No. 06-55537

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS LEE GOLDSTEIN,

Plaintiff/Appellee,

v.

JOHN VAN DE KAMP and CURT LIVESAY,

Defendant/Appellant.

Appeal from the United States District Court
for the Central District of California
The Honorable A. Howard Matz, Judge Presiding
District Court Case No. CV-04-9692 AHM (Ex)

BRIEF OF *AMICI CURIAE* DEFENDER ORGANIZATIONS AND ADVOCATES IN OPPOSITION TO PETITION FOR PANEL REHEARING AND FOR REHEARING *EN BANC*

Theresa Newman
Co-President
The Innocence Network
P.O. Box 90362
Durham, NC 27708-0362
(919) 613-7133

*Timothy P. O'Toole
Catharine Easterly
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

*Counsel of Record

David M. Porter
9th Cir. Vice Chair
NACDL *Amicus* Committee
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700

Daniel Libbey
Vice-President, Criminal Division
Alaska Academy of Trial Lawyers
P.O. Box 101571
Anchorage, AL 99501
(907) 258-4040

John T. Philipsborn
Chair, *Amicus Curiae* Committee
California Attorneys
for Criminal Justice
1225 Eighth Street, Suite 150
Sacramento, CA 95814
(916) 449-8868

William J. Arzbaecher III
California Public Defenders
Association
2407 J Street, Suite 301
Sacramento, CA 95816
(916) 441-3792 ext. 202

Daniel J. Broderick
Federal Defender
Office of the Federal Defender
for the Eastern District
of California
801 I Street -- 3rd Floor
Sacramento, CA 95814
(916) 498-5700

David Glenn Bettencourt
Gideon Litigation Committee Chair
Hawai'i Association of Criminal
Defense Lawyers
Dillingham Transportation Building
735 Bishop Street, Suite 425
Honolulu, HI 96813
(808) 521-3491

Teresa A. Hampton
Immediate Past President
Idaho Association of
Criminal Defense Lawyers
912 N. 8th Street
Boise, ID 83702
(208) 384-5456

JoNell Thomas
NACJ *Amicus* Committee
Nevada Attorneys for
Criminal Justice
Law Office of JoNell Thomas
616 South 8th Street
Las Vegas, NV 89101
(702) 471-6565

Rankin Johnson IV
Chair of the *Amicus* Committee
Oregon Criminal Defense
Lawyers Association
96 East Broadway, Suite 5
Eugene, OR 97401
(541) 686-8716

James D. Hennings
Executive Director
Metropolitan Public Defender
630 SW Fifth Avenue, Suite 500
Portland, OR 97204
(503) 225-9100

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

* Cases and statutes chiefly relied on are marked by an asterisk.

STATUTES

OTHER AUTHORITY

INTEREST OF *AMICI*

Amici curiae – The Innocence Network, the National Association of Criminal Defense Lawyers, Alaska Academy of Trial Lawyers, California Attorneys for Criminal Justice, California Public Defenders Association, Office of the Federal Defender for the Eastern District of California, Hawai'i Association of Criminal Defense Lawyers, Idaho Association of Criminal Defense Lawyers, Nevada Attorneys for Criminal Justice, Oregon Criminal Defense Lawyers Association, Metropolitan Public Defender (Portland, Oregon), and the Public Defender Service for the District of Columbia – share a common view: We believe the Panel's ruling was both entirely consistent with Supreme Court precedent and unremarkable. The Panel simply held that two managers who, years after being directed to do so by the Supreme Court, fail to implement constitutionally-mandated information management systems to ensure that trial prosecutors learn of *Brady* information in possession of the government, can be held civilly liable for their administrative failings. Any decision that held otherwise would have been plainly unlawful and seriously increased the risk of miscarriages of justice like the one that occurred in Mr. Goldstein's case.

ARGUMENT

AN ADMINISTRATOR OF A PROSECUTORS' OFFICE SHOULD NOT BE SHIELDED BY ABSOLUTE IMMUNITY IF HE DEFIES SUPREME COURT DIRECTIVES TO PUT IN PLACE INFORMATION MANAGEMENT SYSTEMS TO ENSURE HIS ATTORNEYS ARE ABLE TO COMPLY WITH THEIR CONSTITUTIONAL OBLIGATIONS UNDER *BRADY V. MARYLAND.*

The Panel's unanimous refusal to extend the extraordinary remedy of absolute prosecutorial immunity to the defendants was entirely correct. Absolute immunity is appropriate when it "protect[s] the judicial process." *Burns v. Reed*, 500 U.S. 478, 492 (1991); but it would serve no such function here. Indeed, it would have the opposite effect.

