

1 prosecutor's constitutional duties under *Brady v. Maryland*, 373 U.S. 83 (1963)
2 and *Giglio v. United States*, 405 U.S. 150 (1972). One such informant, Edward
3 Fink, testified at Goldstein's 1979 trial that while in jail Goldstein had confessed
4 to killing a man. Fink testified that he received no benefits in exchange for his
5 testimony. Goldstein was convicted and was in custody for 24 years. Then he
6 was granted a habeas corpus hearing at which he presented testimony that Fink
7 had lied; in fact he *did* have an agreement with prosecutors and had received
8 benefits for cooperating with law enforcement. Largely because of this evidence,
9 Goldstein was released from prison. *See Goldstein v. Superior Court*, 45 Cal.4th
10 218, 223 (2008) (providing complete background).

11 Defendants Van de Kamp and Livesay previously moved to dismiss the
12 claims against them in this case, claiming they were entitled to absolute
13 prosecutorial immunity. This Court denied their motion and the Ninth Circuit
14 affirmed that ruling. On January 26, 2009, however, the United States Supreme
15 Court held that Van de Kamp and Livesay are entitled to absolute prosecutorial
16 immunity. *See Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009).

17 Now before the Court is defendant County of Los Angeles's motion for
18 judgment on the pleadings on the Fourth Claim for Relief, which alleges that
19 under *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 98
20 S.Ct. 2018 (1978) the County is liable to Goldstein for former District Attorney
21 Van de Kamp's constitutionally violative policies and practices. The fundamental
22 question raised by this motion is whether the conduct and practices of the Los
23 Angeles County District Attorney at issue in this case "may fairly be said to
24 represent [the] official policy" of the County of Los Angeles, as opposed to the
25 State of California, for purposes of section 1983 liability. *Monell*, 98 S.Ct. at
26 2037-38; *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734, 1736
27 (1997).

1 64. The County now argues that because the Supreme Court found that those
2 functions were prosecutorial, under California law the District Attorney was
3 acting on behalf of the State, not the County.

4 The County’s conclusion is sound but its reasoning is faulty. The *Van de*
5 *Kamp* decision did not examine California law. It was based solely on common
6 law precedents and policy implications relating to prosecutorial immunity. True,
7 some courts purporting to use the *McMillian* framework have referred to the
8 distinctions various other courts assessing absolute immunity claims drew among
9 administrative, investigative and prosecutive functions of district attorneys. *Cf.*
10 *Ceballos v. Garcetti*, 361 F.3d 1168, 1183-84 (9th Cir. 2004) (noting that the
11 court may look for “guidance” to absolute and qualified immunity cases to
12 determine whether prosecutor was acting in his prosecutorial or administrative
13 capacity), *rev’d on other grounds*, 126 S.Ct. 1951 (2006); *Bishop Paiute Tribe v.*
14 *County of Inyo*, 291 F.3d 549, 564-65 (9th Cir. 2002) (“By analogy, these cases
15 [*i.e.* cases addressing whether obtaining and executing a search warrant involve
16 prosecutorial, as opposed to investigative, conduct] inform our decision [on
17 whether a district attorney is a state or county officer]”) *vacated and remanded on*
18 *other grounds*, *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*
19 *of the Bishop Colony*, 538 U.S. 701 (2003).³ But however helpful this
20 jurisprudence may be, it is not dispositive.

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22 **B. Plaintiff’s Argument.**

23 For his part, Plaintiff argues that this is a “mixed case involving
24 administrative and prosecutorial aspects,” which “can fairly [be] characterized as
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26 ³ Since the Ninth Circuit *Bishop Paiute Tribe* decision has been vacated, it should
27 not be cited as precedent. However, the Supreme Court did not address the part of
28 the *Bishop* decision that is relevant here.

1 administrative inaction touching on prosecutorial functions,” and that “the conduct
2 is primarily administrative.” Opp’n at 22. Based on that characterization,
3 Goldstein contends that the District Attorney was not acting in the capacity of a
4 state officer.

