UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS LEE GOLDSTEIN, Plaintiff, v. CITY OF LONG BEACH, et al., Defendants.	CASE NO. CV 04-9692 AHM (Ex) ORDER GRANTING THE COUNTY OF LOS ANGELES'S MOTION FOR JUDGMENT ON THE PLEADINGS

I.

INTRODUCTION

In this "section 1983" lawsuit, Plaintiff Thomas Goldstein has sued former Los Angeles County District Attorney John Van de Kamp and his Chief Deputy District Attorney, Curt Livesay.[1] Goldstein alleges that these defendants failed to institute a system enabling and requiring the prosecutors they supervised to obtain and disclose information concerning jailhouse informants, in violation of the

[1] Plaintiff also has claims against the City of Long Beach and Long Beach detectives John Henry Miller, William Collette Logan Wren, and William MacLyman. Those claims are not at issue in this motion.

prosecutor's constitutional duties under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). One such informant, Edward Fink, testified at Goldstein's 1979 trial that while in jail Goldstein had confessed to killing a man. Fink testified that he received no benefits in exchange for his testimony. Goldstein was convicted and was in custody for 24 years. Then he was granted a habeas corpus hearing at which he presented testimony that Fink had lied; in fact he *did* have an agreement with prosecutors and had received benefits for cooperating with law enforcement. Largely because of this evidence, Goldstein was released from prison. *See Goldstein v. Superior Court*, 45 Cal.4th 218, 223 (2008) (providing complete background).

Defendants Van de Kamp and Livesay previously moved to dismiss the claims against them in this case, claiming they were entitled to absolute prosecutorial immunity. This Court denied their motion and the Ninth Circuit affirmed that ruling. On January 26, 2009, however, the United States Supreme Court held that Van de Kamp and Livesay are entitled to absolute prosecutorial immunity. *See Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009).

Now before the Court is defendant County of Los Angeles's motion for judgment on the pleadings on the Fourth Claim for Relief, which alleges that under *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978) the County is liable to Goldstein for former District Attorney Van de Kamp's constitutionally violative policies and practices. The fundamental question raised by this motion is whether the conduct and practices of the Los Angeles County District Attorney at issue in this case "may fairly be said to represent [the] official policy" of the County of Los Angeles, as opposed to the State of California, for purposes of section 1983 liability. *Monell*, 98 S.Ct. at 2037-38; *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734, 1736 (1997).

McMillian held that the public official whose conduct triggers a section 1983 claim must have acted as a policymaker for a local political entity or agency. *See McMillian*, 117 S.Ct. at 1737; *Ceballos v. Garcetti*, 361 F.3d 1168, 1183 n. 11 (9th Cir. 2004) ("Whereas political subdivisions of states, along with their agencies and officials are 'person[s]' for the purpose of § 1983 liability, *see Monell*, 436 U.S. at 663, 98 S.Ct. 2018; 18 U.S.C. § 1983 (providing only that "person[s] ... shall be liable"), states, state agencies, and state officials sued in their official capacity are not. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

The Court finds that although the issue is close, existing Ninth Circuit precedent applying *McMillian* leads to the conclusion that the District Attorney was acting as an agent of the State. Accordingly, the Court GRANTS the County's motion.[2] However, this determination may well warrant interlocutory review by the Ninth Circuit. (See Section IV.)

II.

SUMMARY OF PARTIES' ARGUMENTS

A. The County's Argument.

Although the County recognizes that *McMillian* provides the framework for this determination, it nevertheless relies on the recent Supreme Court ruling in *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009). There, the Court held that Plaintiff's claims against former District Attorney Van de Kamp and his Chief Deputy pertaining to supervision, training, and information-system management were "directly connected with the prosecutor's basic trial advocacy duties" and "intimately associated with the judicial phase of the criminal process." *Id.* at 862-

[2] Docket No. 245.

64. The County now argues that because the Supreme Court found that those functions were prosecutorial, under California law the District Attorney was acting on behalf of the State, not the County.

The County's conclusion is sound but its reasoning is faulty. The *Van de Kamp* decision did not examine California law. It was based solely on common law precedents and policy implications relating to prosecutorial immunity. True, some courts purporting to use the *McMillian* framework have referred to the distinctions various other courts assessing absolute immunity claims drew among administrative, investigative and prosecutive functions of district attorneys. *Cf. Ceballos v. Garcetti*, 361 F.3d 1168, 1183-84 (9th Cir. 2004) (noting that the court may look for "guidance" to absolute and qualified immunity cases to determine whether prosecutor was acting in his prosecutorial or administrative capacity), *rev'd on other grounds*, 126 S.Ct. 1951 (2006); *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 564-65 (9th Cir. 2002) ("By analogy, these cases [*i.e.* cases addressing whether obtaining and executing a search warrant involve prosecutorial, as opposed to investigative, conduct] inform our decision [on whether a district attorney is a state or county officer]") *vacated and remanded on other grounds, Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003).[3] But however helpful this jurisprudence may be, it is not dispositive.

