IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN ALAN MAGRITZ,

Plaintiff,

v. Case No. 12CV806 EGS

OZAUKEE COUNTY, et al.,

Defendants.

MOTION TO DISMISS ACTION AGAINST DEFENDANTS
GEROL, WILLIAMS, AND GONRING

Defendants Adam Y. Gerol, Sandy A. Williams, and Andrew T. Gonring, by Wisconsin Attorney General J.B. Van Hollen and Assistant Attorney General David C. Rice, move the court for judgment dismissing this action against them on the grounds of improper venue, statute of limitations, Eleventh Amendment immunity, prosecutorial immunity, and judicial immunity.

Dated at Madison, Wisconsin, this 6th day of July, 2012.

s/ David C. Rice
DAVID C. RICE
State Bar # 1014323
Assistant Attorney General
Wisconsin Department of Justice
Attorneys for Gerol, Williams, and Gonring
Post Office Box 7857
Madison, Wisconsin 53707-7857
Telephone: 608-266-6823
Fax: 608-267-8906
E-Mail: **ricedc@doj.state.wi.us**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN ALAN MAGRITZ,

Plaintiff,

v. Case No. 12CV806 EGS

OZAUKEE COUNTY, et al.,

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS ACTION AGAINST DEFENDANTS GEROL,WILLIAMS, AND GONRING

STATEMENT OF THE CASE

Plaintiff Steven Alan Magritz commenced this civil action on May 15, 2012. The defendants are Ozaukee County (Wisconsin), the Ozaukee County Sheriff's Department (Complaint, ¶¶ 10-11), and several public officers including Adam Y. Gerol (the Ozaukee County District Attorney), Sandy A. Williams (formerly the Ozaukee County District Attorney and presently an Ozaukee County circuit court judge), and Andrew T. Gonring (a Washington County [Wisconsin] circuit court judge) (Complaint, ¶¶ 50-51, 53).

The case originates in 2001 in the seizure of property owned by Magritz and located in Ozaukee County. The property apparently was seized as part of a state court foreclosure action to recover property taxes. Magritz alleges that Ozaukee County officials breached their fiduciary duty by taking his property for public use, without just compensation, in violation of the federal and state constitutions.

Magritz alleges that in October 2003, defendant Williams (then the Ozaukee County District Attorney) refused to prosecute the Ozaukee County Corporation Counsel (Dennis Kenealy) for his criminal acts related to the seizure of the property owned by Magritz (Complaint, ¶ 87; Affidavit in Support of Complaint, ¶¶ 41, 49).

Magritz alleges that on November 5, 2007, defendant Gonring (acting as a judge) denied his motion to vacate the judgment entered in the foreclosure action in 2001, and did not take any action against Kenealy (Complaint, ¶ 87; Affidavit in Support of Complaint, ¶¶ 42-46).

Magritz alleges that in July 2011, defendant Gerol (acting as the district attorney) refused to prosecute Kenealy (Complaint, ¶ 87; Affidavit in Support of Complaint, ¶ 47).

Magritz alleges that in August 2011, defendant Williams (acting as a judge) failed to recuse herself in a John Doe proceeding initiated by Magritz, and issued a decision and order refusing to issue a criminal complaint against Kenealy (Complaint, ¶ 87; Affidavit in Support of Complaint, ¶¶ 48-51).

Magritz alleges that in September 2011, Gerol (acting as the district attorney) filed a criminal complaint against Magritz in state court, maliciously and in retaliation against Magritz as a victim and a witness of a crime (Complaint, ¶ 87; Affidavit in Support of Complaint, ¶¶ 63-67, 71).

Magritz alleges that in December 2011, at the request of defendant Gerol, defendant Williams (acting as a judge) issued an arrest warrant for Magritz, in retaliation against Magritz as a victim and a witness of a crime (Complaint, ¶ 87; Affidavit in Support of Complaint, ¶¶ 68-70).

Magritz seeks declaratory and injunctive relief, and monetary damages.

