No. 07-854

In The Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In the appellate equivalent of destroying a village in an attempt to save it, respondent Goldstein's brief expressly abandons any substantive theory of liability against petitioners Van de Kamp and Livesay. While the complaint contains broad-based allegations against petitioners' purported failure to implement policies and training concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) in general, and *Giglio v. United States*, 405 U.S. 150 (1972) in particular, as well as regulate the use of jailhouse informants as witnesses, these detailed allegations are now dismissed as simply a "more verbose locution (Brief for Respondent ["Resp. Brief"] at 19) of the semantically sanitized claim concerning "information management" that respondent has coined for the first time in this court.

Respondent has to reduce his claim to one concerning "information management" because the reality is, as noted in petitioners' brief ("Pet. Brief"), there is no way to distinguish the decisions of a chief prosecutor or supervising prosecutor concerning the manner in which individual prosecutors will comply with the prosecution's overall obligations under *Brady* and *Giglio* through implementation of policies and training, from the direct participation of chief prosecutors and supervising prosecutors in individual cases. The decisions in each instance are intimately related to the prosecutorial function and hence are shielded by absolute immunity.

The entire premise of respondent's artificial construct of a claim based upon "information management" is to divorce the information "managed" from any context. It ignores the fact that the decision to implement such a system at all necessarily encompasses a decision as to how and in what manner a particular prosecutorial office and individual prosecutors will comply with *Brady* and *Giglio*. That decision necessarily requires prosecutorial judgment. Respondent consciously separates the information that forms the basis of his claim from the sole function for which it is collected and disseminated, for the all too clear reason that upon any reflection that function is necessarily prosecutorial in nature.

The mischief in respondent's thesis and semantic gamesmanship is that at bottom, virtually all prosecutorial activities could be characterized as "information management." Maintenance of witness lists, evidence, presentation of testimony, is all "information management" of a sort. Without a doubt, the specific (and dubious) theory that respondent asserts here – that large prosecutorial offices must, as a matter of constitutional mandate, necessarily enact some sort of centralized database and assure dissemination of information in order to comply with *Brady* and *Giglio* – would itself spawn hundreds, perhaps even thousands, of lawsuits against chief advocates and supervising prosecutors. Prosecutorial agencies throughout the country would be subjected to litigation to determine whether they are of such a

size so as to "require" implementation of such a system.

Even worse, the potential number of lawsuits premised on virtually any conduct that can be characterized as "information management" is almost limitless. Chief advocates and supervising prosecutors will be subject to potential liability stemming from the multitude of "information" based decisions that individual prosecutors make in the course of criminal prosecutions. The threat of entanglement in such litigation – chief advocates and supervising prosecutors as defendants and frontline prosecutors as indispensable witnesses – will necessarily chill the independent judgment of both and burden the judicial process. As this Court noted in *Imbler v. Pachtman*, 424 U.S. 409 (1976) and its progeny, it is precisely these concerns that form the basis for common law prosecutorial immunity, and similarly requires its application to section 1983 actions.

This Court has repeatedly reaffirmed *Imbler's* holding that these common law-based policy considerations necessitate absolute immunity for those performing prosecutorial functions. Chief advocates and supervising prosecutors necessarily perform a prosecutorial function in making decisions concerning the manner in which individual prosecutors within the office will comply with obligations under *Brady* and *Giglio*, through the implementation of policy and training. Prosecutorial decisions that directly impact every prosecution in the office are no different from decisions made with respect to a particular

prosecution. Such decisions must necessarily be protected by absolute immunity.

ARGUMENT

CHIEF ADVOCATES AND SUPERVISING PROSECUTORS PERFORM A PROSECUTORIAL FUNCTION CLOSELY RELATED TO THE JUDICIAL PROCESS IN MAKING DECISIONS ON POLICY AND TRAINING CONCERNING THE MANNER IN WHICH PROSECUTORS IN ALL CASES COMPLY WITH *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES*.

