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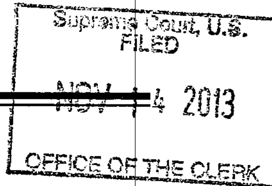

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, DETECTIVE DOUGLAS LEE, SERGEANT EVELYN ALLEGRE AND ADA FRANCIS LONGOBARDI,

Petitioners,

v.

ALEXINA SIMON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On August 23, 2007, Police Officer Shantell McKinnies reported her own car stolen, and identified her friend, Alexandra Griffin, as the last person to see the car on August 22. That car, however, had been in the custody of an undercover New York City Police Department ("NYPD") garage as of August 20, 2007 (A 632). In attempting to reach Alexandra Griffin, the NYPD learned (incorrectly), that her name was Alexina Simon, but she was unwilling to cooperate with the NYPD (A 641). Thus, in connection with its prosecution of McKinnies, now charged with grand larceny and insurance fraud for falsely reporting her car as stolen, Assistant District Attorney ("ADA") Longobardi, of the Queens District Attorney's ("Queens DA") office, got a material witness order and warrant for respondent Alexina Simon ("respondent") on August 8, 2008, from the Queens County Supreme Court (A 630-31), and brought her in for questioning regarding the false stolen car report (A 684.4).

The question presented is:

In failing to bring respondent before a judge according to the language of the material witness order, but instead questioning her intermittently at the office of the Queens District Attorney for two consecutive days about McKinnies, were the Assistant District Attorney and the police officers employed by the Queens DA entitled to the absolute immunity provided to prosecutors engaged in acts of advocacy?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the City of New York, Detective Douglas Lee, Sergeant Evelyn Alegre, and ADA Francis Longobardi respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Second Circuit is reported at 727 F.3d 167 and 2013 U.S. App. LEXIS 17016 (App. 1a-14a). The decision and opinion of the United States District Court for the Eastern District of New York (Vitaliano, D. J.), denying respondent's motion for reconsideration, was issued from the bench and was not published (App. 15a-33a). The memorandum and order of the United States District Court for the Eastern District of New York (Vitaliano, D. J.), is published at 819 F. Supp. 2d 145 and 2011 U.S. Dist. LEXIS 120665 (App.34a-49a). The opinion of the United States District Court for the Eastern District of New York (Reyes, U.S.M.J) is published at 2011 U.S. Dist LEXIS 9515 (App. 50a-98a).

JURISDICTION

The Second Circuit Court of Appeals rendered its decision on August 16, 2013. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Background

On August 23, 2007, Police Officer Shantell McKinnies reported her own car, a white Dodge Charger, stolen. McKinnies completed a Vehicle Theft Supporting Affidavit indicating that her friend, Alexandra Griffin, had parked the vehicle in the lot from which it was stolen and that on August 22, 2007, Griffin was the last person to see the car. That car, however, had been in the custody of an undercover NYPD garage as of August 20, 2007 (A 632). As a result, on January 10, 2008, McKinnies was arraigned on a felony complaint, charging her with, *inter alia,* grand larceny in the third degree and insurance fraud in the third degree (A 632).

An individual identified as "Alexandra Griffin" was contacted by the NYPD. When first contacted, "Alexandra Griffin" began crying and hung up the telephone. Members of the NYPD went to "Alexandra Griffin's" home, at 444 Greene Avenue, Brooklyn, New York, and "were met by an uncooperative person" (A 641).

"Alexandra Griffin" later called the NYPD and indicated that her correct name was "Alexandra Simon" and not "Alexandra Griffin," and that she did not use plaintiff's car, nor could she, since she did not have a driver's license. Ms. Simon further indicated that her household included family members with both the last names Griffin and Simon (A 633-641).

In 2008, the Queens County District Attorney's Office attempted to conduct an interview of the individual

identified as "Alexandra Simon," but was met with resistance from her family, who were uncooperative. ADA Longobardi, of the Queens DA's office, attempted to serve at least one subpoena on "Alexandra Simon" in order to procure her appearance, but was unable to do so. Records obtained through subpoenas issued by the Queens DA's office indicated that the witness's purported residence, 444 Greene Avenue, Brooklyn, N.Y., was also the home of an individual named "Alexina Simon" (A 646).

