutor and

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the police and the witnesses should enjoy absolutely immunity.

I might point out that the assertions of the Respondent in this matter simply do not hold up under scrutiny. We cite in our brief the study, the empirical study, in the Cornell Law Review article which suggests that less than 4 percent of the 1983 cases involve prosecutorial misconduct. And in my reading of that article suggests that the majority of them are disposed of without going to trial. And of the cases scrutinized in the central district of California for 1975 and '76, only cases, I believe, went to trial.

QUESTION: Well, that's true of -- lots of cases are settled on the merit -- settled on payment of money, aren't they, Mr. Sutherlin? I mean that's true of any case. Only a small percentage of cases filed are going to go to trial.

MR. SUTHERLIN: That's true, Mr. Chief Justice, but this particular article actually analyzed the method by which these cases were disposed, and the vast majority of them, all but two as I recall, were disposed of by motions to dismiss or summary judgment. So the prosecutor was not burdened by being involved in protracted litigation.

And as I suggested, the 14-year opportunity, if

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you will, to allow the circuits to be legal laboratories have produced a plausible argument that they are not burdened by this restrictive application as instructed and as taught by Imbler to allow the prosecutor only absolute immunity for those essential functions.

QUESTION: Or else that the prosecutors are pulling their punches in those circuits.

MR. SUTHERLIN: That is quite possible, Your Honor. But the briefs of the respondent and the amici do not challenge our assertions. They merely restate the argument that they will be burdened or that they will be encumbered. There is no statistical information. There is no fact source which can demonstrate that that is supportable. And it is our position, Your Honor, that what would be encouraged if the respondents arguments were persuasive would be even a more divisive problem in the circuits. They would still have to consider what is the distinction between advice and investigatory. And in the proposed bright-line test which I have respectfully urged this Court to consider, most of those problems would be resolved at the threshold of the litigation on the basis of whether or not there was a clearly established principle of law which the prosecutor and -- had violated. And if he had not violated a clearly established principle of law, then the case ends as to him.

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QUESTION: Mr. Sutherlin, most of your argument has been in the nature of a kind of argument you make to a legislature about what kind of rule we ought to adopt and what would be a wise rule. Haven't we in the past looked to the common law for some kind of guidance on what the scope of this immunity is, and if so, what would we find there?

MR. SUTHERLIN: The -- Your Honor, if I could answer that question very briefly. The common law suggests that the prosecutor enjoys immunity but not absolute immunity for everything he does. In the State of Indiana, for example, the prosecutor is defined as a law enforcement officer, and even under State tort law, which is derived from common law, he would be exposed to a liability for false arrest.

And as we've alleged in this particular case and as of -- and as the facts are demonstrated on the record, Mr. Reed was instrumental and crucial in the decision to arrest Cathy Burns without a warrant, based upon his opinion that there was probable cause.

So the common law tradition suggests that there is perhaps a need to protect the essential function of the prosecutor, that is, the prosecutorial function, the initiation of filing formal charges and the presentation of the State's case. But everything in addition to that,

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outside of that, was regarded traditionally as more of a police function and not entitled to absolute immunity.

Mr. Chief Justice, I would like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Sutherlin.

Mr. Spear, we'll hear now from you.

ORAL ARGUMENT OF ROBERT S. SPEAR

ON BEHALF OF THE RESPONDENT

MR. SPEAR: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns a pure legal issue concerning and regarding legal advice given to police concerning hypnosis, legal advice given to police officers concerning probable cause due arrest and asking questions of a police officer in court seeking a search warrant.

The issue is are these prosecutorial functions protected from absolute immunity from civil liability under 42 U.S.C. section 1983?

QUESTION: Are both the functions here are functions that the State law says are within the scope of the prosecutorial function in that State?

MR. SPEAR: Yes, Your Honor, they are. In Indiana we -- it is by definition of common law and historical custom to practice if they are. But like Illinois, which is in the same circuit, the Indiana

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prosecuting attorney is almost a second cousin to the State's attorney in Illinois where giving legal advice to police is in fact a statutory obligation. But giving legal advice to police and conducting search warrant hearings or also asking questions at search warrant hearings is a traditional function in Indiana prosecution.

