IN THE SUPREME COURT OF THE UNITED STATES

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JOHN VAN DE KAMP, ET AL., :

Petitioners :

v. : No. 07-854

THOMAS LEE GOLDSTEIN. :

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Washington, D.C.

Wednesday, November 5, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

TIMOTHY T. COATES, ESQ., Los Angeles, Cal.; on behalf of the Petitioners.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 07-854, Van De Kamp v. Goldstein.

Mr. Coates.

ORAL ARGUMENT OF TIMOTHY T. COATES

ON BEHALF OF THE PETITIONERS

MR. COATES: Mr. Chief Justice, and may it please the Court:

This case arises from a Ninth Circuit opinion that essentially creates an exception to absolute prosecutorial immunity for chief advocates and supervising advocates. The court's decision in the Ninth Circuit essentially held that prosecutorial policies that apply to an entire body of cases in a trial office do not qualify for absolute immunity.

We submit that this is inconsistent with this Court's decision in Imbler v. Pachtman and its progeny, applying the functional approach to absolute immunity. There is essentially no distinction between a chief advocate or supervising prosecutor implementing a policy directing that cases be handled in a particular manner and that particular chief advocate or supervising advocate actually participating in the courtroom.

Because of the size of the prosecutorial agencies, it's not feasible that a chief advocate or supervisor can be in a courtroom in every single case. But they can put their prosecutorial stamp on each case through the implementation of policy, through training, or through other means.

Here the policy at issue concerns compliance with the obligation to disclose exculpatory information under Brady v. Maryland and also Giglio v. United States.

In Imbler versus Pachtman, the Court recognized that those obligations are core prosecutorial obligations that are part of the prosecution's intimate relationship to the fairness of the trial proceedings. And we submit that that duty, that function, is the same whether it's performed in the courtroom or whether it's performed by a chief advocate or supervising advocate in terms of formulating policy or when making particular policy decisions.

Imbler recognized that these core decisions had to be insulated. Otherwise, it would spawn litigation that would burden the judicial process. And it might cause them to hesitate to produce particular exculpatory information. It might create a burden of having them involved in more lawsuits than actually

performing their function and prosecuting the criminal law.

JUSTICE KENNEDY: Was -- was there an element in Imbler of the fact that you have to make tactical and strategic decisions at -- at the moment that are difficult, that call for judgment that has to be exercised on the spur of the moment?

This is somewhat different. This is -- this is a long-term commitment or a long-term policy that the Respondents are arguing for. It seems to me somewhat different than the dynamics that inform the Imbler decision.

MR. COATES: Well, the court in Imbler did mention a time frame in which decisions have to be made -- quickly made by individual prosecutors. It also noted the sheer number of decisions that are often made in the context of a criminal prosecution.

I would say, with respect to chief advocates and -- and supervisors, the number of those types of decisions is the same. They have the same complexity in determining what is going to come up in every single case as an individual prosecutor does in a -- in a single case.

Moreover, there is a multitude more that they have to consider because they are considering the

possibility of its impact on thousands of cases within the office. I will note, though, in Butz v. Economou, where the Court extended absolute immunity to individuals prosecuting agency actions, that same point was raised. But some of the conduct there was a bit more drawn-out in terms of the investigative manner -- not the investigative manner, but the -- the prosecutorial process used by the administrative agency. And the court didn't find that -- that longer time frame to be dispositive.

Going back to Imbler, it again looked at what the basic function was in the administrative agency proceeding and found, yes, it is akin to prosecutorial conduct.

JUSTICE STEVENS: May I ask you kind of perhaps a farfetched hypothetical question just so I get the case law in mind? Supposing a prosecutor wanted to develop a policy which would keep -- which would create a bifurcated regime within the office where the people who interrogate prisoners are entirely separate from the people who prosecute trials, so that they don't have the malicious purpose that your adversary says is involved in this case. And supposing the prosecutor then hired some expert layman who had no trial experience at all to develop such a program, and the program, itself, is

desirable from the prosecution's point of view but -- but presumably unconstitutional. Would the person who developed that program be entitled to immunity --

MR. COATES: The --

JUSTICE STEVENS: -- in my example?

MR. COATES: The lay person --

JUSTICE STEVENS: Yes.

MR. COATES: The layperson, as a private actor, I think would not be. I think the prosecutor that developed the policy would be. It would be like delegating it to a staff member. It might depend also on how close the relationship is. The Court has noted in some of the judicial immunity cases that sometimes court clerks can perform functions that are essentially judicial functions.

In that case, though, under the Court's jurisprudence with private actors, they might have only qualified immunity, the private actors. But the decision to use them would be prosecutorial.

JUSTICE STEVENS: Well, why -- why is it qualified immunity if a separate person does it, but not qualified immunity if precisely the same task is performed by somebody who happens also to be a prosecutor?

MR. COATES: Because it's not so much the

physical task of doing it. It's carrying out the obligation of performing that particular function. The function is compliance with Giglio and Brady. That is always a prosecutorial function. Whether the data is kept with a police department or an investigative agency, the buck stops with the prosecutor.

JUSTICE STEVENS: And in my hypothetical is it or is it not a prosecutorial -- does the layperson perform or not perform a prosecutorial function?

MR. COATES: If he is just collating data, then that is -- that's -- that's a task. Our point is that this isn't about just collating data. It's about the policy that data must be collated and used. That is the Brady-Giglio obligation. You can't divorce the -- the information from the purpose for which, why it's supposed to be used.

JUSTICE STEVENS: No, but I'm trying to divorce the information in the particular case from developing the program.