B. <u>Plaintiff's Argument</u>.

For his part, Plaintiff argues that this is a "mixed case involving administrative and prosecutorial aspects," which "can fairly [be] characterized as

[3] Since the Ninth Circuit *Bishop Paiute Tribe* decision has been vacated, it should not be cited as precedent. However, the Supreme Court did not address the part of the *Bishop* decision that is relevant here.

administrative inaction touching on prosecutorial functions," and that "the conduct is primarily administrative." Opp'n at 22. Based on that characterization, Goldstein contends that the District Attorney was not acting in the capacity of a state officer.

Plaintiff's reliance on such contrived classifications also is beside the point, because the *Van de Kamp* decision did not hinge on labels or characterizations. To be sure, the Supreme Court did agree with Plaintiff that the training, supervision, and information-system management obligations of the District Attorney are generally "administrative obligations." *Van de Kamp*, *supra,* at 861-62. But that characterization made no difference to its analysis and did not affect its conclusion. In deciding whether Van de Kamp and Livesay were entitled to absolute immunity, what mattered to the Supreme Court were public policy considerations - - above all, the need to ensure that a prosecutor can carry out his duties without "harassment by unfounded litigation" and exposure to damages liability. 129 S.Ct. at 860 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976)); see also *id* at 864. To protect prosecutors' independent judgment and reinforce public trust in the integrity of their decision-making, the Supreme Court held, the immunity must be absolute, and it must extend to legal judgments prosecutors make relating to management and dissemination of trial-related information.[4]

Plaintiff also treats this motion as one asserting sovereign immunity under the Eleventh Amendment, which would be subject to the Ninth Circuit's test for determining whether a local government entity is an "arm of the state." This assessment also is mistaken. To be sure, various courts have "blended" *McMillian*

[4] But *Cf. Al-Kidd v. Ashcroft*, ___ F.3d ___, 2009 WL 2836448 (9th Cir. Sept. 4, 2009) (former United States Attorney-General not entitled to absolute immunity for his role in authorizing and possibly procuring material witness arrest warrant).

with Eleventh Amendment immunity. This Court did so at an earlier stage in this case, when the County asserted Eleventh Amendment immunity, yet relied on *McMillian*. *See* Order Granting and Denying Motions to Dismiss, July 27, 2005. In *Ceballos v. Garcetti*, the Ninth Circuit stated that the analyses for determining whether a political subdivision is an arm of the state and for determining whether a county is a "person" subject to the provisions of § 1983 are similar.[5] *See* 361 F.3d at 1183 n. 11; *see also Smith v. County of Los Angeles*, 535 F.Supp.2d 1033, 1035-38 (C.D. Cal. 2008) (using *McMillian* line of cases for an Eleventh Amendment immunity analysis). If under *McMillian* the county officer was acting as an agent of the state, there would be no basis for county liability, and the suit against the individual officer would in fact run against the state as the principal policymaker, which would be immune. *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347 (1974) (Eleventh Amendment immunizes states from liability for retroactive monetary relief).

McMillian focuses on how state law defines the actual functions of a particular official. As Judge Patel succinctly explained, "the section 1983 inquiry

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[5] "In determining whether an entity is an arm of the state, we inquire whether 'the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from . . . [private damage actions brought in federal court."' *Streit v. County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001). *See Mitchell v. Los Angeles*, 861 F.2d 198, 201 (9th Cir. 1988) (describing the circuit's five-factor balancing test for determining whether an entity is actually an instrumentality of the state). The five factors are: (1) "whether a money judgment would be satisfied out of state funds," (2) "whether the entity performs central governmental functions," (3) "whether the entity may sue or be sued," (4) "whether the entity has the power to take property in its own name or only the power of the state," and (5) "the corporate status of the entity." *Mitchell v. Los Angeles*, 861 F.2d 198, 201 (9th Cir. 1988). The first factor refers to the state's exposure to *legal liability* for a monetary judgment, and it is the most important of the five factors. *Eason v. Clark County School District*, 303 F.3d 1137, 1141-1142 (9th Cir. 2002); *Belanger v. Madera Unified School District*, 963 F.2d 248, 251 (9th Cir. 1992).

focuses primarily on which party is empowered to make decisions regarding the formulation and implementation of various programs, while the Eleventh Amendment question centers around whether the state will be financially liable for a judgment against the County and touches peripherally on other questions of the County's fiscal and operational independence." *Laurie Q. v. Contra Costa County*, 304 F.Supp.2d 1185, 1195 n.7 (N.D. Cal. 2004). Perhaps the clearest demonstration of the two distinct analyses is in *Streit*, where the Ninth Circuit first considered the County of Los Angeles's liability under § 1983 for Los Angeles County Sheriff's Department policies using the *McMillian* framework, and then considered the Sheriff's Department argument that if it were a separately suable entity, it would be entitled to Eleventh Amendment immunity under the "arm of the state" doctrine. *Streit*, 236 F.3d at 559-567.

