DOCKET NO. 98-1581

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Raymond Carter,
Plaintiff – Appellant,

vs.

City of Philadelphia

Thomas Ryan, Individually and
as a Police Officer for the City of Philadelphia,

Wayne Settle, Individually and
as a Police Officer for the City of Philadelphia,

Michael Duffy, Individually and
as a Police Officer for the City of Philadelphia,

John Doe, Representing Unknown Employees
Of The Philadelphia Police Department

Richard Roe, Representing Unknown Employees
of the Philadelphia District Attorney's Office
Defendants – Appellees

On Appeal From the June 18, 1998 Order And
Final Judgment (Honorable Bruce W. Kauffman)
In the United States District Court For The Eastern
District of Pennsylvania In Civil Action No. 97-CV-04499

BRIEF OF APPELLANT, RAYMOND CARTER AND APPENDIX

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JURISDICTIONAL STATEMENT

Raymond Carter, brings this appeal from the final Order of the United States District Court for the Eastern District of Pennsylvania (Honorable Bruce W. Kauffman) dated June 18, 1998, which granted the Motion of the Roe Defendants to dismiss Carter's First Amended Complaint. That Complaint alleges violation of Carter's rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and state law by virtue of his wrongful conviction and imprisonment for a murder he did not commit. The District Court concluded that the Roe Defendants, who are unidentified policymakers within the Philadelphia District Attorney's Office, are entitled to immunity as "state officials" by virtue of the Eleventh Amendment to the United States Constitution. It further concluded that Carter had failed to state a cause of action against the Roe Defendants in their individual capacities. The District Court declined to exercise supplemental jurisdiction over Carter's state law claims and entered a final judgment in favor of the Roe Defendants as to all counts of the First Amended Complaint.

The jurisdiction of the District Court was premised on 28 U.S.C. §§1331 (federal question), 1343 (civil rights), 42 U.S.C. §1983 (civil rights) and the District Court's supplemental jurisdiction to hear claims arising under state law pursuant to 28 U.S.C. §1367.

This Court has jurisdiction over Carter's appeal pursuant to 28 U.S.C. §1291 (final decision of a District Court).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Carter is not aware of any related cases or proceedings, whether past, pending or anticipated. Carter notes, however, that the applicability of Eleventh Amendment immunity to the Philadelphia

District Attorney's Office was raised before this Court in the matter of William Harris v. Police Officer Steven Brown, et al, No. 97-2026 in which matter Carter filed a Brief as *Amicus Curiae*. That appeal was withdrawn following settlement by the parties.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Did the District Court err in formulating or applying a legal standard by holding that policy makers within the Philadelphia District Attorney's Office, when performing purely administrative and investigatory functions limited in scope and effect to that local office, nonetheless, are the *alter ego* of the Commonwealth of Pennsylvania and immune from suit by virtue of the Eleventh Amendment to the United States Constitution? This issue was raised below in the District Attorney's Motion to Dismiss and ruled upon by the District Court in its Orders dated April 20, and June 18, 1998.

Standard of Review: *de novo.* Fitchik v. New Jersey Transit Rail Operations, 873 F.2d 655, 658 (Third Circuit *en banc*), cert. den. 493 U.S. 850 (1989).

2. Did the District Court err in formulating or applying a legal standard by holding that the First Amended Complaint fails to state a cause of action under 42 U.S.C. §1983 against policymakers in the Philadelphia District Attorney's office in their individual capacity? This issue was raised below in the District Attorney's Motion to Dismiss and ruled upon by the District Court in its Orders dated April 20, 1998 and June 18, 1998.

Standard of Review: *de novo* Murphy v. Turner, 426 F.2d 422 (10th Cir. 1970)

3. Did the District Court abuse its discretion in declining to exercise supplemental jurisdiction over the state law claims against policymakers within the Philadelphia District

Attorney's Office when those same claims remain as to the other Defendants? This issue was raised below in the District Attorney's Motion to Dismiss and ruled upon by the District Court in its Orders dated April 20, 1998 and June 18, 1998.

Standard of Review: abuse of discretion Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995)

STATEMENT OF THE CASE AND FACTS

Raymond Carter ("Carter") was convicted of first degree murder in a 1988 state court bench trial and sentenced to life imprisonment without the possibility of parole. Carter's conviction rested on the supposed "eyewitness" testimony of Pamela Jenkins ("Jenkins"), a prostitute and police informant. Jenkins was produced to the homicide detectives investigating the murder by Philadelphia police officer and defendant below, Thomas Ryan ("Ryan"). At the time, Ryan was assigned to the 39th Police District (which was not the district in which the murder occurred). Ryan was not attached to the Homicide Division. [First Amended Complaint ¶¶ 11, 12, 14-17]

Ten (10) years after Carter's conviction, as a result of an investigation of long standing corruption within the 39th Police District, it was discovered that Jenkins and Ryan had a sexual relationship and that Ryan had paid Jenkins for her testimony against Carter. Ryan, who also testified against Carter to give Jenkins credibility as an informant, subsequently was convicted of obstruction of justice, and Jenkins admitted to having committed perjury, each in other proceedings. Carter's conviction was overturned and the District Attorney *nolle prosed* the matter. [First Amended Complaint, ¶¶ 13, 18-20].

Having spent nearly one-fifth of his life in jail for a murder he did not commit, Carter instituted the action below pursuant to 42 U.S.C. §1983, the Pennsylvania Constitution and common law against the City of Philadelphia, various of its police officers and the Roe Defendants who are, as of yet, unidentified policy makers within the Philadelphia District Attorney's Office.

Carter alleges that the Roe Defendants failed to establish policies which would have prevented or discouraged police officers from manufacturing perjurious "eyewitnesses" such as Jenkins or have alerted assistant district attorneys to the falsity of such information so that it would

not be used to convict innocent defendants. [First Amended Complaint, ¶20 c-f] Carter does not allege liability on the part of the Roe Defendants arising out of any conduct related to their role as prosecutor, but only as investigators and administrators.[1]

The District Attorney moved pursuant to Fed.R.Civ.Pro. 12(b)(6) to dismiss the Complaint against her in her official capacity on the basis of immunity from suit under the Eleventh Amendment to the United States Constitution. She sought dismissal in her individual capacity on the basis of a prosecutor's absolute immunity for acts taken in the prosecution of crimes, and dismissal of Carter's state law claims on the basis of applicable statutes of limitations. ["Motion of the District Attorney's Office to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim" and supporting Memorandum of Law].