MR. COATES: Well, I --perhaps I misunderstood the question. It sounds to me that the prosecutor has made a decision that he is going to put this thing in place, this process in place. That's their way that they satisfy or don't satisfy Giglio or Brady.

Maybe they don't satisfy. Maybe it's a terrible decision. But I think that decision ends up being prosecutorial in nature.

JUSTICE STEVENS: Even if it's made by a layman?

MR. COATES: Setting up the program, no. But the -- I think the buck stops with the prosecutor as to whether that's a valid process or not. I mean, the person may adequately perform their function, or they may not. But the person at the end of the day who is responsible for it ends up being the prosecutor.

And he may inevitably -- the person may inevitably perform something, but at the end of the day the prosecutor is the one that -- that has the task under Giglio and Brady of ensuring the accuracy of the information.

I think that kind of underscores here the approach the Respondent has taken is to kind of say, well, this is just a collection of data here, this is just bookkeeping. But it's not. The core of the constitutional claim here is that there is an obligation under Brady and Giglio somehow to collect this information, to disseminate this information.

And that's the obligation that we are being sued for, and that's the sort of thing that prosecutors

do. And you can you hire someone to do it, but somebody is the gatekeeper. Someone has to basically decide what goes in or what doesn't go in and whether it's sufficient or insufficient at the end of the day to comply with -- with Brady and Giglio. And so that can't be distinguished from the -- the prosecutorial role, whether it's conducted by a -- a chief advocate or by a supervising advocate.

JUSTICE KENNEDY: Well, I -- I suppose that is why the Petitioners seemed to change their theory. They -- they -- they were -- they were concerned about prosecutorial immunity, so they take it to the higher level of policy.

When -- when they do that, I suppose they might have the stronger argument if they could show deliberate indifference. Are there cases that help them on the "deliberate indifference"? What's -- what's the best case for them on deliberate indifference?

MR. COATES: I couldn't say what the best case is for them. I could not say what the best case is for them on -- on "deliberate indifference." We have not pushed on the merits part of this case. It was not briefed down below, and it is not --

JUSTICE KENNEDY: That is why the case is hard, and I -- I almost have to see what the violation

would be before I could determine the qualified immunity aspect of the case.

MR. COATES: Well, indeed. I mean, several amici has raise the question of whether there is the constitutional violation at all, but it has not been raised below. And of course, under this Court's decision in Buckley we have to assume the existence of a constitutional violation.

JUSTICE KENNEDY: That's what we are deciding in sort of in a vacuum. It's a little difficult.

MR. COATES: Precisely. But I think our point is that -- that if you buy their theory of a constitutional claim, whatever constitutional claim that is is a -- a prosecutorial function-related claim, because that's the nature of the Giglio and Brady obligation. They are trial obligations. They don't have any meaning outside the context of an actual prosecution.

And so, again we submit that there is really no difference to the chief advocate or supervising advocate formulating this particular policy for all the cases in the office -- this is what we do -- then there is the individual actions of a particular trial attorney in a given case or even if it were possible for a

supervising attorney or chief advocate to participate in everything. They could accomplish the same thing, I suppose, by every time a case is filed sending out an e-mail saying: Comply with our policies.

JUSTICE KENNEDY: The Monell case -- does the Monell case rest on the assumption that there can be instances where a policy makes the policy of those who adopted the policy liable?

MR. COATES: I think that's right. Reading the Monell allegations of the complaint against the County of Los Angeles, I think that that is what it is, that the deputy -- that the district attorney rather, acts as a county officer and would be the policymaker for those policies and customs and practices.

That obviously is not at issue here. Petitioners are being sued as individuals for their acts as supervisors and as the chief advocate in formulating a particular policy concerning compliance with Brady and Giglio.

These sort of cases, opening this door particularly for the broad claim that plaintiffs are now trying to assert, which is this kind of notion of information management, can spawn all sorts of claims. Virtually any time that you can't reach the individual trial attorney, all you need do is attribute whatever

you think that person did to the failure to develop a policy or provide training or to have adequate data management to allow them to do the job.

This kind of end-run under Imbler will create the multitude of litigation and drag chief advocates in, as well as supervising advocates, that Imbler was designed to avoid. And it has the worse collateral effect that it's also going to end up pulling in the individual attorneys, the individual trial attorneys in a given case, because maybe they don't have individual liability, but they are certainly going to come in; they are going to testify as witnesses.

So, it's the worst of both worlds, which is you are burdening the chief advocate with this sort of litigation which may impact the way they formulate policy, and you are burdening the individual line deputy attorney, and that's the attorney that Imbler sought to protect as well.

Those adverse consequences on the judicial process are what led this Court in Imbler to recognize the importance of absolute immunity for prosecutors. We submit that it's even more important that that immunity be logically applied to chief advocates and to supervisors. Otherwise, I think Imbler will be eviscerated and we will have the very evils that Imbler

was designed to avoid.

If the Court has no further questions, I will reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Coates.

Oh, excuse me. Sorry about that.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE PETITIONERS

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

This Court recognized absolute prosecutorial immunity for line prosecutors who are charged with violating an obligation that falls uniquely on prosecutors, namely the obligation to disclose exculpatory evidence. The Respondents in this case are seeking to circumvent that absolute prosecutorial immunity by reformulating the claim as one against supervisors who allegedly failed to fulfill duties under the Constitution to collect information that would enable the line prosecutors to comply with the core duty under Giglio and Brady.

CHIEF JUSTICE ROBERTS: Is there such a

constitutional obligation?