QUESTION: Is it covered by statute?

MR. SPEAR: No, Justice, it is not covered by statute. The statutory duties of the Indiana prosecutor are confined to one or two simple statutes --

QUESTION: Is there case law on the question?

MR. SPEAR: Only to the extent, Your Honor, that the Packman itself discusses Griffith v. Slinkard, which is the text on common law case we rely on and later on we see Foster v. Pearcy in Indiana in the 1970's dealing with a wide-ranging deal, a wide-ranging variety of prosecutorial duties. But those particularized functions are not statutory. They are common law and historically based.

As a practical matter, Indiana has 92 counties and many of them are very small, so that in terms of giving legal advice to the police as a practical matter if they do not get legal advice from the prosecuting attorney, they do not give legal advice at all. County attorneys and city attorneys, except in a very major urban

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area, would ordinarily not be giving legal advice on criminal cases to the local police.

QUESTION: How about getting warrants in the, in the State; is it customary that warrants are obtained by the prosecutor as opposed to the police?

MR. SPEAR: Almost always, Justice. The -- there are two methods for instance in search warrants which would be either prior to or after filing of formal charges in Indiana. One is to ask questions in open court and then obtain the warrant, usually drafted by a prosecutor, but signed by a judge after amendment or on its face. The other question would be a preparation of an affidavit signed by the charging witness, usually an officer in preparation of a warrant which would then be signed by a judge or -- as amended or on its face if finding is probable cause. Under either of those circumstances, the prosecutor will be imminently involved in it and it's -- in fact in terms of asking questions in open court in Indiana, only a lawyer can ask questions of a witness in open court, so that the officer, if they did not go in alone, could not have another person ask these questions unless they were an attorney. As a practical matter, the only available attorney would be the prosecuting attorney or one of his or her deputies.

QUESTION: Well, didn't the State trial judge

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testify in this hearing that the prosecutor had to be in her court before a search warrant would be issued?

MR. SPEAR: Yes, Justice, this is a local custom and practice rather than State law but absolutely that is correct.

QUESTION: Mr. Spear, looking at your, your answer to Justice O'Connor prompted this thought in my mind. Looking only at the legal advice aspect of the case, I guess different communities can have different methods of providing the police department with legal advice and supposing the police department in a city hired its own lawyer who's not a prosecutor? His sole function is to handle their pensions, handle their internal things, and also to give legal advice in the course of their duties. Would such a person be entitled to absolute immunity in your view?

MR. SPEAR: That is a cutting edge of the question, whether that immunity would apply in that situation, Justice, and I would believe that it would depend on whether or not it was an integral part of their duties under State law, whether that be statutory law --

QUESTION: Well, I'm assuming it would be that the police have a regular procedure of going to some lawyer -- maybe they hire the lawyer just to give the police legal advice -- but he never prosecutes.

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MR. SPEAR: Under those circumstances, if it was the functional equivalent of what a prosecuting attorney does in most cases, yes --

QUESTION: Well --

MR. SPEAR: -- otherwise, no.

QUESTION: It's the functional equivalent of what some prosecutors do.

MR. SPEAR: Yes, Justice.

QUESTION: But you say that, that if, if any -- a nonprosecutor gives legal advice, he'd get the prosecutorial immunity?

MR. SPEAR: Only in a limited circumstance where it was an integral part of his duties.

QUESTION: Part of his duties.

MR. SPEAR: It would not be a wide-ranging thing. A police officer could not bring a private attorney in and have him ask questions and hope for that immunity. But on the other hand there is some question and that's the circumstance of whether they're State actions as well.

QUESTION: I don't understand what principle you use to get there. I mean you say, getting legal advice must have absolute immunity. It must because the prosecutor does it, and then you say, well, therefore, anybody else that gives legal advice also has immunity.

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MR. SPEAR: The question comes about --

QUESTION: What is all this based on? It just seems sort of random.