The District Court held that, in her official capacity, the District Attorney was the *alter ego* of the Commonwealth of Pennsylvania when investigating and prosecuting crime and entitled to Eleventh Amendment immunity. In her individual capacity, the District Court held that Carter failed to state a cause of action. It dismissed Carter's federal claims against the District Attorney and declined to exercise supplemental jurisdiction over the state law claims, notwithstanding that those claims remain pending against the other Defendants. [Memorandum Opinion entered April 20, 1998]

In granting the District Attorney's Motion, the Court entered the following Order:

ORDER

> **AND NOW**, this 20th day of April, 1998, upon consideration of the Motion of the Philadelphia District Attorney's Office to Dismiss all Counts of the Amended Complaint brought against defendant Richard Roe and the response of plaintiff, Raymond Carter

[1]Hereinafter, the Roe Defendants will be referred to simply as the "District Attorney", the term adopted by the District Court.

> thereto, and having heard oral argument on the matter, it is **ORDERED** that the Motion of the District Attorney's Office is **GRANTED** and all claims against Defendant Richard Roe are **DISMISSED**

On May 8, 1998, Carter requested the District Court to modify its Order pursuant to 28 U.S.C. §1292(b) to state that the Order involved a controlling question of law as to which there was substantial ground for difference of opinion, and that an immediate appeal from the Order might materially advance the ultimate termination of the litigation, thereby permitting Carter to petition this Court for leave to appeal. ["Plaintiff's Motion to Amend Order"] The District Attorney opposed Carter's request, arguing that Carter's right to appeal was limited to that provided by Fed.R.Civ.Pro. 54(b). ["Memorandum of Law of the District Attorney's Office in Opposition to Plaintiff's Motion to Amend Order"]

On June 19, 1998, the District Court entered the following Order:

ORDER

> **AND NOW**, this 18th day of June, 1998, upon consideration of the motion of Plaintiff Raymond Carter ("Carter") to amend the Court's Order of April 20, 1998, and the response of defendant Richard Roe ("Roe") thereto, it is hereby **ORDERED** that Carter's Motion is **GRANTED**. Pursuant to Rule 54(b) of the Federal Rules Of Civil Procedure, the Court finds that there is no just reason for delay and, accordingly, directs that **FINAL JUDGMENT** be entered in favor of Roe and against Carter on all claims set forth in Carter's Amended Complaint.

This is a final Order from which Carter timely appealed on July 2, 1998.

SUMMARY OF ARGUMENT

The Eleventh Amendment acknowledges that the individual states retain a level of sovereignty which includes the right not to be sued without their consent. It cloaks agencies and individuals with sovereign immunity if, but only if, they act as the state itself. It does not immunize individuals who are not the *alter ego* of the sovereign. Sullivan v. Barnett, 139 F.3rd 158, 180 (3rd Cir. 1998); Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974).

In determining that the District Attorney is the *alter ego* of the Commonwealth of Pennsylvania, the District Court erred by confusing the concept of "state actor" under 42 U.S.C. §1983 with that of a "state official" for Eleventh Amendment purposes. It did so by adopting a *per se* functional test; essentially holding that Eleventh Amendment immunity *must* attach if the individual acts "in the name of" the state and is carrying out a "sovereign function."

The District Court's use of the §1983 "functional" analysis was error because it rejected this Court's repeated holdings that Eleventh Amendment immunity turns on the *general* relationship between the individual and the state, not the particular function giving rise to the injury.

The §1983 paradigm is inapplicable to an Eleventh Amendment immunity determination because that analysis necessarily denies states the very sovereignty the Eleventh Amendment is intended to preserve as it removes from the states the authority to determine to whom the state will extend its immunity from suit.

If the §1983 "functional analysis" were appropriate, the District Court nevertheless committed error because the "state actor" analysis turns exclusively on considerations of state law. The District Court ignored "crystal clear" provisions of Pennsylvania's Constitution and its statutory and decisional law which declare that district attorneys are local, not state officials.

The District Court also found that Carter's Amended Complaint failed to state a cause of action against the District Attorney in her individual capacity. This determination rests on a flawed reading of the First Amended Complaint. The District Court mistakenly held that Carter had not alleged that any policies of the District Attorney resulted in his injuries, but only policies of the City of Philadelphia. [Memorandum Opinion at 17] In fact, Carter has alleged that the policies in question were adopted by policymakers within the District Attorney's office having the authority to do so. [First Amended Complaint, ¶20 c-f] As the District Court's reading of Carter's Compliant is flawed, its application of the law was erroneous.

Finally, the District Court abused its discretion in refusing to exercise supplemental jurisdiction over Carter's state law claims. Carter should not be obligated to litigate those claims in both the District Court against the remaining defendants and in state court against the District Attorney.

ARGUMENT

I. The District Attorney Is Not Entitled To Eleventh Amendment Immunity

A. The Standard For Immunity

In Urbano v. Board of Managers, 415 F.2d 247 (3rd Cir., 1969), cert denied, 397 U.S. 948 (1970), the Court formulated nine questions, the answers to which are determinative of whether an individual is the *alter ego* of the state and, as such, entitled to immunity. In Fitchik v. New Jersey Transit Rail Operations, 873 F.2d 655 (3rd Cir., 1989) cert. denied, 493 U.S. 850 (1989), the test was reformatted to three questions which encompass all but one of the overlapping Urbano tests.[2]

The District Courts are to consider:

> 1. Whether, in the event the plaintiff prevails, the payment of any judgment would come from the state's treasury;
>
> 2. The *general* status of the agency or individual under state law; and
>
> 3. The degree of autonomy the individual or agency enjoys from regulation by the state itself. [*Ibid*. at 659, emphasis supplied]

B. Pennsylvania District Attorneys Do Not Satisfy *Any* of the *Fitchik* Tests for Eleventh Amendment Immunity

1. Source Of Funding[3]

The District Court acknowledged that the District Attorney is funded by the City of Philadelphia. [Opinion and Memorandum at 7] No state funds would or could be used to satisfy any

[2]Significantly, in Fitchik, the Court eliminated the test of whether the individual performed a governmental or proprietary function, *Ibid* at 659 n. 2, the very test the District Court erroneously applied.

[3]This question encompasses the following Urbano tests: (i) whether the funds to satisfy a judgment come from the state treasury; (ii) whether the agency has the funds to satisfy the judgment; and (iii) whether the sovereign has immunized itself from responsibility for the agency's debt. Fitchik, p.659.

judgment. The District Attorney has not even alleged that she does not have funds to satisfy a judgment against her. As Eleventh Amendment immunity is an affirmative defense, this is her burden. Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1144 (3rd Cir., 1985) Thus, none of the Urbano funding tests is met instantly.

While no one of the Fitchik factors is dispositive, funding is the most significant because the primary purpose of the Eleventh Amendment is to protect state treasuries from suits the state has not authorized. *Ibid* at 659. See also Edelman v. Jordan, 415 U.S. 651 (1974). While acknowledging that the funding test mitigated against immunity, the District Court held, that the other two Fitchik factors favored immunity and, together, outweighed the funding test. This conclusion is erroneous and rests on an *a priori*, rather than *a posteriori* analysis which is flawed as a matter of law.

