

NO. 83419-3

SUPREME COURT OF THE STATE OF WASHINGTON

PAMELA K. SCOTT,

Petitioner,

v.

LOUISE LOVE, ET. AL.,

Respondents.

RESPONDENT CLARK COUNTY'S RESPONSE TO
APPELLANTS' PETITION FOR REVIEW TO THE
WASHINGTON STATE SUPREME COURT

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INTRODUCTION

The trial court and the Court of Appeals have correctly given effect to repeated holdings that absolute prosecutorial immunity bars Petitioner's claims against the Clark County Defendants. The trial court and the Court of Appeals correctly rejected Appellant's arguments that *Kalina v. Fletcher* applies to this case, which would have precluded the application of the absolute prosecutorial immunity defense. 522 U.S. 118, 127 (1997). The Court of Appeals correctly reasoned that case was not dispositive because DPA Hayes did not place himself in the position of a complaining witness because he did not attest to the veracity of the facts in the charging document at issue. Petitioner disagrees with the Court of Appeals reasoning and makes a baseless claim that DPA Hayes violated her state and federal constitutional rights.

Ultimately, because none of the factors set forth in RAP 13.4(b) are met, this Court should deny the petition for review.

STATEMENT OF THE CASE

On May 31, 2019, Appellant filed a civil rights lawsuit against several individuals who work for county and state agencies. Some of those defendants included prosecutors from the Clark County Prosecutor's Office and the Office itself. CP 1-68. Appellant's claims stem from the criminal sentence she was ordered to serve after being convicted of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree was incorrect. CCSCP 14 at 1-9¹. Appellant was sentenced by a Clark County Superior Court Judge to a Special Sex Offender Sentencing Alternative (SSOSA) which resulted in a sentence of 366 days of confinement and 49 months of community custody. *Id.* The day after this sentence was entered, the parties returned to the Court to modify the judgment to reflect incorrect guidance from the Office of Administration of the Courts that the community custody portion of Appellant's

¹ The Clark County Respondents have submitted a supplemental designation of clerk's papers. References to those documents will be in the following format: CCSCP followed by the document number from the Cowlitz County Case Summary with the specific pages cited.

sentence was to be calculated by subtracting the period of incarceration from the total suspended sentence. *Id.* As a result of this incorrect direction, the parties struck the 49-month suspended sentence and instead ordered Appellant to serve a total of 61 months - 366 days of incarceration and 49 months of community custody.

In January 2016, the Department of Corrections conducted a review of SSOSA sentences and identified Plaintiff's sentence as having been improperly calculated based upon the incorrect guidance from the Administrative Office of the Courts. *Id.* The Department of Corrections concluded that because the judgement and sentence stated Appellant's sentence was for 61 months, the correct period of community custody should have been 61 months *after* she served the 366 days of incarceration. *Id.*

A Deputy Prosecuting Attorney for Clark County, Colin Hayes, filed a motion on behalf of the State of Washington to amend the judgment and sentence to reflect what was believed to be the correct sentence. CCSCP 14 at 4. The motion was filed pursuant to CrR 7.8 and the Court granted the motion over

Appellant's opposition on May 23, 2016. *Id.* Appellant then appealed the amendment to the judgment and sentence, arguing the change corrected an error of law and should have been corrected through a direct appeal instead of a criminal motion. *Id.* In May 2017, the State conceded that the error in the original judgment and sentence contained an error of law that should have been addressed through a direct appeal. *Id.* The Court of Appeals then reversed the trial court and remanded the judgment and sentence for further proceedings. *Id.* On June 20, 2017, the trial court then struck the May 23, 2016, order. *Id.*

Appellant then filed a federal lawsuit against two Clark County Prosecuting Attorneys, Anna Klein and Colin Hayes, and the Clark County Prosecuting Attorney's Office, claiming damages arising from the post-conviction prosecutorial actions that are also subject to this lawsuit. CCSCP 14 at 10-21. On August 8, 2017, the district court *sua sponte* dismissed her claims against the Clark County Prosecuting Attorneys without prejudice on the basis of prosecutorial immunity and because Appellant's allegations did not sufficiently demonstrate malice. SCP 5. Appellant then appealed that dismissal to the Ninth