A. The Decisions Of Chief Advocates And Supervising Attorneys Concerning The Manner In Which Prosecutors Will Comply With *Brady* And *Giglio* Are Necessarily Prosecutorial In Nature.

1. Respondent's rhetorical slight of hand in casting his claim as one based on "information management," cannot disguise the fact that his claim is based on petitioners' decisions concerning the manner in which prosecutors will comply with the obligations set forth in *Brady* and *Giglio*.

Much as Captain Renault is "shocked" to find gambling at Rick's in *Casablanca*, respondent feigns astonishment that petitioners – relying of all things on the allegations of the complaint – would characterize his claim as challenging petitioners' decisions

concerning policy and training directing the manner in which prosecutors would comply with *Brady* and *Giglio*. Resp. Brief 12, 18-19. Instead, he claims, he is asserting nothing more than a claim based upon "information management," a term which respondent is forced to admit he uses for the first time in this Court, notwithstanding its purported centrality to the lawsuit. Resp. Brief 19.

In this effort to reduce this case to the utmost generality, respondent therefore discards what is apparently perceived as the more troublesome allegations of the claims in his complaint concerning general training with respect to compliance with *Brady* and *Giglio* in the context of jailhouse informants, and the wholesale assault on the use of such witnesses at all. *See* Resp. Brief 20; JA 69-70; TR 71 at 39; AER 51-52.

This tactical decision cannot disguise the fact that at bottom, plaintiff's claims still remain premised upon prosecutorial decisions concerning compliance with *Brady* and *Giglio.* Whatever efforts plaintiff now expends to make this case about nothing other than merely data collection, the Ninth Circuit did not view it so. The court repeatedly characterizes respondent's claims as attacking the failure to develop policies and provide adequate training on sharing information regarding jailhouse informants – not simply collecting a database. *See* Appendix to Pet. Cert. ("App.") 11 [describing plaintiff's "theory of liability" as "alleged failure to develop a policy of sharing information regarding jailhouse informants

within the district attorney's office . . . failure to provide adequate training and supervision on this issue"]; App. 15 [noting that the allegations against petitioners "involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject. . . ."].

The Ninth Circuit plainly did not base its decision on any determination that petitioners' actions simply concerned "information management." Rather, it opined that general guidelines applicable to all cases, as opposed to "a particular case or even a particular category of cases," constitutes administrative as opposed to prosecutorial conduct. App. 15. As petitioners have explained, the Ninth Circuit's analysis in this regard is incorrect (Pet. Brief 26-30), but it does not resemble the "information management" theory that respondent now posits here.

As presented, respondent's "information management" claim is squarely at odds with the "functional approach" to prosecutorial immunity that this Court has uniformly applied. This is because respondent divorces the information from the only function for which it is gathered, and indeed turns a blind eye to the nature of the information itself. This is prosecutorial information that is collected for a prosecutorial purpose – compliance with *Giglio* and *Brady*. The decision whether or not to implement such a system requires the exercise of prosecutorial judgment, an understanding of the governing law coupled with a

pragmatic understanding of its application to the prosecutorial process.

Virtually any type of information could be said to be capable of being collected by "anybody," but petitioners are not being sued for a mere failure to collect information. Rather, they have been sued for allegedly failing to make certain that particular information is employed in the prosecution of cases. Police agencies may collect information that a prosecutor subsequently determines is subject to *Brady* disclosure, but it is the prosecution, not the police that makes the evaluation and upon whom the *Brady* obligation rests.

Obviously, mere existence of a database means nothing unless someone has made a determination as to what constitutes the relevant data, and, more critically, directs that it be used for a particular purpose. Even respondent reluctantly acknowledges that merely collecting the information would not be enough unless there was some kind of policy and training directing that it be used. Resp. Brief 19. This concession makes it clear that for all of respondent's posturing, at bottom, petitioners are being sued not for failing to implement some sort of "information management" system, but for decisions concerning how their prosecutorial agency would comply with *Brady* and *Giglio*.