III.

DISCUSSION

A. Identification of Policymaking Officials for Municipal Liability Under § 1983

42 U.S. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

The Supreme Court in *Monell* established that local government bodies are "persons" within the meaning of this statute. 98 S.Ct. at 2036. However, a municipality cannot be held liable through *respondeat superior* -- *i.e.*, "solely because it employs a tortfeasor." *Id.* (emphasis in original). Rather, a

municipality may be held liable only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," causes the constitutional injury. *Id.* at 2037-38.

The Supreme Court later prescribed the manner for determining where policymaking authority lies for purposes of § 1983 as follows:

> Reviewing the relevant legal materials, including state and local positive law, as well as custom or usage having the force of law, the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity.

Jett v. Dallas Independent Sch. Dist., 491 U.S. 701, 109 S.Ct. 2702, 2724 (1989) (emphasis in original).

Here, there is no dispute that Van de Kamp was the final policymaker with responsibility for the practices that Goldstein alleges violated his rights.

B. *McMillian*

McMillian v. Monroe County, supra, should have been the primary Supreme Court authority on which the County relied, not *Van de Kamp v. Goldstein*. McMillian was convicted of murder. After his conviction was overturned, he sued Monroe County (Alabama) and its Sheriff, claiming they had intimidated witnesses and suppressed exculpatory evidence, thereby causing his

wrongful conviction and violating his constitutional rights. The issue was not whether in carrying out the particular acts underlying the plaintiff's section 1983 claim the Sheriff was a final "policymaker" (the parties agreed he was) but whether the policy the Sheriff made was the policy of the State of Alabama or of Monroe County. The Court held that he was a policymaker for the State, not the County.

Two principles from the Supreme Court's previous cases guided its analysis. *See Streit*, 236 F.3d at 560. First, the Court noted that it had to characterize the "actual function" of the county official "in a particular area, or on a particular issue," rather than generalizing about his function or role. *McMillian* at 1737 (citing *Jett*, 109 S.Ct. at 2724). Second, it had to look to how state law defined the official's functions in order to determine whether he was making policy for the state or the county. *Id.* (citing *Jett*, 109 S.Ct. at 2723; *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. at 924 (plurality op.) (1988); and *Pembauer v. Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300 (plurality op.) (1986).

Based on its review of Alabama's constitution, statutes and case law, the Court determined that the Alabama sheriff was a state official when carrying out his law enforcement duties. *Id.* at 1740. The Court placed particular weight on the Alabama Supreme Court's understanding that it was "'the framers' intent to ensure that sheriffs be considered executive officers of the state.'" *Id.* at 1738 (quoting *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987). In support of this conclusion, the Court noted that the state's current constitution designated sheriffs as executive officers of the state, whereas a previous version of the constitution did not list them as executive officers. In addition, the constitution provided that for neglect of their law enforcement duties they could be impeached not by the county courts, but by the Alabama Supreme Court. *Id.* Thus, sheriffs were

subject to the same impeachment procedures as state legal officers and lower state court judges, setting them apart from county and municipal officers. *Id.* The Court also found it significant that the Alabama Supreme Court had interpreted the state constitution as prohibiting county liability for a sheriff's official acts based on *respondeat superior*. *Id.* at 1738-39.

The Court then considered the duties of the sheriff under the Alabama Code, finding it important that while the sheriffs were given complete authority to enforce the state criminal law in their counties, the governing body of the counties (county commissions) could not instruct them in their law enforcement duties. *Id.* at 1739. In contrast, the Court noted, the Alabama Attorney General did have "direct control" because state law allowed the Attorney General to direct the sheriff to conduct special investigations in his county. *Id.* Moreover, the state legislature set the salaries of all the sheriffs. *Id.* Given these provisions establishing sheriffs as state officers, the Court did not find it sufficiently convincing that Sheriffs' salaries were paid out of the county treasury, that their jurisdiction was limited to the borders of their county, or that they were elected locally by county voters. *Id.* at 1740. Although officials and residents had some "element of control," the "weight of the evidence" pointed to the conclusion that Alabama's sheriffs were locally placed state officials who represented the state when they executed their law enforcement duties. *Id.*

C. Post-*McMillian* California and Ninth Circuit Cases

In *Pitts v. County of Kern*, 17 Cal.4th 340, 362 (1998) the California Supreme Court held that a district attorney was a state official for purposes of Section 1983 liability when preparing to prosecute and prosecuting state crimes and when training and developing policy in these areas. The County relies heavily on *Pitts*. In 2004 the California Supreme Court, also relying heavily on *Pitts*, held

that Sheriffs, too, act on behalf of the State when performing law enforcement activities. *Venegas v. County of Los Angeles*, 32 Cal. 4th 820 (2004).