Circuit Court of Appeals. On November 22, 2017, the Ninth Circuit held that the dismissal was proper on the basis of prosecutorial immunity. *Id.*

On May 31, 2019, Appellant filed the present case in Cowlitz County Superior Court which re-states the same claims and allegations against Respondents Anna Klein, Colin Hayes, and the Clark County Prosecuting Attorney's Office. CP 1-68. Those Respondents filed a motion to dismiss on July 25, 2019, arguing they are entitled to absolute prosecutorial immunity, warranting dismissal of the claims against them. CCSCP 14 at 1-9. The Clark County Respondents filed another motion to dismiss raising the additional argument that the Appellant had failed to validly state a *Monell* claim against the Clark County Prosecutor's Office on September 4, 2019. CCSCP 24 at 1-9. The Cowlitz County Court granted both motions to dismiss on November 12, 2019. CCSCP 48 1-2. A motion for reconsideration followed, which the trial court denied.

ISSUES PRESENTED FOR REVIEW

Petitioner fails to present any specific statement of issues, but instead presents “Genuine Issues of Material Fact Presented for Review”. Should this Court consider those “statements” to be that of issues instead of facts, Clark County rejects Petitioner’s statements and presents the following in lieu thereof:

Whether Deputy Prosecuting Attorney Colin Hayes is entitled to absolute prosecutorial immunity for Petitioner’s claims that he improperly filed a motion to revoke Petitioner’s SSOSA?

ARGUMENT

- I. The Court of Appeals Decision is consistent with many Courts’ repeated holdings that absolute prosecutorial immunity applies to cases where a prosecutor does not personally attest to the veracity of facts presented in a document.

The United States Supreme Court and Washington State Courts have long held that prosecuting attorneys acting in their prosecutorial role are entitled to absolute immunity from civil liability. *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935); *Musso–Escude v. Edwards*, 101 Wn. App. 560, 570, 4 P.3d 151 (2000); *McCarthy v. Cty. Of Clark*, 193 Wn. App. 314,

337, 376 P.3d 1127, 1138 (2016); and *Imbler v. Pachtman*, 424 US. 409, 431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (“[I]n initiating prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.”). In 2016, the Washington Court of Appeals reiterated this longstanding doctrine:

“[P]rosecutors generally have absolute immunity for initiating and pursuing a criminal prosecution. Absolute immunity means that a prosecutor is shielded from liability even when he or she engages in willful misconduct. This immunity is warranted to protect the prosecutor's role as an advocate because any lesser immunity could impair the judicial process.”

McCarthy at 337 (internal citations omitted).

The justification for this absolute rule "is founded upon a sound public policy, not for the protection of the [prosecutorial] officers, but for the protection of the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property." *Anderson*, 181 Wash. at 331. And in Washington, the government entity that employs the prosecuting attorney shares the same immunity as

the individual. *Creelman*, 67 Wn.2d at 885.² Thus, to the extent a prosecutor would be individually immune, the County and the Clark County Prosecuting Attorney's Office are as well. *Id.*

In this case, as in *Anderson, Musso–Escude, Imbler* and *McCarthy*, Appellant alleges that the Clark County Prosecuting Attorneys are civilly liable for the prosecutorial actions that they took in pursuing her criminal prosecution. Specifically, Appellant's alleges that her claims and damages arise from DPA Collin Hayes' filing of a CrR 7.8 motion on behalf of the State of Washington to correct a perceived error in Appellant's sentence. Opening Brief at 26. This motion was contested by her criminal defense attorney, argued, and ultimately granted by a Clark County Superior Court Judge before being appealed by Appellant - all pursuant to the due process afforded by the rules of criminal and appellate procedure. The filing of pleadings and motions on behalf of the state in a criminal proceeding is the core and fundamental function of a prosecuting attorney. The

² At the time *Creelman* was decided, the question of whether a prosecuting attorney was an employee of the county or state was unanswered. 67 Wn.2d. at 883. The Washington Court of Appeals has since determined that the prosecutor acts on behalf of the state in such situations. *Whatcom County v. State*, 99 Wn. App. 237, 242, 99311.2d 273 (2000).

fundamental prosecutorial nature of this action and the resulting entitlement prosecutorial immunity does not depend upon whether CrR 7.8 was the correct procedural mechanism to correct the perceived sentencing error or whether this issue was ultimately conceded by the state on appeal. Because the filing of a CrR 7.8 motion with the court is a fundamental prosecutorial function, the Clark County Prosecuting Attorneys are entitled absolute prosecutorial immunity.