In allegedly deciding not to create the centralized database respondent urges here, petitioners necessarily elected to pursue other policies to satisfy *Giglio*

and *Brady*. These could include, for example, relying on prosecutors utilizing jailhouse informants or other witnesses with charges pending to contact the prosecuting attorneys in the other case, or if uncertain as to the status of a witness, check the central criminal docket to see if there were pending criminal charges against the witness and then contact the prosecuting attorney. These policies may be adequate or inadequate in a particular case, but they represent decisions concerning the manner in which prosecutors will fulfill their *Brady* and *Giglio* obligations. As we discuss, such decisions are necessarily prosecutorial in nature and inextricably tied to the prosecution of cases.

2. Decisions concerning policy and training regarding compliance with *Brady* and *Giglio* are closely related to the judicial process and fall squarely within the prosecutorial function.

The artificial nature of respondent's purported claim based upon "information management" is revealed by the absence of any meaningful discussion of *Giglio* in respondent's brief. Review of *Giglio* underscores the prosecutorial nature of the conduct attributed to petitioners here.

In *Giglio*, the issue before the court was whether the criminal defendant's due process rights under *Brady* were violated when the prosecution failed to disclose that promises have been made to prosecution

witnesses whose testimony was central to the case. *Giglio*, 405 U.S. at 150-151. The central question was whether the fact that the Assistant United States Attorney who was prosecuting the defendant was unaware of any promise made to the key witness by another attorney in the office, made a difference. The Court held that it did not, emphasizing that "(t)he prosecutor's office is an entity and as such it is spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Id.* at 154.

The Court acknowledged that imputation of one attorney's promise to the entire office placed a burden on large prosecutorial offices if they wished to avoid reversals based on a failure to disclose such promises. *Ibid*. It suggested that "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." *Ibid*. As several amici curiae note, the Court at most suggested a prophylactic framework to address the "burden", but did not impose a constitutional mandate of a centralized data base of the sort respondent urges here. *See* Brief of Amicus Curiae Cook County at 24-26; Brief for United States at 18-20; Brief of the National Association of Counties, etc. at 15-16.

The entire analytical underpinning of *Giglio* was that a prosecutorial agency functions as a whole with respect to complying with *Brady*, in the context of exculpatory impeachment evidence concerning prosecution witnesses. The focus on the "prosecutor's

office" as "an entity" repudiates respondent's narrow attempt to focus absolute immunity solely on the individual attorney prosecuting a particular case. The recognition that the prosecutorial agency has a role as an "entity" with respect to compliance with *Brady* in this regard, necessarily comprehends that decisions concerning that role must be prosecutorial in nature.

The reality is policy and training dictate the manner in which prosecutors will comply with their obligations under *Brady* and *Giglio*. Making a decision concerning the substance of that policy and training, whether it includes collection of a database or other procedures, is a task that can only be performed by a chief prosecutor or a supervising prosecutor in his or her role as an advocate of the State. It requires professional judgment, an understanding and application of the governing law coupled with knowledge of the prosecutorial process. The ultimate decision as to how prosecutors will comply with *Brady* and *Giglio*, and whether policies are sufficient under the governing law, is a determination that can only rest in the hands of a chief advocate or a supervising prosecutor exercising prosecutorial judgment. The ultimate decision never rests in the hands of a mere low-level "administrator."