This case presents a discrete scenario – when (a) a trial prosecutor attempts to excuse nondisclosure of information he is obligated to disclose under *Brady v. Maryland,* 373 U.S. 83 (1963), on the ground that he *personally* had no knowledge of the information, (b) this lack of personal knowledge is the product of deliberately indifferent administration and system-wide failure of record-keeping and file-sharing in that prosecutors' office, and, (c) as a result of this deliberately indifferent administration, an innocent person is wrongfully convicted.

Over thirty years ago in *Giglio v. United States,* 405 U.S. 150, 154 (1972), the Supreme Court directed prosecutors' offices to ensure they had

adequate information management systems in place to ensure that *Brady* information was properly collected and disseminated to its attorneys; the Court reiterated this directive again twelve years ago in *Kyles v. Whitley,* 514 U.S. 419, 438 (1995). One would expect that most managers of prosecutors' offices heeded *Giglio* and *Kyles.* But if a manager, in defiance of these Supreme Court directives, failed to implement the requisite record-keeping and file-sharing measures, there can be no legitimate excuse for his inaction. Nor is there a legitimate basis to insulate any such administrative failure – which seriously undermines the rule of *Brady* and its promise of promoting fair trials – from civil liability. Accordingly, the Panel's well-considered and correct decision, supported by similar rulings in the Second and Third Circuits, should stand.

A. Comprehensive Record-Keeping and Sharing of *Brady* Information Safeguards The Judicial Process.

Mr. Goldstein's suit highlights the need for comprehensive record-keeping and sharing of information. It is critical for trial prosecutors to be personally aware of *Brady* information constructively or actually in the possession of their offices. But, in order to have such knowledge, systems must be in place to alert them to its existence. For example, law enforcement officers should be required to turn over the entirety of their case

files to the prosecutors' offices,[1] and prosecutors should implement a centralized filing system to keep track of impeachment information concerning government cooperators or informants.

This is what the Supreme Court ordered prosecutors to do thirty years ago. First in *Giglio* and then in *Kyles*, the Court directed prosecutors to put "regulations and procedures" in place to ensure that *Brady* information is properly collected by and disseminated within their offices. *Giglio*, 405 U.S. at 154 (a prosecutors' office as "an entity" has a duty to guarantee that *Brady* information is shared among prosecutors, and, to that end, must implement "procedures and regulations" to ensure "communication of all relevant information to every lawyer who deals with it"); *Kyles*, 514 U.S. at 438 (prosecution's "duty to learn" applies to information in police custody and "procedures and regulations can be established to carry this burden") (quoting *Giglio*).[2]

---

[1] Defendants' *amicus* Appellate Committee of the California District Attorneys Association (CDAA) curiously suggests that local prosecutors are entirely helpless to compel the communication of information from the police. Appellate Committee CDAA Letter at 5. Prosecutors may not have direct administrative authority over law enforcement agencies, but they hold the balance of power: They can decline to prosecute cases where the police have failed to provide them with adequate information about the investigation.

[2] In light of these directives, the assertion by defendant's *amicus* the State of Nevada's Advisory Council for Prosecuting Attorneys that "[e]xposing government officials to potential liability 'detracts from the rule of law,'" is

The Supreme Court issued such directives because even innocent and inadvertent suppression of *Brady* information damages our criminal justice system. The aim of disclosure under *Brady* is to ensure that criminal trials are fair and fulfill the mission of a search for the truth. *See United States v. Bagley*, 473 U.S. 667, 675 & n. 6 (1985) ("to ensure that a miscarriage of justice does not occur," prosecutor has a duty "to assist the defense in making its case."). *Brady* cannot promote fair trials, however, if prosecutors are precluded from learning information in the possession of the prosecution team that might weaken their case, let alone give rise to reasonable doubt. Appellate and habeas courts have tried after-the-fact to right the wrongs of *Brady* violations by imputing to the trial prosecutor knowledge of undisclosed favorable information to which he had access.[3] But to fulfill the true promise of *Brady* – that is to ensure that *before the trial starts* full disclosure of exculpatory and impeachment information has been made – the

---

nonsensical. *See* Nevada Advisory Council for Prosecuting Attorneys Letter at 2. The law is that administrators of prosecutors' offices must put *Giglio-Kyles* procedures in place, and Mr. Goldstein simply seeks to hold defendants accountable for violating this law.