Accordingly, on August 8, 2008, ADA Longobardi, obtained a material witness order and material witness warrant in connection with the felony complaint against McKinnies, from the Queens County Supreme Court (Holder, J.). McKinnies was a friend of respondent's daughter, Alexandra (A 389).

On August 11, 2008, when informed in person of the material witness order and warrant, rather than be placed formally under arrest and handcuffed, respondent agreed to accompany Detectives Lee and Alegre, who transported respondent from the Millennium Broadway Hotel in Manhattan, where she worked as a housekeeper, to the Queens DA's office, to answer questions pursuant to the material witness order (A 595, p. 40; 596-598; 602, p. 67).

As petitioners were unable to complete their questioning of respondent on August 11, 2008, they asked her to return on the following day, August 12, 2008, with her daughter, and respondent agreed to return, but said she could not force her daughter to come (A 597, p. 49). At no point on August 11, 2008 or August 12, 2008 was respondent handcuffed, fingerprinted, or photographed (A 602-603). On August 11, 2008 and August 12, 2008,

respondent was interviewed in a conference room at the Queens DA's office, not a jail cell, and left unattended there on several occasions throughout both days.[1]

Litigation History

Respondent filed the instant action on March 27, 2009, alleging claims of false arrest, excessive force and municipal liability (A 14-24). On August 13, 2009, she filed an amended complaint, naming two investigators employed by the Queens DA's office, Detective Douglas Lee and Sergeant Evelyn Alegre, and ADA Francis Longobardi.

The Motion for Summary Judgment

On July 18, 2011, petitioners moved for summary judgment by notice of motion, supported by attachments including an attorney's declaration, statement of undisputed facts and a memorandum of law (A 489-537). Petitioners also submitted numerous documents relating to the prosecution of respondent's alleged friend, Shantell McKinnies, and the material witness order naming respondent (A 531).

Petitioners argued that the individual defendants were immune from suit under Flagler v. Trainor, 2010 U.S. Dist. LEXIS 96115 (N.D.N.Y., 2010),[2] because ADA

---

1. Ultimately, Simon was not called on to testify before the Grand Jury against McKinnies, and the felony complaint against McKinnies was finally dismissed (A 648.4)

2. Subsequently affirmed in part (on the issue herein disputed), and vacated and remanded, in part, at Flagler v. Trainor, 663 F.3d 543 (2d Cir. 2011).

Longobardi, in procuring the material witness order and bringing respondent in for questioning, was acting "within the scope of his duties in initiating and pursuing a criminal prosecution." Petitioners further argued that, pursuant to Hill v. City of New York, 45 F.3d 653, 660 (2d Cir. 1995), the two investigators employed by the Queens DA's office, Sgt. Alegre and Det. Lee, were acting as agents assisting ADA Longobardi, and thus also were entitled to absolute immunity. Petitioners further argued that the individual defendants were also entitled to qualified immunity under Mitchell v. Forsyth, 472 U.S. 511 (1985).

Additionally, petitioners argued that, under Andersen v. United States, 2011 U.S. Dist. LEXIS 24469 (E.D.N.Y. 2001), the claim for false arrest failed as a matter of law, since the alleged arrest occurred pursuant to a valid warrant. Further, petitioners argued that respondent voluntarily accompanied the officers to the Queens DA's office, on both August 11 and August 12, and that even if she believed that she was under arrest, a false arrest claim must fail under Flagler, because the act of obtaining a material witness order and the resulting arrest of respondent was protected by absolute immunity (A 519-520).

Finally, petitioners argued that respondent could not establish municipal liability as a matter of law because she could not demonstrate that her constitutional rights were violated and had offered no support for her contention that the City failed to train and supervise the Queens DA's employees, other than bald, conclusory statements (A 521-22).

Respondent opposed the motion, arguing that (1) she stated a viable claim for false arrest; (2) there was

no probable cause for her arrest; (3) respondent did not consent to be confined; (4) petitioners intended to confine respondent; and (5) respondent was conscious of her confinement. Respondent also argued that none of the individual petitioners could properly claim either absolute or qualified immunity because the material witness order obtained by the Queens DA did not entitle petitioners to arrest, detain, or interrogate respondent, and thus petitioners were acting beyond their authority (A 569-572).

