The PROSECUTOR Feature

The Case of Thomas Goldstein: A Murder, a Fink, and Prosecutorial Liability

By Albert Locher, Assistant District Attorney, Sacramento County, California

On the night of November 3, 1979, John McGinest was shot and killed on the streets of Long Beach, hit with four shotgun blasts. One week later, within a block of the murder scene, shots were fired in the air, and a witness said the person responsible went into an alley garage. That is how Thomas Goldstein, an engineering student and Marine Corps veteran who lived in the garage, became a suspect in the murder. Police showed the McGinest murder witnesses a photo lineup with Goldstein's picture. Five of the six never identified Goldstein; four of those described the killer as being of a different race than he was. The sixth witness initially did not pick out Goldstein, but when an officer specifically pointed to Goldstein's picture and asked if he was possibly the man the witness had seen, the witness said yes.

Goldstein, who had no prior record, was arrested, and wound up in the Long Beach City Jail. During one night he was there, he shared a cell with three other inmates, including the aptly named Edward Fink, a veteran of the criminal justice system. The next day Fink got in contact with officers to tell them what he later testified to in court—that during the night, Goldstein confessed the murder to him. Fink testified at Goldstein's preliminary hearing and trial, asserting that he was not receiving any benefits for testifying against Goldstein and had not received benefits for assisting law enforcement in the past. In fact, it was later disclosed that Fink (whose record stretched back 10 years) had been acting as an informant for the Long Beach Police Department for several years, and had received a sentence reduction for his cooperation with law enforcement in another case a year before. Further, at the time he came forward to testify against Goldstein, Fink was facing a grand theft charge. Even though he had a prior prison record, he received a sentence of only 58 days on the theft, reduced because of this agreement to testify against Goldstein. A theft warrant from an adjoining county was also later dismissed.

Albert Locher

No firearm or any physical evidence ever linked Goldstein to the murder, and no property belonging to McGinest was ever recovered in Goldstein's possession. The case against him relied entirely on the single eyewitness and the testimony of Fink. Although Long Beach police officers and other deputy district attorneys in the Los Angeles County District Attorney's Office were aware of various aspects of the benefits Fink had received in the past as well as the benefits he was receiving in exchange for his testimony against Goldstein, this impeachment evidence was not shared with the deputy district attorneys prosecuting Goldstein's case. Goldstein's defense attorney thus never learned of the evidence. Goldstein was convicted and sentenced to prison in 1980.[1]

Grand Jury Public Report on Misuse of Jailhouse Informants

Ten years later, after a lengthy investigation, the Los Angeles County Grand Jury, acting in its capacity as an independent watchdog over local government,[2] presented a public report about the misuse of jailhouse informants by the Los Angeles District Attorney's Office. One of the shortcomings the grand jury identified was the failure of the district attorney to maintain any centralized index of potential impeachment information about informants—precisely the failing central to

Goldstein's case. The entire matter of jailhouse informant testimony became the subject of great public debate, and eventually the L.A. District Attorney's Office adopted stringent policies and procedures governing its use.[3]

After the public airing of these issues, attorneys and investigators working on behalf of Goldstein learned of the evidence impeaching Fink that had not been provided to the defense in 1980. The issue he raised is one familiar to prosecutors—the obligation under *Brady v. Maryland*[4] to provide the defense with exculpatory evidence. From that seminal case, an extensive body of law has developed to define what constitutes *Brady* evidence. Included are both express and implied promises made to informant witnesses and promises or inducements made to witnesses in previous cases.[5]

Goldstein's Habeas Petition and Civil Rights Suits

Goldstein brought a habeas corpus petition arguing there had been a *Brady* violation in his case. While he was unsuccessful in state court, in 2002 a U.S. district court magistrate found in his favor. The findings were adopted by the district court and affirmed by the Ninth Circuit.[6] In April 2004, after 24 years in prison, Goldstein was released.

Goldstein brought suit in federal court against the City of Long Beach and the police officers involved in his case for violation of his civil rights, under 42 U.S.C. § 1983. He also sued the prosecutors—but not the individual deputy DA who handled his case. In that respect, Goldstein faced an insurmountable barrier. The Supreme Court held in the 1976 *Imbler v. Pachtman* case that prosecutors have absolute immunity from civil rights suits for acts "intimately associated with the judicial phase of a criminal process."[7] Thus, Goldstein could make no claim against the individual prosecutors who took the case to court and obtained the conviction.