[3] *See, e.g., Mastrachio v. Vose,* 274 F.3d 590 (1st Cir. 2001); *In re Sealed Case (Brady Violations),* 185 F.3d 887 (D.C. Cir. 1999); *Boyd v. French,* 147 F.3d 319 (4th Cir. 1998); *Freeman v. Georgia,* 599 F.2d 65 (5th Cir. 1979); *State v. Williams,* 896 A.2d 973 (Md. 2006); *also Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *Kyles*, 514 U.S. at 438).

trial prosecutor must have *actual* knowledge of favorable information in the possession of his colleagues and his prosecution team.

The absence of regulations and procedures for the proper dissemination of *Brady* information not only hampers honest prosecutors who would comply with their *Brady* obligations if they could, it also emboldens those prosecutors who might be inclined to disregard their *Brady* obligations to act with impunity.[4] Without established protocols or procedures for record-keeping and sharing, and without training on those protocols and procedures, it is extremely difficult, if not virtually impossible, to establish what prosecutors did or could have done to inform themselves about the *Brady* information available in a case. Relatedly, if a prosecutors' office operates without office-information management systems and related training to facilitate *Brady* disclosures, it sends a message to its attorneys that comprehensive *Brady* disclosure is neither a priority nor a concern. This risks creating a culture where *Brady* disclosures are downgraded from a

---

[4] *Amici* emphasize that we assume that most prosecutors who have violated their *Brady* disclosure obligations are sincere when they profess their ignorance of the undisclosed information. Nevertheless, as this Court noted in *United States v. Kojayan*, 8 F.3d 1315, 1325 (9th Cir. 1993), "the temptation is always there: It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win." It has been *amici's* observation and experience that it is particularly easy to rationalize suppression of *Brady* information when a prosecutor believes, honestly but erroneously, that he's "got the right guy."

constitutional obligation to a "matter of prosecutorial grace." *Lewis v. United States*, 408 A.2d 303, 306 (D.C. 1979).

Lastly, if *Brady* information in the actual or constructive possession of the prosecution team is not easily accessible to line prosecutors, there is an increased risk that resources – prosecutorial and judicial – will be expended trying innocent people, like Mr. Goldstein. Wrongful convictions are more likely. The real perpetrators may go free. Public confidence in the criminal justice system is undermined.

The costs of operating without *Brady* information management systems and protocols only multiply when one considers that suppression of *Brady* information still takes place more than 30 years after the Supreme Court instructed prosecutors' offices to take the necessary steps to make sure its attorneys would be able to make complete *Brady* disclosures.

Given that the essence of a *Brady* violation is that it remains hidden in the prosecutor's files, documenting the precise rate at which *Brady* violations occur is virtually impossible.[5] But the studies that have examined

---

[5] The suppression of impeachment information about government informants and cooperators, such as at issue here is especially difficult to uncover. Unlike an exculpatory witness whom the defense could theoretically seek out to interview if it knew of the witness' existence, information about cooperation agreements, monetary payments, and other types of benefits conferred on informants and cooperators are in the exclusive possession of the prosecution and the police.

the problem suggest that it may be very high.[6] The DNA exoneration cases provide further cause for concern: Numerous wrongful convictions are attributable at least in part to undisclosed *Brady* information, and in particular undisclosed *Brady* information about informants and jailhouse snitches, as is at issue in Mr. Goldstein's case.[7] Indeed, the problem with *Brady* nondisclosures has been the subject of such concern in federal courts that an amendment to Rule 16 to clarify prosecutors' obligations is currently under review and now seems likely to be adopted. *See* Advisory Committee on Criminal Rules, Minutes, Sept. 5, 2006 (available at http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf).

---

[6] *See* Ken Armstrong & Maurice Possley, Verdict: Dishonor, Chi. Trib., Jan. 10, 1999, available at http://www.chicagotribune.com/news/nationworld/chi-020102trial1,1,1548798.story?ctrack=2&cset=true (based on nationwide review of *Brady* violations in homicide cases, *Chicago Tribune* concluded that suppression of *Brady* information is a widespread problem); Bill Moushy, *Win at all Costs, Pittsburgh Post-Gazette*, available at http:///www.post-gazette.com/win/default.asp (a separate nationwide review of alleged prosecutorial misconduct by the *Pittsburgh Post-Gazette* reaches same conclusion).

