IN THE
SUPREME COURT OF THE UNITED STATES

JOHN VAN DE KAMP and CURT LIVESAY,
Petitioner,
v.
THOMAS LEE GOLDSTEIN,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS, JOHN VAN DE KAMP AND CURT LIVESAY BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of Petitioners, pursuant to Supreme Court Rule 37.2(a) and 37.4.[1]

1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this Charter, as to such officer, Board or Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion

(continued…)

INTEREST OF AMICUS CURIAE

The Los Angeles County District Attorney's Office is the largest district attorney's office in the United States, employing over 1000 attorneys and prosecuting 60,000 felonies and 200,000 misdemeanors per year. [2] A significant number of dedicated prosecutors serve as managers and administrators responsible for training, setting policies and supervising trial attorneys and support staff. These supervisors make daily decisions affecting ongoing trials, crime charging, and case settlement. The difficulties facing talented attorneys who serve their community would be exacerbated if the attorneys were required to face the potential loss of absolute immunity.

SUMMARY OF ARGUMENT

The decision in *Goldstein v. City of Long Beach,* 481 F.3d 1170 (9th Cir. 2007) radically failed to follow precedent established by this Court. By classifying the uniquely prosecutorial functions of maintaining and disseminating information on jailhouse informants as merely administrative, the Ninth Circuit failed to understand a process that *only* has meaning in the context of preparing for trial. As such, it is clearly a prosecutorial function

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(…continued)

> shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

[2] http://da.co.la.ca.us/oview.htm last viewed on June 25, 2008.

intimately associated with the judicial phase of the criminal process and protected by absolute immunity.

ARGUMENT

I

THE METHOD AND TIMING OF IMPLEMENTING A DATABASE OF JAILHOUSE INFORMANTS FOR DISSEMINATION TO PROSECUTORS FOR CRIME CHARGING AND TRIAL PURPOSES ARE INTIMATELY CONNECTED TO THE JUDICIAL PHASE OF THE CRIMINAL PROCESS

The Supreme Court has adopted a functional analysis in determining prosecutorial absolute immunity. A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). The focus is therefore on the prosecutorial function, not prosecutorial acts or conduct, in determining the scope of immunity.

A prosecutor is absolutely immune when functioning as an advocate in respect to judicial proceedings. *Imbler v. Pachtman,* 424 U.S. at 430; *Malley v. Briggs,* 475 U.S. 335, 342 (1986); *Burns v. Reed,* 500 U.S. 478, 486 (1991); *Buckley v. Fitzsimmons,* 509 U.S. 259, 269-270 (1993). This function, while judicially related, is not limited to the courtroom setting. *Burns v. Reed,* 500 U.S. at 486; *Buckley v. Fitzsimmons,* 509 U.S. at 269-270.

The management and dissemination of potentially discoverable evidence is clearly a unique aspect of the prosecutorial function and intricately connected to the trial of cases. The *Imbler* test,

determining which prosecutorial activities are protected by absolute immunity is based on the function test. The function analysis clearly places the management of potentially discoverable material in the category of trial preparation.

In *Giglio v. U.S.*, 405 U.S. 150 (1972), this Court was presented with a promise for leniency made by one assistant U.S. Attorney where the trial prosecutor was unaware of the promise. Because of this failure to disclose information where the knowledge was imputed to everyone in the prosecutor's office, Giglio's conviction was reversed for denial of due process. This Court offered guidance and direction to large prosecutors' offices in the future to avoid the consequences of dismissal and reversal of convictions for *Brady*[3] violations of this nature.

> A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1 (d). 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 v. U.S., 405 U.S. at 154 [Italics added.]