MR. DREEBEN: Not in our view, Mr. Chief Justice. In our view the Brady obligation is one that falls on the Government. Giglio is an extension of Brady with respect to impeachment information. It's designed to ensure the fairness of the trial. It is violated only when the Government has suppressed material exculpatory evidence, that is, evidence that can undermine the fairness of the trial.

It's intimately linked in a way that really nothing else in the adversary system is to preserving the fairness of the trial. It's an obligation on the prosecutor to go beyond the normal role of an advocate to zealously advocate for his cause, and it puts the advocate in the position of supplying the judicial system with information needed to be submitted in order to have a fair proceeding.

CHIEF JUSTICE ROBERTS: I think you have the flip side of the same problem your friend has. In other words, the further it is removed from the constitutional violation or an allegation of a constitutional violation, the less need there is for immunity. The closer it is or the closer we must assume it is to a constitutional violation, then the immunity argument is stronger.

MR. DREEBEN: Well, it certainly is true that if there were a constitutional obligation under Giglio and Brady, it would be one that is intimately tied to the judicial process, and it should receive absolute prosecutorial immunity.

JUSTICE KENNEDY: In the broad ethical scheme of things, apart from liability under this statute, it seems to me that a newly elected district attorney would take seriously the obligation to make sure that everybody was following Brady.

MR. DREEBEN: Absolutely, Justice Kennedy, and I think that a formulation of policies to achieve that, whether or not required by the Constitution, is something that relates directly and intimately to the prosecutor's duties to assure --

JUSTICE KENNEDY: Well, that's the next point. If I were a prosecutor, I would say: This is my constitutional duty to say it, in the broad sense of -- of my ethical obligations of my duties to the public.

MR. DREEBEN: Only in the sense, I think, that -- that a supervisor who has the power to cause or prevent constitutional violations may be under some obligation not to cause constitutional violations. But the claim here is --

JUSTICE KENNEDY: Well, I think it's more

than that. He can't be indifferent to sloppy practices in the office --

MR. DREEBEN: You certainly should not.

JUSTICE KENNEDY: -- consistent with his or her obligations to perform their duties.

MR. DREEBEN: But I think that the deliberated indifference question that you raise, Justice Kennedy, is really a direct counterpart of the absolute immunity argument that we are making here. We are making here the argument that supervisory prosecutors should not be subject to suit based on broad policies that they have adopted that will directly have impact on individual cases in the way that Brady and Giglio obligations are fulfilled.

JUSTICE STEVENS: Mr. Dreeben, what do you do with my hypothetical? Do you remember it?

MR. DREEBEN: I remember it, Justice Stevens, and I think that the -- I agree with Mr. Coates on this one. The supervisory prosecutor who formulates the policy is the only one who has the unique --

JUSTICE STEVENS: No, I'm -- my hypothetical is they hire a layman --

MR. DREEBEN: Yes.

JUSTICE STEVENS: -- to develop a policy

that will keep separate from prosecutors information about the way witnesses are developed. And the policy I think is highly unprobable, I agree with you, but the policy is designed to avoid the obligation imposed by Giglio and Brady.

MR. DREEBEN: That's the allegation, of course. And the first thing that I want to say is that if you allow suits based on allegations that you think are really bad, you open the door to allegations that will have to be sorted out throughout the judicial system.

JUSTICE STEVENS: But that's true even without -- without an immunity.

MR. DREEBEN: But I think that the point is that the immunity prevents the prosecutors from having to fear that they will be subject to those kind of suits.

But to answer your question directly, the layperson, if he causes a constitutional violation, isn't shielded by the constitutional -- excuse me -- by the prosecutorial immunity that attaches only to prosecutors. And that's because if you go back to the roots in Imbler, what you see is that prosecutorial immunity is really --

JUSTICE STEVENS: Of course, the next

question is, if that's true, and if there is -- you can compartmentalize the prosecutor's work in the office and he develops a separate chapter of his own duty to just do that performance, why is that trial-related?

MR. DREEBEN: I think the flaw in Respondent's theory is the attempt to bifurcate what the prosecutor is doing into an administrative function and a prosecutorial function. And that's the same, I think, maneuver in your hypothetical, to say that the prosecutor is really doing something administrative and Imbler said administrative things are non-prosecutorial; therefore, we can sue him.

I think the problem with that is illustrated by a hypothetical about judicial immunity. Suppose -- judges of course have immunity from sitting on cases, and if a judge sat on a case that involved a conflict of interest he could not be sued or she could not be sued for having done so, even if it violated the Constitution. Suppose that the litigant reformulated the suit and said: Well, the judge should have had a policy to ensure a check of conflicts in all the cases that the judge sat on. And that would have been an administrative duty, set up some notebook that has all the judge's investments and direct some underling to ensure that no party in any case has an interest where

the judge has an investment. That was purely administrative, so we ought to be able to sue. The judge for that. And I think that obviously should fail. It would end-run all of the policy reasons for being able to assert absolute judicial immunity; and I think that that is identical in form to what the Respondents are trying to do here. They are trying to divorce the role of the office in maintaining some sort of a system to ensure that information is available to prosecutors to disclose under Giglio from the obligation under Giglio to ensure the fairness of the judicial process, which is an obligation that falls uniquely on the prosecutor and which Imbler makes clear is subject to absolute immunity.

And you just can't do that. If you do that, you end up exposing the supervisory prosecutors to evils that cannot occur to the line prosecutor himself. And it produces anomalies. The line prosecutor, even if he intentionally violates Giglio, cannot be sued, but under Respondent's theory the supervisory prosecutor, even if what he did is no more than deliberately indifferent or perhaps even negligent, could be sued.