Indeed, in this regard, respondent's analogy to the conflicts system at a law firm (Resp. Brief 37) is apt, but not for the reasons he urges. The person who merely inputs data, or the administrator that executes an attorney's decision to enact a conflict system

may not be "practicing law," but the attorney who directs creation and use of the system as a matter of professional responsibility and who exercises professional judgment as to whether it meets professional obligations most assuredly is. Similarly, chief advocates and supervising prosecutors who make decisions concerning the manner in which prosecutors fulfill their obligations under *Brady* and *Giglio*, whether by assessing what constitutes information falling within the obligation to disclose and directing that particular information be disclosed in a particular manner, inevitably act as prosecutors and advocates of the State. That function is not traditionally performed, and cannot be performed, by someone else. Cf. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (no absolute immunity for fact investigation normally performed by police); *Kalina v. Fletcher*, 522 U.S. 118, 130 (1997) (acting as complaining witness not subject to absolute immunity because task could be, and normally was, performed by others); *see* Resp. Brief 27.)

Respondent contends that decisions concerning policy and training regarding *Brady* and *Giglio* cannot be closely related to the judicial process or the prosecutorial function, because such decisions were made prior to and without regard to his (or any other) particular prosecution. Resp. Brief 20-30. But contrary to respondent's argument, in *Buckley*, this Court did not purport to set a bright-line rule that all pre-trial or even pre-filing conduct fell outside the scope of prosecutorial immunity. To the contrary, as

petitioners noted, the court reaffirmed its "functional approach" to prosecutorial immunity and declined to set a bright-line standard delineating a particular time frame in which decisions become closely related to the judicial process. Pet. Brief at 20, citing *Buckley*, 509 U.S. at 272-273. The court underscored that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Ibid*. To be sure, the court noted that with respect to the investigative conduct at issue there, it could not be said to have been undertaken in the "role of an advocate," because at the time it occurred there had not even been a determination of probable cause to arrest, let alone a proceeding in which the attorney could serve as an "advocate." *Id*. at 273. But again, the court's inquiry was focused on the nature of the act at issue – fact investigation.

Here, the conduct ascribed to petitioners is necessarily prosecutorial in nature and closely related to the judicial process. First, as this Court held in *Imbler*, decisions concerning whether particular information falls within *Brady* are necessarily prosecutorial in nature and thus fall within absolute immunity. *Imbler*, 424 U.S. at 431 n.34; *Kalina v. Fletcher*, 522 U.S. 118, 124 (1997); *Burns v. Reed*, 500 U.S. 478, 486 (1991). As noted, the decisions attributed to petitioners squarely concern compliance with *Giglio* and *Brady*. Indeed, their decisions have no relevance other than in the advocacy context of a

criminal prosecution. Their conduct can *only* relate to a criminal prosecution.

Nor, analytically, does it matter that these decisions are made in advance via policy and training in lieu of having petitioners direct the same conduct in each individual case. Are chief prosecutors and supervising prosecutors required, with respect to each newly filed case, to send a memo directing compliance with policy and training in order to assure that they are entitled to absolute immunity because they are now personally involved in prosecuting a particular case?

The time frame in which the decision is made simply cannot, in a vacuum, be dispositive of when a particular act is taken in a prosecutor's role as an advocate and closely related to the judicial process. For example, the Los Angeles County District Attorney's internal regulations now sharply limit use of jailhouse informant testimony, requiring that it only be used if there is strong corroborating evidence and only with advanced approval. *See* California Commission on the Fair Administration of Justice, *Report and Recommendation on Use of Jailhouse Informants* at 3 *available at* http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf. Thus, the District Attorney is quite literally dictating the circumstances under which a particular witness may be called and the way evidence will be presented in court, essentially supplanting individual discretion on the part of the particular district attorney prosecuting the case in the courtroom. Other prosecutorial agencies could

go even further and entirely ban the use of such informants. As petitioners have noted (Pet. Brief 27), it is difficult to comprehend conduct that is more closely related to the prosecution of cases than dictating the witnesses that will appear in court and the nature of the evidence that will be presented.

