No. 07-30443

In the United States Court of Appeals for the Fifth Circuit

JOHN THOMPSON

Plaintiff-Appellee

versus

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; EDDIE JORDAN, in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE

Defendants - Appellants

On Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Action No. 2:03-CV-2045, Division "J"
the Honorable Carl J. Barbier, presiding

En Banc Amicus Curiae Brief Filed on Behalf of Louisiana District Attorneys Association in Support of Appellants

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Defendants - Appellants

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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F. Leon A. Cannizzaro, Jr.

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/S/ RALPH R. ALEXIS, III

REQUEST FOR ORAL ARGUMENT

Oral argument has been granted and Appellants have allotted, subject to Motion before this Court, two minutes of time from their allotted time for argument to the Louisiana District Attorneys Association. An appropriate motion has been filed.

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STATEMENT OF IDENTITY OF AND INTEREST OF *AMICUS CURIAE*

A. Identity and Authority

The Louisiana District Attorneys Association ("LDAA") is a Louisiana non-profit corporation which includes as members all of the 42 district attorneys of the State of Louisiana. The District Attorney of the City of New Orleans is a member, and has requested that the LDAA file an *Amicus Curiae* brief in these proceedings to support his position on rehearing *en banc*. The membership of the LDAA thereafter authorized the filing of this brief.

B. Interest of the LDAA

The LDAA has a keen interest in all aspects of law pertaining to Louisiana District Attorneys, including the application of *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.2d 611 (1978),[1] which was the underlying source of the judgment appealed from by appellant district attorneys and the underlying basis for the decision of the panel which rendered the decision which is the subject of this rehearing. *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008). The application of *Burge v. Parish of St. Tammany*, 187 F.3d 452 (5th Cir. 1999) and *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), *cert. denied,* 540 U.S. 826, 124 S.Ct. 181 (2003) are also of concern to Louisiana district attorneys. In addition, the impact of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.

[1] This case is hereinafter referred to as *Monell*.

Ed. 215 (1963), which forms the underlying basis for *Monell* liability in this case, is also of great concern to the LDAA. Finally, as more fully set forth in this brief, the application of the United States Supreme Court decision in *Van de Kamp, et al. v. Goldstein*, 555 U.S. _____, 129 S.Ct. 855, 2009 WL 160430 (2009)[2] is of primary and urgent concern to Louisiana district attorneys as it applies to the instant case and all other cases involving allegations of a district attorney's alleged failure to train and/or supervise his assistants.

The LDAA also has an interest in all public policy as it applies to Louisiana district attorneys.

ARGUMENT

I. BACKGROUND

Amicus Curiae adopts the statement of background as set forth in the briefs of appellants.

II. THE DECISION IN *VAN de CAMP v. GOLDSTEIN* ELIMINATES THE BASIS OF LIABILITY IN THE PRESENT CASE

On January 26, 2009, the U. S. Supreme Court unanimously rendered its decision in *Goldstein*. The *Goldstein* decision succinctly states the facts at issue in that case, and they are repeated here to give proper context:

> In 1998, respondent Thomas Goldstein (then a prisoner) filed a habeas corpus action in the Federal District Court for the Central District of California. He claimed that in 1980 he was convicted of

[2]This decision is hereinafter referred to as "*Goldstein*."

> murder; that his conviction depended in critical part upon the testimony of Edward Floyd Fink, a jailhouse informant; that Fink's testimony was unreliable, indeed false; that Fink had previously received reduced sentences for providing prosecutors with favorable testimony in other cases; that at least some prosecutors in the Los Angeles County District Attorney's Office knew about the favorable treatment; that the office had not provided Goldstein's attorney with that information; and that, among other things, the prosecution's failure to provide Goldstein's attorney with this potential impeachment information had led to his erroneous conviction. *Goldstein* v. *Long Beach*, 481 F. 3d 1170, 1171–1172 (CA9 2007).
>
> After an evidentiary hearing the District Court agreed with Goldstein that Fink had not been truthful and that if the prosecution had told Goldstein's lawyer that Fink had received prior rewards in return for favorable testimony it might have made a difference. The court ordered the State either to grant Goldstein a new trial or to release him. The Court of Appeals affirmed the District Court's determination. And the State decided that, rather than retry Goldstein (who had already served 24 years of his sentence), it would release him. App. 54–55, 59–60
>
> *Van de Kamp, et al. v. Goldstein*, 129 S. Ct. at 859.