Defendants Gerol, Williams, and Gonring have filed a motion for judgment dismissing this action against them on the grounds of improper venue, statute of limitations, Eleventh Amendment immunity, prosecutorial immunity, and judicial immunity.

ARGUMENT

I. VENUE IN THIS COURT IS IMPROPER.

In a civil action where jurisdiction is founded only on diversity of citizenship or is not founded solely on diversity of citizenship, the action only may be brought (1) in a judicial district where any defendant resides, if all defendants reside in the same state, (2) in a judicial district in which a substantial part of the events giving rise to the claim occurred, or a substantial part of the property that is subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction, if there is no district in which the action may otherwise be brought. *See* 28 U.S.C. § 1391(a)-(b). In this case, the action may not be brought in this district because none of the defendants resides in the district, because the events giving rise to this action did not occur in this district, because the property that is part of the subject of this action is not situated in this district, and because the defendants are subject to personal jurisdiction in the Eastern District of Wisconsin. Accordingly, this case must be transferred to the Eastern District of Wisconsin or, because the action cannot successfully be maintained against defendants

Gerol, Williams and Gonring in any district, for the reasons to be discussed in this brief, the action against them should be dismissed.

II. THIS ACTION IS BARRED BY WISCONSIN STATUTE § 893.53 FOR ANY ACTS COMMITTED BY DEFENDANTS GEROL, WILLIAMS, OR GONRING PRIOR TO MAY 15, 2006.

The applicable statute of limitations in Wisconsin for federal civil rights claims is the six-year statute of limitations contained in Wis. Stat. § 893.53. *See Reget v. City of La Crosse*, 595 F.3d 691, 694 (7th Cir. 2010); *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989). Since this action was filed on May 15, 2012, the statute of limitations bars this action as to any acts committed prior to May 15, 2006. This includes the refusal of defendant Williams in October 2003 (as the Ozaukee County District Attorney) to prosecute Ozaukee County Corporation Counsel Kenealy for his criminal acts related to the seizure of the property owned by Magritz.

III. THIS ACTION AGAINST DEFENDANTS GEROL, WILLIAMS, AND GONRING IN THEIR OFFICIAL CAPACITY IS BARRED BY THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States Constitution denies federal courts the authority to entertain suits brought by private parties against a state without the state's consent. *See Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Eleventh Amendment immunity also extends to state officials when they are sued for damages in their official capacity. *See Graham,* 473 U.S. at 169.[1] State judges

[1] Similarly, neither a state nor its officials acting in their official capacities are "persons" within the meaning of 42 U.S.C. § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

are state officials. *See* Wis. Stat. § 753.07(1). District attorneys are state employees. *See* Wis. Stat. §§ 230.08(2)(a) and 978.12(1)(a). Consequently, this action against Gerol, Williams, and Gonring in their official capacity is barred by the Eleventh Amendment.

IV. THIS ACTION AGAINST DEFENDANTS GEROL AND WILLIAMS, WHEN ACTING AS THE OZAUKEE COUNTY DISTRICT ATTORNEY, IS BARRED BY ABSOLUTE PROSECUTORIAL IMMUNITY.

Prosecutors are absolutely immune from civil suits for prosecutorial acts that are intimately associated with the judicial phase of the criminal process. *See Imbler v. Pachtman*, 424 U.S. 409, 422-428 (1976). Prosecutorial immunity is based upon the same considerations that underlie judicial immunity. *See id.*, 424 U.S. at 422-423. These considerations include "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *See id.*, 424 U.S. at 423.

In *Imbler*, a civil rights action for damages under 42 U.S.C. § 1983, the prosecutor knowingly used false testimony and suppressed expert fingerprint evidence favorable to the defendant. Concluding that the prosecutor nonetheless was absolutely immune from suit, the Court explained:

> If a prosecutor had only a qualified immunity, the threat of s. 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

> Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. [Citations omitted.] Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.
>
> Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. . . . Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials [Citation omitted].
>
> . . . .
>
> **We conclude that the considerations outlined above dictate the same absolute immunity under s. 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. . . . [W]e find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:**
>
> > **"As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." [Citation omitted].**

Imbler, 424 U.S. at 424-428 (bold added; footnotes omitted).