Respondent also argued that she had adequately pled the existence of a failure to properly train or supervise the Queens DA's subordinates, "amounting to deliberate indifference to the rights of those who come in contact with municipal employees" (A 573-74).

Petitioners filed a reply in further support of their motion for summary judgment (A 787-806).

The District Court's Order

In an order dated October 7, 2011, and entered October 19, 2011, Judge Vitaliano granted petitioners' motion for summary judgment, dismissing the complaint, Simon v. City of New York, 819 F. Supp. 2d 145, *149 (E.D.N.Y. 2011) (App. 34a-49a). Citing Imbler v. Pachtman, 424 U.S. 409 (1976), the Court noted that this Court therein "first recognized the absolute immunity of prosecutors to § 1983 suits, holding that 'a state prosecuting attorney [acting] within the scope of his duties in initiating and pursuing a criminal prosecution,' is not amenable to suit" (App. 38a).

The District Court then explained the difference between the prosecutor's role as an advocate, and

occasional role as a witness, the latter seen in Kalina v. Fletcher, 522 U.S. 118 (1997) (App. 40a). Noting New York's requirement for a prosecutor's certification on the formal request for a material witness order, the Court found that in making such a request, and in deciding which witness he must call, the prosecutor was performing an act of advocacy, undeniably the type of function contemplated in Imbler that is "intimately associated with the judicial phase of the criminal process." In regard to respondent's argument that ADA Longobardi had placed himself in the role of a witness by submitting his sworn affidavit in support of his application for the material witness order, the Court held that in New York only the prosecutor (or defense counsel) can sign such an application, and that by doing so he is acting as an advocate. The Court also held that the officers who brought respondent to the Queens DA's office were similarly protected by absolute immunity, because their actions were "closely tied to the judicial process as opposed to police functions" (App. 43a).

The Court also held that the DA investigators, if not protected by absolute immunity, were "certainly protected by qualified immunity," as was ADA Longobardi (App. 45a, fn 1):

> At a minimum, Longobardi too would be shielded from suit by qualified immunity. The DA's office knew that (a) the victim [McKinnies] had previously identified a specific individual as the last person to see the stolen vehicle, (b) [respondent] had self-identified as the individual named by the original complainant as having information about the stolen car (though [respondent] had denied having any

> such information),[3] and (c) [respondent] had not been successfully served with a subpoena despite efforts to do so. There is no doubt, on these facts, that Longobardi's actions—based on his legal conclusion that he could only obtain [respondent]'s testimony as a material witness with a material witness warrant—were objectively reasonable at the very least.

Finally, the Court also held that respondent's claim against the City could not survive the motion for summary judgment, as Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), held that a municipality may not be sued under § 1983 for an injury inflicted solely by its employees or agents absent evidence of the execution of a governmental policy or custom, nor could liability be based on *respondeat superior* (App. 47a).

The Motion for Reconsideration

Respondent served a motion for reconsideration on November 30, 2011, chiefly arguing that ADA Longobardi exceeded the scope of his authority by performing investigatory functions in questioning her (A 861-867).

Petitioners opposed, pointing out that ADA Longobardi was fully justified in seeking a material witness order for respondent. As to respondent's claim that ADA Longobardi

3. Here the Court was technically mistaken, because the individual who had self-identified as the person in question was actually respondent's daughter, not respondent herself, but this was unknown to both the Queens Supreme Court and the Queens DA at that time.

erred in failing to bring her "before the court forthwith, petitioners, citing Betts v. Richard, 726 F2d 79 (2d Cir. 1984), argued that in preparing a potential witness for testimony before a grand jury, Longobardi was acting as an advocate in a judicial proceeding, and thus was entitled to absolute immunity regardless of whether respondent had been brought before the Court "forthwith."