2. Pennsylvania Does Not Regard Local Prosecutors As State Officials [4]

The second Fitchik test asks what the relationship *generally* is between the state and the individual claiming immunity. What is sought is a "complete picture" of the relationship. *Ibid*. p. 662 That picture necessarily is derived from the state's Constitution, statutory and decisional law. When properly applied, the second Fitchik test establishes that Pennsylvania prosecutors are not entitled to Eleventh Amendment immunity.

a. Pennsylvania's Constitution Defines District Attorneys As Local Officials

[4]This inquiry encompasses the following Urbano issues.: (i) how state law treats the agency *generally*; (ii) whether the entity is separately incorporated; (iii) whether the entity can sue or be sued in its own right; (iv) whether the entity is immune from state taxation. Fitchik, p. 659.

Pennsylvania's Constitution *expressly* defines District Attorneys as county rather than state officers:

> County officers shall consist of commissioners, controllers or auditors, ***district attorneys***, public defenders, treasurers, sheriffs, registers of wills, recorders of deeds, prothonotarys, clerks of the court and such others as may from time to time be provided by law. [Pa.Const., Article IX, Section 4, emphasis supplied.]

Conversely, Pennsylvania's Attorney General is defined to be a member of the Commonwealth's Executive Department, and as such, a state official. [Pa. Const. Article IV, §1]

Although it should be dispositive of the issue, the District Court essentially ignored Pennsylvania's Constitution, discussing it only once in a footnote. In the District Court's view, Pennsylvania's Constitution "...does not in any way affect the District Attorney's function of investigating and prosecuting crimes in the name of the Commonwealth." [Opinion and Memorandum, p. 11, n. 8]

This statement reflects the error of the District Court's analysis of the Eleventh Amendment. Rather than examine Pennsylvania's Constitution with a view to determining how it deals generally with local prosecutors, the District Court began its analysis with the *a priori* belief that the investigation and prosecution of crime is a sovereign function and for that reason alone entitles local prosecutors to sovereign immunity. In short, the District Court placed the rabbit in the hat, simply ignoring everything in Pennsylvania's Constitution (and, as will be seen, its statutory and decisional law as well) which instructs that the rabbit should not be there.

The issue is not whether the District Attorney acts "in the name of the Commonwealth". If it were, every Commonwealth employee would be a state official as each employee's duties are performed in the name of the Commonwealth. Nor is sovereign immunity concerned with the nature

of the function being performed. If it were, every police officer would be entitled to Eleventh Amendment immunity as they are as much involved in the investigation of crime and the enforcement of state laws as are local prosecutors; and police officers too act in the name of the Commonwealth in performing their duties. Rather, the issue is whether the sovereign has determined to have particular functions carried out by one whom the sovereign regards as its *alter ego,* and that is to be determined not by the function being performed, but by the overall relationship between the actor and the state. Fitchik, p. 659.

It may be conceded that Pennsylvania has an abiding interest in the prosecution of crime. It does not follow *a fortiori,* however, as the District Court assumed, that Pennsylvania is limited in addressing that concern only through state, as opposed to local, officials.

The framers of Pennsylvania's Constitution made a deliberate and "crystal clear" distinction between state and local officials. [See, e.g., Article IV, §§1, 4, 4.1.] They were cognizant of Eleventh Amendment implications in making that distinction. Had they wished to extend sovereign immunity to local prosecuting attorneys, it would have been a simple matter for the Constitution to identify them as state officers. That it does not, indeed that it expressly provides to the contrary, reflects the conscious decision of Pennsylvania not to extend sovereign immunity to district attorneys. By ignoring the clear mandate of Pennsylvania's Constitution in favor of some amorphous "in the name of the Commonwealth" standard, and limiting immunity only to traditional governmental functions the District Court violated this Court's instruction in Urbano and Fitchik and deprived Pennsylvania of its sovereign right to decide who is and who is not to receive immunity.

This Court previously recognized that a prosecutor's entitlement to Eleventh Amendment immunity is to be resolved by reference to the Pennsylvania Constitution. In Reitz v. County of

Bucks, 125 F.3rd 139, (3rd Cir. 1997), Judge Rosenn, while not deciding the issue, clearly implied that the answer is to be found in Pennsylvania's Constitution. *Ibid*. at 146, n. 2. It was an error of law for the District Court to have ignored Pennsylvania's organic law.

b. Pennsylvania Statutes Make District Attorneys Local, Not State Officers.

Sovereign immunity is not a grant from the federal government. It is the retention by the states of power they held prior to formation of the union. Accordingly, the scope of a state's sovereign immunity is wholly dependant on the limits each state itself has constructed. Prior to 1978, sovereign immunity in Pennsylvania was a function of its common law. It was for this reason the Pennsylvania Supreme Court found it within its authority to abrogate sovereign immunity *in toto*. Mayle v. Pennsylvania Department of Highways, 388 A.2d 709 (Pa. 1978). The Mayle court necessarily looked to Pennsylvania's Constitution because if sovereign immunity were therein preserved, the Court would have been without power to declare it abrogated. Article I, §11 of Pennsylvania's Constitution, reads in pertinent part:

> Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may, by law direct.

The Mayle court determined that this provision was neutral, neither requiring nor prohibiting sovereign immunity, but leaving it to Pennsylvania's Legislature to determine whether and the scope of any immunity the sovereign wished to preserve. After Mayle, sovereign immunity within Pennsylvania is wholly a matter of statute. Curiously, the District Court gave no consideration to how Pennsylvania's legislature has spoken with regard to the scope of sovereign immunity.[5]

[5]Less than three (3) months after Mayle, Pennsylvania's Legislature enacted its first sovereign immunity statute. Act of September 28, 1978 P.L. 788. In 1980, this statute was repealed and reenacted as part of Subchapter 85 of Pennsylvania's Judicial Code, 42 Pa.C.S.A. §§8501–8528.

Pennsylvania has limited sovereign immunity to those who are a "Commonwealth party". [42 Pa.C.S.A. §8522] A "Commonwealth party" is defined as a "Commonwealth agency and any employee thereof . . ." [42 Pa.C.S.A. §8501] The term "Commonwealth agency" is not defined in Chapter 85 of the Judicial Code, but is defined in Section 102 of the Code which is a general definitional section applicable to the entire Judicial Code. [42 Pa.C.S.A. §102] "Commonwealth agency" is there defined as any "executive agency" or "independent agency". Thus, to be a beneficiary of Pennsylvania's sovereign immunity statute, the District Attorney either must be an executive agency or independent agency.