MR. SPEAR: Whether or not it's an integral part of the judicial process we would submit is the answer to that, Justice Scalia.

QUESTION: Giving, giving legal advice is an integral part of the judicial process?

MR. SPEAR: We would submit that it is. That in fact as early as possible in a criminal investigation of prosecution, the police for public policy reasons should have access to legal advice, and for two reasons. One is to protect the innocent and to protect people's constitutional rights, because hopefully an attorney, the prosecuting attorney, gives better legal advice than a squad sergeant. On the other hand, if the --

QUESTION: Does he give better legal advice if he has absolute immunity than if he has no immunity? Most lawyers don't need absolute immunity to give legal advice.

MR. SPEAR: Most lawyers, Justice, are not subject to the kind of litigation from 1983 that the prosecuting attorney is.

QUESTION: Well, some of them are. We've had cases involving suits against defense counsel. We've had suits a lot from the malpractice actions. There are a lot

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of litigations against lawyers.

MR. SPEAR: I would submit, Justice, that in the hurly-burly of the criminal justice system that, that police officers, judges, and prosecuting attorneys draw far many more lawsuits than the average member of the bar.

QUESTION: Mr. Spear, getting to the person involved, do you claim this right to everybody in the prosecutor's office?

MR. SPEAR: Only a prosecuting attorney or his deputies who are members of the bar, Justice.

QUESTION: Only what?

MR. SPEAR: Only the prosecuting attorney or his deputies who are members of the bar.

QUESTION: For all of those and if the prosecutor's office has 250 people, they all have absolute immunity --

MR. SPEAR: If they are lawyers.

QUESTION: -- without more.

MR. SPEAR: For the facts in this case and for those key prosecutorial functions under Imbler, Justice, yes.

QUESTION: But not just because he's the prosecutor?

MR. SPEAR: No, it relates to the function and not simply because he's the prosecuting attorney, Justice.

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QUESTION: Well, well, the function would be anybody in the prosecutor's office who is a lawyer.

MR. SPEAR: Yes, Justice.

QUESTION: Well, where does a lawyer who was just hired yesterday get any policy making theory?

MR. SPEAR: I would submit, Justice, that in this particular instance it's not necessarily policy making but the choice of whether or not --

QUESTION: Well, don't the cases say policy making position?

MR. SPEAR: I would submit, Justice, that they deal in a criminal justice context simply with a judge and prosecutor context, as opposed to for instance the absolute immunity of the President of the United States which is, which is a policy making question.

QUESTION: And if the opinion's limited to policy making people, you lose?

MR. SPEAR: I would suggest --

QUESTION: You want to go that far?

MR. SPEAR: Not necessarily, Justice, because I'm not sure --

QUESTION: I hope not.

MR. SPEAR: Justice, I would think not, simply because in a courtroom whether you are the prosecutor or the deputy prosecutor, you are the State of Indiana when

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you bring an action.

In this particular case, the district court and the court of appeals found that Mr. Reed engaged in a prosecutorial function by giving legal advice and asking questions in court of a police officer and in key here, the prosecutor did not manage or participate in police investigative activities.

This court in Imbler v. Packman held that a prosecuting attorney has absolute immunity in performing duties which are an integral part of the judicial process in order to protect the prosecutor from harassment and intimidation. Historically, Imbler cites Griffith v. Slinkard, an 1896 Indiana case, dealing with granting legal advice to grand juries and indeed granting legal -- giving legal advice to grand juries, allegedly adding a name to an indictment, allegedly suborning perjury of witnesses in front of a grand jury.

QUESTION: Mr. Spear, the, the phrase -- you didn't use quite the phrase that we used in Imbler. The phrase we used in Imbler as delineating the boundaries of our holding was, was that the respondents' activities were intimately associated with the judicial phase of the criminal process.

QUESTION: Yes, Justice.

MR. SPEAR: Well, do you think that's an

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accurate description of what you're urging us to accept? Intimately associated with the judicial phase of the criminal process?

