No. 07-854

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In The
# Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

*Petitioners,*

vs.

THOMAS LEE GOLDSTEIN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, NATIONAL ASSOCIATION OF PROSECUTOR COORDINATORS, NATIONAL HISPANIC PROSECUTORS ASSOCIATION, NEVADA ADVISORY COUNCIL FOR PROSECUTORS, AND NEVADA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether top level elected and management prosecutors should be held liable for failing to institute procedures relative to the collection, evaluation and dissemination of information used in criminal prosecutions.

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## INTEREST OF *AMICI*[1]

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors; assistant prosecutors; investigators; victim witness advocates; and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally

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[1] Pursuant to Rule 37.2(a), *amici* gave notice to petitioners and respondent on January 18, 2008 of the intention to file this *amicus curiae* brief. Notice was transmitted via FAX, email and U.S. Post. Both parties have consented to the filing of the brief.

Pursuant to Rule 37.6, *amici* advise that no counsel for any party to this action authored any part of this brief, and no person other than *amici* made any monetary contribution to fund the preparation or submission of this brief.

engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as *amicus curiae* in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

The National Association of Prosecutor Coordinators (NAPC) is the only national professional association of prosecutor coordinators. It consists of 45 member states. Prosecutor Coordinators are the professional individuals in each state who serve the state prosecutors by assisting them in the administration of their offices and the pursuit of justice. Prosecutor Coordinators identify, develop and implement training and resource programs for state prosecutors and their supporting personnel. In addition, they monitor criminal law as it develops in state legislatures and alert District and State's Attorneys regarding proposed criminal justice legislation. The charter under which individual Prosecutor Coordinators operate varies according to the individual state's organization. All members have the common mission of providing the most effective professional training and resources available for prosecutors.

The National Hispanic Prosecutors Association (NHPA) was founded in 1997, is the only professional membership organization dedicated to the advancement of Hispanics as prosecutors, and is comprised of over 100 prosecutors nationwide, including both chief and line prosecutors nationwide, from all 50 states. NHPA goals include serving as a national voice for

the fair administration of justice, and providing testimony before Congress and other federal and state legislative bodies as well as national and local leadership on issues of concern to the administration of justice and the community.

The State of Nevada Advisory Council for Prosecuting Attorneys is an executive branch state agency responsible under Nevada Revised Statutes 241A.070 for providing leadership, resources and legislative advocacy on legal and public policy issues related to the duties of Nevada's prosecutors and the administration of justice. These statutory responsibilities extend to approximately 450 state and local prosecutors, including the Attorney General of Nevada, Nevada's 17 elected district attorneys, all city attorneys engaged in the prosecution of criminal cases, and all deputy attorneys employed by these officials.

The Nevada District Attorneys Association is a voluntary, unincorporated association of district attorneys that works with legislatures, courts and local policymakers to ensure that the interests of prosecutors are appropriately represented. The Nevada District Attorneys Association also works to educate prosecutors in the area of prosecutorial training and ethics.

This case raises matters of concern to prosecutors in the 9th Circuit and throughout the country. The rule enunciated by the 9th Circuit conflicts with the rulings from other Circuits, and will lead to civil litigation and potential civil liability for acts by

prosecutors that are necessarily a part of the prosecutorial function, and thus under the authority of this Court have been entitled to absolute immunity from civil liability under 42 U.S.C. § 1983. *Amici* represent the interests of prosecutors on these issues.

## BACKGROUND

Respondent/plaintiff Goldstein (appellee below) filed suit in the United States District Court for the Central District of California under 42 U.S.C. § 1983 for a violation of his civil rights. He alleged that petitioners/defendants John Van de Kamp and Curt Livesay (appellants below), as the elected District Attorney and Chief Deputy District Attorney of Los Angeles County, should be held liable for failing to institute procedures to allow deputy district attorneys to access information about benefits received by "jail house informants," for failing to train deputy district attorneys to disseminate such information, for thereby creating an administrative policy and practice of encouraging the use of fabricated confessions, and for failing to install a system to disseminate to deputy district attorneys and to defendants information which would impeach jail house informants.

Petitioners moved to dismiss, contending they are entitled to absolute immunity for these alleged failings, under the doctrine of prosecutorial immunity enunciated by this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976). Respondent Goldstein contended

that Van de Kamp and Livesay are not entitled to absolute immunity because the challenged acts and inactions were administrative, rather than prosecutorial, in nature. The District Court agreed with Goldstein and denied the motion to dismiss. On appeal, a three judge panel of the 9th Circuit Court of Appeals affirmed the ruling of the District Court (481 F.3d 1170). Motions for a rehearing and hearing en banc were denied.