The *Venegas* court provided the following useful description of *Pitts*:

> In *Pitts*, persons whose child molestation convictions were reversed on appeal brought civil actions against the County of Kern and its district attorney and his employees, asserting civil rights violations under section 1983 arising from alleged misconduct during the criminal prosecution. The district attorney and his employees prevailed under the doctrine of prosecutorial immunity and, accordingly, *Pitts* was concerned only with the liability of the county. (*Pitts*, supra, 17 Cal.4th at pp. 345-347, 352, 70 Cal.Rptr.2d 823, 949 P.2d 920.)
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> The plaintiffs' action against the county alleged that its district attorney had established a pattern or practice of procuring false statements and testimony by threats, promises, and intimidation, and also failed to provide adequate training procedures and regulations to prevent such conduct. (*Pitts*, supra, 17 Cal.4th at p. 352, 70 Cal.Rptr.2d 823, 949 P.2d 920.) . . . *Pitts* held, however, that a district attorney represents the state rather than the county when preparing to prosecute crimes and training and developing policies for prosecutorial staff. *Although*

Pitts involved district attorneys rather than sheriffs, the court relied on statutes and analysis applying to both kinds of officers . . .

In *Pitts*, we first observed that the question whether a public official represents a county or a state when acting in a particular capacity is analyzed under state, not federal law. (*Pitts*, supra, 17 Cal.4th at pp. 352-353, 356, 70 Cal.Rptr.2d 823, 949 P.2d 920; see *McMillian*, supra, 520 U.S. at p. 786, 117 S.Ct. 1734 [determining actual functions of government officer is dependent on relevant state law].) For guidance in resolving this question, *Pitts* next turned to *McMillian*, which had examined Alabama state law to determine whether a sheriff was a state or county official . . .

Pitts applied *McMillian*'s analytical framework to conclude that a California district attorney acts on behalf of the state rather than the county in preparing to prosecute crimes and in training and developing policies for prosecutorial staff. (*Pitts*, supra, 17 Cal.4th at pp. 356-366, 70 Cal.Rptr.2d 823, 949 P.2d 920.) In reaching its conclusion, the court considered several constitutional and statutory provisions tending to support or negate state agency, but placed special emphasis on article V,

section 13, of the state Constitution, providing that "[t]he Attorney General shall have direct supervision over every district attorney ... in all matters pertaining to the duties of their ... offices...." Under this same provision, the Attorney General may require district attorneys to make appropriate reports "concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions," and may prosecute violations of law if, in his or her opinion, state laws are not adequately being enforced in any county. (*Pitts*, supra, 17 Cal.4th at pp. 356-357, 70 Cal.Rptr.2d 823, 949 P.2d 920.) We also noted in *Pitts* that Government Code sections 12550 and 12524, and Penal Code section 923 contain similar provisions placing county district attorneys under the supervision of the state Attorney General. (*Pitts*, supra, at pp. 357-358, & fn. 5, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

We observed in *Pitts* that, in contrast to the broad supervisory powers of the Attorney General over district attorneys, Government Code section 25303 bars county boards of supervisors from affecting or obstructing the district attorneys' investigative or prosecutorial functions. (*Pitts*, supra, 17 Cal.4th at p. 358, 70 Cal.Rptr.2d 823, 949 P.2d

920.) We also pointed out that a district attorney acts in the name of the people of the state when prosecuting criminal violations of state law. (Id. at p. 359, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

Pitts readily acknowledged that other constitutional and statutory provisions would support a conclusion that a district attorney is a county officer: For example, county voters elect district attorneys (Cal. Const., art. XI, § 4, subd. (c)), who are listed as county officers (Gov.Code, § 24000, subd. (a)), are generally ineligible to hold office unless they are registered voters of the county in which they perform their duties (Gov.Code, § 24001), and are compensated as prescribed by the county board of supervisors (Gov.Code, § 25300). (*Pitts*, supra, 17 Cal.4th at pp. 360-361, 70 Cal.Rptr.2d 823, 949 P.2d 920.) Furthermore, under Government Code section 25303, the county board of supervisors supervises the district attorney's official conduct and expenditure of funds, although it cannot affect the district attorney's independent investigative and prosecutorial functions. (*Pitts*, supra, at p. 361, 70 Cal.Rptr.2d 823, 949 P.2d 920.) Necessary expenses incurred by the district attorney in the prosecution of criminal cases are considered county charges. (Gov.Code, § 29601, subd. (b)(2).)

