No. 07-854

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN VAN DE KAMP and CURT LIVESAY,
Petitioner,
v.
THOMAS LEE GOLDSTEIN,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS VAN DE KAMP AND LIVESAY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petition for a writ of certiorari to review the judgment of the Ninth Circuit Court as the authorized law officer of the county, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1] Counsel of record for all parties received notice

1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or

(continued...)

at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

INTEREST OF AMICUS CURIAE

The Los Angeles County District Attorney's Office is the largest district attorney's office in the United States, employing approximately 1000 attorneys and prosecuting 60,000 felonies and 200,000 misdemeanors per year. [2] A significant number of dedicated prosecutors serve as managers and administrators responsible for training, setting policies, and supervising trial attorneys and support staff. These supervisors make daily decisions affecting ongoing trials, crime charging and case settlement. The difficulties facing talented supervising attorneys who serve their community would be exacerbated if the attorneys were required to face the potential loss of absolute immunity.

(...continued)

> hereafter prescribed by general law, and by this Charter as to such officer, Board or Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.

Cal. Gov't Code § 26500 (West 1998).

2. http://da.co.la.ca.us/oview.htm last viewed on January 22, 2008.

SUMMARY OF ARGUMENT

The decision in *Goldstein* by the Ninth Circuit diverges from a majority of the Circuits in erroneously classifying important prosecutorial functions which merit absolute immunity as merely administrative. Training trial prosecutors to be effective and ethical advocates is an ongoing process, one that often requires the supervising prosecutor to assist the trial deputy mid-trial. Supervising attorneys should be allowed to establish policies for crime charging and settling cases without concern for having to defend their actions against vexatious litigation. *Goldstein* mistakenly characterizes the accumulation, analysis and dissemination of jailhouse informant information as administrative and removes the protection of absolute immunity.

ARGUMENT

I. THE METHOD AND TIMING OF IMPLEMENTING A DATABASE OF JAILHOUSE INFORMANTS FOR DISSEMINATION TO PROSECUTORS FOR CRIME CHARGING AND TRIAL PURPOSES IS INTIMATELY CONNECTED TO THE JUDICIAL PHASE OF THE CRIMINAL PROCESS

This Court has adopted a functional analysis in determining prosecutorial absolute immunity. A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler v.*

Pachtman, 424 U.S. 409, 430 (1976). The focus is therefore on the prosecutorial function, not prosecutorial acts or conduct, in determining the scope of immunity.

A prosecutor is absolutely immune when functioning as an advocate in respect to judicial proceedings. *Imbler,* 424 U.S. at 430; *Malley v. Briggs,* 475 U.S. 335, 342 (1986); *Burns v. Reed,* 500 U.S. 478, 486 (1991); *Buckley v. Fitzsimmons* 509 U.S. 259, 269-270, (1993). This function, while judicially related, is not limited to the courtroom setting. *Burns,* 500 U.S. at 486; *Buckley,* 509 U.S. at 269-270.

The management and dissemination of potentially discoverable evidence is clearly a unique aspect of the prosecutorial function and intricately connected to the trial of cases. The *Imbler* test, determining which prosecutorial activities are based on the function test, clearly places the management of potentially discoverable material in the category of trial preparation.

In *Goldstein*, the Ninth Circuit mistakenly characterized the delay in establishing a database for dissemination of jailhouse informant information for deputy district attorneys preparing for trial as administrative. The error in this approach is clear when the response to the jailhouse informant problems, enacted by the Los Angeles County District Attorney is examined. Without threat of losing absolute immunity, the Los Angeles County District Attorney did in fact create a central clearing house of jailhouse informants using modern technology. The Los Angeles County jailhouse informant system has required years of preparation,

discussion with law enforcement agencies, advances in technology, and has received plaudits from the defense bar.