The Decision Upon Reconsideration

Ruling from the bench after oral argument, Judge Vitaliano held:

> The issue here is whether or not the prosecutor was acting in an advocate's role. Flagler [663 F3d 543 (2d Cir. 2011)] says a district attorney who is seeking a material witness order and executing a material witness order is acting as an advocate and therefore is entitled to absolute immunity That's what I read Flagler to say (App. 31a).
>
> * * *
>
> We seem to have a fundamental disagreement between [respondent's attorney] and myself about what the law is. There is no disagreement about what the record is, and, more importantly, on this motion to reconsider, where I'm looking for either new facts or somehow new law, the only new law in the case is the fact that the Circuit, since the time of my decision in this case, has issued an opinion that in effect reaffirms my thinking about this case. There is nothing

> that I have that I -- that you showed me that I misapprehended; and therefore, there being nothing new and nothing misapprehended, the motion for reconsideration is denied (App. 33a).

Respondent Simon appealed from the District Court's decision, arguing again, *inter alia*, that defendants exceeded the scope of the authority granted by the material witness order, in that Longobardi performed investigatory activities instead of bringing respondent before the judge.

Petitioners' brief argued that the ADA Longobardi had been acting as an advocate in obtaining the material witness order and serving it on respondent, and thus was entitled to absolute immunity.

With the Court's permission, an *amicus curiae* brief was submitted on behalf of the National Association of Criminal Defense Lawyers, et al, in support of respondent Simon, arguing that the execution of a material witness warrant does not receive absolute immunity.

At the invitation of the Court, the United States Department of Justice submitted a letter brief as *amicus curiae*, which argued that absolute immunity extends to the execution of a material witness warrant, including the detention and questioning of the witness, if the acts performed are "reasonably related to decisions whether or not to begin or carry on a particular prosecution" (Letter Brief at 2, quoting Giraldo v. Kessler, 694 F3d 161, 166 [2d Cir. 2012]).

THE ORDER OF THE SECOND CIRCUIT COURT OF APPEALS

On appeal from the decision of the District Court, the Court of Appeals held that, although defendant Longobardi was protected by absolute immunity in regard to obtaining the material witness order and warrant, his failure to bring respondent before the Court, as required by the language of the material witness order, and the detention of respondent for "two full days," was beyond the protection of absolute immunity. Simon v. City of New York, 2013 U.S. App. LEXIS 17016 * 12-13, 15 (2d Cir. 2013):

> [D]efendants do not have absolute immunity for their detention of Simon against her will for two full days. The *execution* of a material witness warrant is a police function, not a prosecutorial function, as New York's material witness statute, and the warrant issued in this case, explicitly state. While under New York law a prosecutor is responsible for seeking a material witness warrant, only police officers, not prosecutors, are authorized to execute the warrant by arresting people. See N.Y. Crim. Proc. Law § 620.30(2)(b) "[T]he court may issue a warrant directed to a police officer, directing such officer to take such prospective witness into custody . . . ."). Accordingly, the warrant issued by the court in this case was directed to "any police officer in the State of New York." The arrest of Simon and her detention for questioning were thus police functions, not prosecutorial ones (App. 9a-10a).

* * *

Once defendants decided that Simon should be detained for questioning by Longobardi and the officers, however, and compelled her attendance at the Queens DA for two days of intermittent questioning, rather than bringing her before the court to have her status settled, their actions fell outside the protection of the warrant. They were not acting in the role of advocate in connection with a judicial proceeding. A material witness warrant secures a witness's presence at a trial or grand jury proceedings; it does not authorize a person's arrest for purposes of subjecting that person to extrajudicial interrogation by a prosecutor (App. 11a).

REASON FOR GRANTING THE PETITION

UNDER IMBLER AND VAN DE KAMP, ASSISTANT DISTRICT ATTORNEY LONGOBARDI WAS ACTING AS AN ADVOCATE FOR THE PEOPLE IN A CRIMINAL PROCEEDING IN OBTAINING AND DIRECTING THE EXECUTION OF A MATERIAL WITNESS WARRANT, INCLUDING THE DETENTION AND QUESTIONING OF THE WITNESS, AND THUS WAS ENTITLED TO ABSOLUTE IMMUNITY, AS WERE THE DETECTIVES ACTING UNDER ADA LONGOBARDI'S DIRECTION.

