

In the Supreme Court of the United States

JOHN C. BAER,

Applicant,

v.

LARRY TRENT ROBERTS; CITY OF HARRISBURG; DAVID LAU.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Third Circuit:

1. Pursuant to Supreme Court Rule 13.5, Applicant John C. Baer respectfully requests a 60-day extension of time, to and including July 4, 2024, within which to file a petition for a writ of certiorari. The U.S. Court of Appeals for the Third Circuit issued an opinion on January 11, 2024. A copy of that opinion is attached as Exhibit A. The U.S. Court of Appeals for the Third Circuit denied rehearing in an order issued on February 5, 2024. A copy of that order is attached as Exhibit B. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on May 5, 2024. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case seeks review of an extraordinary absolute immunity denial by a divided Third Circuit panel over a powerful dissent by Judge Shwartz. After police officers arrested Respondent Larry Trent Roberts and charged him with murder, Applicant Assistant District Attorney John C. Baer identified a potential motive witness, introduced to him by a police detective, and interviewed the witness during the course of trial preparation. In Respondent Roberts’s subsequent civil rights suit, the two-judge Third Circuit majority held that this conduct—identifying and interviewing a witness in preparation for trial—was an investigative task, rather than a quasi-judicial task, for which Petitioner is not entitled to absolute immunity.

4. This case raises an exceptionally important question warranting this Court’s review. The circuits are split on where the line between “investigative” and “prosecutorial” actions lies, and that split means prosecutors in different circuits face differing levels of immunity. The Third Circuit stands alone in allowing a prosecutor to be held liable for identifying and interviewing a witness in preparation for the trial of an already identified, already charged defendant.

5. Applicant Baer was an assistant district attorney in Dauphin County, Pennsylvania. In 2005, a man was shot while sitting in his car in Harrisburg. There were no eyewitnesses to the shooting, but three bystanders witnessed the aftermath. While responding to the crime scene, Respondent David Lau, a detective, saw Respondent Roberts’s name repeatedly appear on the victim’s phone. Lau had a tumultuous history with Roberts, so Lau decided to include Roberts in a photo lineup. Lau had not found any other evidence connecting Roberts to the murder. Through allegedly coercive techniques,

one witness identified Roberts as the man she saw near the car after the murder. Lau then submitted an affidavit of probable cause, and Roberts was arrested and charged with murder.

6. After the arrest, Lau met with another witness and convinced him to provide testimony implicating Roberts in the murder. That witness testified at a preliminary hearing wherein the court found the prosecution had made out a prima facie case.

7. Two months before trial, Lau informed Applicant that a prospective witness would not be able to testify regarding the motive for the murder. A month before trial and led by Lau, Applicant then interviewed a new potential motive witness. This witness, Layton Potter, was a known jailhouse snitch. Roberts alleges Potter fabricated a false statement regarding Roberts's motive in order to gain favor with Applicant in his own criminal case.

8. Applicant used Potter's statement at trial, and a jury convicted Roberts of murder. He was sentenced to life in prison without the possibility of parole. Six years later, Potter admitted to fabricating his statement and, in 2019, Roberts was acquitted of all crimes.

9. Roberts subsequently filed a suit under 42 U.S.C. § 1983, alleging Applicant fabricated evidence in violation of the Fourteenth Amendment and was involved in a conspiracy in violation of the Fourth and Fourteenth Amendments. Applicant moved to dismiss on the basis of absolute prosecutorial immunity. The district court denied the motion, finding that, under Third Circuit precedent, Applicant was not entitled to absolute immunity because the facts alleged constituted investigatory actions.

10. A split panel of the Third Circuit affirmed the denial of absolute immunity. The majority opinion, authored by Judge Montgomery-Reeves and joined by Judge Roth, characterized Applicant's interview of a potential motive witness one month before trial as "quintessential 'police investigative work'" for which he was not entitled to absolute immunity. The majority noted that, under prevailing Third Circuit law, a prosecutor is absolutely immune for using "stick and carrot treatment" to elicit false testimony from a witness. Despite acknowledging the leeway owed to prosecutors acting as advocates, it continued that the case was "a close call" and "[p]erhaps ... presents a tough question with no clear answer" from the existing case law. Ultimately, it deemed Applicant's conduct "investigative" rather than "prosecutorial" because Roberts alleged Applicant sought out the new witness. Applicant's actions were post-charge and served to produce inculpatory evidence at trial, but, leaning on a footnote of dicta in this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 n.5 (1993), the majority found those facts did not render the actions prosecutorial.