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[3] *Brady v. Maryland, 373 U.S. 83* (1963)

In *Goldstein*, the Ninth Circuit, with no explanation, mistakenly characterized the delay in establishing a database for dissemination of *Brady* material for deputy district attorneys preparing for trial as administrative. Counsel for Goldstein claimed that the failure to immediately implement a policy for maintaining a database, in response to *Giglio*, should result in a punitive loss of absolute immunity for the District Attorney and his chief advocate. This approach dismisses the *Imbler* function test and manifests selective amnesia for the events surrounding the jailhouse informant scandal investigated by the Los Angeles County Grand Jury in 1990. Counsel for Goldstein referred to the Los Angeles County Grand Jury report in the Appellee's Response to Amicus Briefs Supporting Certiorari filed July 27, 2007 in the Ninth Circuit at pp.11-12 and suggested that this report supported their proposition that management knew of the informant problem since 1979. In fact, the Report does discuss the failure of District Attorney Management to act in creating a database but states as follows:

"By January 1987, senior management of the Los Angeles County District Attorney's Office was cognizant of a concern within the office that a central repository of information on informants should be established." (Los Angeles County Grand Jury Report 1989-1990 (http://www.ccfaj.org/documents/reports/jailhouse/expert/1989-1990%20LA%20County%20Grand%20Jury%20Report.pdf) at p.111. Being alerted to the problem in 1987 would have been of no benefit to Mr. Goldstein who was convicted in 1980. The June 26, 1990 Report chronicled numerous deceptions and machinations by informants who deceived jurors, prosecutors and judges resulting in convictions of innocent persons. The revelations of

Leslie Vernon White, a notorious informant, in 1988 revealed lapses in security which allowed informants to obtain supposedly unreleased details of a case. These details enabled the informant to fake a credible confession, incorporating supposedly corroborating details presumably unknown to the public at large.

If *Goldstein's* flawed logic is followed, a failure to create a clearing house which caused a *Brady* violation in 1973 would have resulted in evaporation of absolute immunity in addition to reversal of the conviction. Even the language in *Giglio* advising prosecutors appeared to acknowledge the lawyer's role in "establishing procedures and regulations to insure communication of all relevant information." Determining what information is relevant is clearly an advocate's function only, not simply a bureaucratic one. The error in Goldstein's approach is even clearer when the solutions to the jailhouse informant problems enacted by the Los Angeles County District Attorney are examined. Without threat of losing absolute immunity, the Los Angeles County District Attorney did in fact create a central clearing house of jailhouse informants using modern technology[4]. The Los Angeles County jailhouse

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[4] Without fear of loss of absolute immunity, the counties responsible for the most prosecutions in California now discourage the use of jailhouse informants. According to a report by The California Commission on the Fair Administration of Justice(which includes Petitioner Van De Kamp as the Chairperson) in its 2006-2007 session

> A letter was sent to each of the fifty-eight County District Attorneys in the State, inquiring whether they had office policies

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informant system required years of preparation, discussion with law enforcement agencies and advances in technology and has received plaudits from the defense bar.

> In Los Angeles County, the use of jailhouse informant testimony has been significantly curtailed in the past 15 years according to the county's assistant DA and Gigi Gordon, director of the Post Conviction Assistance Center in Los

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(…continued)

> governing the use of in-custody informants, and requesting a copy of that policy if it was in writing. The letter also inquired as to how many cases included testimony of in-custody informants during the past five years. We received nine responses. Four of the five largest counties had written policies similar to the Los Angeles County policy, requiring supervisory approval before the testimony of an in-custody informant could be utilized.1 None of the four smallest counties had written policies, but three indicated that supervisory approval is required.2 The Santa Clara County and Orange County District Attorneys were the only offices whose policy requires the maintenance of a central file of all informant information. The survey suggests that the use of the testimony of in-custody informants is rarely approved by any of the responding offices.

http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf (last viewed June 23, 2008)

> Angeles. In the wake of a "devastating report" on jailhouse informants issued by the county grand jury in 1990, the Los Angeles district attorney's office adopted policies to "strictly control" the use of informant witnesses. *Now, use of informants as witnesses must be approved by a committee overseen by the chief deputy DA*. Because of these controls, jailhouse informants were used in "fewer than a dozen of the thousands of trials over the last three years." Gordon said that Los Angeles County has done "a fabulous job" of addressing the problem since it was revealed.

30 Dec Champion 52, Copyright (c) 2006 National Association of Criminal Defense Lawyers, Inc. The Champion (Italics added.)