The term "executive agency" is defined in §102 of the Judicial Code as:

> The Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth government. But the term does not include any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies or any independent agency.

Local district attorneys do not fall within the definition of "executive agency" unless they are encompassed by the term "Commonwealth government". "Commonwealth government" is defined in Section 102 as:

> The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, but the term does not include any political subdivision, municipal *or other local authority or any other officer or agency of any such political subdivision or local authority*. [Emphasis supplied.]

District attorneys are not an "executive agency" and are not entitled to immunity unless they are an "independent agency". "Independent agency" is defined in relevant part as:

> Boards, commissions, authorities and other agencies of the

> Commonwealth government which are not subject to the policies, supervision and control of the Governor, but the term does not include any court or other officer or agency of the unified judicial system or the General Assembly and its officers and agencies. [42 Pa.C.S.A. §102]

District attorneys are not encompassed by the term independent agencies for the same reason; they are not within the definition of "Commonwealth government". Indeed, they are expressly excluded as they are clearly a "local authority" having no power to act outside their respective counties.

None of the definitional sections applicable to a determination of the scope of Pennsylvania's sovereign immunity includes local prosecuting attorneys. When these definitions are read in the context of Article IX, §4 of Pennsylvania's Constitution which expressly defines district attorneys as county officials (or city officials in the case of a Home Rule Charter), it becomes clear that Pennsylvania's Legislature has not cloaked local district attorneys with sovereign immunity.

Not remarkably, Pennsylvania's other statutes, which establish the "complete picture" as to district attorneys similarly, treat them as county or city, but not state officials.

Prior to 1850, criminal prosecutions in Pennsylvania were conducted through the office of its Attorney General. Commonwealth ex rel Specter v. Freed, 228 A.2d 382, 383-84 (Pa. 1967). The Attorney General appointed local district attorneys who were subject to his direct supervision and control. In 1850, however, Pennsylvania enacted the Commonwealth's Attorney's Act 71 P.S. §§732–101, et seq. which all but severed the relationship between local district attorneys and the Attorney General. That Act provides in relevant part:

> Law Enforcement; criminal investigation – the Attorney General shall be the chief law enforcement officer of the Commonwealth; the district attorney shall be the chief law enforcement officer for the county in which he is elected. 71 P.S. §732-206(a)

Since 1850, local district attorneys have been elected by county electorates and funded from county coffers. The Attorney General has no authority to replace a local prosecutor. Rather he must be impeached just as any other locally elected officeholder. [Pa.Const. Article VI, §7] The Attorney General has no authority to supercede a local prosecutor generally and very narrowly circumscribed powers to supercede in any particular criminal prosecution. This limited power to supercede is subject to either Court authorization (as to which the Attorney General bears the burden of proof) or invitation of the local district attorney. [71 P.S. §732–205a(3) - (5)]

As employees of the counties from which they are elected, District Attorneys participate in the County Retirement System pursuant to the County Pension Law. [16 P.S. §§11651-11682] The Attorney General participates as a "state employee" in the State Employee's Retirement Code, 71 Pa.C.S.A. §§5101–5956. See also MacElree v. Chester County, 667 A.2d 1188 (Cmlwth.1995).

The District Court observed that:

> It would be hard to imagine functions more essential to the sovereignty of state government than the investigation and prosecution of state criminal charges. [Memorandum Opinion at 7]

This reflects an improper concern with whether the particular function giving rise to the injury was a governmental or proprietary function; precisely the inquiry this Court removed from Eleventh Amendment analysis in Fitchik. [*Ibid* at 659 n. 2.] The District Court assumed that everyone carrying out a governmental function necessarily is a state official entitled to immunity. That *a priori* reasoning denies Pennsylvania its sovereign right to have *local* officials discharge governmental duties and to withhold immunity from those officials. It also precludes a state from according sovereign immunity to one carrying out a function not traditionally regarded as a "sovereign" (i.e., governmental) function.

Pennsylvania's Supreme Court has recognized that merely performing an essential governmental function does not establish a right to sovereign immunity. In Specter v. Commonwealth, 341 A.2d 481 (Pa. 1975), it declared that members of the Pennsylvania Turnpike Commission were not entitled to sovereign immunity notwithstanding that the Commission was a creature of the legislature; was expressly constituted as an "instrument of the Commonwealth"; and, exercised powers that were "an essential government function of the Commonwealth." *Ibid*. 488-85.

The Specter Court's test was precisely that enunciated by this Court in Urbano and Fitchik; viz.: Whether the *overall* relationship between the Commission and the Commonwealth rendered the Commission a part of the state itself? Finding that it did not, it denied sovereign immunity. *Ibid*. at 491. The Court focused on the Commission's independence from control by the state as evidenced by its self-government, ability to acquire property, ability to sue and be sued, lack of state funding and exemption from taxation -- not the mere conclusion that the Commission carried out an essential governmental function. The Specter Court noted that the state could have constructed the turnpike through its Department of Highways, a state agency which does benefit from sovereign immunity. These factors, as discussed in greater detail below, precisely parallel the relationship between Pennsylvania and its local district attorneys.[6]

While no doubt unintended, the District Court's adoption of a "sovereign function" test for application of sovereign immunity greatly limits Pennsylvania's authority to accord sovereign immunity. This is so, because it necessarily limits the scope of immunity to those performing "sovereign" or traditionally governmental functions. Pennsylvania's Legislature has clearly

[6]After enactment of Pennsylvania's sovereign immunity statute, the Commission was found to be a "Commonwealth party" and, as such entitled to sovereign immunity. Pennsylvania Turnpike Authority v. Jellig, 563 A.2d 202 (Pa. Cmwlth., 1989)

evidenced its intention, however, that sovereign immunity be extended in certain circumstances to those who do not perform traditionally sovereign functions. For example, Pennsylvania's Legislature has purported to extend sovereign immunity to employees of Pennsylvania's Liquor Control Board except where those employees have sold liquor to a minor, a person visibly intoxicated, an insane person or any person known as a habitual drunkard or of untempered habit. [42 Pa.C.S.A. §8522(b)(7)] As the sale of liquor is not a traditional governmental function, under the District Court's analysis of sovereign immunity, Pennsylvania would not be permitted to accord sovereign immunity to employees of the State Liquor Control Board. Conversely, were it to be concluded that the sale of liquor is indeed a governmental function then private bar and restaurant owners who also sell liquor would also be engaged in a governmental function and entitled to sovereign immunity.

Thus, the real evil of the District Court's use of a "sovereign function" test for application of Eleventh Amendment immunity is that it encroaches upon the very sovereignty of Pennsylvania to determine to whom it will accord immunity which the Eleventh Amendment was intended to preserve.