The line prosecutor who handles a certain number of cases cannot be sued, in part because it would ensure a distraction of the duties of the prosecutor and

would divert him from performing his role of enforcing the criminal law. The supervisor, who is responsible for far more cases and is subject to far more disappointed litigants who would like to sue him, that person can be sued. And it would have an even more disruptive effect on an office if supervisory prosecutors, who have the responsibility, as Justice Kennedy pointed out, of trying to come up with policies that will prevent constitutional violations, and that will ensure that the office functions in an efficient and an effective manner, they will be the ones who are most deterred -- most deterred from acting, because they will suffer the possibility of thinking of their own individual liability rather than focusing on what they are supposed to do, the public interest, both disclosing information that needs to be disclosed, bringing suits that need to be brought, and using witnesses regardless of fears that someone later on is going to discover information that should have been disclosed and sue the supervisor, saying, "We know we can't sue the individual prosecutor, but you, supervisor, failed to develop effective policies to get that information to the court." That kind of circumvention of Imbler plays no role of fulfilling the policies that absolute prosecutorial immunity is

designed to fulfill.

If the Court has no further questions --

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE RESPONDENT

MR. ROSENKRANZ: Mr. Chief Justice, and may it please the Court:

This case is not about whether a chief D.A. can set policies about trial strategy. We could stipulate that this chief D.A. would be immune from those sorts of suits and it would not affect our case at all.

This case is about the function of deciding on an officewide basis whether to track important historical facts and disseminate them internally within an office to employees who need to know those facts. This case is about gathering and preserving information, certain categories of raw data, that may or may not ever get into the courtroom, not about how to use those specific pieces of data once you actually have a prosecution materializing.

This claim is no different from a claim against a chief of police, for example, for

systematically destroying 911 tapes, thereby depriving defendants of exculpatory information.

CHIEF JUSTICE ROBERTS: Why isn't --

JUSTICE GINSBURG: This is creating -- this is creating a database. And what was the year of this prosecution?

MR. ROSENKRANZ: The prosecution, Your Honor, was in 1979, it began. That was the crime; the prosecution was in '80.

JUSTICE GINSBURG: And back in 1979 we did not have the information-gathering electronic capability that we now have. So what are we talking about? What kind of database? How would it operate? Would you --

MR. ROSENKRANZ: Well, Your Honor, so that's getting to the merits of the actual claim. It could be as simple as a file cabinet or 3 by 5 cards on which you list the name of the informant and his prior record of collaboration.

In the U.S. Attorney's offices that do this, completely apart from this enormous FBI database, they do it very simply, the ones that I know about. They appoint a Giglio czar in each bureau and they say that when there is contact with the prosecutor's office and an informant, you make sure you tell this person, "send an e-mail," and he keeps it all in a file.

CHIEF JUSTICE ROBERTS: Well, but that goes to the merits, doesn't it? I mean, if -- I -- you could develop and make the same point, saying U.S. attorneys are instructed in complying with Giglio and Brady in this way. But if there is a decision not to -- I mean, immunity is only necessary when you assume some -- there has been some violation. And so the fact that somebody else avoids a violation, it seems to me, is not a good argument to deprive other people of immunity.

MR. ROSENKRANZ: Well, Your Honor, this Court has said as clearly as it can possibly say that the location of the injury is irrelevant. I am quoting now from Buckley. In Kalina, the prosecutor executed the challenged certification probably the morning before the morning she walked into court, and it was held to be not immune because that was not the function of a prosecutor. She - with the charging document.

CHIEF JUSTICE ROBERTS: You drew a distinction earlier on between a determination by a prosecutor not to turn over certain material, which is absolutely immune, and said this was different. But what if the purpose of the policy is to not provide prosecutors with material so they can't turn it over? Why doesn't that go into the same prosecutorial core function?

MR. ROSENKRANZ: Well, Your Honor, the answer is quite simple. That is the alleged motive in this case, in fact. It was intentional or with deliberate indifference, so the allegation is, the intention was to cut the flow of information to the line prosecutor. And the reason that's different is because while Petitioners say compliance with Brady, our answer is compliance with Brady comprises at least two functions.

There is the front line function of the prosecutor, the advocate, making the decision, "Do I turn this information over to the defense?" This case has nothing to do with that front line function. This case has to do with the back room function. The function of --

CHIEF JUSTICE ROBERTS: Why isn't that the same as the determination by the supervisor that, don't turn this information over. Here's all -- we are not going to share informant information because we don't think that should be turned over to comply with Giglio. The individual prosecutor they have says I'm not going to turn it over. Why isn't it exactly the same?

MR. ROSENKRANZ: Well, Your Honor, if the decree comes from on high, "we don't turn over Giglio information here," which has actually happened in some

cases, that would be a different case, because that is the chief administrator directing trial tactics.

Here it's the chief administrator looking entirely inward and saying, like any administrator in any major agency or business does, how do we get information from the people who know it to the people who need it at the front line?

JUSTICE SCALIA: That is certainly -- you know, that's an interesting theory, but it's certainly not the theory on which the decision below was based. The decision below says "Neither" -- speaking of Imbler and prior cases -- "Neither the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise or failure to develop an officewide policy regarding a Constitutional obligation like the one set forth in Giglio are subject to absolute immunity."

And I could quote portions of the opinion they are.

MR. ROSENKRANZ: That's what --

JUSTICE SCALIA: They are talking about supervising prosecutors. They are talking about training prosecutors and having an officewide policy regarding what you do with -- with Giglio information.

