

9th Circuit OKs Lawsuit Against Prosecutors

The federal Ninth Circuit ruled in *Goldstein v. City of Long Beach*, No. 06-55537 (9th Cir. 03/28/2007), that prosecutors can be held civilly liable for damages related to their failure to perform constitutionally required *administrative* obligations under *Giglio v. United States*, 405 U.S. 150 (1972). Thomas Goldstein was convicted of murder in 1980 based on the testimony of a jailhouse informant. Goldstein's trial lawyer wasn't provided with the impeachment evidence that the informant had an extensive history of exchanging prosecution favorable testimony for a sentence reduction. After his release from 24-years of wrongful imprisonment, Goldstein filed a federal civil rights lawsuit (42 U.S.C. §1983) against the Los Angeles District Attorney and his chief deputy, alleging they failed to develop policies and procedures and they failed to adequately train and supervise their subordinates, to fulfill their constitutional obligation of ensuring that information regarding jailhouse informants was shared among prosecutors in their office. The Ninth Circuit ruled that a prosecutor only has qualified, not absolute immunity, from civil liability for failing to perform the administrative functions alleged in Goldstein's lawsuit. Excerpts from the *Goldstein* opinion follows.

Goldstein v. City of Long Beach,
No. 06-55537 (9th Cir. 03/28/2007)

[1] United States Court Of Appeals For The Ninth Circuit

...

[3] 2007.C09.0001470

< <http://www.versuslaw.com> >

[4] March 28, 2007

[5] Thomas Lee Goldstein,
Plaintiff-Appellee,
v.

City Of Long Beach, et al, Defendants, And John Van de Kamp And Curt Livesay, Defendant-Appellants.

...

[11] For Publication

...

[15] Opinion

[16] In this case, we are asked to determine whether an elected district attorney and his chief deputy are entitled to absolute immunity from suit based on allegations that they failed to develop policies and procedures, and failed to adequately train and supervise their subordinates, to fulfill their constitutional obligation of ensuring that information regarding jail-house informants was shared among prosecutors in their office. See *Giglio v. United States*, 405 U.S. 150, 154 (1972). For the reasons discussed in this opinion, we hold that they are not, and we therefore affirm the opinion of the district court.

[17] I. Background

[18] After serving twenty-four years in prison, Plaintiff-Appellee Thomas Lee Goldstein was released on April 2, 2004, following this Court's affirmance of the [U.S.] district court's order granting Goldstein's petition for habeas relief. Goldstein has now filed a complaint seeking damages under 42 U.S.C. § 1983 based on his wrongful conviction for murder. Although he has sued several individuals and entities ... only his claims against Defendants-Appellants John Van De Kamp and Curt Livesay are at issue in this appeal. Van De Kamp was the Los Angeles County District Attorney at the time Goldstein was prosecuted and convicted, and Livesay was his chief deputy.

[19] The claims relevant to this appeal stem from the testimony at Goldstein's 1980 criminal trial of Edward Floyd Fink, a jailhouse informant. Fink testified that Goldstein confessed the murder to him while both were being detained in the Long Beach City Jail. Goldstein alleges that this testimony was false, as was Fink's testimony that he was not receiving any benefits for testifying against Goldstein and had never received any benefits for assisting law enforcement in the past. Fink had, in fact, been acting as an informant for the Long Beach Police Department for several years and had received multiple reduced sentences in return. Although other deputy district attorneys in the Los

Angeles County District Attorney's Office were aware of the benefits provided to Fink in exchange for his testimony against Goldstein, this critical impeachment evidence was never shared with the deputy district attorneys prosecuting Goldstein's case, allegedly because no system of sharing such information existed in the District Attorney's Office at the time and because deputy district attorneys were not adequately trained or supervised to share such information. As a result, evidence that could have been used to impeach Fink was not shared with Goldstein's defense counsel, in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[20] Several years prior to Goldstein's arrest and conviction, the Supreme Court explained that prosecutors' offices have a constitutional obligation to establish "procedures and regulations . . . to insure communication of all relevant information on each case [including promises made to informants in exchange for testimony in that case] to every lawyer who deals with it." *Giglio*, 405 U.S. at 154. Thus, Goldstein alleges that Van De Kamp and Livesay are liable under § 1983 because, as administrators of the Los Angeles County District Attorney's Office, they violated his constitutional rights by purposefully or with deliberate indifference failing to create a system that would satisfy this obligation. Goldstein further alleges that Van De Kamp and Livesay violated his constitutional rights by failing to adequately train and supervise deputy district attorneys to ensure that they shared information regarding jailhouse informants with their colleagues.

[21] Van De Kamp and Livesay sought dismissal of the claims against them, under Federal Rule of Civil Procedure 12(b)(6), based on an assertion of absolute prosecutorial immunity. The district court denied their motion on March 8, 2006, finding that Van De Kamp and Livesay's alleged conduct was administrative rather than prosecutorial and, therefore, not entitled to the protections of absolute immunity. ...

[26] III. Discussion

[27] Courts have recognized two types of immunity from suit under 42 U.S.C. § 1983: qualified immunity and absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Only absolute immunity is at issue in this appeal ...

...

[30] A prosecutor is entitled to absolute immunity under § 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), and "occur[s] in the course of his [or her] role as an advocate for the State," *Buckley*, 509 U.S. at 273. However, conduct is not shielded by absolute immunity simply because it is performed by a prosecutor. Id. To the contrary, a prosecutor is entitled only to qualified immunity "if he or she is performing investigatory or administrative functions, or is essentially functioning as a police officer or detective." ... Thus, when determining whether absolute immunity applies, courts must examine "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988).