By their very nature, decisions concerning policy and training with respect to *Giglio* and *Brady* only have relevance to the prosecutorial function. The rights assured by *Giglio* and *Brady* arise only where there is a criminal prosecution and the policies themselves can *only* act on the prosecutor at the time of prosecution. Because these decisions are closely related to the judicial process and were taken by petitioners in their role as advocates for the State, they are necessarily shielded by absolute immunity.

B. Absolute Immunity For Decisions Concerning Policy And Training With Respect To Exculpatory Evidence Under *Brady* And *Giglio* Is Consistent With The Common Law Protection Of The Prosecutorial Function.

Respondent contends that there is no common law counterpart to the "information management" claim based on "record-keeping" that they assert here, and that hence, petitioners cannot establish entitlement to absolute immunity. Resp. Brief 40-42. This contention too, rests on respondent's artificially crabbed characterization of his claim and does not withstand scrutiny. As a threshold matter, the Court,

consistent with its view that absolute immunity protects the prosecutorial function not a particular office, has not declined application of absolute immunity simply because a particular claim or form of prosecution did not exist at common law in 1871. Hence, in *Butz v. Economou*, 438 U.S. 478, 515 (1978), the court held that agency counsel prosecuting administrative proceedings were entitled to absolute immunity under *Imbler* because those proceedings were functionally equivalent to criminal prosecution. Thus, the question is whether the conduct attributed to petitioners is analogous to the prosecutorial conduct that fell within the scope of immunity at common law as reflected in this Court's "functional approach." As previously noted, it undoubtedly does. It is for this reason that respondent's discussion of pre- and post-1871 cases concerning the purported liability of judges for "information based" or "record-keeping" errors unrelated to deciding cases are inapposite.[1] As the court observed in *Imbler*, decisions

[1] Respondent, as well as several amici also cite pre- and post-1871 cases purporting to establish the absence of prosecutorial immunity in the United States during those time periods. Resp. Brief 41-45; Brief Amici Curiae of Law Professors in Support of Respondent 33 n.14; Brief of the Constitutional Accountability Center as Amicus Curiae 12-13. The bulk of the cases do not involve public prosecutions, but rather private prosecutions, or civil actions in which judicial process is invoked to preserve property or restrain a debtor. *See, e.g.*, *Warfield v. Campbell*, 35 Ala. 749 (1859) [writ of *capias* ad *saticfaciendum*]; *Burnap v. Marsh*, 13 Ill. 535 (1852) [writ of *no exeat*]. As the Court noted in *Imbler*, 424, U.S. at 420 n.18, *Parker v. Huntington*, 68 Mass. 124 (1854), the case cited as demonstrating the

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concerning exculpatory evidence under *Brady* necessarily fall within the scope of common law-based prosecutorial immunity. *Imbler*, 424 U.S. at 431 n.34; *Kalina*, 522 U.S. at 124. These decisions are no different if they are made in advance through policy and training as to every case prosecuted. They remain prosecutorial in function, and as we discuss below, recognition of absolute immunity for such decisions is supported by the very policy reasons which informed application of the immunity at common law.

C. Absolute Immunity Is Essential To Assure The Proper Functioning Of The Judicial Process As Well As Independent And Vigorous Exercise Of Prosecutorial Judgment.

1. Chief advocates and supervising attorneys will be subject to overwhelming exposure to vexatious claims.

As petitioners explained (Pet. Brief at 33), this Court has recognized that the adversarial nature of criminal proceedings inevitably spawns a concrete threat of vexatious and retaliatory suits against prosecutors. Petitioners noted this threat was particularly acute with respect to chief prosecutors and

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absence of prosecutorial immunity at common law in 1871, involves the elements of a malicious prosecution cause of action rather than the immunity of a prosecutor. As the Court further noted, *Leong Yau v. Carden*, 23 Haw. 362 (1916) represented the minority view. *Id.* at 422 n.19.