The District Court did not identify a single Pennsylvania statute that treats local prosecutors are state officials. It was error for it to conclude that Pennsylvania has conferred sovereign immunity on the District Attorney.

c. Under Pennsylvania Case Law, District Attorneys Are Local, Not State Officials

As with its Constitution and legislation, so too, Pennsylvania case law establishes that local district attorneys are just that.

In Commonwealth ex rel Specter v. Moak, 307 A.2d 884 (Pa., 1973), Philadelphia assistant district attorneys argued that they should be classified as state officers because they enforce

Commonwealth penal laws having state-wide application and do so on behalf of the Commonwealth. They sought exemption from Philadelphia's Home Rule Charter which prohibited them from running for election to another office while serving as assistant district attorneys. The Court rejected this argument noting that many officials, including Philadelphia's Sheriff and Mayor, have similar responsibilities to enforce Pennsylvania law. The fact that the prosecutorial "function" was carried out "in the name of the Commonwealth" did not make them state officials.

Referring to the substantially similar predecessor to Section 4 of Article IX of Pennsylvania's Constitution the Supreme Court stated:

> The aforesaid language of the Constitution of Pennsylvania is, we repeat, crystal clear. It states in the clearest imaginable language that *District Attorneys* are County – not State-officers, and in Philadelphia, by virtue of the above-quoted Constitutional provisions of the Home Rule Charter, are *City – not State – officers* and no Procrustean stretch can alter or change or nullify this language. Chalfin v. Specter, 233 A2d 562, 565 (Pa., 1967), emphasis in original.

The District Court relied on Pennsylvania Gamefowl Breeders Association v. Commonwealth of Pennsylvania, 551 A.2d, 361, 363 (Pa. Cmwlth. 1988) for the proposition that District Attorneys are state officials because they perform sovereign functions of state government. [Memorandum Opinion at 8-9] That case makes clear, however, that one can perform a sovereign function without being a state official. Indeed, its holding is that district attorneys are *not* state officials:

> District attorneys are charged with conducting criminal prosecutions in the name of the Commonwealth but *only in the county* in which the district attorney is elected. District attorneys, while they perform sovereign functions of state government, are limited geographically in the performance of their duties. In Schroeck v. Pennsylvania State Police, 26 Pa. Cmwlth Ct. 41, 49, 362 A.2d 486, 490 (1976), this court held that district attorneys, for jurisdictional purposes, are *officers of the counties in which they are elected and not officers of the Commonwealth*. Civil actions against

> district attorneys may not be brought in this court's original jurisdiction. [*Ibid*. at 363, some internal citations omitted, some emphasis supplied.]

A proper reading of Pennsylvania Gamefowl Breeders Association establishes that even though district attorneys perform a governmental function when prosecuting crime, that fact is insufficient to make them state officials.

Through the adoption of two successive Constitutions, legislative enactments and court decisions, Pennsylvania, uniformly has declared that its district attorneys are local, not state officials. By ignoring these laws, the District Court grievously invaded the very sovereignty of Pennsylvania which the Eleventh Amendment is intended to preserve.

3. The District Attorney's Autonomy Renders It Ineligible for Eleventh Amendment Immunity

The third test under Fitchik is the degree of autonomy the individual has from the state's control. The greater the autonomy the less the individual can be considered the *alter ego* of the state. Accordingly, where a high degree of autonomy exists, Eleventh Amendment immunity does not.

The District Court's initial focus was on the District Attorney's autonomy from the City of Philadelphia (and then only when prosecuting crimes). This reflects that the District Court applied an erroneous legal standard. Autonomy is not measured by the relationship between the District Attorney and the City, but by the District Attorney's relationship with the Commonwealth. When the District Court did turn its attention to that relationship it failed to consider all relevant facts.

Local district attorneys are virtually unfettered from state control in prosecuting crime within their counties. Unlike other jurisdictions, such as New Jersey or California, [see discussion below at pp.23-30] the Pennsylvania Attorney General has no inherent authority to supercede a local district attorney's prosecution of or decision not to prosecute the violation of state law. To prosecute a local

matter, the Attorney General must petition the county court having jurisdiction over the criminal proceeding. That court must then request the Pennsylvania Supreme Court to assign a judge to hear the matter. Only if that judge determines that the local district attorney has failed or refused to prosecute and that such failure or refusal constitutes an abuse of discretion, may the Attorney General prosecute the violation. [See 71 P.S. §732–205] Even when the Attorney General obtains court permission to supercede a local prosecutor, he may do so only as to a particular matter. There is no authority to supercede generally and the local district attorney loses no authority as to other matters in his office.

In Commonwealth v. Schab, 383 A.2d 819 (Pa. 1978), a local district attorney determined not to prosecute a homicide which he deemed excusable. The Attorney General conducted his own investigation and decided that a suspect should be prosecuted. The Pennsylvania Supreme Court, rejecting common law to the contrary, stated:

> Simply because the attorney general *had* the common law power to replace his own deputies does not justify the conclusion that he now has the right to supercede an elected district attorney, an officer unknown to the common law. *It would be incongruous to place a district attorney in the position of being responsible to the electorate for the performance of his duties while actual control over his performance was, in effect, in the attorney general. To countenance such a separation of accountability and control undermines self-government and promotes centralization* . . . [*Ibid*. at 822, internal citations omitted, emphasis supplied.]

Plainly, even as to the prosecution of crime, Pennsylvania has determined that this "sovereign function" is to be performed by local officials rather than by the state itself. Subsequent to this decision, the Legislature enacted the Commonwealth Attorneys Act, 71 P.S. §732–101, et seq. which embodies Schab. In Commonwealth v. Carsia, 491 A.2d, 237, 341 (Pa.Super. 1985) aff'd 517 A.2d 956, (Pa. 1985), the Court held that this statute is the sole source of the Attorney General's power

to investigate and prosecute criminal actions.

The District Court attempted to minimize the District Attorney's autonomy by reference to the judiciary's control over prosecutors. Its reference to Commonwealth v. DiPasquale, 246 A.2d 430, 432 (Pa. 1968) for that purpose is particularly unavailing. That case does not stand for the proposition that the judiciary may, in any way, involve itself in a district attorney's decision to prosecute or not prosecute a crime. Much less does it authorize a court to involve itself in the investigatory or administrative functions of a prosecutor. DiPasquale holds only that the judiciary's role is to assure that the *judicial* process is administered in an orderly fashion and that a defendant's constitutional rights are protected. In that sense, the judiciary exercises identical control over defense counsel. That fact does not make defense attorneys state officials.

C. Even Under the "Functional Analysis" Adopted By the District Court, Pennsylvania Prosecutors Are Local Officials

The "functional" analysis employed by the District Court is the test employed to determine if an individual is a "state actor" amenable to suit under §1983. As authority for its approach, the District Court cites McMillian v. Monroe County, Alabama, 520 U.S. 781 (1997) and this Court's opinion in Coleman v. Kaye, 87 F.3d 1491 (3rd Cir. 1996). McMillian and Coleman are §1983, not Eleventh Amendment cases.