[7] http://www.innocenceproject.org/understand/Government-Misconduct.php ("In more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant. Often, statements from people with incentives to testify – particularly incentives that are not disclosed to the jury – are the central evidence in convicting an innocent person."); *see also* Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, Winter 2004-05 (out of 111 exonerations since states reinstated the death penalty, over 45% relied on false testimony from "incentivized witnesses").

Any failure to put procedures in place to ensure the proper communication and dissemination of *Brady* information to the trial prosecutor undermines the *Brady* rule. Despite the Supreme Court's clear directives and the inherent difficulties of uncovering *Brady* nondisclosure, the case law still contains too many instances where a prosecutor's excuse for suppression of *Brady* information is lack of personal knowledge. *See, e.g., In Re Sealed Case (Brady violations)*, 185 F.3d 887, 896 (D.C. Cir. 1999); *Mastracchio v. Vose*, 274 F.3d 590, 600-01 (1st Cir. 2001); *State v. Youngblood*, 2007 WL 1388186 (W.Va. 2007); *State v. Williams*, 896 A.2d 973, 976 (Md. 2006); *State v Moore*, 2006 WL 2035664 *6-7 (Ala. App. 2006); *Hendrix v. State*, 908 So.2d 412, 424 (Fla. 2005); *People v. Wright*, 86 N.Y.2d 591, 595, 598 (N.Y. 1995); *State v. Siano*, 579 A.2d 79, 277, 280-81 (Conn. 1990).

In the District of Columbia, a recent survey of *Brady* nondisclosures showed that a trial prosecutor's lack of personal knowledge was still a common excuse for nondisclosure.[8] The scandal of Paul Howes, a former Assistant United States Attorney, who used witness vouchers as a "discretionary fund" to pay off his incarcerated cooperators and their friends and family, further documents the problem. Although Mr. Howes gave out

[8] *See* http://www.pdsdc.org/Calendar/SummerSeries/SS06292006/BradyChart.pdf

almost $150,000 to 132 people, apparently no one else in the United States Attorney's Office – including his co-counsel – was aware of his conduct, and these substantial monetary benefits were not disclosed to the defendants at whose trials these cooperators testified. *See* Washington Post, Henri E. Cauvin, "Misconduct Probe Cuts Sentences in D.C. Case." Dec. 24, 2004 (available at http://www.truthinjustice.org/paul-howes.htm).

It does not have to be this way. Indeed, the creation of a centralized index for jailhouse informants by the Los Angeles District Attorneys Office[9] demonstrates that prosecutors' offices can easily put systems in place to ensure that that their attorneys have comprehensive access to *Brady* information. Moreover there is no reason why prosecutors cannot apply to *Brady* information the same information technologies that have been used to such beneficial effect in creating comprehensive databases for DNA profiles, fingerprints, mug shots, criminal records and other data that assist the law enforcement mission.

In short, the negligible cost of requiring administrators of prosecutors' offices to do precisely what the Supreme Court directed

---

[9] *See* Legal Policies Manual, Los Angeles County District Attorney's Office, April 2005, available at http://www.ccfaj.org/documents/reports/jailhouse/expert/LACountyDApolicies.pdf.

them to do in *Giglio* and *Kyles* is outweighed by its substantial benefits, whereas the cost of extending absolute immunity to administrators of prosecutors' offices who defy these directives is high and unmitigated. It would not help resolve the intractable problem of *Brady* suppression and would likely exacerbate it. The pursuit of truth and the delivery of justice in criminal trials would be the ultimate casualty.

B. Civil Liability Is Necessary To Deter Administrators Of Prosecutors' Offices From Disregarding The Directives Of *Giglio* And *Kyles*.

The Panel's decision to refuse to extend to defendants the extraordinary protection of absolute immunity was additionally correct because the alternatives to civil liability – professional sanctions and sanctions in the context of criminal litigation – are necessarily constricted and unlikely to deter a failure to put *Giglio/Kyles* procedures in place. *See Burns,* 500 U.S. at 486.

Commentators have noted that disciplinary proceedings are generally an ineffective mechanism for deterring misconduct by prosecutors. *See, e.g.,* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady*

Violations: A Paper Tiger, 65 N.C. L. Rev. 693 (1987).[10] But even if disciplinary proceedings effectively deterred individual prosecutors from willfully disregarding their *Brady* obligations in particular cases, they would serve no purpose where the alleged conduct is an *administrative* failure to put information management systems in place for the collection and dissemination of *Brady* information. This is simply not the realm of responsibility policed by Bar and ethics rules.