MR. SPEAR: Yes, Justice, because we disagree strongly with petitioner that there is a bright-line test which this Court can apply overall to determine where Imbler applies. We wold submit that the Imbler teaching is that you must apply it on a case-by-case basis, that there will be tough questions for the courts to make and that there is no bright-line one way or another. And we are submitting not that this Court extend Imbler but apply it to the facts in this case and there are three specific situations, giving legal advice on hypnosis, giving legal advice concerning probable cause, and asking questions in open court on a search warrant hearing, and we ask this Court to do no more than apply Imbler to those facts and not to create -- to extend Imbler, but merely to apply it herein. We think Imbler answers the questions that this case brought up.

QUESTION: But Imbler saved the question of whether in giving advice -- wasn't that subject to an absolute immunity?

MR. SPEAR: Certainly, Justice, it did not decide the specific issues in this case, but it gave us the teachings to apply to a fact situation and reach a

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result which we believe that the circuits and the district courts have over the years.

Now there is admittedly a split in the circuit -- in the circuits on legal advice; the Seventh, Eighth, and Eleventh, find absolute immunity, the Tenth definitively does not.

QUESTION: But just giving legal advice is perhaps different from actually appearing in court to get a search warrant.

MR. SPEAR: We would suggest that it is a similar situation because this prosecuting attorney did not appear in court as a witness, Justice. He appeared to ask questions.

QUESTION: Sure, sure, sure.

MR. SPEAR: This is a function that he would be doing in a trial situation. He would also be --

QUESTION: But it's different from just giving legal advice?

MR. SPEAR: Yes, Justice, it certainly is.

QUESTION: And somewhere I suppose there might be differences between what the advice related to. Like in this case, advice about hypnosis is maybe different from giving advice about whether there is probable cause to get a search warrant.

MR. SPEAR: We believe those two are almost

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identical questions where his asking questions in court is a separate question, Justice. That would be our submission.

QUESTION: And how is it that the giving of the advice is intimately associated with the judicial function?

MR. SPEAR: We would submit, Justice, that if the -- the prosecuting attorney by analogy does exactly the same thing with regard to a grand jury that he or she does in this case. They give legal advice to grand juries. In Indiana they call the grand jury to give legal advice to the grand jury, ask questions of witnesses before grand juries. We believe that is a very direct analogy to what this prosecuting attorney -- prosecuting attorney did, which is give legal advice to the police, and furthermore, then proceeded to ask questions in open court before a judge. And we think the analogy is very direct, because this prosecutor did not engage in what we think is investigative conduct.

QUESTION: Mr. Spear, what, what happens down the line -- if the person who gives the advice has absolute immunity and the person who receives it continues to have qualified immunity I suppose, right?

MR. SPEAR: Yes, Justice.

QUESTION: So that if you have somebody who has

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absolute immunity giving advice to a policeman, as long as a policeman seeks advice from somebody who can't possibly be held liable for it, the policeman can't be held liable and also the person who gave the advice can't at all be held liable.

MR. SPEAR: I'm not sure the policeman can't be held liable, Justice. In Malley v. Briggs for instance, the magistrate was clearly absolutely immune who issued the warrant and yet the officer who testified and asked for the warrant was found to be not immune. Under those circumstances, there is -- the qualified immunity would apply but on a particular fact situation it may not protect the officer.

QUESTION: Well, I think it would be a pretty hard fact situation where you get advice from a lawyer. You're not yourself a lawyer. That's, that's a harsh doctrine, it seems to me.

MR. SPEAR: The, the doctrine of absolute judicial immunity, prosecutorial immunity, Justice, is not to protect the individuals. It's to protect the system. It is inconceivable there would be such a doctrine if there weren't public policy grounds to protect the system as a whole as is opposed to individuals and I think that makes the difference.

QUESTION: Mr. Spear --

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QUESTION: And also the doctrine grew out of the common law and I'm curious to what extent can you point or call our attention to common law authority for the proposition that a prosecutor giving legal advice is absolutely immune?