The important and sole question here is whether ADA Longobardi, and the police officers assisting him, in bringing in a reluctant witness for questioning pursuant to a material witness warrant, in a case involving an alleged felony fraud by a NYPD police officer, were engaged in prosecutorial advocacy or investigatory police work. The Court of Appeals has drawn a new line between the functions of the District Attorney and those of the police, one that contradicts its own recent holdings in Giraldo v. Kessler, 694 F.3d 161 (2d Cir. 2012), and Warney v. Monroe County, 587 F.3d 113 (2d Cir. 2009). More importantly, it glaringly contradicts this Court's holdings in Imbler v. Pachtman, 424 U.S. 409, 431 (1976) and Van de Kamp v. Goldstein, 555 U.S. 335, 343 (2009).

Here, by separating the functions of the District Attorney in prosecuting a felony complaint already filed, and labeling the actions taken herein as "investigatory"

or "police functions," the Court of Appeals undermines the integrity of the prosecutorial process.[4] Conceding that obtaining the material witness warrant is a prosecutorial function, the Court artificially breaks apart the natural flow of the prosecutor's work into discrete sections, and concludes that (1) because the execution of the warrant is done by the police, and (2) the detention of the witness took two consecutive days, the DA's questioning of that witness pursuant to the warrant is not entitled to absolute immunity.

Here, the District Court correctly found that petitioners had absolute immunity from respondent's claim that her constitutional rights were violated by the material witness warrant and her questioning by the Queens DA regarding Shantell McKinnies' allegedly stolen vehicle. But the Court of Appeals held that such questioning was a purely police, or investigatory function, rather than an advocacy function, and unmindful of the existence of a felony complaint against Shantell McKinnies, held that the Queens DA was not entitled to absolute immunity.

In coming to this conclusion, the Court did not cite this Court's precedent. It referred only to the statute which gives authority to the police to make an arrest under a material witness warrant, and directs the police to bring the subject of the warrant before the Court forthwith, holding (2013 U.S. App LEXIS 17016 at *13-16):

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4. In Warney 587 F.3d at 123, the Court held, "[W]e conclude that it is unhelpful to ascertain the prosecutor's functional role by isolating each specific act done or not done; rather a prosecutor's function depends chiefly on whether there is pending or in preparation a court proceeding in which the prosecutor acts as a advocate."

However, defendants do not have absolute immunity for their detention of Simon against her will for two full days.

* * *

Far from taking actions "intimately associated with the judicial phase of the criminal process," Imbler, 424 U.S. at 430, defendants were actively *avoiding* the court-ordered material witness hearing (App. 9a-10a).

* * *

The prosecutorial function may encompass questioning a witness for a brief period before presentation to determine whether, in the prosecutor's judgment, the witness's testimony should still be pursued or whether the witness should be released without further action. Based on Simon's testimony, however, a reasonable jury could find that the detention and interrogation went beyond what could reasonably be construed as clarifying Simon's status or "preparing" her for a grand jury appearance, and became an investigative interview. . . . [A material witness warrant] does not authorize a person's arrest and prolonged detention for purposes of investigative interrogation by the police or a prosecutor (App.12a).

In stating that the Queens DA was actively avoiding the material witness hearing, the Court of Appeals overlooks the efforts being made by petitioners to prepare

for a grand jury presentation. Even assuming that petitioners failed to bring respondent to court regarding the material witness order, they were nevertheless taking actions "intimately associated with the judicial phase of the criminal process."

The Court did not define "brief," or "prolonged," and its rejection of "two full days" of detention suggests that perhaps one full day, or half a day, might have been acceptable. The Court did not address the DA's subsequent decision not to go to the Grand Jury, a decision at least as important as one to present a witness's testimony, and unquestionably one that exemplifies the advocacy role of a District Attorney.[5]

A Functional Analysis Shows that Petitioners Are Covered by Absolute Immunity.

In Imbler v. Pachtman, 424 U.S. 409, 431 (1976), this Court held that the "functional nature of the . . . [prosecutor's] activities would determine the extent of the immunity." "[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under *§ 1983*." Imbler, 424 U.S. at 431 (emphasis in original). As the District Court noted herein, citing Van de Kamp v. Goldstein, 555 U.S. 335, 343 (2009), "Absolute immunity does apply 'when a prosecutor prepares to initiate a judicial proceeding, or appears in court to present evidence in support of a search warrant application.'" Simon v. City of New York, 819 F. Supp. 2d 145 *149 (E.D.N.Y. 2012) (App. 39a).