Criminal trials, appeals, and post-conviction proceedings likewise do not afford a viable forum to address any failure to put in place procedures and regulations to ensure the proper dissemination of *Brady* information. To begin with, the likelihood that the parties or the Court will ever become aware of a *Brady* violation is highly remote, particularly in the context of *Giglio* information for informants and cooperators. *See* n. 5 *supra*. Because a *Brady* violation – unlike a trial error – will only be known at all because of a fortuitous event, any rational administrator of a prosecutors' office would view the chances of a *Brady* reversal (or dismissal if, even more unlikely,

---

[10] *See also* Neil Gordon, Center for Public Integrity, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct* (2003), http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39 (nationwide study found that prosecutors are almost never disciplined; out of more than 2,000 cases of prosecutorial misconduct since 1970, only 44 prosecutors faced disciplinary hearings).

the *Brady* violation actually surfaces before the conclusion of trial) as about as likely as a lightening strike and as instructive.[11]

In the limited instances where a *Brady* violation is fortuitously uncovered, a court's mission is to assess the impact on the individual defendant's case, not to conduct a mini-trial into the management of the prosecution's office. And if the Court determines that the defendant has suffered no prejudice from the prosecution's nondisclosure[12] – *e.g.,* because defense counsel was able to uncover other information that undermined the prosecution's case – no sanction will be imposed, even if the nondisclosure is the product of a problem with the management of *Brady* information by the prosecutors' office.

Even if a court were inclined to delve into these administrative problems, it is unlikely to penalize or hold responsible the individual trial prosecutor for the lapses of his superiors that cause him to be unaware of *Brady* information. *See Government of Virgin Islands v. Fahie*, 419 F.3d

---

[11] *See* Joseph R. Weeks, *No Wrong Without A Remedy: The Effective Enforcement of the Duty Of Prosecutors To Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 870 (1997) (given the very low odds of adverse consequences, it is "perfectly rational" that prosecutors might "take their chances . . . and not risk their prospects for obtaining a conviction in the first instance by complying with . . . *Brady*"); Janet C. Hoeffel, *Prosecutorial Discretion At The Core: The Good Prosecutor Meets Brady*, 109 Penn. St. L. Rev. 1133, 1145-46 (Spring 2005) (same).

[12] *See Strickler*, 527 U.S. at 281-82.

249, 254-55 (3d Cir. 2005) (requiring showing of trial prosecutor's bad faith for sanction of dismissal); *but see id.* at 254 (noting that a number of courts have indicated that "no harsher sanction than a new trial is *ever* available to remedy a *Brady* violation") (emphasis added). Thus, absence of personal knowledge of *Brady* information *itself* impedes meaningful sanction in the course of a criminal trial. The wrong person – the trial attorney, not the administrator who failed to ensure that information was properly communicated to and within the office – would be before the court.

Given the lack of alternative deterrents, liability under 42 U.S.C. § 1983 is wholly appropriate and critically necessary. Indeed, any determination to the contrary would conflict with the Supreme Court's endorsement of civil liability for government officials in *Hudson v. Michigan*,126 S. Ct. 2159 (2006), where the Court considered and rejected defendant's argument that he was entitled to the benefit of the exclusionary rule as a sanction for a Fourth Amendment knock-and-announce violation. Specifically rejecting the defendant's assertion that without suppression he would be left without an adequate remedy and that there would be nothing to deter similar Fourth Amendment violations, the Court embraced *civil litigation* as the appropriate means of seeking meaningful relief and

deterring federal and state actors from engaging in unconstitutional conduct. *Id.* at 2166-68.

One can expect the very effectiveness of civil liability as a deterrent in this context will spur any prosecutors' offices who have yet to comply with the directives of *Giglio* and *Kyles* to do so now, thus undermining defendant's and *amici's* claim that the floodgates of civil litigation will open if the Panel decision stands – an argument that appears to be premised on continued defiance of *Giglio* and *Kyles*. For a number of other logistical and procedural reasons too, it is unlikely that courts will see very many of these claims. Even to bring a § 1983 action, a plaintiff would arguably have to first discover and prove a *Brady* violation, and obtain a reversal or a vacatur of his conviction on that basis, *see Heck v. Humphrey*, 512 U.S. 477 (1994). In addition, the plaintiff would have to meet any statute of limitations bar, determined by the state statute of limitations, *see Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995), which in California is a mere two years. Cal. Civ. Proc. Code § 340(3). Finally, a plaintiff would have to overcome the bar of qualified immunity. *See Burns*, 500 U.S. at 486-87.