> In Los Angeles County, the use of jailhouse informant testimony has been significantly curtailed in the past 15 years according to the county's assistant DA and Gigi Gordon, director of the Post Conviction Assistance Center in Los Angeles. In the wake of a "devastating report" on jailhouse informants issued by the county grand jury in 1990, the Los Angeles district attorney's office adopted policies to "strictly control" the use of informant witnesses. *Now, use of informants as witnesses must be approved by a committee overseen by the chief deputy DA.* Because of these controls, jailhouse informants were used in "fewer than a dozen of the thousands of trials over the last three years." Gordon said that Los Angeles County has done "a fabulous job" of addressing the problem since it was revealed.

Scott Ehlers , Column: State Legislative Affairs Update, *30 Champion 52,* (2006) (Italics added.)

Thus, the committee, which includes the Chief Deputy District Attorney, participates with the trial attorney in determining which informants may be relevant and trustworthy. This determination would require evaluation of the credibility of the informant and a comparison of the informant's purported testimony with other evidence. This is clearly a trial

preparation function not purely administrative. Maintaining a database would also be a trial preparation function requiring an experienced trial attorney's judgment as to what information is relevant and material, and what is not. Experienced trial attorneys are the only personnel assigned to make these determinations for that reason.

Some management functions are strictly bureaucratic in nature; activities that all government managers must perform, whether they are running a school district or the District Attorney's office. Examples of such activities include management of the budget and applying for state and federal grant money. Managing the budget is not intimately connected to the trial and prosecution of criminal cases, nor is applying for grant money.

Other policies implemented by the District Attorney are also not intimately associated with the judicial phase of the criminal process. The Los Angeles County District Attorney sponsors a number of community outreach and crime prevention programs which are intended to improve the community and deter people from committing crimes. This management choice is not intimately connected with the judicial phase of the criminal process. Therefore, the participants and the management would not be entitled to absolute immunity for lawsuits arising from those functions.

Conversely, the management of the District Attorney's office has the responsibility for filing criminal charges and determining what cases to prosecute. The decision to file a case is based on factual input derived from police reports, knowledge by the filing deputy of the law, and application of the

policies of the District Attorney. For example, Los Angeles County District Attorney policy requires interviews of victims in sexual assault cases whenever feasible. This interview allows the filing deputy to make an assessment of credibility and determine the appropriate charges. This 'filing' function has been determined to be uniquely prosecutorial and thereby protected by absolute immunity, even when the filing decision has become a policy relating to an entire class of cases.

> Roe claims that even if absolute immunity exists for the typical, single-case situation in which a disgruntled victim resents the prosecutor's failure to prosecute, absolute immunity should not exist for a decision involving a whole line of cases, such as the decision made here of not prosecuting any of an officer's unwitnessed arrests.
>
> This argument is unpersuasive. In analyzing the rational underpinnings of absolute prosecutorial immunity in this context, there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." *Haynesworth v. Miller*, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1269 (D.C. Cir. 1987). "Both practices involve a balancing of myriad factors, including culpability, prosecutorial resources and public interests" and "both procedures culminate in initiation of criminal proceedings against particular defendants, and in each it is the individual prosecution that

> begats the asserted deprivation of constitutional rights." *Id.*

Roe v. City & County of S.F., 109 F.3d 578, 583-584 (9th Cir. 1997).

II *GOLDSTEIN'S* DIVERGENCE FROM THE MAJORITY OF THE CIRCUITS ERODES PROSECUTORIAL IMMUNITY AND CREATES NEW AVENUES FOR HARASSING LITIGATION

As discussed in the Petition for Certiorari, *Goldstein* is in direct conflict with other Circuits. The cases which *Goldstein* purports to follow are clearly wrongly decided.