In this case, Magritz alleges that District Attorneys Williams and Gerol refused to prosecute Kenealy criminally and that District Attorney Gerol filed a criminal complaint against Magritz. Such acts plainly are prosecutorial acts. Accordingly, this action

against District Attorneys Gerol and Williams is barred by absolute prosecutorial immunity.

V. THIS ACTION AGAINST DEFENDANTS WILLIAMS AND GONRING, WHEN ACTING AS STATE CIRCUIT COURT JUDGES, IS BARRED BY ABSOLUTE JUDICIAL IMMUNITY.

Judges are absolutely immune from civil suits for their judicial acts. *See Stump v. Sparkman*, 435 U.S. 349, 355-356 (1978). Judicial immunity is immunity from suit, not just immunity from the assessment of damages. *See Mireles v. Waco*, 502 U.S. 9, 11 (1991).

Judicial immunity is premised upon the "general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *See Stump* at 355 (quoting *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 347, 20 L.Ed 646 (1871)). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *See id.* at 356-357 (quoting *Bradley*, 13 Wall. at 351)). The scope of the judge's jurisdiction must be construed broadly where the issue concerns the judge's immunity from liability. *See id.* The doctrine of judicial immunity even extends to federal civil rights actions. *See id.*

In determining whether a judge is acting in the "clear absence of all jurisdiction" or merely is acting in excess of jurisdiction, the Supreme Court in *Stump* relied on *Bradley* in two footnotes:

> In holding that a judge was immune for his judicial acts, even when such acts were performed in excess of his jurisdiction, the Court in *Bradley* stated: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." *Id.*, at 351-352.
>
> . . . .
>
> In *Bradley*, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.*, at 352.

See Stump, 435 U.S. at 356 n.6, 357 n.7.

In this case, Magritz alleges that defendant Williams (acting as a judge) failed to recuse herself and refused to issue a criminal complaint against Kenealy in a John Doe proceeding initiated by Magritz, and issued an arrest warrant against Magritz. In addition, Magritz alleges that defendant Gonring (acting as a judge) denied his motion to

vacate a judgment. Such acts plainly are judicial acts. Accordingly, this action against Judges Williams and Gonring is barred by absolute prosecutorial immunity.

CONCLUSION

Defendants Gerol, Williams, and Gonring respectfully request that the court enter judgment granting their motion and dismissing this action against them.

Dated this 6th day of July, 2012.

s/ David C. Rice
DAVID C. RICE
State Bar # 1014323
Assistant Attorney General
Attorneys for Gerol, Williams, and Gonring
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
Telephone: 608-266-6823
Fax: 608-267-8906
E-Mail: **ricedc@doj.state.wi.us**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven Alan Magritz v. Ozaukee County, et al.
Case No. 12CV806 EGS

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2012, I electronically filed on behalf of defendants, Adam Y. Gerol, Sandy A. Williams, and Andrew T. Gonring, the following documents:

- **Motion to Dismiss Action Against Defendants Gerol, Williams, and Gonring**

- **Brief in Support of Motion to Dismiss Action Against Defendants Gerol, Williams, and Gonring**

with the Clerk of the Court using the ECF system. I hereby certify that a copy of these documents was mailed by United States Postal Service to the non-ECF participants on July 6, 2012, at the following places and addresses, which are the last known addresses of the non-ECF participants:

Steven Alan Magritz
c/o Kenneth A. Kraucunas, Notary Public
P.O. Box 342443
Milwaukee, Wisconsin 53234

Christine K. Van Berkum
Phillips Borowski, S.C.
10140 N. Port Washington Road
Mequon, Wisconsin 53092

s/ David C. Rice
DAVID C. RICE
State Bar # 1014323
Assistant Attorney General
Wisconsin Department of Justice
Attorneys for Defendants Gerol, Williams and Gonring
Post Office Box 7857
Madison, Wisconsin 53707-7857
Telephone: 608-266-6823
Fax: 608-267-8906
E-Mail: **ricedc@doj.state.wi.us**