But the protection of absolute immunity does not extend to everything prosecutors do. They have only qualified or limited immunity in two areas—the investigative stages of a case (where the prosecutor's limited immunity is the same as police), and actions that are "administrative."[8] While a prosecutor might ultimately prevail in situations covered by only qualified immunity, the litigation could be prolonged and might lead to civil liability.

For this reason, Goldstein elected to sue not his trial prosecutor, but rather the elected district attorney, John Van de Kamp, and his chief deputy, Curt Livesay. Goldstein did not contend that the failings by the prosecution had arisen in the investigative stage. Rather, he claimed that these top level prosecutors had violated his civil rights in their administrative capacity by failing to adopt a system for making sure jailhouse informant impeachment information was available and disseminated throughout the entire District Attorney's Office and failing to train prosecutors on the dangers associated with jailhouse informant testimony. If these acts and failings were "administrative" for purposes of § 1983 analysis, then Van de Kamp and Livesay would not enjoy absolute immunity, and the suit could go forward.

Brady and *Giglio* Obligations

A key principle on which Goldstein's case turned had been settled in *Brady* jurisprudence seven years before the McGinest murder. The point is whether a prosecutor has *Brady* responsibility for information he or she does not personally know about an informant witness, but is known to another prosecutor in the same office. In 1972, in the case of *Giglio v. United States,*[9] the United States Supreme Court extended the *Brady* rule to cover implied promises of leniency made to informant witnesses. *Giglio* further held that when one prosecutor makes such a promise to the informant, the fact that a subsequent prosecutor has no personal knowledge of the promise does not relieve the government of the *Brady* obligation as to that information:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. ...To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.[10]

Thus, *Giglio* held that the *Brady* obligation is not merely a personal obligation imposed on the individual prosecutor (though it is certainly that), it is also an institutional obligation imposed on the prosecution office. *Giglio* specifically stated that large prosecution offices should establish procedures to see that this obligation is met.

In suing Van de Kamp and Livesay, Goldstein claimed they failed in their obligation as top managers of the prosecutor's office to establish procedures and regulations to ensure communication of information about jailhouse informants. Seven years after *Giglio,* when his case arose, they had still not put in place any system for collecting such information and making it available throughout the office. Goldstein also contended that they failed to train subordinate prosecutors in the dangers and pitfalls of informant testimony. He claimed that these were administrative failings that deprived him of his civil rights and for which Van de Kamp and Livesay were not entitled to absolute immunity.

In federal civil rights cases, government defendants ordinarily seek to limit the case or have it dismissed at the pleading stage. Van de Kamp and Livesay did precisely that, moving to dismiss based on absolute prosecutorial immunity. The district court denied their motion, holding that Goldstein's claim related to the administrative responsibilities of the top prosecutors. The Ninth Circuit affirmed.[11]

U.S. Supreme Court Reverses Ninth Circuit

In January of this year, the United States Supreme Court took a different view. In an unusually brief opinion, issued less than three months after oral argument, the high court unanimously reversed the Ninth Circuit.[12]

Writing for the court, Justice Breyer began by noting that supervising prosecutors are often involved in decisions that affect the presentation of a case in court. Had the supervisor been directly involved in deciding the strategy in court, then he or she would have the same absolute immunity the trial prosecutor had. Starting from that premise, the court reasoned that prosecution policies or training that are of general application (rather than specific to a particular trial) do not present a different situation for immunity analysis purposes.

The court noted that any different result would mean that nearly any failing by the trial prosecutor, who would be absolutely immune, could be translated into a failing in policies, procedure or training by the supervisor, who would not be absolutely immune under Goldstein's proposed theory. A trial prosecutor could thus be absolutely immune for intentional misconduct, while the supervisor would not share the same immunity for negligently training the trial prosecutor. The ease with which any claim against the trial prosecutor could be reframed into a claim of negligent policy or training would essentially eviscerate the absolute immunity doctrine of *Imbler.*

Considering the last component of Goldstein's allegations, the court concluded that the creation and management of a system for recording and disseminating informant impeachment came within the same analysis because the key component of such a system relates to the information it maintains. The decision about what information is included in such a system is not different than deciding what policies and training to have—both require legal knowledge and analysis intimately associated with the trial process.