C. It Is The Function Of An Administrator, Not An Advocate, To Create Information Management Systems Of The Sort Contemplated In *Giglio* And *Kyles.*

The damage inflicted on our criminal justice system as a result of the failure to establish administrative procedures for the dissemination of *Brady* information – damage for which there appears to be no other meaningful remedy – presents precisely the sort of situation where the Supreme Court has indicated that civil liability *should* lie. The Court has acknowledged that the extraordinary remedy of absolute immunity is properly extended to prosecutors when they are acting in their "role as advocate[s] for the state." *Burns*, 500 U.S. at 491; *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976). But the Court likewise has made clear that actions by prosecutors *not* related to the litigation of cases are protected only by qualified immunity. *Burns*, 500 U.S. at 494-96; *see also Carter v. City of Philadelphia,* 181 F.3d 339, 356 (3d Cir. 1999) (citing *Imbler*); *Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992).

Far from advocacy work, the defendants' alleged unconstitutional conduct relates to quintessentially administrative decisions about information management in an office setting. It is the function of an administrator, not an advocate, to establish protocols and procedures addressing (1) what information must kept in office files and in what format

to ensure that it is easily searchable; (2) where physically (or virtually) that information should be stored; (3) who should have access to that information; (4) who should get training to use that information.[13] Creating and implementing these policies and protocols takes time and requires reflection. In other words, this is precisely the sort of circumstance where an executive official is reasonably expected to "pause to consider" whether he is running afoul of the Constitution – precisely the sort of circumstance where absolute immunity is unwarranted. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *see also Butz v. Economou*, 438 U.S. 478, 506. 507 (1978) (blanket absolute immunity should not be granted so high level executive officials "may with impunity discharge their duties in a way that . . . they should know transgresses a clearly established constitutional rule").

Not only does the challenged conduct have no relationship to the prosecution of a particular case, it gives rise to none of the motivations for according absolute immunity to prosecutors when acting as advocates – to shield discretionary, fact-specific decisions, often made under some time

---

[13] Similarly, when allocating office resources, administrators of a public defenders office are "performing essentially an administrative role" which "materially differs from the relationship inherent in [an attorney's] representation of an individual client." *Miranda v. Clark County Nevada*, 319 F.3d 465, 469 (9th Cir. 2003) (administrators of public defenders' offices could be sued for instituting policy of polygraphing clients to determine which cases would be investigated).

pressure from undue scrutiny. *Imbler,* 424 U.S. at 425. Post *Giglio* and *Kyles*, whether to put in place regulations or procedures to ensure that individual prosecutors have access to the information they need to fulfill their *Brady* obligations simply is not a matter reserved to the discretion of an administrator of a prosecutors' office.[14] Moreover, unless time is measured in centuries, a decision made by an administrator of a prosecutors' office not to abide by the Supreme Court's now-more-than-thirty-year-old directive in *Giglio*, reaffirmed twelve years ago in *Kyles,* would not be one made under time constraints.

In short, the compliance by prosecutors' offices with the directives of the Supreme Court in *Giglio* and *Kyles* to put information management systems in place to ensure comprehensive and complete *Brady* disclosures is not optional. It is not a judgment call. And the task is purely administrative.

---

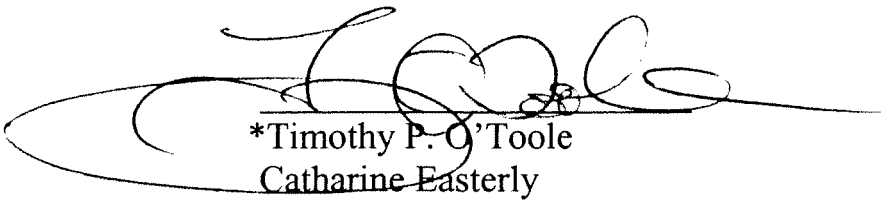
[14] In its *amicus* letter, Appellate Committee of the CDAA suggests a separate question: whether an administrator of a prosecutors' office might claim absolute immunity where a plaintiff is challenging the *adequacy* of *Giglio-Kyles* procedures or regulations. *See* Appellate Committee CDAA Letter at 4. For many of the same reasons discussed herein, that conduct too should properly only be protected by qualified immunity, but this Court need not address the issue as the allegation in this case is that defendants completely failed to put in place *any* procedures and regulations to ensure that impeachment information about jail-house snitches known to one trial prosecutor would be available to all the prosecutors in their office, and failed to train trial prosecutors to use the nonexistent dissemination procedures. *See* Appellee's Opposition to Petition for Panel Rehearing and for Rehearing *En Banc* (hereinafter "Rehearing Opposition") at 3.