The Supreme Court's holding in *Goldstein* prohibits *Monell* claims against district attorneys alleging failure to train or supervise assistants arising out of alleged constitutional violations occurring during a prosecution. Thus, it is respectfully urged that *Goldstein* mandates the reversal of the panel's decision.

III. *GOLDSTEIN* HOLDS THAT ALLEGATIONS OF FAILURE TO SUPERVISE AND TRAIN, *HOWEVER PLED*, DO NOT SUPPORT A CLAIM AGAINST DISTRICT ATTORNEYS

A. Discussion of Facts and Holding of *Goldstein*

After his release from prison, Goldstein filed a §1983 action against the

former Los Angeles County district attorney and chief deputy district attorney.

The Supreme Court framed the question presented thusly:

> We ask whether that immunity[3] extends to claims that the prosecution failed to disclose impeachment material, see *Giglio* v. *United States*, 405 U. S. 150 (1972), due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants. We conclude that a prosecutor's absolute immunity extends to all these claims. *Id*., at 858.

Goldstein asserted claims that the district attorney and his chief assistant violated their constitutional obligation to provide his attorney with impeachment-related information because they failed "to adequately train and supervise deputy district attorneys on that subject." *Goldstein v. City of Long Beach*, 481 S.3d 1170, 1176 (9th Cir. 2007). This argument was based upon the allegation that the DAs "failed to create any system for the Deputy District Attorney's handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information." 129 S.Ct. at 856.

The Supreme Court concluded

> … that prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here. Those claims focus upon a certain kind of administrative obligation—a kind that itself is directly connected with the conduct of a trial. *Here, unlike with other claims related to administrative decisions, an individual prosecutor's error*

[3] Referring to the Court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) determining that a prosecutor has absolute immunity "in initiating a prosecution and in presenting the State's case." 96 S.Ct. at 995.

> *in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim*. … Moreover, the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management. And in that sense also Goldstein's claims are unlike claims of, say, unlawful discrimination in hiring employees. Given these features of the case before us, *we believe absolute immunity must follow* (emphasis supplied).[4]

The Court then dramatically re-affirmed *Imbler* and delivered what is a "knock-out punch" for suits such as the instant one:

> … because better training or supervision might prevent most, if not all, prosecutorial errors at trial, *permission to bring such a suit here would grant permission to criminal defendants to bring claims in other similar instances, in effect claiming damages for (trial-related) training or supervisory failings*. Cf. *Imbler*, *supra*. Further, given the complexity of the constitutional issues, inadequate training and supervision suits could, as in *Imbler*, "pose substantial danger of liability even to the honest prosecutor." *Id*., at 425. Finally, as *Imbler* pointed out, *defending prosecutorial decisions*, *often years after they were made*, could impose *"unique and intolerable burdens* upon a prosecutor responsible annually for hundreds of indictments *and trials*." *Id*., at 425–426 (emphasis supplied).[5]

The Court continued:

> … *Most important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate Imbler* (emphasis supplied).[6]

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[4] 129 S.Ct. at 861-862.
[5] *Id*., at 863.
[6] *Id*., at 863

B. Discussion of Application of *Goldstein* to *Monell* Cases Such As The Instant Case

The instant case involves "artful pleading," under the guise of *Monell*, of a §1983 claim based on alleged failure to train or supervise. This is the type of claim that the Supreme Court in *Goldstein* so adamantly rejected. Although *Goldstein* admittedly did not address a *Monell* claim, its holding is no less applicable to cases such as the instant one. Why would the Supreme Court so vigorously establish a prosecutor's absolute immunity in his personal capacity for alleged constitutional violations committed by him/her while acting as advocate for the state, yet be presumed to sanction "artful pleading" around *Imbler* pursuant to *Monell* to establish liability for the same thing? *Goldstein* confirms that the Court does not sanction such artful pleading. It is submitted that *Goldstein* holds that district attorneys cannot be held civilly liable for their alleged failures to train or supervise assistants where the alleged constitutional violations committed by assistants occur "in initiating a prosecution and in presenting the State's case." The following analysis of the rationale behind that decision demonstrates our contention:

(1) The Public Trust Would Suffer Unless *Goldstein* is Made Applicable to *Monell* Claims Such As The Instant Case

In *Goldstein*, the Court reiterated *Imbler's* rationale that

The "public trust of the prosecutor's office would suffer" were the

> prosecutor to have in mind his "own potential" damages "liability" when making prosecutorial decisions—as he might well were he subject to §1983 liability … (emphasis supplied).[7]

Is that rationale not applicable in our instant matter where a substantial judgment against the District Attorney of Orleans Parish in his official capacity might ultimately shut down the District Attorney's office?

(2) Unique and Intolerable Burdens Will Be Placed Upon Prosecutors Unless *Goldstein* is Made Applicable to *Monell* Claims Such As The Instant Case

In *Goldstein*, the Court further relied on *Imbler's* rationale that

> … fair-trial questions "often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury"). 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*." … Emphasis supplied.[8]

The instant case involves exactly these circumstances.

(3) The Threat of Damages Liability Would Affect The Way in Which Prosecutors Carry Out Their Basic Court-Related Tasks Unless *Goldstein* is Made Applicable to *Monell* Claims Such As The Instant Case

In *Goldstein* the Court further stated in support of its holding:

> Decisions about indictment or trial prosecution will often involve more than one prosecutor within an office. We do not see how such differences in the pattern of liability among a group of prosecutors in

[7] 129 S.Ct. at 860.
[8] *Id*.

> a single office could alleviate *Imbler*'s *basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks*. Moreover, this Court has pointed out that "*it is the interest in protecting the proper functioning of the office*, rather than the interest in protecting its occupant, that is of primary importance." *Kalina* v. *Fletcher*, 522 U. S. 118, 125 (1997). Emphasis supplied.[9]

Does not this rationale apply in the instant case? Here there is a judgment against the District Attorney in his official capacity in an amount exceeding $15 million. If the Supreme Court has established society's overriding interest in "protecting the proper functioning of the [District Attorneys] office," can it be reasonably argued that *Monell* provides an artful way to skirt *Imbler* and potentially obtain a judgment against a District Attorney's office that would cause the office to cease operating or otherwise cause serious financial and service-related repercussions to that office?

After *Goldstein*, the answers to these questions are obvious. After *Goldstein*, it is certain that the Supreme Court will not allow district attorneys to be "intolerably burdened" through artful pleading, i.e. through *Monell*. After *Goldstein*, it is clear that *Imbler* means what it says: No civil suits whatsoever are recognizable against prosecutors under § 1983, *however artfully pleaded,* based on actions taken by prosecutors "in initiating a prosecution and in presenting the State's case."

[9] 129 S.Ct. at 862.

V. CONCLUSION

We conclude with a compelling statement by the Supreme Court in *Goldstein*:

> … Immunity does not exist to help prosecutors in the easy case; it exists because the easy cases bring difficult cases in their wake. And, as *Imbler* pointed out, the likely presence of too many difficult cases threatens, not prosecutors, *but the public*, for the reason that it threatens to undermine the necessary independence and integrity of the prosecutorial decision making process. 129 S.Ct. at 864.

It is respectfully submitted that *Goldstein* holds that no suit, however artfully pled, may be brought under *Monell* or otherwise asserting liability of a district attorney based upon an alleged failure to train or supervise an assistant district attorney for actions taken while acting as an advocate for the State.

For the reasons set forth herein, it is respectfully urged that this Honorable Court sitting *en banc* reverse the judgment of and vacate the jury verdict rendered in the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 2,224 words, excluding parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(1)(6).

/S/ RALPH R. ALEXIS, III

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the above and foregoing, and an electronic diskette of the same, has been served this 15th day of April, 2009, via the United States mail, property addressed and postage prepaid, on all counsel of record as follows:

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