MR. SPEAR: I would suggest that at least in Griffith v. Slinkard, which is the Indiana case --

QUESTION: Which is not a legal advice case.

MR. SPEAR: I would suggest that giving advice to a grand jury is a legal advice case, Justice.

QUESTION: Isn't that the one where he added the name to the --

MR. SPEAR: Yes, he did, but he also asked what -- allegedly suborned perjury in front of the grand jury and allegedly -- and gave legal advice to the grand jury as well.

QUESTION: Well, have you got any cases involving giving legal advice to police officers?

MR. SPEAR: In terms of --

QUESTION: Wherein at the common law it was found that that was absolutely immune.

MR. SPEAR: No, Justice.

QUESTION: Mr. Spear, do you think that the prosecutor here would have been able to obtain summary judgment under qualified immunity?

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MR. SPEAR: We believe so, Justice.

QUESTION: Or is that open to some question?

MR. SPEAR: We obviously would disagree with petitioner about that, but we believe he would. We think that the abstract proposition whether or not you can hypnotize someone is something which he could have said -- obtained qualified immunity on, giving legal advice on probable cause would also fit that category. And that we also believe that objectively since in any -- there is an Indiana case that says that hypnosis can provide probable cause although not used as evidence, that each of those three situations would have produced summary judgment under --

QUESTION: How about concealing the basis for the background of the warrant from the judge?

MR. SPEAR: We would submit, Justice, that the record shows that he asked the officer questions. He asked them if there was anything else he wanted to say, to which he responded no. And in Gentry v. State in Indiana, it is irrelevant where it was under hypnosis or not, because for probable cause purposes the confession, properly given hypnosis, would have produced probable cause in either event whether it was under hypnosis or not. And there was no clear-cut law that said you couldn't do it. Subsequent case law said you could.

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At common law we would submit, however, that A cannot sue B's lawyer for legal advice, even bad legal advice, that B's lawyer gives B. We would submit the same situation is true here. It's not a prosecutorial case.

QUESTION: Yeah, but that's not an immunity argument, that's just there was no cause of action, isn't that right?

MR. SPEAR: Yes, Justice.

QUESTION: Yeah.

MR. SPEAR: But there is a common law principle involved here. It is related but not on all fours.

In this case Reed did not participate in the interrogation. He did not make an arrest. We would submit prosecutors should be encouraged to give police legal advice in the building and screening of cases as early as possible. In Indiana it is a historical custom and practice for prosecutors to appear at search warrant hearings and again, only an attorney can ask questions in Indiana court. This prosecutor was neither an affiant nor a witness in that hearing. We believe asking questions of importance is imminently associated with a judicial phase of the criminal proceedings and is entitled to absolute immunity.

The prosecutorial analysis approach is a determination of whether prosecutor activities have been a

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judicial phase of criminal process including initiating the process. If so, the prosecutor is absolutely immune from civil liability. On performing this historical function in a criminal case the prosecution got the same immunity as judges. Public policy requires that criminal justice system be allowed to protect the innocent and pursue the guilty.

Here we would ask the Court to apply Imbler v. Packman. The prosecutor should be afforded absolute civil immunity any time he or she functions as a prosecuting attorney either in court or giving legal advice. In other words, the Seventh Circuit be affirmed.

QUESTION: Thank you, Mr. Spear. Mr. Lazerwitz.

ORAL ARGUMENT OF MICHAEL R. LAZERWITZ

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

MR. LAZERWITZ: Thank you, Mr. Chief Justice, and may it please the Court:

In our view the Court's decisions, and Imbler against Packman in particular, suggest that absolute immunity shields those -- shields the performance of those prosecutorial functions that directly affect the fairness and integrity of the judicial process. Those are the functions that -- excuse me, that's the concern that's the driving force behind the Court's recognition of absolute

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immunity in this area of the law.

Here the challenged prosecutorial activities; giving advice to the police officers about the conduct of their investigation and later participating in the judicial proceeding to obtain a search warrant are integral to the prosecutorial functions that do directly implicate the judicial process. Those well-recognized functions are (1) screening cases that lead to the formal charging decision, and secondly, the prosecutor's duty to make sure that the criminal justice process is always fair.