[31] Applying this functional analysis, the Supreme Court has held that prosecutors are absolutely immune from § 1983 liability for decisions to initiate a particular prosecution, to present knowingly false testimony at trial, and to suppress exculpatory evidence. *Imbler*, 424 U.S. at 431 & n.34. Prosecutors also enjoy absolute immunity for decisions not to prosecute particular cases, ... and for gathering evidence to present to the trier of fact, as opposed to gathering evidence to determine whether probable cause exists to arrest ...

[32] On the other hand, prosecutors do not have absolute immunity "for advising police officers during the investigative phase of a criminal case, performing acts which are generally considered functions of the police, acting prior to having probable cause to arrest, or making statements to the public concerning criminal pro-

Goldstein cont. on p. 13

Lee Long Awarded \$900,000 In Attorney Malpractice Suit For Botched Compensation Claim



By Hans Sherrer

Lee Long was convicted of rape, robbery and sexual abuse by a New York city jury in April 1995. His convictions were based on the eyewitness testimony of the victim, who identified Long as the perpetrator of the 1994 attack. In convicting him, the jury rejected Long's alibi that he was with his girlfriend the entire night that the rape occurred.

The 35-year-old Long was sentenced to two concurrent terms of 8 to 24 years imprisonment. His convictions were affirmed on direct appeal in 1997.

Long filed a post-conviction motion for a new trial, and during an interview with a Queens Legal Aid Society (Legal Aid) lawyer, he

reiterated his alibi. He also said a NYPD officer had called his girlfriend before his trial, and verified his alibi. Legal Aid investigated his claim by tracking down the officer – who confirmed what Long said. The prosecution had concealed that information during Long's trial by neither having the officer testify, nor turning over his report to Long's lawyer.

Based on the "new evidence," Legal Aid filed a motion in March 2000 to set aside Long's conviction on three grounds: violation of his constitutional rights, newly discovered evidence, and dismissal in furtherance of justice. On June 23, 2000, Justice Joseph Golia issued an Order vacating Long's conviction and dismissing his indictment. Three days later, on June 26, Golia issued a written Memorandum in which he wrote, "the defendant's motion to set aside the judgment of conviction, pursuant to CPL 440.10, is granted, and the indictment is dismissed, in the interests of justice in accordance with CPL section 210.40."

Long was released after six years of wrongful imprisonment.

After his release Long contracted with the New York based for-profit law firm of Cochran, Neufeld and Scheck to pursue compensation for his experience. Barry Scheck – co-founder of the Innocence Project at Cardozo School of Law – subsequently filed on Long's behalf, a federal civil rights lawsuit against the City of New York and the NYPD.

On May 16, 2002, almost two years after Long's indictment had been dismissed, Scheck filed a motion to vacate Long's conviction on the ground of "newly discovered evidence," which Justice Golia did not do in June 2000. In an Order dated, May 28, 2002, Justice Golia wrote that "...defendant's convictions must be vacated" pursuant to CPL 440.10(g) [newly discovered evidence], and the indictment is dismissed in the interests of justice." The indictment's dismissal was a reiteration of the Justice's order of June 26, 2000.

Scheck then prepared a claim for state compensation with the New York Court of Claims. The claim was verified by Scheck and filed on June 26, 2002, two years to the day after Justice Golia issued his written

Long cont. on page 14

Goldstein cont. from p. 12

ceedings." ... Unlike the removal of a deputy attorney from a particular case, which falls "within the District Attorney's prosecutorial function" because it is "intimately associated with the judicial phase of the criminal process," we determined that these challenged actions were "personnel decisions" falling "squarely within the District Attorney's administrative function." ...

[33] Neither the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in *Giglio*, are subject to absolute immunity. ...

[35] ... Goldstein does not contend that Van De Kamp and Livesay are liable because they knew about, condoned, or directed any specific trial decisions made by the deputy district attorneys prosecuting Goldstein's criminal case. Goldstein does not, for instance, assert that Van De Kamp and Livesay

knew that Fink had been granted immunity for perjured testimony in Goldstein's particular case, or that they condoned withholding such information from Goldstein's criminal defense attorney. Instead, Goldstein rests his theory of liability on Van De Kamp and Livesay's alleged failure to develop a policy of sharing information regarding jailhouse informants within the District Attorney's Office and on their alleged failure to provide adequate training and supervision on this issue.

[38] In this case, Van De Kamp and Livesay contend that the challenged conduct was prosecutorial in function even if it may have been administrative in form. We disagree. In the context of determining whether absolute immunity applies, "prosecutorial" refers only to conduct that is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Thus, an act is not "prosecutorial" simply because it has some connection with the judicial process or may have some impact at the trial level. Were that the rule, then prosecu-

tors would be absolutely immune from any suit because all actions taken by prosecutors arguably have some connection to the judicial process – even those, such as personnel decisions, that we have explicitly held fall outside the protections of absolute immunity. ... As the Supreme Court has cautioned, "[a]lmost any action by a prosecutor, including his or her direct participation in a purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Burns v. Reed*, 500 U.S. 478, 495 (1990).

[39] ... we conclude that Goldstein's allegations are administrative and not prosecutorial in function. ... Van De Kamp and Livesay have failed to demonstrate the required "close association . . . [with] the judicial phase of [Goldstein's] criminal trial," ... Administrative work cannot be "retroactively transform[ed]" into the prosecutorial simply because "the evidence this work produced" might affect whether a prosecutor de-

cides to bring a case or, if a case is brought, how the evidence is presented at trial. *Buckley*, 509 U.S. at 275-76. The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases. Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.

[40] IV. Conclusion

[41] For the above reasons, we hold that the district court correctly determined that Goldstein's allegations against Van De Kamp and Livesay describe conduct in furtherance of an administrative rather than prosecutorial function. ... Accordingly, the decision of the district court is AFFIRMED.