5. Indeed, upon information and belief, the felony complaint against McKinnies was withdrawn on August 20, 2008, only eight days after Simon was interviewed by ADA Longobardi.

The question is whether the actions at issue "are part of a prosecutor's traditional functions." Doe v. Phillips, 81 F.3d 1204, 1209 (2d Cir. 1996), cert. denied, D'Amelia v. Doe, 520 U.S. 1115 (1997). "Prosecutorial immunity from § 1983 liability is broadly defined, covering virtually all acts, regardless of motivation, associated with (his/her) function as an advocate.'" (Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994).

This approach was recognized in Imbler, where this Court listed numerous examples of duties encompassed within a prosecuting attorney's advocacy function, as follows: "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." Imbler, 424 U.S. at 431 n.33. See also Burns v. Reed, 500 U.S. 478, 486 (1991) (collecting cases applying "functional approach" to immunity).

In Malley v. Briggs, 475 U.S. 335, 343 (1986), this Court held:

> We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability

for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process (emphasis added).

In Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993), this Court recognized that, pursuant to Imbler, the duties of prosecutors in their role as advocates for the State involve "actions apart from the courtroom." Buckley, 509 U.S. at 272 (quoting Imbler, 424 U.S. at 431, fn. 33). Thus, "Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." Buckley, 509 U.S. at 269.

In Buckley, prosecutors were sued for fabricating evidence "during the early stages of the investigation" where "police officers and assistant prosecutors were performing essentially the same investigatory functions." 509 U.S. at 262-63, 275-76. The fabrication allegation was that prosecutors, after three expert witnesses could not connect a bootprint to the suspect (the § 1983 plaintiff), "shopped" for the opinion of a particular expert who was well known for her willingness to fabricate unreliable

expert testimony. Id. at 262. In denying absolute immunity, this Court reasoned (id. at 273):

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

In Van de Kamp, applying a functional analysis, this Court recognized that even certain kinds of administrative obligations, the type which are directly connected with the conduct of a trial and judicial proceedings, are covered by absolute immunity. Thus, the administrative obligations at issue concerning establishing an information sharing system were "unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which the plaintiff's claims focused 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." Van de Kamp, 555 U.S. 335 at 344.

Furthermore, this Court unanimously recognized: "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 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.'" Van de Kamp, 555 U.S. 335 at 344 (2009), quoting Kalina v. Fletcher, 522 U.S. at 125. See also Van de Kamp, 555 U.S at 349 ("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").

In this case, the conduct at issue is covered by absolute immunity. As set forth in Imbler, the presumptive point at which a prosecutor becomes an advocate is at the point of probable cause for an arrest, which in this case occurred when Shantell McKinnies was arrested for allegedly filing a false report of her car having been stolen, which occurred months before the interview of respondent by the Queens DA. Instead of focusing on the ensuing prosecutorial functions at issue, the Court of Appeals focused on the tale of woe alleged by respondent in her complaint. But the facts are not at issue on this motion for summary judgment.[6] Rather, the issue is the legal

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6. Although the Court below described the facts as reported by the parties as being "dramatically different," they did not differ significantly. Simon insisted that she had been arrested, and petitioner read her deposition testimony to indicate that,

application of the doctrine of absolute immunity to the facts as alleged in the complaint, and testified to during respondent's deposition, accepting them as true, solely for the purposes of the motion herein.

It is well-settled that typically, the point of time at which probable cause exists for an arrest is the point at which a prosecutor is considered an "advocate." Buckley, 509 U.S. at 274. "The immunity attaches to the prosecutor's function, not to the manner in which he performed it." Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994). See also Burns v. Reed, 500 U.S. at 486-87 (functional approach looks to the nature of the function performed, not the identity of the actor who performed it); Forrester v. White, 484 U.S. 219, 229 (1988) (same).