## SUMMARY OF ARGUMENT

Under longstanding authority of this Court, prosecutors are afforded absolute immunity for official actions that are intimately associated with the judicial phase of the criminal process. The respondent (plaintiff) seeks to impose liability on petitioners John Van de Kamp and Curt Livesay, top level prosecutors, based on the theory that they failed to adopt policies and procedures related to disseminating information about jailhouse informants, and about evaluating and using jailhouse informants in criminal prosecutions, thereby leading to a violation of respondent's constitutional rights when a subordinate prosecutor used a jailhouse informant to prosecute respondent. Such alleged failings on the part of petitioners, insofar as they have any constitutional and civil rights dimension, necessarily involve official actions which are intimately associated with the prosecution function in the judicial process. Lower federal courts have split on the issue of management

liability for prosecution policy decisions, but substantial authority supports the position urged by petitioners and *amici*. Contrary authority relied on by the 9th Circuit is poorly reasoned, or has underpinnings not applicable to this case. Further, the rule adopted by the 9th Circuit here would lead to incongruous results, excusing intentional violations of civil rights by some prosecutors while finding liability for unintentional violations by supervising prosecutors.

## ARGUMENT

This Court has applied a functional analysis to the activities of public prosecutors in deciding whether or not absolute immunity applies to a claim under section 1983. *Imbler*, supra, 424 U.S. at 430; *Burns v. Reed*, 500 U.S. 478, at 486-487 (1991); *Kalina v. Fletcher*, 522 U.S. 118, at 126-127 (1997). Absolute immunity applies to a prosecutor's activities that are "intimately associated with the judicial phase of a criminal process." *Imbler*, supra, 424 U.S. at 430. Applying such a functional analysis to the alleged failings of defendants/appellants Van de Kamp and Livesay, the conclusion is inevitable that the challenged practices and policies (or lack thereof) are entitled to absolute immunity.

In summary, Goldstein's claim is that Van de Kamp and Livesay failed to adopt and enforce policies and procedures that would ensure that information about benefits to jail house informants (which would

reflect on the informant's credibility, and therefore would be *Brady* material) would be transmitted to all deputy district attorneys and to defense counsel. This claim is thus that Van de Kamp and Livesay committed a *Brady/Giglio* violation.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has a constitutional obligation to disclose to a criminal defendant material evidence that is favorable to the defendant. *Giglio v. United States*, 405 U.S. 150 (1972) extended the *Brady* rule to cover implied promises of leniency made to informant witnesses. *Giglio* further held that when such a promise is made to the informant by one prosecutor, the fact that a subsequent prosecutor has no personal knowledge of the promise does not relieve the government of the *Brady* obligation as to that information.

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

*Giglio*, supra, 405 U.S. at 154.

Thus, *Giglio* holds that the *Brady* obligation is not merely a personal obligation imposed on the individual prosecutor (though it is certainly that), it

is also an institutional obligation imposed on the prosecution office.

Courts have held the *Brady* obligation covers a variety of inducements to witnesses. See, e.g., *In re Jackson*, 3 Cal.4th 578, 593-597 (1992) (promises made to jailhouse informants held to be covered generally by *Brady*, but not material in that case; overruled as to materiality standard in *In re Sassounian*, 9 Cal.4th 535, 545, fn. 6 (1995)); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (evidence that witnesses were paid for their testimony); *People v. Kasim*, 56 Cal.App.4th 1360 (1997) (promises or inducements to a witness in prior cases). In these cases, the evidence implicates *Brady* because it may impeach the credibility of the witness.

Evidence which impeaches the credibility of a witness may lead the prosecutor to decide not to rely on that witness (and thus either to prosecute the case without using the witness, or decline to prosecute the case altogether). If the prosecutor does prosecute the case using the witness, the defense may use the impeachment evidence at trial to undermine the testimony of the witness before the jury. Under any of these situations, the prosecutor deals with the impeachment evidence in intimate association with the judicial phase of the criminal process.

As noted above, Supreme Court authority holds that absolute immunity applies to a prosecutor's activities that are "intimately associated with the judicial phase of a criminal process." *Imbler*, supra,

424 U.S. at 430. In the case at bar, the alleged violation is an institutional failing of the *Brady/Giglio* obligation, with Van de Kamp and Livesay, as the head of the institution, being charged with liability. The key point is that a *Brady* violation *necessarily* occurs in intimate association with the judicial phase of the criminal process.