MR. ROSENKRANZ: Your Honor, the passage you

read from was the broad passage that the court was referring to when it said this sets up a bunch of hard questions. This case becomes an easy case, the court said, because we were not dealing with the prosecutor, the chief D.A. setting trial tactics for the line prosecutors; we are dealing -- the court says this on page 5 of the petition -- excuse me, the petition appendix.

JUSTICE SCALIA: Page 5?

MR. ROSENKRANZ: Page 5 of the petition appendix at the top. It lays out the theories. Number one theory is exactly the theory we are presenting here. At the very top line, "They violated his constitutional rights by purposely or with deliberate indifference failing to create a system that would satisfy the Giglio obligation."

JUSTICE SCALIA: They are not talking about just collecting information.

MR. ROSENKRANZ: Your Honor --

JUSTICE SCALIA: They are talking about, as they clarify later on, a -- a system in which they train and supervise and develop an officewide policy regarding the Giglio obligations.

MR. ROSENKRANZ: Your Honor, no, they -- the court was very clear that it was talking about

supervising and training, about the internal function of circulation of information within the D.A.'s office. Not --

JUSTICE SOUTER: Let's assume that's -- that's what they did mean. I have to say I read it as broadly as Justice Scalia did, but let's -- let's narrow down the -- the Court's opinion to -- to -- to the claim that you are making right now.

Let me go back to the Chief Justice's hypothetical and add one minor detail.

Let's assume that in a given department they put into effect exactly the policy that you want. They have a fine system of -- of data collection, far more sophisticated than three by five cards, and the -- the boss D.A. says everybody in this office ought to know what kind of deals are being made and offered at all times. And they have such a system.

And the boss D.A. also says and don't you disclose one word of it ever in any case. We are going to defy Giglio.

If he made that or gave that order so that in every case there would be a defiance of Giglio, even though the facts were known, would he have absolute immunity?

MR. ROSENKRANZ: And he's directing that

order to trial lawyers?

JUSTICE SOUTER: That's right.

MR. ROSENKRANZ: Yes, Your Honor. The answer is I don't know. I could imagine a theory, a very strong one --

JUSTICE SOUTER: Well, you know if in a given case, if they had this system, and the lawyer comes to him and says, okay, I've consulted our system and I realize we that have got a Giglio obligation. And the boss D.A. says: Forget it. Don't tell him a word.

There would be absolute immunity, wouldn't there?

MR. ROSENKRANZ: There absolutely would, Your Honor.

JUSTICE SOUTER: Okay.

MR. ROSENKRANZ: And my point is --

JUSTICE SOUTER: Why would the -- why would the answer be any different if he says don't bother me with particular cases? I am telling you right now what the answer is going to be in every case in which we have a Giglio obligation and that is, bury it.

Presumably there would be absolute immunity, wouldn't there?

MR. ROSENKRANZ: Your Honor, I can imagine an argument on either side. I can imagine the Plaintiff

making the argument --

JUSTICE SOUTER: What's your answer?

MR. ROSENKRANZ: I don't have an answer to that hypothetical because it's so different from our case.

JUSTICE SOUTER: The trouble is if you don't have an answer to that hypothetical, then we got to leave open the possibilities as far as your case is concerned that he would have absolute immunity in that case. And if he would have absolute immunity in that case, then the -- the -- the reason for allowing anything less than absolute immunity with respect to this data collection obligation reduces down to something like an almost a silly point.

MR. ROSENKRANZ: If --

JUSTICE SOUTER: If you can get everything you want, and all the prosecutor has got to say is: Keep it under your hat and there is going to be absolute immunity and nobody gets anything. What is -- what is to be gained by that?

MR. ROSENKRANZ: Well, Your Honor, that may well be a consequence of Imbler. But when Imbler talks about the function, Imbler is very clear that there is a distinction between trial tactics and strategy on the one hand in the cases under Imbler, and the sort of

backroom functions about the flow of information on the other --

JUSTICE SOUTER: But if the backroom function is reduced to an absolute nullity by an immunized decision to -- to bury the Giglio information in every case, then I don't see the point of saying there's no immunity for the supposed backroom function, because nothing will be accomplished even if there is no absolute immunity.

MR. ROSENKRANZ: Sure, Your Honor. We can -- if we imagine a corrupt district attorney who wants to make sure that constitutional rights are violated and evades the edict of this Court, sure, that is the consequence of Imbler.

But my point in -- in not answering the question about the theory under that case, is that the argument of the plaintiff in that case is so different from the argument that we are making here. The plaintiff in that case would be arguing, well, it is removed in time from the -- the actual prosecution which is an argument that we, too, can make. The conduct was before the initiation of criminal proceedings. It's not -- you know, you could not say it's not unique to prosecutors.

Here, our argument is that there is nothing

unique to prosecutors or to lawyers about the information management function, about the function of tracking information. And by the way, this is not an exotic theory. This is exactly the line that this Court has been following in distinguishing between --

JUSTICE ALITO: Can't you say anything about training subordinates in any office. There is nothing unique about training or not training subordinates in a prosecutor's office as opposed to any other government office or, I would suppose, an office in the private sector. So does your argument extend to any failure to provided adequate training or any instance where there is a deliberate indifference as to the training that is provided?

MR. ROSENKRANZ: I can see the plaintiff in a case using our argument to advance that point. But my point here is we don't even need to get to that argument because --

JUSTICE ALITO: So a plaintiff could say that it could sue a -- a district attorney for failing to have adequate training as to subordinates before you -- they are sent in to deliver a summation so that they know they are not supposed to comment on the failure of a defendant to take the stand --

MR. ROSENKRANZ: As I said --

JUSTICE ALITO: They are not supposed to vouch for witnesses, that would be a viable theory in your opinion?