Thus, absolute immunity applies to acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial.[7]

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after being shown the warrant, rather than being handcuffed and forcibly hustled out to the waiting police car, she agreed to go with the police officers. Simon conceded that, in addition to not being handcuffed, she suffered none of the other indicia of arrest: she was not photographed, fingerprinted, or held in a cell or a locked room. Nonetheless, it is clear that, absent the warrant, Simon would not have presented herself to the Queens DA.

7. See Giraldo v. Kessler, 694 F.3d 161 (2d Cir. 2012) (reversal of District Court's denial of absolute immunity for Queens DA who had vigorously interrogated the plaintiff, a suspected domestic violence victim, against her will, and in the face of her persistent denial that her injury was anything but accidental); Flagler v. Trainor, 663 F.3d 543 (2d Cir. 2011) (prosecutor who used material witness order to procure complaining witness for trial was absolutely immune from suit, regardless of any purported misrepresentations in the material witness affirmation); Warney v. Monroe County, 587 F.3d 113, (2d Cir. 2009) (District Attorney

Respondent argued that Longobardi exceeded the scope of his authority because (1) there was no grand jury impaneled, a statement often repeated but never supported with any documentation; and (2) unlike the situation in Flagler, no trial was scheduled, and the material witness order was issued to secure the witness's attendance at trial.[8] Here, whether or not a grand jury presentation was immediately pending, there is no question that a felony complaint was filed with the local criminal court on January 1, 2008 against Shantell McKinnies -- charging her with third degree grand larceny, third degree insurance fraud, first degree falsifying business records, and fifth degree conspiracy -- and was pending when the material witness order was obtained in August, 2008. And, by definition, the material witness order is issued in

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was challenged for withholding exculpatory DNA evidence for 72 days after receiving it, the Court reversed the District Court which had denied absolute immunity for the DA, and held that the DA's actions, even though administrative in nature, were also in the performance of an advocacy function, and thus were entitled to absolute immunity: (citations omitted); Betts v. Richard, 726 F.2d 79, 81 (2d Cir. 1984) (plaintiff was arrested pursuant to a material witness warrant for her as a complaining witness who had changed her mind about testifying against her abusive boyfriend. "[a] bsolute immunity attaches to this act, and any claimed improper motivation is irrelevant" (internal citations omitted).

8. To support this argument, respondent noted that the Second Circuit stated in Flagler that "a material witness order . . . . may issue only when a prosecution is ready for trial." Although Flagler referred to the relevant portion of the Criminal Procedure Law ("CPL") for that case, the statute provides other circumstances under which a material witness order may issue. Pertinent here is CPL §620.20(2)(c), which states that a material witness order may issue where "a felony complaint has been filed with a local criminal court and is currently pending therein."

connection with a pending criminal proceeding. Such acts are "intimately associated with the judicial phase of the criminal process" Imbler, 424 U.S. at 430. Indeed, as here, they occur in the context of a specific judicial proceeding. Thus, respondent's chief argument, that Longobardi was exceeding the scope of his authority is, simply, wrong, and the District Court's holding was entirely correct, Simon v. City of New York, 819 F. Supp. 2d 145 * 151 (E.D.N.Y. 2012) (App. 44a):

> Since a prosecutor's actions in pursuing a criminal prosecution, including deciding which witnesses are indispensible, fall squarely within the "advocacy" category, Longobardi's actions in procuring the material witness warrant are entitled to absolute immunity.[9]

Public Policy is Served By Absolute Immunity In this Case.

The critical purposes served by absolute immunity will be served by reversal here. These purposes include removing the substantial threat of harassment by the overhanging cloud of litigation and interference with the independent functioning of the DA's office and with the capacity to perform their duties set forth in the law as informed by their legal judgment and discretion. See

9. The same reasoning applies to the two police officers (Alegre and Lee), employed by the Queens DA, who executed the warrant obtained by ADA Longobardi, and also questioned respondent pursuant to Longobardi's instructions. Thus, Alegre and Lee were "performing functions closely tied to the judicial process as opposed to police functions." Simon, 819 F. Supp. 2d 145 * 151 (App. 44a).

Imbler and discussion, *ante*. Indeed, the holding of Briggs ("we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process," 475 U.S. at 343), also warns that in its decision herein, the Court of Appeals risks chilling the performance of the prosecutor by arbitrarily limiting the amount of time he/she can spend interviewing a prospective Grand Jury witness.