> Yet, after balancing the competing factors, and relying on *McMillian's* similar analysis, we concluded in *Pitts* that, when preparing to prosecute and prosecuting crimes, a district attorney represents the state, and is not considered a policy maker for the county. (*Pitts*, supra, 17 Cal.4th at p. 362, 70 Cal.Rptr.2d 823, 949 P.2d 920.) We similarly concluded that a district attorney does not represent the county when training staff and developing policy in the area of criminal investigation and prosecution. We stated that "[n]o meaningful analytical distinction can be made between these two functions [i.e., prosecuting crime on the one hand, and training/policymaking regarding criminal investigation and prosecution on the other]. Indeed, a contrary rule would require impossibly precise distinctions." (Ibid.) Thus, the constitutional and statutory provisions discussed above give the Attorney General "oversight not only with respect to a district attorney's actions in a particular case, but also in the training and development of policy intended for use in every criminal case." (Id. at p. 363, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

Venegas, 32 Cal.4th at 830-833 (emphasis in original).

Despite the importance of *Pitts* (reflected in the length of the foregoing

summary of that case in *Venegas*), *Pitts* does not control this Court's analysis. Liability under § 1983 is ultimately a federal question. *Streit*, 236 F.3d at 560. Although the Ninth Circuit takes into account state courts' analyses of state law, it requires an "independent analysis of California's constitution, statutes and case law." *Id.* at 561; *see also Weiner v. San Diego County*, 210 F.3d 1025, 1029 (9th Cir. 2000); *Bishop Paiute Tribe v. County of Inyo*, *supra*, 291 F.3d at 562-65. Indeed, the Ninth Circuit has sometimes diverged from the California Supreme Court. Like *Pitts*, the Ninth Circuit has held that a California district attorney is acting for the state when deciding whether to prosecute an individual. *Weiner*, 210 F.3d at 1031. Unlike *Pitts*, the Ninth Circuit has gone no further. A district attorney is acting for the county, it has held, when investigating a crime, *Bishop Paiute Tribe*, 291 F.3d at 565 (district attorney's execution of a search warrant) or when making personnel decisions unrelated to any particular prosecution or ongoing judicial proceeding. *Ceballos v. Garcetti*, 361 F.3d 1168, 1184 (9th Cir. 2004), *rev'd on other grounds*, 126 S.Ct. 1951 (2006). *See Womack v. County of Amador*, 551 F.Supp.2d 1017, 1027 (E.D. Cal. 2008) (describing the divergence of California and Ninth Circuit authority).[6]

D. Application of *McMillian* in Ninth Circuit

[6] The California Supreme Court and Ninth Circuit have also split on the question of whether county sheriffs are state or county policymakers. The former court holds that sheriffs act on behalf of the state when executing their law enforcement duties, while the latter has consistently held that sheriffs act on behalf of the County. *Compare Venegas v. County of Los Angeles*, 32 Cal.4th 820, 832-33 (2004) with *Streit*, 236 F.3d at 564-65 (sheriffs' management of county jails); *Brewster v. County of Shasta*, 275 F.3d 803, 812 (9th Cir. 2001) (sheriffs' investigation of crimes); *Bishop Paiute Tribe*, 291 F.3d at 554 (sheriffs' execution of search warrant). As previously explained, the differences between prosecutive, investigative and administrative functions are central to the issues of absolute immunity and not to *Monell/McMillian* liability.

Weiner v. San Diego County, 210 F.3d 1025 (9th Cir. 2000) is the key case. There, the plaintiff sued the county under Section 1983, claiming that the district attorney had twice wrongfully prosecuted him for murder (the first time securing a conviction, which was overturned, and the second time an acquittal). Plaintiff claimed the district attorney's office had withheld exculpatory evidence. The Ninth Circuit held that "the district attorney acted on behalf of the state, not the County, in deciding to prosecute Weiner, and as a result Weiner's § 1983 claim against the County for his alleged wrongful prosecution fails." *Id.* at 1026-27.

