

**ABSOLUTE IMMUNITY FOR PROSECUTORS IN SECTION 1983 CASE**  
**BY TERRANCE R. KELLY**

The doctrines of prosecutorial immunity and constitutional due process are in constant tension. Prosecutorial immunity does not have a constitutional source, although it has a lengthy history of common law application in the United States. It does not, however, provide absolute immunity, and the courts have been willing to reject prosecutors' attempts to immunize their conduct under various circumstances.

A few years ago, a San Jose, California prosecutor named Ben Fields was running up quite an impressive string of convictions. In his ardor, he became less and less interested in how he achieved those convictions, and he became more and more aggressive in defending his convictions.

Damon Auguste was convicted of sodomy in concert, rape in concert and oral copulation in concert by Fields in 1998 when Auguste was 21 years of age. He was sentenced to 18 years and 8 months in California prisons. His aunt, Donna Auguste, was a former entrepreneur-high tech engineer turned philanthropist, living in Colorado. Damon was fortunate. His aunt retained the best experts, investigators and lawyers available in Northern California to fight the conviction. As the investigation revealed Fields' prosecutorial tactics, Fields struck back. He secured search warrants on the residences of Damon's family and witnesses. He brought criminal charges against a witness. He effectively hid witnesses. He misrepresented facts. Realizing that Donna Auguste was financing the attempts to overturn the conviction, Fields went so far as to send a California law enforcement officer to Colorado to secure a search warrant of Donna Auguste's home. While Ms. Auguste was on a philanthropic mission overseas, Colorado's Larimer County law enforcement agents, aided by a California D.A. investigator, broke into her home and conducted a search of the premises, leaving the remnants of their search in piles.

The California assistant district attorney and his cohorts picked the wrong person. Donna Auguste continued the fight to free her nephew, successfully getting the conviction overturned and Damon Auguste released in exchange for a misdemeanor plea. Ben Field's demand for a bond greater than \$8 million dollars resulted in the District Attorney removing him from the case. More than that, Ms. Auguste sued Fields and other California law enforcement and the Colorado Larimer County law enforcement officers who executed Fields' strategy. She brought the suit in the United States District Court for the District of Colorado. Federico Alvarez, Terrance Kelly and Christine Murphy represented Donna Auguste in that action.

Fields raised the defense of absolute prosecutorial immunity. District Judge Wiley Daniel rejected the defense. Fields' employer, California's Santa Clara County, appealed the decision to the Tenth Circuit Court of Appeals. Argument was heard on September 26, 2006, and on May 22, 2007, in an opinion by Senior Judge Stephanie K. Seymour and joined in by Judge Carlos Lucero and Judge Terrence L. O'Brien, Judge Daniel's ruling was upheld. The decision noted that the search warrant was obtained in direct contravention of the direction of Judge James Emerson, the California trial court judge who was presiding over Damon Auguste's habeas corpus proceeding. Field's lawless conduct was denied the shield of prosecutorial immunity. Fields and California then asked for reconsideration by the panel, and an en banc review of the decision. That appears to be standard delaying tactics by the Santa Clara County office, according to various lawyers and litigants from San Jose who have contacted Ms. Auguste's Colorado attorneys. On August 7, 2007, the Tenth Circuit, rejecting the reconsideration and en banc review requests, and remanded the case to U.S. District of Colorado trial court for proceedings consistent with Judge Seymour's opinion. Alvarez, Kelly and Murphy had continued their representation of Auguste in the Tenth Circuit proceedings.

In the meantime, Field's conduct and those of several other members of the Santa Clara County District Attorneys Office underwent public scrutiny. Pulitzer Prize winning investigative reporter Ric Tulsy led an investigation that culminated in a five part series in the San Jose Mercury News. Fields left the D.A.'s office and has been seeking a judicial appointment from Gov. Schwarzenegger. Field's history is proving difficult to get away from, however, and his intention to run for District Attorney of Santa Clara County has likewise been thwarted. Donna Auguste filed a complaint with the California lawyer discipline agency against Fields, and is prosecuting that complaint.

A link is provided for the parties' briefs and the Tenth Circuit opinion.