supervising prosecutors because, by virtue of their prosecutorial duties, they are in charge of the prosecution of hundreds, and at times even tens of thousands of cases within a particular jurisdiction. *Ibid*. at 34. *See* Amicus Curiae Brief of Los Angeles County District Attorney on Behalf of Los Angeles County at 2 [noting office prosecutes 60,000 felonies and 200,000 misdemeanors a year]; Brief of Amicus Curiae City of New York at 4, n.2 [New York County District Attorney's Office prosecutes 100,000 criminal cases annually]. Thus, chief and supervising prosecutors will be the inevitable targets of artfully pleaded claims that wrongful convictions or unsuccessful prosecutions were the result of some policy or improper training – some failure of "information management" – and be subjected to potential liability where the courtroom prosecutor would be immune. Under such circumstances, both the chief and supervising prosecutors, as well as the courtroom prosecutor would face the prospect of entanglement in litigation – the former as defendants, the latter as a witness – which would deter the very sort of independent prosecutorial decision-making that absolute immunity was designed to protect.

In response, respondent can do no more than artificially parse his claim as excruciatingly narrow while, at the same time, ignoring the broad practical implications of his "information management" theory.

First, respondent argues there is no need for absolute immunity here because there is limited exposure given that under *Heck v. Humphrey*, 512

U.S. 477 (1994), a potential plaintiff must first successfully challenge his conviction before filing suit and, in any event, few claims would have the precise factual basis he asserts here. Resp. Brief 49. As a threshold matter, this Court has emphasized it is the threat of malicious prosecution actions that necessitates absolute prosecutorial immunity. *Imbler*, 424 U.S. at 423-425. *Heck's* requirement of a successful attack on a criminal conviction as a prerequisite to a civil rights suit is, as this Court noted, simply analogous to the requirement in a malicious prosecution claim that the plaintiff establish that he or she prevailed in the underlying action. *Heck*, 504 U.S. at 484-87. Thus, *Heck* offers no more protection from potential liability than the prevailing party requirement in a malicious prosecution claim – a requirement which, as this Court recognized in *Imbler*, was insufficient to adequately protect prosecutorial decisionmaking and the judicial process so as to eliminate the need for absolute immunity.

Second, respondent asserts that his particular claim – an "information management" based claim arising from use of a jailhouse informant, is unlikely to recur. Resp. Brief 48-49. This seems squarely at odds with the position taken by amici filings in support of respondent, to the effect that the use of jailhouse informants and failure to provide *Brady* and *Giglio* information with respect to such informants is a widespread problem. Brief Amicus Curiae of the American Civil Liberties Union, et al. 10-14.

Respondent also ignores the nature of the very claim that he asserts here – dubious that it is – that *Brady* and *Giglio* somehow create an affirmative duty on prosecutorial offices of a certain size to maintain a central database concerning jailhouse informants and arrangements made with them with respect to cooperation in a prosecution to assure dissemination of the information to courtroom prosecutors. It is no stretch of reason to assume that this newly minted theory will spawn countless suits seeking to adjudicate whether a particular prosecutorial jurisdiction is large enough to "require" such a centralized database. Quite literally, the question will be litigated on a jurisdiction-by-jurisdiction basis, entangling prosecutors at every level in proceedings during which the underlying facts of each criminal prosecution at issue will be revisited with the full participation of not simply chief and supervising attorneys, but courtroom prosecutors as well.

Moreover, the *Brady* obligation encompasses not simply a requirement to disclose exculpatory information concerning a witness under *Giglio*. Virtually every criminal conviction that is reversed based upon a *Brady* violation of any kind therefore becomes a font from which a plaintiff will no doubt assert that the individual prosecutor's *Brady* violation may be traced back to a chief advocate's or supervising prosecutor's decisions with respect to enacting policies and training, including an "information management" system concerning the information in question. This Court observed in *Imbler* that the ubiquitous presence

of potential *Brady* claims against prosecutors necessitated absolute immunity because the exposure to such liability would improperly impact prosecutorial decisionmaking and burden the judicial process. *Imbler*, 424 U.S. at 424-425. These same perils threaten, and indeed are multiplied, with respect to chief prosecutors and supervising prosecutors.