MR. ROSENKRANZ: I -- I believe that there is an argument. It's not the argument that I am making. The argument that I am making it matters what the D.A. is training on. If the D.A. is training on trial tactics, that's one thing. But here the D.A. is training on how to use a database, and he's not training the lawyers who are going to be using it.

JUSTICE GINSBURG: Mr. Rosenkranz, you have, it seems to me, a theory of this case that is not the theory that the Ninth Circuit went on. I mean, the Ninth Circuit talks about training and supervising deputy district attorneys. And why do we train them? Because we want to ensure that they share information.

Now you are cutting out the training and supervision, and you are saying the obligation of the supervising attorney is to have this information bank, which the deputy attorneys can then -- then consult, which, may be a very sound policy. But is it an element of due process that the supervising attorney has to devise a system to share information? Where is there anything -- anything that the Court has held that suggests that there is a data collection function

required by due process?

MR. ROSENKRANZ: So, Your Honor, let me ask -- let me answer the first half first, which is about what the Ninth Circuit held. And first, I should say what it is that we argued to the Ninth Circuit.

It's on -- it's in our brief, very clearly we've presented on page -- excuse me -- on page 17 of our brief, that big paragraph, the only full paragraph, we present both what we argued to the Ninth Circuit, which was about the creation of a database, and what Petitioners argued to the Ninth Circuit, which reflected exactly what we were saying. So petitioners were not confused. They attributed to us the argument that they, quote, failed to set up a system to disseminate to deputy district attorneys information about plea deals and other assistance being offered to informants.

That was -- and that was directly out of our brief. That was the first line of their brief, and the first line of our brief also referred to that.

I agree, the Ninth Circuit spoke more about training than about this information database. But the Ninth Circuit was also speaking only about --

JUSTICE GINSBURG: And there is nothing in the Ninth Circuit -- there was nothing that was presented to the Ninth Circuit by Mr. Goldstein that had

to do with this talk about training?

MR. ROSENKRANZ: There was, Your Honor. In our complaint we had two what might be called information management theories.

One -- and you can see it on page 45 of our complaint of the joint appendix, and so while the Court is orienting itself -- there were -- there's a theory of information management that is the most prominent theory in the complaint. If you look at the bottom of page 45, about seven lines up from the bottom, you see two distinct kind of subtheories.

The first is -- so it starts -- the line starts purposely or with a deliberate indifference -- theory 1-A, that petitioners failed to create any system for the deputy district attorneys handling criminal cases to access information, about informants, of course.

Theory B, two lines from the bottom, "that they failed to train deputy district attorneys to disseminate information pertaining to the benefits provided to jailhouse informants." That's also about disseminating it internally. If one turns to page 69, the specific allegations against Petitioners, you see paragraph 154, repeatedly talking about this information system, this information sharing system, both as a

system to create and as a failure to train. But, again, train on what? Train on the need, when you don't have the system, to inform the other guy that you've just made a deal with the informant.

JUSTICE BREYER: But I would like to follow that up a bit by saying, one, I'm not sure what this difference between what you are arguing now and what you are arguing then matters. I don't understand it, frankly. I don't actually understand it, because I agree, when you were in the Ninth Circuit, with what you said: It's a failure to disseminate information. And then you said: And it's a failure to train and supervise. You did say that. Now, why that matters, I don't know, because the problem that -- maybe it does matter, maybe it doesn't. So I have to say I don't understand it. Now, help my understanding.

MR. ROSENKRANZ: I don't think it does matter.

JUSTICE BREYER: All right. I know you don't, but I'm not worried about that. I'm worried about my understanding of your argument, and that's what I am trying to get to. Answer this question, please, because it will help me: The obvious response is the response the Government made. You can take any -- which is what Justice Alito said. So I would just like to you

elaborate on it. You can take anything that the D.A. does that is wrong in the case, you know, some horrible thing he did. And maybe he shouldn't be immune, but he is, okay? Or maybe he should be. There we are.

So, here I know I can't bring this suit, but here's what I claim: You failed to have a system that did... and now we fill in the blank. And whatever that blank is, it's going to be something that would have stopped him from doing this bad thing. In your case, it happens to be an information dissemination system. In other case, it would be some other kind of system that would have the effect of stopping this bad thing. So, their point is that, if you can go ahead with yours, so can anybody else go ahead with theirs, and that is the end of immunity. Okay?

Now, what is your response? That's what I want to know.

MR. ROSENKRANZ: Your Honor, my response to that is very simple: I don't know of any other trial right -- prosecutorial misconduct, that can be controlled -- excuse me, where you can evade immunity under our theory the way you can with a theory that is based on the management --

JUSTICE BREYER: Sure, it's easy. What the prosecutor does is he makes the most horrendous

prejudicial argument you'd ever see. So we say: What you need in the D.A.'s office, since this happens all the time, are classes, or what you need is a special section of the library where they have horrible arguments underlined, okay?

(Laughter.)

JUSTICE BREYER: And so, I can do that. So can you. You are very good at it. And any good lawyer can do that. And that's their point. So, if your only response, that's your response, your point is that a good lawyer, while he can do yours, couldn't do others, I understand the response. I'm not sure I agree with it.