As a matter of logic, the test for who is a "state actor" and who is a "state official" cannot be the same. On the one hand, to be amenable to suit under §1983 an individual must be a "state actor". On the other hand, no state official may be sued in federal court under the Eleventh Amendment. It follows that while certain state actors also may be state officials there must be some distinction between a "state actor" and a "state official". If there were not, §1983 would be rendered meaningless.

The purpose of the §1983 "state actor" analysis is to determine whether the conduct of an individual is *sufficiently* associated with the state such that the state properly can be charged with responsibility for the individual's conduct. It asks only if the *minimal* nexus exists. See generally Mark v. Borough of Hatboro, et al., 51 F.3d 1137, 1141-1143 (3rd Cir., 1995) cert. den. 116 S.Ct. 165. When this is the question, it is proper to ask if the individual is performing a governmental or proprietary function because the nature of the function is relevant to the issue of the *degree* of the relationship between the actor and the state. The greater the "governmental" nature of the function, the more appropriate it is to hold the state accountable for the actor's conduct. The §1983 analysis is not concerned, however, with whether the state's treasury or policies will be affected adversely.

Conversely, the Eleventh Amendment necessarily *assumes* a relationship with the state. It is unconcerned with the nature (i.e., function) or degree of that relationship but only with whether a judgment against the individual defendant would adversely affect the state's treasury or some overarching state policy. The effect on a state's treasury and its policies does not turn on the function being performed by the individual when injury is caused but on whether the state is liable for those acts. Instantly, a decision regarding the constitutionality of the policies of a local district attorney regarding her relationship with local police and the manner in which informant-witnesses are used by her office, cannot adversely affect the Commonwealth's treasury nor its broader interest, the prosecution of criminal conduct.

As the concerns of a §1983 "state actor" inquiry and those of an Eleventh Amendment "state official" inquiry are completely different, use of the §1983 functional approach below was error.

If the functional analysis employed in McMillian and Coleman, *supra* were appropriate for the Eleventh Amendment inquiry, however, two principles must apply. First, the §1983 factors used

to establish the relationship must be present in more abundance than necessary merely to establish an individual as a state actor for purposes of §1983. Were this not so, all state actors also would be state officials thereby rendering §1983 a nullity. Secondly, the "factors" analyzed must be limited to those that would put the state's treasury or some overarching state policy at risk. This is so because those are the only interests protected by the Eleventh Amendment.

The functional analysis adopted in McMillian and Coleman, mandates a careful review of the state's Constitution, statutes and common law which establish the relationship between the state and individual defendants. That analysis here instructs that Pennsylvania district attorneys are local, not state, officials when investigating crime and administering their offices. Set forth below is a comparison of Alabama and Pennsylvania law as to those aspects McMillian considered critical in determining who is a "state actor". The comparison makes plain that even under a functional approach, Pennsylvania prosecutors are not state officials for Eleventh Amendment purposes.

The McMillian court first turned to Alabama's Constitution noting that it expressly listed Alabama's sheriffs as officers of the state's executive department. Conversely, Article IX, §4 of the Pennsylvania Constitution denominates local prosecutors as county officers or, in the case of a Home Rule Charter, city officers.

The McMillian court identified as "especially important" [*Ibid.* at 1738] the fact that historically Alabama's sheriffs had *not* been part of its executive department but that its constitution was specifically amended to make sheriffs state officials. Pennsylvania's history is precisely the opposite. Prior to 1850, district attorneys were appointed by the Attorney General and subject to his direct supervision. In 1850, Pennsylvania removed the authority of the Attorney General to appoint local district attorneys and thereby his ability to prosecute local crime except in narrowly

circumscribed situations. See Schab, *supra*. at 821.

McMillian next looked at Alabama's statutory treatment of its sheriffs. It noted that Alabama counties have no law enforcement authority whereas Philadelphia may enact and enforce ordinances, the violation of which is punishable by fines and imprisonment. [52 P.S. §13131] Alabama sheriffs can be directed to perform duties outside a sheriff's local jurisdiction whereas local district attorneys have no extraterritorial authority to prosecute crime. Alabama sheriffs report financially to the state treasurer, whereas Philadelphia district attorneys do not, but to the local city council. Alabama sheriffs serve at the pleasure of the governor of the state whereas the Pennsylvania District Attorneys are elected through local elections and may not be removed by the governor, but only through impeachment. Moreover, Pennsylvania's Attorney General cannot supercede a local prosecutor generally, but only as to particular cases and then only with judicial imprimatur or invitation of the local prosecutor.

Finally, McMillian examined Alabama's common law. It noted that the Alabama Supreme Court had ruled that county sheriffs are state officials when engaged in law enforcement activities. Contrariwise, Pennsylvania's Supreme Court and other appellate courts have made no such ruling, but have expressly ruled that district attorneys are not state officials when engaging in other activities. See Chalfin, Commonwealth ex rel Specter v. Moak, supra. Schroeck v. Pennsylvania State Police, 362 A.2d 486 (Pa.Cmwlth, 1976); and Pennsylvania Gamefowl Breeders Association, supra.

In Coleman, this Court performed a similar analysis of New Jersey law, which evidences strong central control of local prosecutors by that state not present in Pennsylvania.

New Jersey prosecutors are nominated and appointed by the governor with the advice and

consent of the Senate. [N.J. Const. Act VII §2, par. 1] New Jersey statutes vest in the prosecutor the same powers within his or her county as are accorded the New Jersey Attorney General. [N.J. Stat. Ann. §2A: 158-5] The authority of New Jersey prosecutors thus is defined by specific reference to that of its Attorney General who directly supervises them:

> The Attorney General shall consult with and advise the several county prosecutors in matters relating to the duties of their office *and shall maintain a general supervision over said county prosecutors with a view to obtaining effective and* ***uniform*** *enforcement of the criminal laws throughout the State. He may conduct periodic evaluations of each county prosecutor's office including audits of funds received and disbursed in the office of each county prosecutor.* [N.J. Stat. Ann. §52: 17B-103, emphasis supplied]

Pennsylvania conversely draws a bright line between the authority of its Attorney General and that of local prosecutors. Each county prosecutor is designated the chief legal officer of his respective jurisdiction.