The court explained that for analyzing the application of prosecutorial immunity as it relates to duties that might be characterized as administrative, one must look to the nature of the activities at issue. Administrative work directly connected to the trial itself is to be distinguished from matters such as payroll decisions, hiring and firing or discrimination in employment. The latter types of action do not merit absolute immunity. But actions that are in one sense administrative, but which involve legal knowledge and analysis and directly affect the trial process, are entitled to absolute immunity, even when they are of general application to many trials.

What Prosecutors Should Learn from the Ruling

The Supreme Court's conclusion is obviously welcome for managing prosecutors, who may have overall authority for thousands of cases over the course of a career. However, this ruling clarifying and limiting the extent of civil liability should not lead prosecutors to feel lax about their very real responsibilities under *Brady* and *Giglio.*

The *Brady* rule is a part of due process that prosecutors should not just grudgingly observe—they should embrace. As prosecutors, we should not be afraid to put our evidence to the test. Indeed, it is our readiness to do so that makes the role of the prosecutor so important in the criminal justice system. The *Giglio* component of *Brady* is an important aspect of our willingness to meet that test. No prosecutor wants to be in the situation where, a decade or more after a conviction is won, the defendant is set free amid the fanfare of having been wrongly convicted.

DNA exonerations over recent years have amply demonstrated that the criminal justice system is sometimes imperfect. Since the system is run by humans, that is to be expected. But *Brady/Giglio* reversals have a different character than DNA exonerations, because there is a sense that, somehow, the prosecution made an unholy alliance with a criminal at the expense of an innocent person. We prosecutors are better served by ensuring that all relevant material about an informant's reliability is made known, and the case is openly litigated. When we win such convictions, they are fairly won. When we lose, we need to accept that if the evidence was weak, we should have lost. We need to remember that the interest of the prosecutor's office in a criminal prosecution "is not that it shall win a case, but that justice shall be done."[13]

Endnotes

[1] For the basic facts of the underlying prosecution, see the Ninth Circuit unpublished opinion on habeas corpus in *Goldstein v. Harris,* 82 Fed. Appx. 592; 2003 U.S. App. LEXIS 24615 (9th Cir. 2003), or the California Supreme Court opinion in *Goldstein v. Superior Court* (2008) 45 Cal.4th 218, 195 P.3d 588. Those wishing a more detailed review can look to the federal magistrate's report of November 6, 2002, in the habeas corpus case, which is available online at the Web site for the United States District Court, Central District of California, *Goldstein v. Harris,* Case No. CV 98-5035.

[2] California Penal Code § 925 et seq.

[3] *Goldstein v. Superior Court, supra,* 45 Cal.4th at 222-223, 195 P.3d at 590-591.

[4] 373 U.S. 83 (1963).

[5] *See generally United States v. Bagley,* 473 U.S. 667, 676 (1985); *In re Jackson,* 3 Cal. 4th 578, 593-597 (1992) (promises made to jailhouse informants held to be covered generally by *Brady; overruled on other grounds; In re Sassounian,* 9 Cal.4th 535, 545, (1995) fn. 6); *People v. Kasim,* 56 Cal.App.4th 1360 (1997) (promises or inducements to a witness in prior cases); *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 479; *Singh v. Prunty* (9th Cir. 1998) 142 F.3d 1157, 1162.

[6] *Goldstein v. Harris,* 82 Fed. Appx. 592; 2003 U.S. App. LEXIS 24615 (9th Cir. 2003).

[7] *Imbler v. Pachtman,* 424 U.S. 409 (1976).

[8] *Id.*, 424 U.S. at 430-431; *Burns v Maryland,* 500 U.S. 478, 486 (1991).

[9] 405 U.S. 150 (1972).

[10] *Giglio, supra,* 405 U.S. at 154.

[11] 481 F.3d 1170 (2007).

[12] *Van de Kamp v. Goldstein,* 555 U.S. ___ (2009).

[13] *Berger v. United States,* 295 U.S. 78, at 88 (1935).