*Brady* imposes on the prosecution the "duty under the due process clause to insure that 'criminal trials are fair,'. . . ." *Weatherford v. Bursey*, 429 U.S. 545, at 559 (1977). However, the obligation must be balanced against the rule that a criminal defendant has no constitutional right to general discovery in a criminal case. *Id.* Thus, *Wardius v. Oregon*, 412 U.S. 470 at 474 (1973), states that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." Because the right is one related to criminal trials, whether a *Brady* violation exists is measured by whether "the defendant is given impeachment material, even exculpatory impeachment material, *in time for use at trial*. . . ." *United States v. Presser*, 844 F.2d 1275, at 1283 (6th Cir. 1988) (emphasis added). Courts have held that disclosure of *Brady* material on the first day of trial may satisfy the due process requirement. *United States v. Wooley*, 9 F.3d 774, at 777 (9th Cir. 1993); *United States v. Koehler*, 266 F.3d 937, at 939 (8th Cir. 2001). Likewise, this Court has held that the prosecution need not disclose impeachment evidence before a defendant enters a guilty plea, as long as all evidence of the defendant's factual

innocence has been disclosed. *United States v. Ruiz*, 536 U.S. 622 (2002).

When the *Brady* obligation is viewed in this light, it is obvious that any policies or procedures designed to insure that *Brady* is satisfied necessarily are in intimate association with the judicial phase of the criminal process, within the meaning of *Imbler*. It is difficult to conceive how they could be otherwise. The policies, practices and training Goldstein would have Mr. Van de Kamp and Mr. Livesay put in place only have constitutional effect (and thus § 1983 effect) in the prosecution context, and indeed in the trial context.

It is established that even knowing use of false testimony at trial and suppression of exculpatory evidence represent conduct protected by absolute immunity. *Imbler*, supra, 424 U.S. at 431. Further, the 9th Circuit has held that supervising prosecutors who grant immunity to a witness in exchange for perjured testimony are protected by absolute immunity. *Genzler v. Longanbach*, 410 F.3d 630, at 643-644 (9th Cir. 2005). The 9th Circuit has also stated that for absolute immunity purposes,

> . . . there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." *Haynesworth v. Miller*, 261 U.S.App.D.C. 66, 820 F.2d 1245, 1269 (D.C.Cir.1987.) "Both practices involve a balancing of myriad factors, including culpability, prosecutorial

> resources and public interests" and "both procedures culminate in initiation of criminal proceedings against particular defendants, and in each it is the individual prosecution that begats the asserted deprivation of constitutional rights." *Id.*

*Roe v. City & County of San Francisco*, 109 F.3d 578, at 583-584 (9th Cir. 1997)

Policies of general application regarding jailhouse informants and the dissemination of *Brady* material are subject to these same principles. Such policies will encompass identifying and balancing factors to be considered in application to the trial function of individual cases, such as:

- the relative levels of culpability of the defendant and the jailhouse informant;
- balancing the public benefit to be had in affording leniency to a criminal suspect who is also an informant weighed against the public detriment suffered from failing to hold that suspect/informant fully accountable for his crimes;
- the benefit to be gained through the testimony of the informant against another defendant;
- the nature of the informant benefits and whether or not they rise to the level of materiality;

- the documentation for dissemination and discovery purposes of any material benefits conferred;
- the prosecutorial resources allocated to determining what information different from benefits given to the informant is material enough to warrant inclusion in such a system;
- the means of documenting non-benefit information about informants (i.e. past testimony, past criminal record, etc.) which is deemed to be material;
- the prosecutorial resources allocated to creating some sort of system for recording, integrating, sharing and disseminating such information among prosecutors;
- the timing for the disclosure of such information to the defense.

These are but some of the factors that would go into the development of such policies and procedures. All of these factors are part of the balancing function prosecutors traditionally make assembling, evaluating and presenting a case in the judicial process. They are no less prosecutorial if they are compiled and designed for general application, put onto a piece of paper and placed in a binder marked "DA Policies and Procedures" – the test is a functional one. In this context, while the policy may be general, it is felt exclusively in the trial stage of individual cases. It has no constitutional impact outside of the trial context.

Other courts have held that supervising prosecuting attorneys are entitled to absolute immunity against allegations of inadequate training or policies regarding prosecutorial activities which are subject to absolute immunity when conducted by subordinate prosecutors. *Hamilton v. Daley*, 777 F.2d 1207, at 1213 (7th Cir. 1985) (holding that such claims were sufficiently meritless as to justify the awarding of attorneys fees); *Haynesworth v. Miller*, 820 F.2d 1245, at 1269 (D.C. Cir. 1987) (overruled in part on other grounds in *Hartman v. Moore*, 547 U.S. 250 (2006)); *Boddi v. Morgenthau*, 342 F.Supp. 193, at 205 (S.D.N.Y. 2004); *Pinaud v. County of Suffolk*, 798 F.Supp. 913 (E.D.N.Y. 1992), rev'd in part on other grounds, 52 F.3d 1139 (2d Cir. 1995). The 9th Circuit opinion gives no consideration to these authorities, nor any explanation why the reasoning of these cases is not sound.