The New Jersey Attorney General may supercede a county prosecutor in any investigation or criminal action whenever in his or her opinion the interest of the state will be furthered by doing so. [NJ Stat. Ann. §52: 17B-107(a)] When he does, assistant prosecutors and other members of the prosecutor's office may exercise only such powers as the Attorney General permits. [N.J. Stat. Ann. §52: 17B-106] Thus, New Jersey district attorneys are subject to the direct authority of the state through its chief legal officer. This stems from a desire on the part of the New Jersey legislature to assure uniformity in the enforcement of its penal codes, whereas Pennsylvania accords local district attorneys complete discretion in how they will enforce Pennsylvania's criminal laws. [Coleman *supra.* at 1501. See also N.J. Stat. Ann. §52:17B-103]

The direct and encompassing control exercised by New Jersey's Attorney General over New Jersey prosecutors is the basis on which this Court said that New Jersey prosecutors are state officials

when carrying out their prosecutorial functions. The factors extant under New Jersey law, which auger in favor of considering its local prosecutors state officials, are absent from Pennsylvania law, and compel the opposite conclusion.

As noted above, the nature of the local prosecutor's functions is relevant to the Eleventh Amendment analysis only to the extent that the functions are such that an adverse judgment against the individual would interfere with some policy of the state or its treasury, the latter of which is not at issue here. The only interest of the state identified by the District Court is the prosecution of crime. The fatal flaw in this analysis is that Carter's Complaint in no way challenges any such policy.

The District Court itself noted that the policies on which Carter's suit is based relate only to how the District Attorney's Office interacted with Philadelphia police in obtaining and validating information received from police informants and to this local district attorney's training of her subordinates with regard to the use of informant testimony. [Memorandum Opinion, p. 13, 15, 16] These policies, which have no effect beyond the limits of Philadelphia, do not, in any meaningful sense, implicate any policy of the Commonwealth. They are the exclusive and limited domain of the *Philadelphia* District Attorney. This fact is established beyond cavil, by the fact that Pennsylvania district attorneys are autonomous in the management of their office. Unlike other states, such as New Jersey and California, local Pennsylvania prosecutors are not subjected to administrative control by the Pennsylvania Attorney General.

To bridge this gap, the District Court relied on holdings from other jurisdictions but did so without critical analysis of their factual underpinnings. In each of those cases, the activity engaged in by the District Attorney constituted the act of prosecuting crimes, not investigating or administrating her office.

In Estevez v. Brock, 106 F.3d 674 (5th Cir. 1997), the conduct at issue was the district attorney's unconstitutional use of peremptory strikes during trial to eliminate African Americans from the jury. The Estevez court was clear to point out that it was only in presenting the state's case in court and those acts *immediately associated with the judicial phase* of the criminal process that Texas prosecutors enjoy Eleventh Amendment immunity. *Ibid*. at 677. In Crane v. Texas, 766 F.2d 193 (5th Cir., 1985) cert den. 474 U.S. 1020 (1985), the same court held that district attorneys are local officials when engaged in conduct not "intimately" associated with the judicial phase of the criminal process. The relationship between Texas and its local prosecutors is virtually identical to that of Pennsylvania. In relying on Estevez, the District Court completely ignored this distinction.

Likewise, in Arnold v. McClain, 926 F.2d 963 (10th Cir. 1991), the conduct complained of was the discretionary function of determining whether to initiate charges. Furthermore, Oklahoma prosecutors are funded by the state and subject to the state's "extensive" control. *Ibid* at 965 citing Laidly v. McClain, 914 F.2d 1387, 1391-92 (10th Cir. 1990). These are critical facts which the Court below ignored but which distinguish a Pennsylvania prosecutor's relationship to the state.

While the conduct in Bibbs v. Newman, 997 F.Supp. 1174 (S.D. Indiana, 1998) did not consist of purely prosecutorial functions, there, unlike Pennsylvania, the state paid the county district attorney's salary and was liable for any judgment against him even if related to matters outside his prosecutorial role. Also, unlike Pennsylvania, the state was obligated to provide for or pay for a district attorney's defense when sued. The District Court simply ignored these critical constitutional and statutory distinctions between district attorneys in Indiana and those in Pennsylvania.

The District Court's reliance on Pitts v. County of Kern, 17 Cal. 4th 340, 949 P.2d 920, 70 Cal.Rptr. 2nd 823 (1998) is particularly inappropriate. That court made a painstaking comparison of

the factors found to be critical to the McMillian analysis to California law and expressly noted that reference to the law of other jurisdictions is of no precedential value when determining whether a particular individual is a state or local official for Eleventh Amendment purposes. *Ibid* at 837. The Court below made no such critical assessment of Pennsylvania law but merely applied the holding of McMillian and Pitts. As with the other cases cited by the District Court, California law is considerably different from Pennsylvania anent the relationship between local prosecutors and the state. The California Constitution specifically provides that it is the:

> ...duty of the Attorney General to see that the laws of the State are *uniformly* and adequately enforced [and the Attorney General has] direct supervision over every district attorney ... in all matters pertaining to the duties of their office, and may require any of said officers to make reports concerning the investigation, detention, prosecution and punishment of crimes in their respective jurisdictions as to the Attorney General may seem advisable. [California Constitution, Article V, Section 13, Gov. Code §12550, emphasis supplied. See also Pitts, *supra*. at 834.

There is no Pennsylvania analog to the law relied on by Pitts in holding California district attorneys to be state officials when engaged in prosecutorial functions. Indeed, Pennsylvania law is "crystal clear" that when the interests of the sovereign are at issue, it is the Attorney General, not local district attorneys who are to act. [See 71 P.S. §732-205]

The absence of any statutory or constitutional requirement of uniformity among Pennsylvania counties in the enforcement of Pennsylvania's penal statutes also suggests that Pennsylvania does not view local District Attorneys as state officials; and certainly does not when they carry out merely investigative or administrative functions.

As Pennsylvania's treasury will not be subject to any judgment Carter obtains against the Philadelphia District Attorney and because there is no overarching policy of the Commonwealth of

Pennsylvania implicated by Carter's challenge to the District Attorney's investigatory and training functions, the District Court committed error of law in according the Philadelphia District Attorney immunity from suit even if a "functional analysis" were appropriate.

II. Carter's Individual Capacity Claims Against The Roe Defendants State a Cause of Action Under §1983

The Eleventh Amendment does not immunize state officials from liability under §1983 for action taken in their individual capacities. Sullivan v. Barnett, *supra*. The District Court acknowledged that prosecutors are not entitled to absolute prosecutorial immunity from suit under §1983 when the injury is alleged to have been caused by a policy, practice or custom which is deliberately indifferent to the rights of persons with whom the District Attorney could expect to come into contact. [Memorandum Opinion, pp. 15-16. See also Monell v. Department of Social Services, 436 U.S. 658 (1978); City of Canton v. Harris, 489 U.S. 378, 388 (1989).] It nevertheless dismissed Carter's action against the District Attorney in her individual capacity because it found that Carter's Amended Complaint alleges that the City alone is responsible for the policies leading to Carter's conviction and that the policies alleged by Carter were too "nebulous" and merely "passively adopted" by some unknown policy making assistant district attorney...". [Memorandum Opinion at 17]

Plainly, the District Court misread Carter's First Amended Complaint. Paragraph 20 reads in pertinent part:

> 20. The unlawful arrest, conviction and imprisonment and continued imprisonment of Carter as aforesaid were proximately caused by the following policies, practices, customs or usages of the City *as adopted by its duly authorized agents*. [Emphasis supplied]

Paragraph 9 of the First Amended Complaint reads in pertinent part:

> 9. Richard Roe ("Roe") at all material times, were employees of the *Philadelphia* District Attorney's Office and acted both within the scope and course of their employment and under color of state law. [Emphasis supplied.]