If defendants defied these directives, as alleged by Mr. Goldstein below, they did so at their peril, and Mr. Goldstein should be afforded the opportunity to call them to account for their administrative failures in a § 1983 action.

CONCLUSION

For all the reasons stated above and in Mr. Goldstein's briefs to this Court, the Panel's decision was correct and should stand.

Respectfully submitted,



*Timothy P. O'Toole
Catharine Easterly

Theresa Newman
Co-President
The Innocence Network
P.O. Box 90362
Durham, NC 27708-0362
(919) 613-7133

Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

David M. Porter
9th Cir. Vice Chair
NACDL *Amicus* Committee
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700

Daniel Libbey
Vice-President, Criminal Division
Alaska Academy of Trial Lawyers
P.O. Box 101571
Anchorage, AL 99501
(907) 258-4040

John T. Philipsborn
Chair, *Amicus Curiae* Committee
California Attorneys for Criminal Justice
1225 Eighth Street, Suite 150
Sacramento, CA 95814
(916) 449-8868

William J. Arzbaecher III
California Public Defenders Association
2407 J Street, Suite 301
Sacramento, CA 95816
(916) 441-3792 ext. 202

Daniel J. Broderick
Federal Defender
Office of the Federal Defender
for the Eastern District
of California
801 I Street -- 3rd Floor
Sacramento, CA 95814
(916) 498-5700

David Glenn Bettencourt
Gideon Litigation
Committee Chair
Hawai'i Association of
Criminal Defense Lawyers
Dillingham Transportation
Building
735 Bishop Street, Suite 425
Honolulu, HI 96813
(808) 521-3491

Teresa A. Hampton
Immediate Past President
Idaho Association of
Criminal Defense Lawyers
912 N. 8th Street
Boise, Idaho 83702
(208) 384-5456

JoNell Thomas
NACJ *Amicus* Committee
Nevada Attorneys for
Criminal Justice
Law Office of JoNell Thomas
616 South 8th Street
Las Vegas, NV 89101
(702) 471-6565

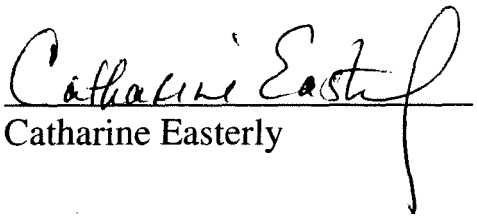
Rankin Johnson IV
Chair of the *Amicus* Committee
Oregon Criminal Defense
Lawyers Association
96 East Broadway, Suite 5
Eugene, OR 97401
(541) 686-8716

James D. Hennings
Executive Director
Metropolitan Public Defender
630 SW Fifth Avenue,
Suite 500
Portland, OR 97204
(503) 225-9100

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32(A) AND CIRCUIT RULE 29-2(b)

This brief complies with type-volume limitations of Circuit Rule 29-2(b) because it contains only 4,146 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B). This brief complies with the type-face requirements of Circuit Rule 29-2(b) and Fed. R. App. 32 (a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced type-face program using Word 2000 in Times New Roman 14 point font.



Catharine Easterly

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 2007, a copy of the foregoing brief has been served, by federal express upon

Ronald O. Kaye
David S. McLane
Marilyn E. Bednarski, LLP
Kaye, McLane & Bednarski, LLP
128 N. Fair Oaks Avenue
Pasadena, CA 91103

Theresa M. Traber
Laboni A. Hoq
Traber & Voorhees
128 N. Fair Oaks Avenue, Suite 204
Pasadena, CA 91103

Steven J. Renick
Manning & Marder Kass, Ellrod, Ramirez, LLP
801 So. Figueroa Street, 14th Floor
Los Angeles, CA 90017

Catharine Easterly