In *Weiner*, the Ninth Circuit relied heavily on the California Supreme Court's opinion in *Pitts*. *Id.* at 1028-29. Indeed, the Ninth Circuit adopted the *Pitts* Court's assessment of at least five aspects of California constitutional and statutory law to which *Pitts* pointed in concluding that a district attorney is a state officer: (1) Art. V, section 13 of the California constitution (conferring direct supervision over every district attorney on the State Attorney-General), *id.* at 1029; (2) Gov't Code § 12550 (same), *id.*; (3) Gov't Code § 12524 (authorizing Attorney-General to call into conference district attorneys for the purpose of achieving uniform enforcement of state laws), *id.*; (4) Gov't Code §25303 (prohibiting county boards of supervisors from obstructing the *investigative and* prosecutorial functions of the district attorney), *id.* (emphasis added); (5) Gov't Code §100(b) (all suits are to be conducted in the name of the state), *id.*

On the other hand, *Weiner* also discussed at least four of the "provisions that weigh . . . against concluding that the district attorney is a state officer" that *Pitts*, too, had considered: (1) Gov't Code § 24000(a) (listing district attorneys as county officers), *id.*; (2) Gov't Code § 25300 (counties set district attorneys' salaries), *id.*; (3) Gov't Code § 24001 (district attorneys must be registered to vote in their respective counties), *id.*; and (4) Gov't Code § 25303 (counties supervise district attorneys' use of public funds), *id.*. The Ninth Circuit went on to cite two

additional statutes that could support the conclusion that under California law district attorneys are county officers: Gov't Code §§ 3060 and 3073 (county grand juries can initiate proceedings to remove a district attorney). *Id.* at 1029-30.[7]

Having reviewed these factors, the Ninth Circuit concluded,

> Balancing the foregoing constitutional and statutory factors leads us toward the conclusion that under California law a district attorney acts as a state official when deciding whether to prosecute an individual . . . [This is so because] the function of the district attorney, including who can control the district attorney's conduct is the issue.

Id. at 1030. Given that determination, the Ninth Circuit held that the "district attorney was acting as a state official in deciding to proceed with Weiner's criminal prosecution. Weiner's § 1983 claim against the County, therefore, fails." *Id.* at 1031.

Should *Weiner* be limited only to a district attorney's decision to proceed with a prosecution, as opposed, for example, to decisions about how his office investigated or continued to pursue a prosecution? The short answer is "no."

To start with, *Weiner* itself twice cited Gov't Code § 25303, which provides that a county may not obstruct *both* "the investigative and prosecutorial function of the district attorney . . . ." *Id.* at 1029-30. *Weiner* also stated, "All relevant California cases, including *Pitts*, have held that district attorneys are state officers for the purpose of *investigating and* proceeding with criminal prosecutions." *Id.* at 1030 (emphasis added).

In this regard, the pithy summary of *Weiner* that Judge Whyte provided in *MK Ballistics Systems v. Simpson*, 2007 WL 2022025, at *3; (N.D. Ca. 2007) is

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[7] However, *Weiner* later noted that under Gov't Code § 3073 the state court must appoint a prosecutor to conduct such removal proceedings. *Id.* at 1030.

worth quoting:

> With the exception of prosecuting suits under the name of the state of California, all of the constitutional and statutory provisions the Ninth Circuit considered in *Weiner* apply to both investigations and prosecutions. See also *Brewster v. County of Shasta*, 275 F.3d 803, 810 (9th Cir.2001). In distinguishing *Weiner* to find that a sheriff acted for the county in conducting investigations, the court in *Brewster* drew the line not between investigations and prosecutions but between sheriffs and district attorneys. Id. It found that California law "establishes a closer relationship between the Attorney General and district attorneys than between the Attorney General and county sheriffs," stressing that the Attorney General could "take full charge of any investigation or prosecution, in which case [he] would have all the powers of a district attorney." Id. (emphasis added) (citing Cal. Const. art. V, § 13 and Cal. Gov.Code § 12550). *Brewster* thus implicitly accepts the proposition that *Weiner* applies to district attorneys acting in both investigations and prosecutions.

In *MK Ballistics,* the Section 1983 claim against the district attorney arose out of the conduct of an investigator. Judge Whyte nevertheless concluded that the claim should be dismissed because the district attorney had acted as a state officer. He reached the same conclusion in *Walker v. County of Santa Clara*, 2005 U.S. Dist. LEXIS 42118 (N.D. Cal. 2005), where he noted that in *Pitts* "[t]he California Supreme Court went on to find that there was no reasonable distinction between a district attorney's actions when prosecuting violations of state law, and the district attorney's training and developing policy in these areas. Thus, a district attorney also represents the state when training *and developing policies related to prosecuting* violations of state law." Id. at *11. (emphasis added).

E. Conclusion.

As noted above, Goldstein's claims basically are that the District Attorney and his office violated Goldstein's constitutional right to due process by not creating and maintaining systems necessary to assure that if a jailhouse informant has an agreement with the District Attorney, the agreement is disclosed to the defendant. In light of *Weiner* and the two decisions of Judge Whyte construing it,

the Court reluctantly concludes that these claims must be dismissed because the District Attorney was acting as a state officer.

IV.