Exposing such conduct to the threat and intimidation of civil litigation would inevitably impair the judicial process. There are other alternatives, remedies, short of a civil damages action -- excuse me -- to take care of a prosecutor's misconduct. In these circumstances we submit the prosecutor is entitled to absolute immunity.

QUESTION: Well, the prosecutor goes with the police to execute a search warrant because he thinks and the police think maybe there's some question about how far they can go with the search if he goes with him and gives him some advice and he's dead wrong. Is it absolute immunity?

MR. LAZERWITZ: In that situation, Justice

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White, rare as it may be at least in the Federal practice -- it doesn't matter where the prosecutor is, whether he's on the phone in his office or at the scene, although it's a bad practice for the prosecutor to be on the scene because he could become a witness, which is something you don't want. But to contrast that situation --

QUESTION: So you're answer is he would be absolutely immune --

MR. LAZERWITZ: Yes, but if he's on the --

QUESTION: Because he's only giving advice.

MR. LAZERWITZ: Right. But if he's on the search scene, and there are cases that we cited in our brief where the prosecutor is participating in the search. He's with the investigators rummaging through the house to look for the evidence. Then we submit that's a much more difficult case to say that he's entitled to absolute immunity, because he is functioning not so much -- he's not functioning as a prosecutor --

QUESTION: Does it matter if he's a prosecutor? Suppose it's somebody else who gives advice. You have somebody called Police Counsel and he doesn't prosecute cases, but he gives advice to all the police --

MR. LAZERWITZ: We -- our submission here is not that anyone who gives legal advice --

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QUESTION: Well, why not?

MR. LAZERWITZ: Because that person --

QUESTION: If you say it's an integral part of --

MR. LAZERWITZ: It's, it's --

QUESTION: -- the integrity of the judicial process?

MR. LAZERWITZ: The person, the legal advice giver in your hypothetical who's not a prosecutor isn't functioning the system the way a prosecutor does. That's not his job. He's not thinking in terms of, well, if I give him the right advice, am I going to be able to make a case out of this? Is this going to lead to evidentiary problems? Is this the kind of case we want to bring? And that's the distinction between the prosecutor and, for example, if -- at least in the Federal system -- all the investigative agencies have --

QUESTION: Well, the police are always trying to make cases, and so here's one police department that hires their own lawyer to give them advice about search warrants. And here's another police department that relies on the prosecutor. You think there's a major difference between those two systems?

MR. LAZERWITZ: I wouldn't say it's a major difference, Justice White, but in this case --

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QUESTION: Well, enough to --

MR. LAZERWITZ: Yes, we would, we would pause before we would want the court to clothe absolute immunity to that person as opposed to a prosecutor and the distinction is -- and it's what Imbler against Packman suggests. It's what this Court even recognized in Butz and Economou. It's got to be not just the person's hat or whether he has a law degree. It's what his role is in the overall process and in this -- in the case before the Court, the reason why giving legal advice is, so to speak, intimately connected with the judicial process in the words of Imbler is that when the prosecutor gives that advice, he's giving it in the context of making a case, presenting the charging decision. He is the one who has to make the charging decision, which all agree must be protected from absolute -- from suit by absolute immunity.

QUESTION: You label him greater immunity than the cop on the beat who obeys his advice?

MR. LAZERWITZ: Yes, the unfortunate or as was pointed out before, one apparent anomaly is that the police officer goes to the prosecutor and says -- one hypothetical would be -- can I beat this person up to get a confession? And the stupid prosecutor, the incompetent prosecutor says, I think that's constitutional.

There's no doubt that and our submission the

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prosecution --

QUESTION: The competent prosecutor who knows it's unconstitutional says, yes, that's constitutional, go beat him up. I mean that's what you're arguing for?