MR. ROSENKRANZ: No, Your Honor, and I was beginning to say before that there is nothing at all exotic about the theory. The same lines are being drawn by this Court all the time. For example, in Kalina, a very fine line between the prosecutor who is creating charging documents on the one hand, writing them, submitting them to the Court, and then on the other hand, signing them. Or, in the investigative cases, the line between the process of gathering information, the raw data, on the one hand; and on the other hand, the assessment of that data for trial.

And so, when you are talking about a

prosecutor and trying to hold the district attorney vicariously liable for decisions of a trial lawyer, that is just very different from trying to hold the district attorney liable for the process of managing data, raw information, that may or may not ever make its way into a courtroom.

JUSTICE ALITO: Your theory applies to any system of data dissemination. Is that -- would that be correct?

MR. ROSENKRANZ: Any one that is constitutionally based, Your Honor. I mean, one where you could imagine a prosecution on the other end with a constitutional right that is violated.

JUSTICE ALITO: If the prosecutor has the policy of failing to distribute to the line attorneys the latest Ninth Circuit decision or the latest decisions of this Court on important issues of criminal constitutional procedure, because they just don't like the way the law is developing in these areas. So they like the law the way it existed at sometime in the past, and they are just not going to distribute any of that. Would that be a theory?

MR. ROSENKRANZ: Well, you have to imagine a world in which the district attorney is depriving people of the tools of their trade so that they can't get it

elsewhere. There is actually a real case that I -- that I've heard about where, you know, the district attorney decided way back when to stop buying supplements for statutory -- for statute books, and so district attorneys, line prosecutors were charging under the wrong statutes.

That, to me Your Honor, is a commissary function. It is a function of an administrator trying -- making decisions about how to arm the trial lawyer.

JUSTICE STEVENS: Can I ask you this question? I know we have an immunity case, but your underlying cause of action, the one you just described, the policy there of not filing supplements, or say you had a policy of training lawyers how to evade the Batson issue. There are all sorts of troublesome policies that might be developed. Are you aware of any case in which the court has held that such a policy can be challenged in the abstract, in the -- as, sort of, on its face, rather than as applied?

MR. ROSENKRANZ: You are asking whether the policy --

JUSTICE STEVENS: The policy when they -- when they deny someone his Giglio rights or so on and so on. Have you had any cases like this one in which a court has held that such a cause of action is available

against an office policy?

MR. ROSENKRANZ: That such a cause of action --

JUSTICE STEVENS: Can be brought under 1983 for such a general policy?

MR. ROSENKRANZ: In the absence of a constitutional injury?

JUSTICE STEVENS: That it will produce on a regular basis constitutional --

MR. ROSENKRANZ: No, Your Honor, I am aware of any such case, but I will say --

JUSTICE STEVENS: Then it seems to me that in this case the absolute immunity question is harder than the question that you present on the merits.

MR. ROSENKRANZ: Your Honor, it's actually not, and I will tell you why. Our -- we do not have to allege, for a 1983 case, that the conduct complained of was unconstitutional. All we have to allege was that the conduct caused a constitutional violation. So, for 1983 purposes, this case is a case -- most clearly, most prominently our theory would be that this case is a case in which the district attorney was aware of this market bazaar atmosphere of trading in illegal -- excuse me -- in perjured jailhouse confessions and did nothing to intervene. It's sort of a classic Hanton claim.

JUSTICE GINSBURG: But the bottom line would be, if you are right, that every district attorney in the country, large or small office, would have to have a data bank that can be shared by all prosecutors, informants that are used. That would be the constitutional requirement for every supervising prosecutor in the land.

MR. ROSENKRANZ: Not necessarily, Your Honor. First of all, Giglio imposes the -- or puts the district attorneys on notice as to what they ought to be doing. But the constitutional requirement would be when you were aware of strong warnings of this bizarre atmosphere in which jailhouse confessions are being used in this way, and you are aware that lawyers on one side of the office don't know what lawyers on the other side of the office are doing, then, yes, you are deliberately indifferent to the constitutional violations.

CHIEF JUSTICE ROBERTS: I was surprised by your answer to Justice Stevens's hypothetical, because I thought it undermines your case. You said that you don't have to show that the data system is unconstitutional. You just have to show that it caused a constitutional violation. But it would cause a constitutional violation as applied in a particular case. And you would object to it in that case, and

perhaps all this data sharing information system would be very good evidence in that case. Look, he didn't turn over this document. The reason he didn't turn it over is because they've got a policy of not giving them the document. But your objection would have to be based in a particular case. And we have already held that in that case there is absolute immunity.

MR. ROSENKRANZ: Yes, Your Honor, and that is true of almost every prosecutorial immunity case. The injury almost always happens when the lapse materializes in injury in the courtroom.

CHIEF JUSTICE ROBERTS: Exactly. Now, doesn't that just confirm the concern that has been expressed that all you're doing is circumventing the absolute immunity we recognized at trial.

MR. ROSENKRANZ: No, Your Honor, not any more --

CHIEF JUSTICE ROBERTS: Even though the data system, as you've said, doesn't cause a constitutional violation. It's the application of it at trial. Now, I know that's immune. You say, well, I'm going to get around it.

MR. ROSENKRANZ: Well, not any more, Your Honor, than Buckley or Burns were circumnavigating around Imbler. I mean in those cases, the

constitutional violations -- excuse me -- the acts that were being challenged were fabricating evidence. Why? The only purpose for fabricating the evidence was to produce it in the courtroom. Giving legal advice to extract a confession in a particular way. Why? The only purpose was to use that in the courtroom.

CHIEF JUSTICE ROBERTS: But you began this dialogue by suggesting that you don't -- I am saying -- you don't have to prove that what you are complaining about causes a -- is a constitutional violation. You just have to prove that it causes a Constitutional violation.