POSSIBLE INTERLOCUTORY APPEAL

This Court is profoundly concerned that the foregoing conclusion could result in a terrible injustice. Plaintiff Goldstein spent 24 years in custody for a crime that, the evidence now available strongly suggests, he did not commit. Goldstein alleges that the evidence that led to his release after that very lengthy incarceration had been withheld from him prior to and during his trial as a result of the policies and practices of the then-District Attorney (Van de Kamp) and his Chief Deputy (Livesay). Because of the U.S. Supreme Court's recent ruling in *Van de Kamp v. Goldstein*, *supra*, those two individuals recently have been relieved of potential liability; they are entitled to absolute immunity. Now, the County of Los Angeles, for whose District Attorney Office Van de Kamp and Livesay were *the* highest ranking policymakers, will also be relieved of potential liability, as a result of an entirely different legal doctrine (*McMillian*).

Unfortunate and even inequitable consequences of a district court's rulings do not warrant interlocutory review under 28 U.S.C. § 1292(b). But an "order [that] involves a controlling question of law as to which there is substantial ground for difference of opinion and [as to which] an immediate appeal from the order may materially advance the ultimate termination of the litigation" does warrant such review. It appears to this Court that this ruling may meet that standard, for the following reasons.

A. Provisions Not Cited in *Weiner* Indicate District Attorneys Are County Officers.

California's 58 district attorneys serve both the state and their respective counties. *See Ceballos*, 361 F.3d at 1182 (noting that district attorneys serve both the state and the county). The Ninth Circuit has not squarely addressed the part of the *Pitts* holding dealing with the district attorney's "preparing to prosecute" and "training and developing policy" for prosecutions. Its previous decisions concerning district attorneys, - - *Weiner*, *Bishop Paiute Tribe*, and *Ceballos*, - - dealt with a specific decision whether to prosecute an individual, a specific decision about a search warrant during an investigation, and personnel decisions alleged to be retaliation against one prosecutor, respectively. In short, the Ninth Circuit has not had occasion to apply the *McMillian* framework to a claim, such as Goldstein's here, of failure on the part of a prosecutor to enact policies and procedures, including training and supervision, that were constitutionally required.

In finding the district attorney functioned as a state official in *Weiner*, the Ninth Circuit did not cite certain state law provisions that could warrant the opposite conclusion it had reached in *Ceballos* and *Bishop Paiute*. Thus, in addition to Gov't Code § 25303, in California district attorneys are beholden to, and serve as a guardian of, the county treasury and county interests. The District Attorney's Office submits a proposed budget to the county board of supervisors each fiscal year. *Cf. Streit*, 236 F.3d at 562 (citing Los Angeles County Code, subch. 4.12.070). (In Alabama, in contrast, sheriffs' and district attorneys' salaries are set by the state legislature. *McMillian*, 117 S.Ct. at 1739.) Necessary expenses incurred by the district attorney in prosecuting criminal cases are county charges. Gov't Code § 29601(b)(2). *See also id.* § 26520. The district attorney must defend the county treasurer and auditor from legal claims. *Id.*, § 26520. He cannot advocate or present claims against the county. *Id.*, § 26527. He may

defend the county against claims of the State of California in a state eminent domain proceeding. *Id.*, § 26541. Moreover, counties are required to defend and indemnify the district attorney in an action for damages. Cal. Gov. Code § 825. *Cf. Brewster*, 275 F.3d at 808 (noting that a similar provision in Gov't Code § 815.2 indicates the state legislature considered the sheriff to be a county actor). It is also significant that if Goldstein *were* entitled to pursue his claims against the County because of the District Attorney's alleged constitutional violations, the county, not the state, would be liable for any monetary judgment, a "crucial factor [that] weighs heavily[.]" *Streit*, 236 F.3d at 562 (citing Cal. Gov. Code § 815.2).

These various budgetary and funding provisions certainly suggest that the county government and county residents have not just an "element of control" over the district attorney, *McMillian*, 117 S.Ct. at 1740, but an array of tools and powers that assure the district attorney is truly answerable to the county. (Of course, in any event he is answerable to the voters in the county.) Moreover, as described in the next section, most of the laws treating district attorneys as state officers are not as wide-ranging or direct.

B. The state law provisions providing for Attorney General supervision do not necessarily establish that district attorneys act for the state in making policies for their offices.

California law does not confer on the Attorney General the power to direct the activities of any district attorney, only the power to assume the district attorney's powers and responsibilities. *See* Cal. Const., art. V, § 13; Cal Gov. Code § 12550. Turning first to Article V, § 13 of the constitution, the Ninth Circuit has cautioned against placing much weight on that constitutional provision. The original purpose of the provision "was to ease the difficulty of solving crimes, and arresting responsible criminals, by coordinating county law

enforcement agencies and providing the necessary supervision by the Attorney General over them." *Brewster*, 272 F.3d at 809 (quoting *Pitts*, 17 Cal.4th at 357 n.4). Since this constitutional provision applies to "all law enforcement officers in California," it is not helpful in determining whether a particular local law enforcement entity is subject to § 1983 liability. *See id.* Indeed, the Ninth Circuit has found that California sheriffs are county actors, notwithstanding Article V, section 13. *See, e.g.*, *Brewster*, 275 F.3d 807-08; *Streit*, 236 F.3d at 555-56.