Thus, the committee, which includes the Chief Deputy District Attorney, participates with the trial attorney in determining which informants may be relevant and trustworthy. This requires evaluation of the credibility of the informant and a comparison of the informant's purported testimony with other evidence. This is clearly a trial preparation function not administrative. Maintaining a database is also a trial preparation function requiring an experienced trial attorney's judgment as to what information is relevant and material and what is not. Recognizing that requirement, experienced trial attorneys, are the only personnel assigned to make these determinations. [5] Goldstein's March 3, 2008 Brief in

[5] The Los Angeles County District Attorney Legal Office Policy Manual provides :

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Opposition to the Petition for Certiorari fails to understand the complexity of trial preparation by prosecutors. Goldstein envisions the creation of a database as purely ministerial where a secretary could check off boxes, resulting in a process that is not trial preparation. (Goldstein's March 3, 2008 Brief in Opposition, p.20.) Trial preparation includes organizing large amounts of information and making the information available for trial prosecutors to present to defense attorneys, judges and juries. This is clearly *only* a trial function in the same way that preparing a graph for presentation to the jury by a prosecutor's paralegal condenses information so that it is helpful to the trier of fact. Large amounts of information must be collected, solely for the purpose of being used in trial. This can only be considered a trial function and would be protected by absolute immunity.

Moreover, establishment of a database, contrary to the Ninth Circuit's dismissive characterization of this role as purely

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> The Habeas Corpus Litigation Team maintains a Central Index of jailhouse informants who have offered to be, or who have been used as witnesses. The trial deputy must contact the Deputy-in-Charge of the Habeas Corpus Litigation Team (HABLIT) and determine whether the informant has offered to be a witness in the past or has testified in any prior case.
> (http://72.3.233.244/pdfs/drugpolicy/ladapolicyoninformants.pdf, last viewed June 25, 2008)

administrative, merits the judgment of experienced advocates.

Policies must continue to evolve even after the system is enacted since new case decisions and legislation may have an impact on what type of information must be maintained, how long it must be maintained and rules for dissemination. By way of example, the California State Legislature enacted Penal Code section 1127a in 1989 which specifically addressed what information needs to be collected and provided to all parties when an in custody informant is used in trial.[6] Another similar statute enacted in 1989 requires the People to notify the jailhouse

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[6] (c) When the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant.

The statement filed with the court shall not expand or limit the defendant's right to discover information that is otherwise provided by law. The statement shall be provided to the defendant or the defendant's attorney prior to trial and the information contained in the statement shall be subject to rules of evidence.

(d) For purposes of subdivision (c), "consideration" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.
Cal. Penal Code § 1127a (West 2008).

informant's prior victim before being called to testify in a new trial. Cal Penal Code section 1191.25. (West 2008) It would be unrealistic to delegate to a non-lawyer the responsibility of keeping abreast of changes in the law and expect that person be capable of implementing the required modifications. Only an experienced trial prosecutor can make those assessments in what is clearly a uniquely prosecutorial function.

Some management functions are strictly bureaucratic in nature: activities that all government managers must perform, whether they are running a school district or the District Attorney's office. Management of the budget and applying for state and federal grant money are not intimately connected to the trial and prosecution of criminal cases. A large office like the Los Angeles County District Attorney's office has an entire division dedicated to such purely administrative functions.

Other policies implemented by the elected District Attorney are also not intimately associated with the judicial phase of the criminal process. The Los Angeles County District Attorney sponsors a number of community outreach and crime prevention programs which are intended to improve the community and deter people from committing crimes. This management choice is not intimately connected with the judicial phase of the criminal process.

Conversely, the core role of the District Attorney's office is filing criminal charges and determining what cases to prosecute. The decision to file a case is based on factual input derived from police reports, knowledge by the filing deputy of the

law and application of the policies of the District Attorney. For example, Los Angeles County District Attorney policy requires interviews of victims in sexual assault cases whenever feasible.[7]. This interview allows the filing deputy to assess credibility and determine the appropriate charges. This 'filing' function has been determined to be uniquely prosecutorial and thereby protected by absolute immunity, even when the filing decision has become a policy relating to an entire class of cases.