5 Plaintiff’s reliance on such contrived classifications also is beside the point,
6 because the *Van de Kamp* decision did not hinge on labels or characterizations.
7 To be sure, the Supreme Court did agree with Plaintiff that the training,
8 supervision, and information-system management obligations of the District
9 Attorney are generally “administrative obligations.” *Van de Kamp, supra*, at 861-
10 62. But that characterization made no difference to its analysis and did not affect
11 its conclusion. In deciding whether Van de Kamp and Livesay were entitled to
12 absolute immunity, what mattered to the Supreme Court were public policy
13 considerations - - above all, the need to ensure that a prosecutor can carry out his
14 duties without “harassment by unfounded litigation” and exposure to damages
15 liability. 129 S.Ct. at 860 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 423
16 (1976)); see also *id* at 864. To protect prosecutors’ independent judgment and
17 reinforce public trust in the integrity of their decision-making, the Supreme Court
18 held, the immunity must be absolute, and it must extend to legal judgments
19 prosecutors make relating to management and dissemination of trial-related
20 information.⁴

21 Plaintiff also treats this motion as one asserting sovereign immunity under
22 the Eleventh Amendment, which would be subject to the Ninth Circuit’s test for
23 determining whether a local government entity is an “arm of the state.” This
24 assessment also is mistaken. To be sure, various courts have “blended” *McMillian*

26 ⁴ But *Cf. Al-Kidd v. Ashcroft*, ___ F.3d ___, 2009 WL 2836448 (9th Cir. Sept. 4,
27 2009) (former United States Attorney-General not entitled to absolute immunity for
28 his role in authorizing and possibly procuring material witness arrest warrant).

1 with Eleventh Amendment immunity. This Court did so at an earlier stage in this
2 case, when the County asserted Eleventh Amendment immunity, yet relied on
3 *McMillian*. See Order Granting and Denying Motions to Dismiss, July 27, 2005.
4 In *Ceballos v. Garcetti*, the Ninth Circuit stated that the analyses for determining
5 whether a political subdivision is an arm of the state and for determining whether
6 a county is a “person” subject to the provisions of § 1983 are similar.⁵ See 361
7 F.3d at 1183 n. 11; see also *Smith v. County of Los Angeles*, 535 F.Supp.2d 1033,
8 1035-38 (C.D. Cal. 2008) (using *McMillian* line of cases for an Eleventh
9 Amendment immunity analysis). If under *McMillian* the county officer was
10 acting as an agent of the state, there would be no basis for county liability, and the
11 suit against the individual officer would in fact run against the state as the
12 principal policymaker, which would be immune. *Edelman v. Jordan*, 415 U.S.
13 651, 668, 94 S.Ct. 1347 (1974) (Eleventh Amendment immunizes states from
14 liability for retroactive monetary relief).

15 *McMillian* focuses on how state law defines the actual functions of a
16 particular official. As Judge Patel succinctly explained, “the section 1983 inquiry

18 ⁵ “In determining whether an entity is an arm of the state, we inquire whether ‘the
19 state is the real, substantial party in interest and is entitled to invoke its sovereign
20 immunity from . . . [private damage actions brought in federal court.]’ *Streit v.*
21 *County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001). See *Mitchell v. Los*
22 *Angeles*, 861 F.2d 198, 201 (9th Cir. 1988) (describing the circuit’s five-factor
23 balancing test for determining whether an entity is actually an instrumentality of the
24 state). The five factors are: (1) “whether a money judgment would be satisfied out
25 of state funds,” (2) “whether the entity performs central governmental functions,”
26 (3) “whether the entity may sue or be sued,” (4) “whether the entity has the power
27 to take property in its own name or only the power of the state,” and (5) “the
28 corporate status of the entity.” *Mitchell v. Los Angeles*, 861 F.2d 198, 201 (9th Cir.
1988). The first factor refers to the state’s exposure to *legal liability* for a monetary
judgment, and it is the most important of the five factors. *Eason v. Clark County*
School District, 303 F.3d 1137, 1141-1142 (9th Cir. 2002); *Belanger v. Madera*
Unified School District, 963 F.2d 248, 251 (9th Cir. 1992).