DPA Hayes' subsequent filing of a motion to revoke Appellant's SSOSA status are likewise core prosecutorial functions for which he is entitled to absolute prosecutorial immunity. Moreover, that action has no bearing on Appellant's claims because the motion to revoke SSOSA status was withdrawn. Finally, as the federal court observed, these prosecutorial actions do not demonstrate malice.

Because all of Petitioner's claims against the Clark County Prosecuting Attorney's Office and the individual attorney arose from the performance of official prosecutorial duties and are thus barred by the doctrine of absolute prosecutorial immunity, the Court of Appeals properly ruled

that Petitioner's claims were properly dismissed as a matter of law pursuant to CR 12(b).

II. The Court of Appeals Decision is not in conflict with *Kalina* or any decision of the Court of Appeals.

Petitioner does not appear to contend that a conflict exists with the Supreme Court decision in *Kalina*, but instead argues that the Court of Appeals did not properly apply the holding of the case to the circumstances presented in this case. Should this Court consider Petitioner's argument to be that the decision conflicts with *Kalina*, she has failed to show any such conflict warranting this Court's

The Court of Appeals' well-reasoned refusal to extend the holding of *Kalina* to the circumstances presented in Petitioner's complaint is not equivalent to creating a conflict with existing case law. As the Court of Appeals noted in its decision, Petitioner believes *Kalina* applies in this case because Hayes filed a sworn motion to revoke her SSOSA. The Court of Appeals properly held that DPA Hayes's actions of filing a sworn motion is not the same as personally vouching for the truth of matters stated in any affidavit or motion, which would make Hayes more

of a complaining witness. Rather, Hayes signed the motion as the attorney of record. The Court acted pursuant to existing case law in applying absolute prosecutorial immunity and dismissing DPA from petitioner's lawsuit.

III. This case does not present an issue of substantial public importance or precedential value because the case law is well settled in favor of dismissal.

Petitioner does not present any argument that there is substantial public importance or precedential value necessitating this Court's review. The Court of Appeals decision properly considered the existing case law, as stated above, and did not deviate or render a decision contrary to that case law. The court's decision does not have the potential of affecting parties beyond this proceeding. The petitioner certainly has not presented any argument to the contrary. Absent any showing that the Court of Appeals ruling presents an issue of substantial public importance or precedential value in its decision to uphold the dismissal of DPA Hayes, this Court should not grant the petition for review.

CONCLUSION

The Court of Appeals correctly applied this Court's well-developed body of law regarding absolute qualified immunity. For the reasons set forth above, this Court should deny the petition for review.

DATED this 24th day of June, 2022.

Respectfully submitted:

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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the Respondent Clark County's Response to Appellants' Petition for Review to the Washington State Supreme Court was prepared using Century Schoolbook 12-point typeface and contains 2,100 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). This certificate was prepared in reliance on the word count function of the word processing system used to prepare the document. I declare under perjury that the foregoing is true and correct.

Respectfully submitted,

s/ Nichole Carnes _____
Nichole Carnes, Legal Assistant

CERTIFICATE OF SERVICE

I hereby certify that on June 24th, 2022, I electronically filed the foregoing *RESPONDENT CLARK COUNTY'S RESPONSE TO APPELLANTS' PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT* with the Clerk of the Court by using the Washington State JIS Appellate Courts' Portal system which will send notification of such filing to the following:

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DATED this 24th day of June, 2022.

s/ Nichole Carnes _____
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June 24, 2022 - 10:56 AM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 83419-3
Appellate Court Case Title: Pamela K. Scott, Appellant v. Louise Love, et al, Respondents
Superior Court Case Number: 19-2-00514-0

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Comments:

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