The adverse consequences of failing to grant absolute immunity are self-evident, just as they were in Imbler, Van de Kamp, and progeny. Independent judgment will be undermined if, following an arrest based upon probable cause, the DA defendants face litigation over ongoing decisions with respect to how to prepare and present cases in the courtroom on behalf of the People of the State of New York. Furthermore, the time and energy devoted to litigating such actions drains the DA's office staff and diverts them from ongoing criminal prosecutions.

In contrast, applying absolute immunity in this case will increase the ability of prosecutors to exercise their independent judgment not only generally, but also specifically in cases involving reluctant witnesses, a not unusual subcategory.

The prospect that prosecutors will face litigation and potential liability imposed by civil damages over the conduct of their official duties will chill prosecutorial efforts that are necessary to combat and deter crime. The increase in litigation will impose precisely the burdens on prosecutors – in terms of inhibiting independent decision-making that the public trust expects, prosecutorial time,

energy and fiscal consequences – that the doctrine of absolute immunity is intended to preclude. See Imbler, 424 U.S. at 423; 424-25, 428 and discussion above, *ante*.

All the policy reasons set forth in Imbler, and reaffirmed in Van de Kamp, apply here. First, forcing a prosecutor to answer in a civil lawsuit for his decision to initiate and pursue a prosecution could skew decision-making, tempting one to consider the personal ramifications of a decision rather than rest that decision purely on appropriate concerns. Id. at 424-25. Further, prosecutors haled into court to defend their decisions would, even if they prevailed on the merits, have had their energies diverted from their important duty of enforcing the criminal law. Id. at 425. Lastly, because the prosecutor may be responsible annually for hundreds of indictments and trials, and because so many of these decisions to prosecute could engender colorable claims of constitutional deprivation, forcing him to defend these decisions could impose intolerable burdens. Id. at 425-26. See also Schloss v. Bounce, 876 F.2d 287 (2d Cir. 1989), citing Imbler at 410, 424-25.[10]

Notwithstanding, however, as courts have frequently recognized, prosecutors are government attorneys who act under the additional safeguards of rules of professional conduct and constitutional obligations. Compare Garcetti v. Ceballos, 547 U.S. 410, 425-26 (2006) ("[T]hese imperatives, as well obligations arising from any other

10. Additionally, the Court reviewed the reasons why, "as a matter of logic, absolute immunity must also protect the prosecutor from damages suits based on his decision not to prosecute." Schloss, 876 F.2d at 290 (discussing *Imbler* and other cases).

constitutional provisions and mandates of criminal and civil laws, . . . provide checks on supervisors who would order unlawful or otherwise inappropriate actions."). Thus, prosecutors who engage in misconduct may be subject to discipline by a variety of institutions, including the prosecutors' offices themselves, state bar associations, and the judges before whom they appear. See, *e.g.*, ABA Standards for Criminal Justice: Prosecution Function, Standard 3-3.5 Relations with Grand Jury. And in the most extreme cases, prosecutors may themselves face criminal sanctions for any misconduct.

In sum, the societal interest in preparing and prosecuting criminal cases entitles prosecutors to absolute immunity from liability that might otherwise affect their pursuit of those proceedings. The Court of Appeals failed to apply the law properly, particularly in light of this Court's unanimous decision in Van de Kamp. By lumping the questioning of respondent in with police functions because only a police officer could effect the material witness arrest, the Court of Appeals created an artificial separation in the continuous functioning of the prosecutor's role as an advocate for the People. And, by limiting the amount of time spent interviewing a witness, the Court needlessly curtailed the preparation necessary for a Grand Jury presentation.

Indeed, the Van de Kamp case should end the inquiry here, given this Court's recognition that even certain kinds of administrative prosecutorial obligations, the type which are directly connected with the conduct of a trial and judicial proceedings, are covered by absolute immunity. This Court aptly distinguished them from other types of administrative duties, such as hiring

and payroll, emphasizing that the activities at issue, "necessarily require legal knowledge and the exercise of related [prosecutorial] discretion...." Van De Kamp, 555 U.S. at 344

For all the above reasons, petitioners are entitled to absolute immunity from this action.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

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