A case outside of the Ninth Circuit, *Walker v. N.Y.*, 974 F.2d 293 (2d Cir. 1992), was relied on by the Court in *Goldstein* for holding that there is no absolute immunity for a prosecutor's "training function". In *Walker*, the trial deputy district attorney (referred to in New York as an ADA) actually committed a crime and suborned perjury in his misconduct. Any layperson knows that this is wrong. Yet the *Walker* court opined that the District Attorney's office breached its duty to train by failing to remind lawyers to not commit crimes. *Walker* is wrongly decided and should not be followed because of the extraordinary factual situation in *Walker*. *Walker* should be viewed as an anomaly generated out of criminal conduct by a deputy district attorney who could not be sued pursuant to 42 U.S.C.A. § 1983. The remedy in *Walker* for that particular miscarriage of justice was reversal of the charges against Walker and the potential of prosecuting the

ADA for his criminal conduct or exposing him to professional discipline. None of these remedies require distorting absolute immunity or are limited by it.

The Court in *Goldstein* also cited *Carter v. City of Phil.*, 181 F.3d 339 (3d Cir. 1999) to support its position. As with *Walker*, *Carter* was an anomaly which should not be followed.

> Raymond Carter had been convicted of murder and had served ten (10) years of a life sentence without possibility of parole before his conviction was overturned and the case against him *nol prossed* following disclosures of long-standing corruption within Philadelphia's 39th Police District.[n3] Carter then brought an action against the City of Philadelphia, named police officers, unknown employees of the Philadelphia Police Department, and unknown policymakers within the Philadelphia DA's Office.
>
> [n3] During disclosures of police misconduct uncovered during an investigation of that district, it came to light that the single eyewitness's testimony placing Carter at the murder scene - the testimony on which his conviction rested - was purchased by a 39th District officer, Thomas Ryan, from a prostitute-informant (Ms. Jenkins) with whom Ryan was intimate. In subsequent proceedings, Ryan was convicted of obstruction of justice and Jenkins admitted her perjured testimony. There

> was no forensic evidence linking Carter to the crime scene and Carter maintains his innocence.

Carter v. City of Phil., 181 F.3d 339, 342-343 (3d Cir. 1999)(footnotes 4 and 5 omitted).

As *Walker* was the result of an ADA committing a crime, *Carter* was the tragic result of a police officer committing a crime and being punished for it. Unfortunately, the *Carter* Court targeted others to be punished also.

> Carter's action against individuals in the DA's Office was premised on their failure as administrators to establish training, supervision and discipline policies which would have (a) prevented or discouraged Philadelphia police officers from procuring perjurious "eyewitnesses" and (b) alerted assistant district attorneys to the falsity of such information and prevented its introduction as evidence. The District Court dismissed all claims against the DA's Office, pursuant to Fed. R. Civ. P. 12(b)(6) concluding that those defendants were "state officials" and therefore immune from suit for acts in their professional capacity by virtue of the Eleventh Amendment. It further concluded that Carter had failed to state a cause of action against those defendants in their personal capacities.

Carter v. City of Phil., 181 F.3d 339, 342 (3d Cir. 1999)(footnotes omitted).

Carter represents ignorance of the limits of training. Reminding police officers not to have illicit relationships with prostitutes or suborn perjury would only insult honest police officers and would certainly not deter those officers determined to violate moral standards and the law. No filing deputy has a crystal ball or the ability with enhanced training to detect an illegal sexual liaison between a police officer and a prostitute/informant. A filing deputy district attorney reads reports, occasionally interviews victims and is expected to be aware of the applicable law. A trial deputy district attorney, even after enhanced training would not likely detect the *Walker-Carter* level of deception. As in *Walker*, *Carter* involved egregious criminal behavior which deprived Carter of his freedom. The *Carter* Court was eager to make everyone, even those civil servants tangentially involved, pay a price without thoughtful analysis.

The Court in *Carter* cited *Walker* with approval when it reinstated Carter's cause of action. Careful review does not support viewing those two cases as persuasive authority.