11. The majority noted that Applicant had cited several cases from other circuits, including *Annappareddy v. Pascale*, 996 F.3d 120 (4th Cir. 2021) and *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), both of which establish different rules for when absolute immunity protects a prosecutor's actions. But the majority simply discarded these cases as nonbinding, out-of-circuit authority.

12. Judge Shwartz dissented. She found Applicant was acting as an advocate and not an investigator when he interviewed a witness and solicited testimony. Judge Shwartz noted that the alleged conduct occurred over a year and a half after Roberts had been

identified as a suspect and charged, and only after Lau identified the witness to Applicant one month before trial. She noted that the majority's rule "means that every time a prosecutor prepares for trial and determines that an additional piece of evidence is needed to prove the crime beyond a reasonable doubt, he is acting in an investigative role," a view that "essentially narrows the advocacy work protected by absolute immunity to actions in the courtroom[,]" a view "plainly foreclosed" by this Court's precedent. *Buckley*, 509 U.S. at 272.

13. This case presents an important question about the scope of absolute immunity for prosecutors. As this Court held in *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976), absolute prosecutorial immunity is critical because "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." The Third Circuit's decision retreats from these principles and exposes prosecutors to liability for identifying and interviewing witnesses in the weeks before trial, without providing future prosecutors with any clear line as to when their actions may be subject to a claim for damages.

14. The Third Circuit's decision is in conflict with the law on absolute immunity in, at minimum, the Second, Fourth, Fifth, Sixth, and Seventh Circuits. In each of those Circuits, "the question of absolute immunity turns on whether [the defendant] had been identified as a suspect at the time [the witness] was interviewed and whether the interview related to testimony to be presented at trial." *Cousin*, 325 F.3d at 633. *See also id.* at 635 (prosecutor had absolute immunity where "interview was intended to secure evidence that

would be used in the presentation of the state’s case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause”); *Hill v. City of New York*, 45 F.3d 653, 661-62 (2d Cir. 1995) (holding “absolute prosecutorial immunity extends even to conspiracies to present false evidence at trial” and any actions that occurred “after the prosecutorial phase of the case had begun”); *Annappareddy*, 996 F.3d at 142 (decisions about evidence are made in an “advocative” capacity); *Price v. Montgomery Cnty., Ky.*, 72 F.4th 711, 720 (6th Cir. 2023) (absolute immunity warranted for conduct “in furtherance of genuine prosecutorial interests,” including “addressing matters related to [defendant’s] prosecution with [police]”); *Fields v. Wharrie*, 740 F.3d 1107, 1115 (7th Cir. 2014) (“Once prosecution begins, bifurcating a prosecutor’s role between investigation and prosecution is no longer feasible.”). The Third Circuit stands alone in allowing prosecutors to be held liable for post-charge activity directly linked to a judicial proceeding.

15. This case also presents an opportunity for this Court to revisit its suggestion in *Buckley* that prosecutors are not immune for post-charge work that may be of a mixed investigatory and advocatory capacity. *Buckley*, 509 U.S. 259 at 274 n.5. This single footnote has sowed great confusion among the Circuits. See *Wearry v. Foster*, 52 F.4th 258, 263 (5th Cir. 2022) (Jones, J., dissenting from the denial of en banc rehearing) (noting “intra-circuit” and inter-circuit conflict on the question of where to draw the line between investigative and prosecutorial work). Review of this case would allow the Court to clear that confusion.

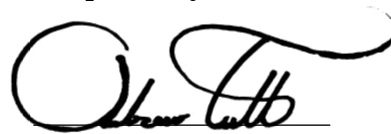
16. Applicant respectfully requests an extension of time to file a petition for a writ of certiorari. Counsel was retained in this matter recently, and a 60-day extension

would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, the undersigned counsel has a number of other pending matters that will interfere with counsel's ability to file the petition on or before May 5, 2024.

Wherefore, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to and including July 4, 2024.

Dated: April 12, 2024

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew T. Tutt", written over a horizontal line.

Andrew T. Tutt

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