1 focuses primarily on which party is empowered to make decisions regarding the
2 formulation and implementation of various programs, while the Eleventh
3 Amendment question centers around whether the state will be financially liable for
4 a judgment against the County and touches peripherally on other questions of the
5 County’s fiscal and operational independence.” *Laurie Q. v. Contra Costa*
6 *County*, 304 F.Supp.2d 1185, 1195 n.7 (N.D. Cal. 2004). Perhaps the clearest
7 demonstration of the two distinct analyses is in *Streit*, where the Ninth Circuit first
8 considered the County of Los Angeles’s liability under § 1983 for Los Angeles
9 County Sheriff’s Department policies using the *McMillian* framework, and then
10 considered the Sheriff’s Department argument that if it were a separately suable
11 entity, it would be entitled to Eleventh Amendment immunity under the “arm of
12 the state” doctrine. *Streit*, 236 F.3d at 559-567.

13 14 III.

15 DISCUSSION

16 A. Identification of Policymaking Officials for Municipal Liability Under 17 § 1983

18 42 U.S. § 1983 provides: “Every person who, under color of any statute,
19 ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be
20 subjected, any citizen of the United States or other person within the jurisdiction
21 thereof to the deprivation of any rights, privileges, or immunities secured by the
22 Constitution and laws, shall be liable to the party injured in an action at law, suit
23 in equity, or other proper proceeding for redress. . . .”

24 The Supreme Court in *Monell* established that local government bodies are
25 “persons” within the meaning of this statute. 98 S.Ct. at 2036. However, a
26 municipality cannot be held liable through *respondeat superior* -- *i.e.*, “solely
27 because it employs a tortfeasor.” *Id.* (emphasis in original). Rather, a
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1 municipality may be held liable only when “execution of a government’s policy or
2 custom, whether made by its lawmakers or by those whose edicts or acts may
3 fairly be said to represent official policy,” causes the constitutional injury. *Id.* at
4 2037-38.

5 The Supreme Court later prescribed the manner for determining where
6 policymaking authority lies for purposes of § 1983 as follows:

7 Reviewing the relevant legal materials, including state and local positive
8 law, as well as custom or usage having the force of law, the trial judge must
9 identify those officials or governmental bodies who speak with final
10 policymaking authority for the local governmental actor concerning the
11 action alleged to have caused the particular constitutional or statutory
12 violation at issue. Once those officials who have the power to make official
13 policy on a particular issue have been identified, it is for the jury to
14 determine whether *their* decisions have caused the deprivation of rights at
15 issue by policies which affirmatively command that it occur, or by
16 acquiescence in a longstanding practice or custom which constitutes the
17 standard operating procedure of the local governmental entity.

18 *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 2724 (1989)
19 (emphasis in original).

20 Here, there is no dispute that Van de Kamp was the final policymaker with
21 responsibility for the practices that Goldstein alleges violated his rights.

22 **B. *McMillian***

23 *McMillian v. Monroe County*, *supra*, should have been the primary
24 Supreme Court authority on which the County relied, not *Van de Kamp v.*
25 *Goldstein*. *McMillian* was convicted of murder. After his conviction was
26 overturned, he sued Monroe County (Alabama) and its Sheriff, claiming they had
27 intimidated witnesses and suppressed exculpatory evidence, thereby causing his
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1 wrongful conviction and violating his constitutional rights. The issue was not
2 whether in carrying out the particular acts underlying the plaintiff's section 1983
3 claim the Sheriff was a final "policymaker" (the parties agreed he was) but
4 whether the policy the Sheriff made was the policy of the State of Alabama or of
5 Monroe County. The Court held that he was a policymaker for the State, not the
6 County.

7 Two principles from the Supreme Court's previous cases guided its
8 analysis. *See Streit*, 236 F.3d at 560. First, the Court noted that it had to
9 characterize the "actual function" of the county official "in a particular area, or on
10 a particular issue," rather than generalizing about his function or role. *McMillian*
11 at 1737 (citing *Jett*, 109 S.Ct. at 2724). Second, it had to look to how state law
12 defined the official's functions in order to determine whether he was making
13 policy for the state or the county. *Id.* (citing *Jett*, 109 S.Ct. at 2723; *St. Louis v.*
14 *Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. at 924 (plurality op.) (1988); and
15 *Pembauer v. Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300 (plurality op.)
16 (1986).