> Roe claims that even if absolute immunity exists for the typical, single-case situation in which a disgruntled victim resents the prosecutor's failure to prosecute, absolute immunity should not exist for a decision involving a whole line of cases, such as the decision made here of not prosecuting any of an officer's unwitnessed arrests.
>
> This argument is unpersuasive. In analyzing the rational underpinnings of absolute prosecutorial immunity in this context, 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

[7] (http://da.lacounty.gov/savip.htm, last viewed June 30, 2008.)

> 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, 583-584 (9th Cir. 1997).

The criteria to be used in identifying an inmate as a jailhouse informant and the procedures to be followed before using that informant or adding that informant to an official database are likewise uniquely prosecutorial and are intimately related to the judicial function. As such, any decisions relating to that process are protected by absolute immunity.

II

GOLDSTEIN'S EROSION OF PROSECUTORIAL IMMUNITY CREATES NEW AVENUES FOR HARASSING LITIGATION

The Court in *Goldstein* attempted to justify its erosion of absolute immunity by relying on two cases in its flawed opinion.

A case outside of the Ninth Circuit, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), was relied on by the Court in *Goldstein* for holding that there is no absolute immunity for a prosecutor's "training function". In *Walker*, the trial deputy district attorney (referred to in New York as an ADA) actually committed a crime and suborned perjury in his misconduct. Any layperson knows that this is wrong. Yet the *Walker* court opined that the District Attorney's office breached its duty to train by failing to remind lawyers to not commit crimes. *Walker* is wrongly decided and should not be

followed because of the extraordinary factual situation in *Walker*. *Walker* should be viewed as an anomaly generated out of criminal conduct by a deputy district attorney who could not be sued pursuant to 42 U.S.C.A. § 1983. The remedy in *Walker* for that particular miscarriage of justice was reversal of the charges against *Walker* and the potential of prosecuting the ADA for his criminal conduct or exposing him to professional discipline. None of these remedies require distorting absolute immunity or are limited by it.

The Court in *Goldstein* also cited *Carter* in support its position. As with *Walker*, *Carter* was an anomaly which should not be followed.

> Raymond Carter had been convicted of murder and had served ten (10) years of a life sentence without possibility of parole before his conviction was overturned and the case against him *nol prossed* following disclosures of longstanding corruption within Philadelphia's 39th Police District. n3 Carter then brought an action against the City of Philadelphia, named police officers, n4 unknown employees of the Philadelphia Police Department, and unknown policymakers within the Philadelphia DA's Office. n5
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> - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - -
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> n3 During disclosures of police misconduct uncovered during an investigation of that district, it came to light that the single eyewitness's testimony placing Carter at the murder scene - the testimony on which his conviction rested - was purchased by a

> 39th District officer, Thomas Ryan, from a prostitute-informant (Ms. Jenkins) with whom Ryan was intimate. In subsequent proceedings, Ryan was convicted of obstruction of justice and Jenkins admitted her perjured testimony. There was no forensic evidence linking Carter to the crime scene and Carter maintains his innocence.

Carter v. City of Phil., 181 F.3d 339, 342-343 (3d Cir. 1999).

As *Walker* was the result of an ADA committing a crime*, Carter* was the tragic result of a police officer committing a crime and being punished for it but the *Carter* Court targeted others to be punished also.

> Carter's action against individuals in the DA's Office was premised on their failure as administrators to establish training, supervision and discipline policies which would have (a) prevented or discouraged Philadelphia police officers from procuring perjurious "eyewitnesses" and (b) alerted assistant district attorneys to the falsity of such information and prevented its introduction as evidence.n6 The District Court dismissed all claims against the DA's Office, pursuant to Fed. R. Civ. P. 12(b)(6) concluding that those defendants were "state officials" and therefore immune from suit for acts in their professional capacity by virtue of the Eleventh Amendment. n7 It further concluded that Carter had failed to state a

> cause of action against those defendants in their personal capacities.

Carter, 181 F.3d at 343.