MR. ROSENKRANZ: Right, Your Honor.

CHIEF JUSTICE ROBERTS: In all the examples you just gave me, it seems to me the allegation would be that --

MR. ROSENKRANZ: No, not -- under Cedank, Your Honor, it was not -- it would not be a constitutional violation to extract a confession from someone until that confession is used in the courtroom.

CHIEF JUSTICE ROBERTS: Well, but that gets -- it seems to me a fundamental tension in your case. When you are talking about the conduct, you need to link it to a particular constitutional violation. The data system has to be linked. But when you are talking about

immunity, you want to say, oh, it has got nothing to do with the constitutional violation. It's just shuffling paper.

MR. ROSENKRANZ: Well, Your Honor, that's exactly right. It is because the functional approach -- for purposes of a functional approach, you never look at the case through the lens of a constitutional violation. You look at it through the lens of the conduct that's being challenged. So that's what, for example, this Court did in Kalina. The constitutional violation occurred in the courtroom, but the lens that the Court looked at it through was the specific conduct where this Court said --

JUSTICE STEVENS: But your client's standing to challenge this whole policy is the fact that he was the victim of the -- of the use of the policy in a particular case for which the prosecutor has absolute immunity.

MR. ROSENKRANZ: Yes, Your Honor, and that is always true in an immunity case. It is always true that the -- that the injury materializes in the courtroom. And this Court said in Buckley and in Burns it is utterly irrelevant where the injury materializes. What is relevant is whether you have a --

JUSTICE STEVENS: But I think you told me

earlier that there are no prior cases in which such -- a person who suffered such an injury can bring an independent 1983 case challenging the policy at large.

MR. ROSENKRANZ: Well, that's correct, Your Honor, but it's a rare event that gets discovered.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Now, Mr. Coates, you have eight minutes remaining.

REBUTTAL ARGUMENT OF TIMOTHY T. COATES

ON BEHALF OF THE PETITIONERS

MR. COATES: Thank you, Mr. Chief Justice.

I think some of the Court's comments have underscored the tension in this case that the nature of the constitutional claim here: That the rights that were actually violated are the Giglio and Brady rights. But the function we are talking about is the function of complying with Brady and Giglio.

You can do it in various fashions. Maybe it's a data base. Maybe it's something else. Maybe in some cases it's even foreclosing particular witnesses from testifying because you don't trust them. That is essentially what the district attorney's policy is now. It -- it forecloses deputy district attorneys from just, willy-nilly, using jailhouse informants. They have

severe restrictions on what they can do.

It's hard to imagine a -- a policy that is more directed to courtroom behavior than something that's caveating the discretion of a particular line prosecutor as to which witnesses they can use.

I think what we have here is a constitutional claim that the tighter they try and draw not just the causation, but the nature of the obligation itself is tied to the prosecutorial function. Because it's part of the prosecutorial function to assure the disclosure of exculpatory information under Brady and -- and Giglio.

And so I would submit that under Imbler this Court has already held that that conduct by an individual prosecutor falls squarely within immunity. And I submit that there is -- there is simply no distinction for that kind of conduct when it's done in the courtroom and that kind of conduct when it's done in advance in all cases by a supervising prosecutor or by a chief advocate. If the Court has no further questions --

JUSTICE BREYER: I suppose the distinction he's trying to make maybe -- I'm not sure I've got it right, but you see there are certain kinds of systems that maybe administratively an office ought to have.

And where it turns out that this is really an administrative system, a lot of offices do have it, some don't, but where it was negligent not to have it and the very presence of it would have prevented the -- the individual in the courtroom from behaving the way he did, well, that's a separate kind of a claim. That's an administrative claim.

Just as if, for example, suppose you had no secretary or assistants. He says, look, everybody should have secretarial assistance. And if only you had secretarial assistance, these people would not have misread everything the way they did or would have gotten the phone calls or would have done something like that. That's the kind of line -- so he's trying to draw a line there between something that is pretty purely administrative and -- and something that is really supervisory and training. And he is not saying supervisory and training. He is saying that was a separate claim.

MR. COATES: Well, I think it's hard for him to get away from the manner in which he is trying to characterize it as being just administrative because it's not information just sitting there in a vacuum. The key thing is the policy that --

JUSTICE BREYER: Training in today's world

or he wants to say in that day's world, whatever it was. They have information systems. They existed, and every office ought to have them. And now he says I might lose on that claim; but, nonetheless, it's not the kind of claim that falls within Imbler. I think that's his point. I'm not positive. He doesn't have to take my --

MR. COATES: I think that is -- that is the point. But I think our point is that trying to characterize that as an administrative system strips it of the -- the meaning for which you are collecting the data. I mean, according to them, the reason we have the obligation is because of the prosecutorial obligation under Giglio and Brady to make sure that exculpatory information gets out there. So it's -- it's not just administrative.

And I -- I assume if you look at the Ninth Circuit decision -- and I -- and one of the main focuses of the Ninth Circuit's decision in the case was not so much that it was merely administerial. It kind of reached that conclusion on this notion that decisions about all cases are different than decisions about a particular case.

And I think our point is that, in looking at the -- at the function performed here, you can't make that distinction. That it really -- there really isn't

a distinction. That if you are making a decision for all cases, then you are making a decision for that particular case.

There is no difference from making a policy in advance and saying everybody has to follow it. And then, as I mentioned before, the criminal complaint is filed, and you send out an e-mail saying comply with Brady, or this is how you comply with Brady. There is no real difference there.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:01 p.m., the case was submitted.)