17 Based on its review of Alabama's constitution, statutes and case law, the
18 Court determined that the Alabama sheriff was a state official when carrying out
19 his law enforcement duties. *Id.* at 1740. The Court placed particular weight on
20 the Alabama Supreme Court's understanding that it was "the framers' intent to
21 ensure that sheriffs be considered executive officers of the state." *Id.* at 1738
22 (quoting *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987). In support of this
23 conclusion, the Court noted that the state's current constitution designated sheriffs
24 as executive officers of the state, whereas a previous version of the constitution
25 did not list them as executive officers. In addition, the constitution provided that
26 for neglect of their law enforcement duties they could be impeached not by the
27 county courts, but by the Alabama Supreme Court. *Id.* Thus, sheriffs were
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1 subject to the same impeachment procedures as state legal officers and lower state
2 court judges, setting them apart from county and municipal officers. *Id.* The
3 Court also found it significant that the Alabama Supreme Court had interpreted
4 the state constitution as prohibiting county liability for a sheriff’s official acts
5 based on *respondeat superior*. *Id.* at 1738-39.

6 The Court then considered the duties of the sheriff under the Alabama
7 Code, finding it important that while the sheriffs were given complete authority to
8 enforce the state criminal law in their counties, the governing body of the counties
9 (county commissions) could not instruct them in their law enforcement duties. *Id.*
10 at 1739. In contrast, the Court noted, the Alabama Attorney General did have
11 “direct control” because state law allowed the Attorney General to direct the
12 sheriff to conduct special investigations in his county. *Id.* Moreover, the state
13 legislature set the salaries of all the sheriffs. *Id.* Given these provisions
14 establishing sheriffs as state officers, the Court did not find it sufficiently
15 convincing that Sheriffs’ salaries were paid out of the county treasury, that their
16 jurisdiction was limited to the borders of their county, or that they were elected
17 locally by county voters. *Id.* at 1740. Although officials and residents had some
18 “element of control,” the “weight of the evidence” pointed to the conclusion that
19 Alabama’s sheriffs were locally placed state officials who represented the state
20 when they executed their law enforcement duties. *Id.*

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22 **C. Post-McMillian California and Ninth Circuit Cases**

23 In *Pitts v. County of Kern*, 17 Cal.4th 340, 362 (1998) the California
24 Supreme Court held that a district attorney was a state official for purposes of
25 Section 1983 liability when preparing to prosecute and prosecuting state crimes
26 and when training and developing policy in these areas. The County relies heavily
27 on *Pitts*. In 2004 the California Supreme Court, also relying heavily on *Pitts*, held
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1 that Sheriffs, too, act on behalf of the State when performing law enforcement
2 activities. *Venegas v. County of Los Angeles*, 32 Cal. 4th 820 (2004).

3 The *Venegas* court provided the following useful description of *Pitts*:

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5 In *Pitts*, persons whose child molestation convictions
6 were reversed on appeal brought civil actions
7 against the County of Kern and its district attorney
8 and his employees, asserting civil rights violations
9 under section 1983 arising from alleged misconduct
10 during the criminal prosecution. The district attorney
11 and his employees prevailed under the doctrine
12 of prosecutorial immunity and, accordingly,
13 *Pitts* was concerned only with the liability of
14 the county. (*Pitts*, supra, 17 Cal.4th at pp. 345-347,
15 352, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

16
17 The plaintiffs' action against the county alleged that
18 its district attorney had established a pattern or
19 practice of procuring false statements and testimony
20 by threats, promises, and intimidation, and
21 also failed to provide adequate training procedures
22 and regulations to prevent such conduct. (*Pitts*,
23 supra, 17 Cal.4th at p. 352, 70 Cal.Rptr.2d 823, 949
24 P.2d 920.) . . . *Pitts* held, however, that a district attorney
25 represents the state rather than the county when
26 preparing to prosecute crimes and training and developing
27 policies for prosecutorial staff. *Although*

1 *Pitts* involved district attorneys rather than sheriffs,
2 the court relied on statutes and analysis applying
3 to both kinds of officers . . .