Carter views the Roe Defendants as the "duly authorized agents" of the City of Philadelphia and it was these duly authorized agents within the *Philadelphia* District Attorney's Office who adopted the policies. This view is supported by the Pennsylvania Constitution which denominates district attorneys as county employees or, in the case of a home rule city, such as Philadelphia, as a city employee.

In alleging that the offending policies were adopted by "duly authorized agents of the City," Carter necessarily included the Roe Defendants. He cannot identify the Roe Defendants by name because, at this juncture, with no discovery having taken place, he does not know who those authorized agents were.

Perhaps, after discovery is completed, Carter should be required to further amend his Complaint to identify the particular individual policy makers within the District Attorney's Office to whom this aspect of his Complaint relates. His Complaint should not have been dismissed under Rule 12(b) before he had the opportunity to more particularly identify those agents of the City who happened to be employed within the District Attorney's office.

Nor are Carter's allegations concerning the offending policies "nebulous", as the District Court found. Carter specifically has alleged that these policies, practices and customs and usages include:

> (i) failure to discipline or prosecute known incidents of police officers procuring and providing to the District Attorney's office

> tainted evidence for use in homicide prosecutions. [Amended Complaint, ¶20.d]
>
> (ii) refusing to investigate or inadequately investigating complaints of the use of tainted evidence in homicide prosecutions. [Amended Complaint, ¶20.e]
>
> (iii) concealing or withholding from those wrongfully arrested, convicted and/or imprisoned in homicide cases information known to the City which would enable such wrongfully arrested, convicted and imprisoned person to secure post-conviction relief. [Amended Complaint, ¶20.f]

These averments go far beyond "suing people in the hope that evidence to justify the claim might later be obtained". [Opinion Memorandum, p. 17] Defendant Police Officer Ryan pleaded guilty to obstructing justice based upon the fabrication of false evidence. Carter's conviction ultimately was *nolle prossed* after Ryan's payment to Jenkins was discovered. Scores of other convictions have been overturned in the wake of the 39th Police District scandal.

Houston v. Partee, 978 F.2d 362 (7th Cir., 1992) is directly analogous. There, the plaintiff was wrongly convicted. During a subsequent and unrelated investigation, members of the local prosecutor's office other than those who had prosecuted the plaintiff discovered exculpatory information which had not been turned over to the defendant during the original prosecution. While the failure of the original prosecuting attorneys to disclose this material was privileged, the Court held that the failure to disclose this information to the then-convicted plaintiff when it arose in an investigation unrelated to the original prosecution was not immunized and permitted the plaintiff's §1983 action to go forward.[7]

Carter has alleged an identical scenario here; namely, that during the investigation of the 39th

[7]Unlike Eleventh Amendment immunity, prosecutorial immunity is not systemic but does depend on the function being performed when the injury is caused. *Ibid*. at 366. See also cases cited therein.

Police District scandal (an investigation unrelated to his original prosecution) exculpatory information regarding the fabrication of evidence by Officer Ryan was discovered but not turned over to Carter and that this failure to disclose arose as the result of a policy, practice or custom of the District Attorney's Office in dealing with such information. This allegation along with the other policies discussed above sufficiently state a cause of action under §1983.

Accordingly, the District Court's dismissal of Carter's claims against the Roe Defendants in their individual capacities should be reversed.

III. The District Court Abused Its Discretion in Declining to Exercise Supplemental Jurisdiction Over Carter's State-Based Claims

Pursuant to 28 U.S.C. §1367, the District Courts have supplemental jurisdiction over all non-federal claims that are so related to the action within the District Court's original jurisdiction that they form part of the same case or controversy. Having dismissed Carter's federal claims, the District Court declined to exercise its supplemental jurisdiction over Carter's state-based claims against the district attorney.

Subsection (c) to §1367 provides that the Courts may decline supplemental jurisdiction if:

(i) the claim raises a novel or complex issue of State law;
(ii) the claims substantially predominates over the claim or claims over which the District Court has original jurisdictions;
(iii) the District Court has dismissed all claims over which it has original jurisdiction; or
(iv) in exceptional circumstances, there are other compelling reasons for declining jurisdictions.

The District Court did not state the basis on which it declined supplemental jurisdiction. As Carter's state-based claims do not raise novel or complex issues of state law, nor predominate over the federal claims which remain against the other defendants, it would appear that the basis for the

Court's dismissal of the state-based claims rests on its dismissal of the federal claims against the District Attorney.

Section 1367 was intended to provide an independent basis for federal courts to exercise jurisdiction over claims even when the court's original federal jurisdiction is lacking where the state claims arise from the same operative facts. Young v. Francis, 820 F.Supp. 940 (E.D. Pa. 1993) Admittedly, district courts retain broad discretion in determining whether to exercise supplemental jurisdiction. However, that discretion must be tied to the four predicates established in §1367(c). The exercise of that discretion should be informed by generally accepted principles of judicial economy, convenience and fairness to the litigants. Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995)

Instantly, the Court has not dismissed all of Carter's federal claims. The very claims which the District Court dismissed as against the District Attorney remain against the other defendants, as do Carter's state-law based claims. Accordingly, there will be no judicial economy as far as the District Court is concerned by dismissal of Carter's state-based claims against the District Attorney.

Indeed, just the opposite is true. Carter will be now forced to maintain his state-based claims against the District Attorney in state Court which will result not only in two different tribunals having to deal with those issues, but duplicative discovery and trial time on the part of both the courts and the litigants. Other courts have noted that the avoidance of such piecemeal litigation is a proper basis on which supplement jurisdiction should be exercised. See, e.g., Loral Fairchild Corp. v. Matsushita Electric Industries Co., 840 F.Supp. 211 (E.D. NY, 1994).

For the foregoing reasons, Carter submits that the District Court abused its discretion in dismissing Carter's state-law claims.

CONCLUSION

For all the foregoing reasons, Carter respectfully requests this Court to reverse the Order of the District Court.

Respectfully submitted,

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