Moreover, if the decision in *Goldstein* is not corrected, a disgruntled defendant could circumvent the absolute immunity afforded to prosecutors' filing decisions by suing the District Attorney management. If the lawsuit were based on a failure to train filing deputies, the erroneous application of the function test by *Goldstein* would destroy absolute

immunity for the elected District Attorney. If a filing deputy failed to read all of the submitted police reports and erroneously filed charges against a defendant later determined to be innocent, the defendant may file a civil action against the deputy district attorney and the elected District Attorney. The filing deputy district attorney would have absolute immunity for the erroneous filing. If the defendant alleged the elected district attorney failed to train the filing deputies properly, the elected District Attorney would not have absolute immunity under *Goldstein*. Failure to train would be the basis for the cause of action and based on *Goldstein*, absolute immunity would have evaporated.

Goldstein opens the door to a plethora of vindictive lawsuits against past and current elected District Attorneys on amorphous "failure to train" causes of action. Large urban District Attorney offices, like Los Angeles, have a training division which is primarily responsible for training new prosecutors and ongoing training of experienced prosecutors. Training Divisions are staffed by career prosecutors working to enhance professionalism among prosecutors. Hanging this proverbial sword of Damocles over administrators and training staff would result in the unintended consequence of limiting or eliminating training programs. Qualified staff would decline assignments to train or supervise out of fear. The potential for harassing litigation would have a chilling effect on vigorous proactive training divisions.

Management dissemination of information to filing deputies regarding potential problems with a police officer's credibility as in *Roe* is exactly the same function as dissemination of information to

filing deputies regarding potential problems with a jailhouse informant. The Ninth Circuit found the first example to be uniquely prosecutorial in *Roe* but not uniquely prosecutorial in *Goldstein*. In both situations, the process is intimately connected with the judicial function of the prosecutor and cannot be arbitrarily distinguished.

If the trial deputy in *Goldstein* had failed to disclose the exculpatory evidence, he could not have been sued since he would have been entitled to absolute immunity. *See Imbler*.[3]

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3. County prosecutors were entitled to absolute immunity on citizen's § 1983 claim that they withheld exculpatory evidence prior to citizen's trial on charges of kidnapping, rape, and murder. 42 U.S.C.A. § 1983. *Yarris v. County of Del.*, 465 F.3d 129 (3d Cir. 2006).

State prosecutor is absolutely immune from action for damages brought under Civil Rights Act, 42 U.S.C.A. § 1983, based upon alleged use of false testimony or suppression of exculpatory evidence at trial. *Hauptmann v Wilentz* 570 F Supp 351 (D.N.J. 1983), affd without op, 770 F2d 1070 (3d Cir.*), cert den* 474 U.S. 1103 (1986).
District attorneys had absolute immunity from criminal defendant's claims against them for their actions in initiating and prosecuting criminal investigation and for their alleged improper conduct in withholding exculpatory evidence. *Douris v. Schweiker*, 229 F. Supp. 2d 391 (E.D. Pa. 2002).

Prosecutor was entitled to absolute immunity from claim under 42 U.S.C.A. § 1983 that prosecutor had withheld evidence that shooting victim had shot herself to frame claimant, her former husband, where alleged suppression of exculpatory evidence was squarely within range of prosecutorial functions to which immunity applies. *Carter v Burch,* 34 F3d 257 (4th Cir.. 1994), *cert den* 513 U.S. 1150.

Section 1983 claims asserted against prosecutor in his

(continued...)

CONCLUSION

The importance of granting certiorari is not limited to correcting the erroneous decision below. It extends to the need to clearly settle whether litigants can embroil prosecutors in complex litigation simply by casting their pleadings as "failing to supervise or failing to train."

Respectfully submitted,

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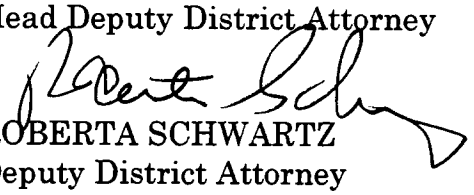
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(...continued)

individual capacity stemming from his direct participation in suppression of *Brady* evidence in criminal prosecution were barred by absolute prosecutorial immunity. 42 U.S.C.A. § 1983. *Truvia v. Julien*, 187 Fed. Appx. 346 (5th Cir. 2006).