The assertion by respondent that to the extent any constitutional claim can be traced to "information management" it must fall outside of prosecutorial immunity, is not simply an invitation, but a guarantee of boot-strapped constitutional claims for all aspects of purported prosecutorial misconduct. As previously noted, most prosecutorial activities can, through use of respondent's parsing, be reduced to nothing more than "information management." Keeping track of witnesses? Information management. Keeping track of evidence? Information management. Keeping track of testimony? Information management. All of these activities could be theoretically traced to the failure of a chief advocate or supervising attorney to make sure that there was some sort of policy, training, or system to keep track of and allow access to such information for use by prosecutors in the courtroom. Virtually every reversed conviction is traceable to "information management."

Moreover, the spectre of such potential liability will negatively impact chief prosecutors and supervising prosecutors in making basic decisions concerning the manner in which cases are prosecuted. Again minutely parsing his claim, respondent speciously

asserts that the only consequence of subjecting chief prosecutors and supervising prosecutors to potential liability for decisions concerning policies directing the creation and implementation of an "information management" system concerning informants would be to include more, rather than less information. Resp. Brief 51. But the reality is, as petitioners have noted, a chief or supervising prosecutor faced with potential liability arising from use of informant testimony could just as simply make a blanket decision prohibiting use of informant testimony in any prosecution, regardless of how trustworthy or necessary it might be. It is precisely this sort of chilling effect on direct prosecutorial decisions – indeed, how much more prosecutorial can it be than to dictate which witnesses will be called in court – that lower appellate courts have recognized compel application of absolute immunity for chief prosecutors. Pet. Brief at 35, citing *Hanesworth v. Miller*, 820 F.2d 1245, 1270 n.199 (D.C. Cir. 1987), abrogated on unrelated point by *Hartman v. Moore*, 547 U.S. 250, 256, 265-266 (2006).

2. The volume and fact-intensive nature of potential *Brady* claims against chief advocates and supervising attorneys for decisions concerning policy and training render qualified immunity insufficient to protect the judicial process.

Nor does qualified immunity provide sufficient protection to secure the vital independence necessary

to make prosecutorial decisions. As this Court observed in *Imbler*, criminal proceedings are necessarily fraught with multiple complex issues and tactical decisions, all of which will come into play if the criminal action is essentially retried in the context of attempting to establish qualified immunity. 424 U.S. at 425. This problem is not diminished simply because the plaintiff attempts to plead around the absolute immunity of an individual prosecutor by suing a chief or supervising prosecutor and attributing the purported misconduct to deficient policies or training – including decisions with respect to an "information management" system.

Qualified immunity is not established in a vacuum. To the contrary, as this Court has made plain, the inquiry is generally very fact specific, focusing on whether, given the facts the defendant possessed, he or she could have reasonable good faith belief premised on the governing law that the conduct was within constitutional boundaries. *Anderson v. Creighton*, 483 U.S. 635, 640-641 (1987). The claim asserted against petitioners here illustrates the fact intensive inquiry potentially necessary to establish qualified immunity. As respondent concedes, his complaint premises liability against petitioners based upon their purported knowledge of the widespread abuse of improper jailhouse informer testimony and need to improve information sharing concerning such witnesses. Resp. Brief 5, citing JA 44, 46. Thus, the question of what knowledge petitioners had before them will be front and center, which will require

chapter and verse exploration of the individual cases which purportedly should have put petitioners on notice. The same would be true in virtually any policy and training-based case against chief advocates and supervising prosecutors.