MR. LAZERWITZ: Yes, it doesn't -- in our submission the prosecutor is scot-free. The policeman can only claim qualified immunity and in those circumstances I submit he would probably have a tough time claiming qualified immunity because of -- his state of mind isn't relevant. It's whether a reasonable police officer would know that he could engage in this conduct and I submit he would have a tough time making that claim.

QUESTION: Mr. Lazerwitz, can I ask you the same question I've asked the other lawyers? To what extent are you aware of common law precedent for the position you take?

MR. LAZERWITZ: Justice Stevens, in our brief we made three points on this particular question. One, in Anderson against Creighton the Court made clear that the common law analog isn't the end of the case. Second, at common law in the 18th, 19th, and 17th centuries, this particular function wasn't entrenched in the public prosecutor's office. It's a modern development. And third --

QUESTION: With the cuts against you of course.

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MR. LAZERWITZ: It does to a certain extent, but to the extent that we look for a common law analog -- this goes back to my point before. In the context of giving legal advice, it's he's thinking about the charging decision. It could be a form of malicious prosecution which is really what this case is -- at least from the plaintiff's standpoint -- is all about and of course as Imbler recognized, a prosecutor was absolutely immune at common law for that.

And finally this was not in our brief but it was mentioned before. Given the privity requirements at common law, this wouldn't -- this suit wouldn't arise, because a third party couldn't sue the lawyer for giving him legal advice. And so the reason why there may not be any cases showing absolute immunity for this particular set of circumstances, there was no cause of action at common law. And so we think that for those reasons the fact that we can't give you a case --

QUESTION: Well, I suppose it's still somewhat unsettled as to the nature of the cause of action here, too. This is a little bit unusual.

MR. LAZERWITZ: It is -- it's at least on the --

QUESTION: So you want to argue alternative, not argue for immunity, but just argue as an analogy of the

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common law that while the lawyer isn't responsible in this situation.

MR. LAZERWITZ: Well, at common law, of course, today, the privity rules have changed --

QUESTION: Yeah.

MR. LAZERWITZ: -- and there are suits where people sue lawyers. And in terms of this particular suit, it is strange in terms of the legal advice, at least with the hypnosis, that it was not decided on qualified immunity grounds. But even -- but of course respondent didn't make that argument to the court at the petition stage and the case comes before you presenting the issue that has bothered the lower courts of whether legal advice as such -- it is entitled to absolute immunity.

QUESTION: The rule, rule we get from what you say is that if a policeman wants to violate somebody's rights the rule is be sure and get a prosecutor to advise you?

MR. LAZERWITZ: Yes, in some respects --

QUESTION: Is that what the rule is?

MR. LAZERWITZ: That's, that's one of the offshoots of our submission, that the reason why we believe that absolute immunity is necessary is to keep the prosecutors in the wheel, in the decision making, to have them available, so they can --

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QUESTION: Yes, but you don't really suggest that no prosecutor would ever give legal advice if he didn't absolutely mean it. But he's perfectly confident of his position. He's going to give the advice. It's only on these fringe areas, can I hypnotize some woman who's got 14 personalities, can I give that kind of legal advice is what we're talking about. But when you're in settled areas of the law where he knows what he's talking about, he doesn't need absolute immunity.

MR. LAZERWITZ: In looking at individual cases, there's no doubt that you don't, you wouldn't think that you need this absolute protection, but the point of the doctrine, and this Court has recognized this in Imbler and other cases, is you have to look at the broader category of cases. You just don't want -- yes, you are going to have the incompetent, lousy prosecutors getting off, but at the expense of having otherwise honest, hard-working correct prosecutors not being subject to the harassment of suit. And we submit that is, that's the calculus in any given case. It's outrageous what happens, what might happen to a particular plaintiff, but you can't throw out the baby with the bath water. And we submit that --

QUESTION: Yes, but the thing you're avoiding is frivolous suits. You're not necessarily -- you don't have to have this rule to be sure that competent prosecutors

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will give sound advice. You're talking -- there is a danger that that competent prosecutor will be sued and you want to keep as much as that frivolous litigation out of the court system. But I don't think the goal you're seeking is be sure there's some prosecutors out there who are willing to answer police officers' questions.