Government Code §§ 12550 and 12524, which implement Article V, section 13 of the constitution, merely entitle the Attorney General to assist and coordinate across local jurisdictions or to take over a district attorney's role of prosecuting criminal violations; they do not explicitly grant the Attorney General the power to direct the manner in which the district attorney carries out his duties.

The Attorney General is not authorized to supervise a district attorney in the same manner that a district attorney is required to supervise the activities of junior prosecutors in his office, or even in the way the Attorney General may "*direct the activities* of any *sheriff* relative to the investigation or detection of crime within the jurisdiction of the sheriff . . ." Cal. Gov. Code § 12560 (emphasis added). In contrast, in *McMillian* the Alabama Attorney General had "direct control" over sheriffs by virtue of being able to direct them to conduct investigations. *McMillian*, 117 S.Ct. at 1739.

California case law confirms this interpretation. *People v. Brophy*, cited in *Brewster*, 275 F.3d 810-11 and *Bishop Paiute Tribe*, 291 F.3d at 563-64, addressed at length (albeit in *dicta*) the relationship under Government Code § 12550 between the Attorney General and county sheriffs and district attorneys. The Court of Appeal in *Brophy* wrote that the Attorney General's "direct supervision over every district attorney and sheriff . . . does not contemplate absolute control and direction of such officials," because district attorneys and

sheriffs are officers created by the Constitution, "with public duties delegated and entrusted to them. . . . the performance of which is an exercise of the governmental functions of the particular political unit for which they, as agents, are active." 49 Cal.App.2d 15, 28 (Cal. Ct. App. 1942). The Court of Appeal further stated that "sheriffs and district attorneys cannot avoid or evade the duties and responsibilities of their respective offices by permitting a substitution of judgment." *Id.* The provision allowing the Attorney General to assume the powers of a district attorney could allow a substitution of judgment, *Brophy* noted, but "even this provision affords no excuse for a district attorney or a sheriff to yield the general control of his office and duties to the Attorney General." *Id.*

Government Code § 25303, which also applies to both district attorneys and sheriffs, authorizes the board of supervisors "to supervise the official conduct of all county officers," although it goes on to prohibit the board from obstructing the investigative and prosecutorial functions of the sheriff and district attorney. The Ninth Circuit has noted that the limitation on obstruction "appears to be directed at preserving the independence of the sheriff from political pressure. The provision thus is akin to a separation of powers provision, and as such, has no obvious bearing on whether the sheriff should be understood to act for the state or the county. . . Merely because a county official exercises certain functions independently of other political entities within the county does not mean that he does not act *for* the county." *Brewster*, 275 F3d. at 809-10 (emphasis in original). The *Brewster* characterization of the limitation in Gov't Code § 25303 could also apply to district attorneys.

Although the Attorney General unquestionably has the authority to take over a particular case or institute prosecutions himself, nothing in these California statutory and constitutional provisions indicates that he has the authority to prescribe a jailhouse informant policy that county district attorneys would have to

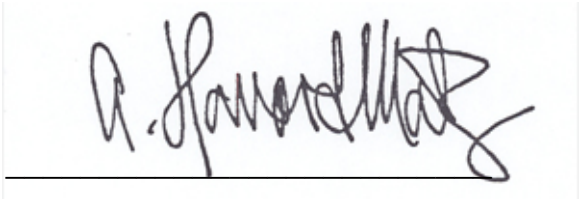
follow, or to proscribe the one that the District Attorney followed here. In short, these provisions do not establish that the Attorney General has the authority to formulate policies and procedures applicable to the day to day conduct of a District Attorney office.

C. Choice Available to Plaintiff

This difficult lawsuit has been pending for some five years, in large measure because it has triggered several important and precedential decisions (including by the United States and California Supreme Courts). Typically, a plaintiff abhors delay. But if in light of this Section IV Goldstein wishes to request the Ninth Circuit to grant interlocutory review of this ruling, this Court would probably certify it for such review (although first giving the County an opportunity to oppose certification). Accordingly, by not later than October 2, 2009, Plaintiff shall specify in writing whether he seeks interlocutory review. If he does, the County shall file its written response to that request not later than seven days after plaintiff's request has been filed. The Court will thereafter decide whether to certify the matter for interlocutory review.

IT IS SO ORDERED.

DATE: September 23, 2009



A. Howard Matz
United States District Judge