The 9th Circuit panel relied on two cases from other circuits which conflict with the above authorities, *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999) and *Walker v. New York*, 974 F.2d 293 (2d Cir. 1992). Neither those opinions themselves, nor the 9th Circuit's reliance on them, is convincing.

*Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999) involved a suit against both police and prosecutors for *Brady* and related violations. The prosecutors' liability in that case was based in part on the failure to institute policies that would have trained and discouraged *police* from soliciting perjured testimony. Without addressing the relationship between police and prosecutors in Philadelphia, Pennsylvania, the extension of

such a ruling to a California District Attorney would be wholly unwarranted.

In California, the District Attorney and the police agencies are separate and independent – neither has authority over the other. California District Attorneys are independent officials under the California Constitution, elected to the post. See generally, California Constitution, Article XI, § 1(b); California Government Code §§ 24000(a), 26500 through 26543. Police authority ordinarily resides with the Sheriff in unincorporated areas, and the city police department in incorporated cities. The Sheriff, like the District Attorney, is an independent elected county officer provided for by the California Constitution and by statute, with duties and authority separate from the District Attorney. California Constitution, Article XI, § 1(b); California Government Code §§ 26600 through 26770. Likewise, police departments, as a subdivision of a city, have their own status independent of the District Attorney. See California Constitution, Article XI, § 5(b); *Brown v. City of Berkeley*, 57 Cal.App.3d 223 (1976). The police department of a city is under the control of the chief of police, not the District Attorney. See California Government Code § 38630 as to general law cities; California Constitution, Article XI, § 5(b) as to charter cities; see also *Armas v. City of Oakland*, 135 Cal.App. 411 (1933).[2]

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[2] In California, cities are of two types – general law cities and charter cities.

The point is that in California, the District Attorney does not have administrative authority over either the Sheriff or the police. Whatever the relationship may be between the Philadelphia Police Department and the Philadelphia District Attorney, it would be wholly inappropriate to hold Mr. Van de Kamp and Mr. Livesay responsible for not adequately training an independent police agency over which they had no administrative authority. The reasoning of *Carter* is thus suspect as applied to this case.[3]

*Carter* can also be distinguished from the instant case by its analysis of the 11th Amendment issue in that case. The *Carter* court concluded that the District Attorney in Pennsylvania was not a state official for 11th Amendment purposes, analyzing and interpreting Pennsylvania law. In California, by contrast, definitive California Supreme Court authority holds that a California District Attorney is in fact a state official, not only in prosecuting cases, but also in establishing policy and training employees. *Pitts v. County of Kern*, 17 Cal.4th 340 (1998).

*Walker v. New York*, 974 F.2d 293 (2d Cir. 1992), is also suspect as authority for liability in this case. Neither *Walker* nor the earlier Second Circuit case on

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[3] This is to be distinguished from the prosecutor's involvement with the police in the investigative stage of the prosecution, which may lead to qualified immunity rather than absolute immunity (see *Burns v. Reed*, 500 U.S. 478, at 492-496 (1991)). But respondent Goldstein has not alleged here that Van de Kamp or Livesay participated in the investigation in such a manner that their actions entered the realm of qualified immunity.

which it relies, *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991) has any discussion of *Imbler* or the line of cases distinguishing prosecutorial and administrative functions. Such paltry analysis hardly provides a sound basis for the liability decision concerning prosecutorial immunity that the 9th Circuit panel made here.

The 9th Circuit opinion also will lead to an incongruous result. Intentional violations in individual cases will be subject to absolute immunity for those individual prosecutors who deliberately intend to violate a criminal defendant's rights. However, supervising prosecutors such as Van de Kamp and Livesay, whose violation for failing to put policies and training in place can be characterized at most as negligent or perhaps done with willful disregard, rather than being an intentional violation of an individual defendant's rights, will not be entitled to absolute immunity for their policy decisions (or indecision) regarding some perceived or alleged failure to have adequate *Brady/Giglio* procedures and training in place. Indeed, under the 9th Circuit's formulation, virtually any prosecution action by a line prosecutor which would be entitled to absolute immunity could be transformed into potential liability for supervising or managing prosecutors, based on some alleged failure to enact proper or adequate policies or procedures. Such a result would greatly undermine the wise policy enunciated by *Imbler*.

## CONCLUSION

The decisions of the District Court and the 9th Circuit are not well founded, in legal reasoning or supporting authority. If the rule they enunciate remains, it will lead to excess civil litigation which second guesses District Attorneys in the policy decisions they make, and the allocation of their efforts and resources in balancing case prosecution needs.

For the foregoing reasons, *amici* respectfully request that this Court grant a writ of certiorari in this case, and reverse the ruling of the 9th Circuit Court of Appeals.

Respectfully submitted,

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