The PROSECUTOR

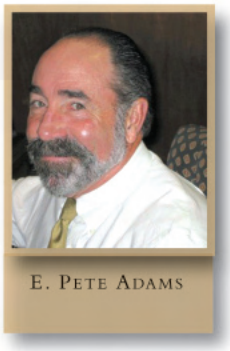
Does Prosecutor Liability under MONELL Survive GOLDSTEIN?

BY E. PETE ADAMS, EXECUTIVE DIRECTOR, LOUISIANA DISTRICT ATTORNEYS ASSOCIATION

AMERICAN PROSECUTORS breathed a collective sigh of relief at the unanimous decision of the United States Supreme Court in *Van de Kamp, et al. v. Goldstein,* ___ U.S. ___, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009). The opinion seemed to affirm absolute immunity for prosecutors engaged in the prosecution function and to include in that function all training and supervisory activities related to trial work. Unmentioned in the opinion, however, was the issue of prosecutor liability under *Monell* actions. *(See, Monell v. New York City Dep't of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.2d 611 (1978)).* In May of this year, the Fifth Circuit held an en banc hearing for oral argument in the matter of *Thompson v. Connick,* No. 07-30443 (5th Cir. Dec. 19, 2008). Although the appeal addressed multiple issues, a key question in this case is whether district attorneys may be found liable, in their official capacity, for failure to properly train and failure to properly supervise assistant district attorneys on *Brady* issues.

The facts in *Thompson* are substantially as follows: In 1985, Thompson was convicted of an armed robbery which occurred in December of 1984, approximately three weeks following the murder of a prominent New Orleans hotelier, Ray Liuzza. Thompson was tried and convicted for the Liuzza murder a month after the armed robbery conviction.

Prior to the armed robbery trial, the prosecution received a lab report on a bloody swatch of the victim's pants, which was not turned over to the defense. Later, in a deathbed admission, one of the assistants handling the original armed robbery trial admitted that he knowingly withheld the lab report when he should have disclosed it to the defense. In 2002, the armed robbery conviction was reversed on *Brady* grounds, and, because it effectively prevented Thompson from taking the stand in the murder case, a new trial was ordered for the murder. The defendant was acquitted after a re-trial.



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Thompson filed a *Monell* action against the Orleans Parish District Attorney's Office, the former district attorney for that office, Harry Connick, and others for 18 years of wrongful incarceration that they allege was substantially caused by the defendants' failure to train and/or supervise his assistants on *Brady* issues. The district court then held Connick, in his "official capacity," and the office liable under 42 U.S.C. § 1983 and awarded Thompson $14 million in damages on February 9, 2007. The defendants then appealed to the Court of Appeals for the Fifth Circuit.

The Louisiana District Attorneys Association (LDAA) submitted an amicus curiae brief in support of the appellants in April 2009. Chief among its arguments is that the Supreme Court's decision in *Goldstein* eliminated the basis of liability for Thompson's suit. In *Goldstein,* The Supreme Court stated, "that prosecutors involved in such supervision or training [...] enjoy absolute immunity from the sort of legal claims at issue here." The Court went on to re-affirm

its decision in *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), that "given the complexity of the constitutional issues, inadequate training and supervision suits could [...] pose substantial danger of liability even to the most honest prosecutor" and defending prosecutorial decisions years after they were made could pose intolerable burdens upon prosecutors. 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.*

Thompson v. Connick involves "artful pleading," under the guise of *Monell,* of a § 1983 claim. We believe that this is the type of claim the Supreme Court in *Goldstein* so adamantly rejected. Although *Goldstein* admittedly did not address a *Monell* claim, its holding should be no less applicable to cases such as *Thompson*. To hold otherwise would suggest that the Supreme Court vigorously affirmed a prosecutor's absolute immunity in his personal capacity for alleged constitutional violations, while sanctioning "artful pleading" around *Imbler* pursuant to *Monell* to establish liability for the same activity. Surely this was not the Supreme Court's intention.

The rationale underlying the Supreme Court's decision in *Goldstein* supports the LDAA's contention:

- First, the Court in *Goldstein* reiterated *Imbler* by asserting that the public trust of the prosecutor's office would suffer were the prosecutor to have to mind his own potential liability when making prosecutorial decisions—"as he might well were he subject to § 1983 liability." It would seem that this rationale is applicable in *Thompson* and other *Monell* actions where a substantial judgment against the district attorney of Orleans Parish in his official capacity might ultimately shut down the office.

- Second, the Court stated that such suits would often amount to a virtual retrial of the criminal offense in a new forum. The Court was particularly concerned that "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." *Thompson* involves exactly these circumstances.

- Third, the Court in *Goldstein* reiterated *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." Allowing *Monell* actions against a district attorney's office would result in the same consequences—that is, the threat of serious financial and service-related repercussions could chill the decision-making of the elected district attorney and his assistants.

After *Goldstein,* it is hoped that the Supreme Court will not allow district attorneys to be "intolerably burdened" through "artful pleading" (i.e., through *Monell*). It should be 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." Thus, the LDAA in its *amicus curiae* brief in *Thompson* respectfully submitted that *Goldstein* holds that no suit, however artfully plead, 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.

The LDAA and the defendants are currently awaiting the decision of the Fifth Circuit in *Thompson.*

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NDAA Summer Board Meeting
Lake Buena Vista, Florida
Disney's Coronado Springs Resort
Room rate: $155
Reservations: 407.939.1020
Cut-off: June 12, 2009

July 12-15, 2009
NDAA Annual Summer Conference
Lake Buena Vista, Florida
Disney's Coronado Springs Resort
Room rate: $155
Reservations: 407.939.1020
Cut-off: June 12, 2009

NDAA Fall Board Meeting
Denver, Colorado
October 15-17, 2009
Grant Hyatt Denver
Room rate: $149
Reservations: 303.295.1234
Cut-off: September 23, 2009