Carter represents ignorance of the limits of training. Reminding police officers not to have illicit relationships with prostitutes or suborn perjury would only insult the honest police officers and would certainly not deter those officers determined to violate moral standards and the law. No filing deputy has a crystal ball or the ability with enhanced training to detect an illegal sexual liaison between a police officer and a prostitute/informant. A filing deputy district attorney reads reports, occasionally interviews victims and is expected to be aware of the applicable law. Nor would a trial deputy district attorney, even after enhanced training, be likely to detect that level of deception. As in *Walker*, this case involved criminal behavior by a police officer which deprived Carter of his freedom. The *Carter* Court was eager to make everyone, even those civil servants tangentially involved, pay a price without thoughtful analysis.

The Court in *Carter* cited *Walker* with approval when it reinstated Carter's cause of action. Careful review does not support viewing those two cases as persuasive authority.

Moreover, if the decision in *Goldstein* is not corrected, a disgruntled defendant could circumvent the absolute immunity afforded to prosecutors' filing decisions by suing the District Attorney management. If the lawsuit were based on a failure to train filing deputies, the erroneous application of the function test by *Goldstein* would destroy absolute immunity for the elected District Attorney. If a filing

deputy failed to read all of the submitted police reports and erroneously filed charges against a defendant later determined to be innocent, the defendant could file a civil action against the deputy district attorney and the elected District Attorney. The filing deputy district attorney would have absolute immunity for the erroneous filing. If the defendant alleged that the elected district attorney failed to train the filing deputies properly, the elected District Attorney would not have absolute immunity under *Goldstein*. Failure to train would be the basis for the cause of action and based on *Goldstein*, absolute immunity would have evaporated. *Goldstein* opens the door to a plethora of vindictive lawsuits against past and current elected District Attorneys on amorphous "failure to train" causes of action. Large urban District Attorney offices, like Los Angeles, have a training division which is primarily responsible for training new prosecutors and ongoing training of experienced prosecutors. Training Divisions are staffed by career prosecutors working to enhance professionalism among prosecutors. Trial deputies often receive legal or tactical advice from senior trial deputies without a foreboding sense of potential litigation and loss of absolute immunity. Defense attorneys have begun modifying their discovery requests to include lists of prosecutors tangentially involved in prosecutions.[8] Hanging this proverbial sword of

[8] While the evidence for this new practice is only anecdotal since *Goldstein*, discovery of all deputies who discussed a pending case has been attempted in recusal motions seeking to disqualify large offices based on legal advice given by fellow prosecutors.

> Second, since the supervisors of the Compton District Attorney's office[] were involved in the prosecution's case against Humberto [S.] and sanctioned the third-party

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Damocles over administrators and training staff would result in the unintended consequence of limiting or eliminating training programs. Qualified staff would decline assignments to train or supervise out of fear. The potential for harassing litigation would have a chilling effect on vigorous proactive training divisions.

Management's dissemination of information to filing deputies regarding a police officer's credibility as in *Roe* is exactly the same function as dissemination of information to filing deputies of potential concerns about a jailhouse informant. The Ninth Circuit found the first example of dissemination of information to be uniquely prosecutorial in *Roe* but not uniquely prosecutorial in *Goldstein*. The process in either situation is intimately connected with the judicial function of the prosecutor and cannot be arbitrarily distinguished.

(…continued)

> representation it is likely that the conflict has spread to other deputy district attorneys." On that basis, it also recused "the supervising deputy district attorneys involved in the [Humberto S.] matter … along with anyone who has discussed the case, as well as the attorneys that the supervisors direct or directed, evaluate and promote because they are subject to the same consideration[s] barring the supervising attorneys." The effect of these rulings was to recuse the assigned trial prosecutor, Timothy Hu, and an indeterminate but potentially significant number of additional attorneys. However, the trial court denied Humberto S.'s request that the entire district attorney's office be recused, concluding such wholesale recusal had not been shown to be necessary. *People v. Superior Court (Humberto S.)*, 43 Cal. 4th 737 ,745 (2008)[It should be noted that the California Supreme Court determined recusal was not appropriate in this case.]

If the trial deputy in *Goldstein* had failed to disclose the exculpatory evidence, he could not have been sued since he would have been entitled to absolute immunity. See *Imbler*.

CONCLUSION

Reversing the clearly erroneous decision will once again reaffirm the *Imbler* function test and find that litigants cannot embroil prosecutors in complex litigation simply by casting their pleadings as "failing to supervise or failing to train."

Respectfully submitted,

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