

# Court Will Hear Case From L.A. Whistle-Blower

## Prosecutor Reported Police Misconduct, Met With Reprisals

### Chilled Speech?

By Brent Kendall

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WASHINGTON — A local employment dispute at the Los Angeles County district attorney's office could have national free-speech implications, because the U.S. Supreme Court will hear oral arguments this week to determine whether a whistle-blowing prosecutor who reported his suspicions of police misconduct is protected by the First Amendment.

The case could determine whether, and how much, the Constitution protects a public employee's job-related speech on issues of public importance.

"It has the potential to have a big impact," said Deputy District Attorney Richard Ceballos, the prosecutor at the center of the case. *Garcetti v. Ceballos*, 04-473.

#### 'First Line'

Ceballos said a ruling against him could chill the speech of public employees at all levels — to the detriment of the public.

"People are going to be less inclined to speak out about things they witnessed within the scope of their jobs," he said. "We're the first line to witness misconduct and corruption."

Although Ceballos and free-speech advocates are warning of serious consequences if they lose, Los Angeles County and other public employers have their own set of concerns.

#### 'Operational Nightmare'

The county's lawyer, Cindy S. Lee of Franscell, Strickland, Roberts & Lawrence in Glendale, said in filings with the court that a ruling for Ceballos would create "an operational nightmare" for government employers, who could face costly and complex First Amendment litigation "whenever they contemplate taking what they believe to be legitimate employment actions against incompetent and unproductive employees."

The biggest public employer, the federal government, also has taken notice, and the Justice Department will argue in support of the county when the justices hear the case on Wednesday.

At issue is Ceballos' supervision of a narcotics and weapons case in 2000, in which he investigated whether an arresting deputy in the county Sheriff's Department lied in a search warrant affidavit.

His lawyer, Bonnie Robin-Vergeer of the Public Citizen Litigation Group in Washington, D.C., noted in court filings that this investigation took place just months after the city's Rampart police scandal, when "the interest of the L.A. community in preventing, disclosing and

See Page 5 — HIGH

# High Court Will Hear L.A. Whistle-Blower Case

Continued from Page 1

rectifying police misconduct was at its zenith."

Ceballos concluded that the affidavit in question contained misleading information, if not outright falsehoods. He reported this assessment in a memorandum to his supervisors and recommended the dismissal of charges against the three defendants in the case.

Supervisor Frank Sundstedt was concerned by Ceballos' report but, after meeting with the Sheriff's Department, decided to go forward with the prosecution and let the judge decide the validity of the warrant.

Ceballos informed the defense of his views on the affidavit, and he was subpoenaed to testify. He turned over two memorandums to the defense and appeared as a witness at a motion hearing on the warrant.

The defense's challenge to the warrant failed, and the county won a conviction and two guilty pleas in the case.

Ceballos alleged that, in the following months, his superiors retaliated against him because of his memorandums and testimony.

Filing a civil suit in federal court, he charged that the district attorney's office demoted him, denied him a promotion and later transferred him to a location farther from his home.

District Court Judge A. Howard Matz of Los Angeles granted summary judgment to the district attorney's office, holding that Ceballos' speech was not protected because he expressed his concerns in his official capacity, not as a private citizen.

But the 9th U.S. Circuit Court of Appeals reversed, deciding the speech was protected regardless of whether Ceballos' actions were work-related because the subject matter was "of

public concern."

"The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process," Judge Stephen Reinhardt wrote.

"Stripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations," Reinhardt wrote.

Judge Diarmuid O'Scannlain concurred in the ruling but said it ought to be overruled.

An earlier 9th Circuit decision, *Roth v. Veteran's Administration of the United States*, 856 F.2d 1401 (9th Cir. 1988), controlled this case, but it had been wrongly decided, O'Scannlain said.

In *Roth*, the 9th Circuit held that the speech of government employees receives no First Amendment protection only when it is "of no relevance" to matters of public importance.

Lee, the county's lawyer, did not return a call for comment, but she argued in court filings that Ceballos' speech came not in his capacity as a citizen but within the normal course of his job duties.

And the Supreme Court, she argued, has never held that purely job-required speech is constitutionally protected.

Ceballos' attorneys, on the other hand, said that the high court has never held that such speech is unprotected, either.

And they said that, although Ceballos' speech was related to his job as a prosecutor, his efforts to bring attention to possible police misconduct were hardly within his routine duties.

Two earlier key rulings on the speech of public employees, *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), are sure to be at the center of Wednesday's argument.

In *Pickering*, the court ruled that a school board violated a teacher's First Amendment rights when it fired him for writing a newspaper letter critical of the board's actions. The justices said the teacher was speaking as a citizen on matters of public concern.

The court said it had to balance the teacher's speech rights with the school board's interests in running its workplace, but the court said that the teacher's letter did not impede his work or the school's operations.

In *Connick*, the court ruled in favor of a New Orleans district attorney who fired an assistant attorney who distributed a critical questionnaire around the office.

The justices ruled that the fired attorney was speaking not as a citizen on a matters of public concern but instead as an employee about an issue only of personal interest.

In this case, the justices will have the benefit of plenty of input from amici.

In addition to being backed by the Bush administration, Los Angeles County has received amicus support from groups including the National Association of Counties, the National League of Cities and the National Conference of State Legislatures.

Groups supporting Ceballos include the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the California Prosecutors Association, the Government Accountability Project and the American Federation of Labor.

Ceballos, now a calendar deputy in the Central Trials Division, said he would be in Washington this week for the oral argument, even though he would have preferred that the justices not take the case.

"At this point, it's out of my hands," he said.

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