MR. LAZERWITZ: Well, I can't stand before the Court and say that which ever way this case comes out, the Federal prosecutor is no longer going to answer the phone and give advice. They're duty bound by department regulation and by ethical rules to give advice. But people are people and the concern is that subjecting prosecutors to the harassment of this litigation in the broad category of cases will undermine the system itself.

QUESTION: Has it happened up 'til now? I mean how many suits are there again Federal prosecutors for giving advice?

MR. LAZERWITZ: There are reported cases, there may be several dozen if that many.

Thank you.

QUESTION: Thank you, Mr. Lazerwitz. Mr. Sutherlin, do you have rebuttal?

REBUTTAL ARGUMENT OF MICHAEL K. SUTHERLIN

ON BEHALF OF THE PETITIONER

MR. SUTHERLIN: Yes, Mr. Chief Justice, I do.

In response to Justice O'Connor's question, although this Court may not necessarily reach the question of qualified immunity when asked by the trial judge to rule on a direct or a motion to dismiss and a motion for summary judgment. In each of those instances, the trial judge found that Mr. Reed was not entitled to qualified immunity. But it was at the close of plaintiff's case on a motion for directed verdict that the court chose to review the Henderson v. Lopez case of the Seventh Circuit which indirectly talked about advice and simply found, not on the basis of qualified immunity, but simply found on the basis of the Henderson case, that if advice was -- giving advice was involved, then the prosecutor was absolutely immune without getting to the specific activities.

And what is created as a -- is confusion. And in response to Justice Scalia's question, you have the inevitable problem that if you have a police officer interrogating an individual at the police station and in the process shredding the Constitution to tiny bits with the prosecutor standing there advising him of the questions to ask, then the police officer is entitled only to qualified immunity based upon the hypothetical and the prosecutor gets absolute immunity.

What a couple circuits have said, that is so

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inconsistent that the police officer must be entitled to raise the affirmative defense of good faith, because what he has done is sought the best advice possible and in doing so, he has drawn himself into the shadow of the absolute immunity protection.

QUESTION: We have said that qualified immunity is an objective standard insofar as our involved cases in which the plaintiff tries to show that, that the defendant knew it was wrong. And we said it didn't matter whether he knew it was wrong. If the average person wouldn't have known it was wrong, the qualified immunity defense applies. But do you know of any cases where we have or other Federal courts have rejected a good faith defense by someone who sought legal advice and although somebody else might have known otherwise, he, on the basis of legal advice, thought what he was doing was right? But I don't know any.

MR. SUTHERLIN: I believe that I can't right now cite you to one, Justice Scalia, but I believe have run across at least two cases in preparing where the courts have said it would be an inconsistent outcome to hold the prosecutor absolutely immune and to find that the police officer was not entitled to any immunity, although he might otherwise be, because he sought the advice. And the dilemma that would -- that all the courts would face if

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the arguments were adopted of the Solicitor General and the respondent would be that the trial courts would still be faced with the dilemma of discerning the difference between investigative activities and giving advice.

There is no simple advice. That occurs in the classroom. The police officer sought advice expecting to get it. The prosecutor gave it expecting that it would be followed and in this particular instance on numerous occasions at critical junctures of the investigation, the advice was clearly intended to direct -- the force of the investigation was clearly intended to violate Mrs. Burns' rights by first hypnotizing her, then by detaining her on the opinion -- on his opinion that it was without -- that it was based on probable cause, but without a warrant. Had he gone to the court and had he presented the information as is required by the Fourth Amendment to the court in an open and candid fashion, there would not be a lawsuit.

And what he has tried to do is to say that because this is in the nature of a quasi-judicial function, or is intimately associated with the judicial process, that he's entitled to absolute immunity. I respectfully submit that that is not the case.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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(Whereupon, at 1:57 p.m., the case in the above-entitled matter was submitted.)

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BY Rodney Hunter

(REPORTER)

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