Establishing qualified immunity as well as any defense in the underlining merits of such a claim would also necessarily entangle front-line prosecutors in litigation and require them to testify as percipient witnesses as to their particular conduct in the underlying criminal case. Respondent sidesteps this issue, simply arguing in conclusory fashion that once a conviction is reversed in satisfaction of *Heck*, that somehow the facts of the underlying trial will become irrelevant. Resp. Brief 50. As noted above, not so. Line prosecutors will be required to testify as percipient witnesses for purposes of establishing a factual basis for qualified immunity, as well as with respect to causation and other related issues.

Indeed, even in the context of a case where an "information management" system of the sort urged by respondent existed, there would be an issue as to whether the individual prosecutor did or did not consult it, and further issues as to whether particular prosecutors in other prosecutions adequately or properly noted that a particular witness received consideration for his or her testimony. Moreover, the individual prosecuting attorney will be questioned as to various other tactics that may or may not have influenced the outcome. The reality is, however, that the prosecutor will have to testify, and it is the very

threat of this entanglement that this Court has recognized chills prosecutorial decisionmaking. A prosecutor faced with the prospect of acting as a witness in rehashing his entire trial history based upon a decision to use a jailhouse informant, or a coconspirator subject to a plea deal as a witness, may think twice about doing so.

Similarly, as noted, chief advocates and supervising attorneys themselves, subject to an onslaught of potential claims arising from the use of such witnesses, could simply issue a blanket policy prohibiting their use. This is exactly the adverse impact on prosecutorial judgment and independence that unacceptably impedes and burdens the judicial process. *Imbler*, 424 U.S. at 427-428.

3. Mechanisms, other than suits for damages against chief advocates and supervising attorneys provide a sufficient check on decisionmaking concerning prosecutorial policy and training.

Against these compelling public policies, respondent makes no showing of the need to impose potential liability in a single case, even one where correction at the hands of the criminal justice system comes lamentably late. In *Imbler*, this Court expressly recognized that there was a tradeoff that

would create hardship in individual cases.[2] 424 U.S. at 427-428.

Moreover, the ameliorative factors of the self-correcting nature of the criminal justice system, ethical standards for attorneys and the availability of professional discipline,[3] potential criminal liability and uniquely with respect to many chief prosecutors, public opinion and electoral or political accountability are directly applicable to the actions of a chief or supervising prosecutor.

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[2] In some cases, the hardship may be lessened through Legislative action. California, for example, authorizes the payment of up to $100 per day of wrongful incarceration, or a maximum of $36,500 per year of incarceration for those who have been wrongfully convicted, subject to legislative approval. Cal. Penal Code §§ 4900, 4904. The comparable federal statutory provisions for compensating innocent persons provides compensation of $50,000 for each year of prison confinement, and $100,000 for each year on death row. 28 U.S.C. § 2513.

[3] With respect to professional discipline, if anything, the focus is now turned to increasing scrutiny of prosecutors for such alleged misconduct. Petitioner John Van de Kamp is the Chair of the California Commission on the Fair Administration of Justice. That body issued a report and recommendation on reporting misconduct that notes shortcomings of the current disciplinary system in making certain that disciplinary proceedings are instituted against not simply district attorneys but also public defenders for misconduct resulting in improper criminal convictions. *See* Brief of Amicus Curiae, Innocence Network at 26; California Commission on the Fair Administration of Justice, *Report and Recommendation on Reporting Misconduct* (October 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf. It also suggests reforms to improve the disciplinary system in this respect. *Id.* at 21-27.

It cannot escape notice that the genesis of respondent's lawsuit was a successful attack on his conviction through the criminal justice system or that the centerpiece of his complaint is a grand jury report by a public watchdog agency, delving at length into the very problem of which he complains. If anything, this case underscores that this Court was correct in its understanding of the potential corrective factors for misconduct other than entangling prosecutors in litigation for prosecutorial decisions.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions to reverse the order denying Mr. Van de Kamp and Mr. Livesay's motion to dismiss and to enter an order dismissing the action.

DATED: September 29, 2008

Respectfully submitted,

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