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5 In *Pitts*, we first observed that the question whether
6 a public official represents a county or a state when
7 acting in a particular capacity is analyzed under
8 state, not federal law. (*Pitts*, supra, 17 Cal.4th at
9 pp. 352-353, 356, 70 Cal.Rptr.2d 823, 949 P.2d
10 920; see *McMillian*, supra, 520 U.S. at p. 786, 117
11 S.Ct. 1734 [determining actual functions of government
12 officer is dependent on relevant state law].)

13 For guidance in resolving this question, *Pitts* next
14 turned to *McMillian*, which had examined Alabama
15 state law to determine whether a sheriff was a state
16 or county official . . .

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18 *Pitts* applied *McMillian*'s analytical framework
19 to conclude that a California district attorney
20 acts on behalf of the state rather than the county in
21 preparing to prosecute crimes and in training and
22 developing policies for prosecutorial staff. (*Pitts*,
23 supra, 17 Cal.4th at pp. 356-366, 70 Cal.Rptr.2d
24 823, 949 P.2d 920.) In reaching its conclusion, the
25 court considered several constitutional and statutory
26 provisions tending to support or negate state
27 agency, but placed special emphasis on article V,
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1 section 13, of the state Constitution, providing that
2 “[t]he Attorney General shall have direct supervision
3 over every district attorney ... in all matters
4 pertaining to the duties of their ... offices....” Under
5 this same provision, the Attorney General may require
6 district attorneys to make appropriate reports
7 “concerning the investigation, detection, prosecution,
8 and punishment of crime in their respective
9 jurisdictions,” and may prosecute violations of law
10 if, in his or her opinion, state laws are not adequately
11 being enforced in any county. (*Pitts*,
12 supra, 17 Cal.4th at pp. 356-357, 70 Cal.Rptr.2d
13 823, 949 P.2d 920.) We also noted in *Pitts* that
14 Government Code sections 12550 and 12524, and
15 Penal Code section 923 contain similar provisions
16 placing county district attorneys under the supervision
17 of the state Attorney General. (*Pitts*, supra,
18 at pp. 357-358, & fn. 5, 70 Cal.Rptr.2d 823, 949
19 P.2d 920.)

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21 We observed in *Pitts* that, in contrast to the broad
22 supervisory powers of the Attorney General over
23 district attorneys, Government Code section 25303
24 bars county boards of supervisors from affecting or
25 obstructing the district attorneys' investigative or
26 prosecutorial functions. (*Pitts*, supra, 17
27 Cal.4th at p. 358, 70 Cal.Rptr.2d 823, 949 P.2d
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1 920.) We also pointed out that a district attorney
2 acts in the name of the people of the state when
3 prosecuting criminal violations of state law. (Id. at
4 p. 359, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

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6 *Pitts* readily acknowledged that other constitutional
7 and statutory provisions would support a conclusion
8 that a district attorney is a county officer: For
9 example, county voters elect district attorneys (Cal.
10 Const., art. XI, § 4, subd. (c)), who are listed as
11 county officers (Gov.Code, § 24000, subd. (a)), are
12 generally ineligible to hold office unless they are
13 registered voters of the county in which they perform
14 their duties (Gov.Code, § 24001), and are
15 compensated as prescribed by the county board of
16 supervisors (Gov.Code, § 25300). (*Pitts*, supra, 17
17 Cal.4th at pp. 360-361, 70 Cal.Rptr.2d 823, 949
18 P.2d 920.) Furthermore, under Government Code
19 section 25303, the county board of supervisors supervises
20 the district attorney's official conduct and
21 expenditure of funds, although it cannot affect the
22 district attorney's independent investigative and
23 prosecutorial functions. (*Pitts*, supra, at p. 361, 70
24 Cal.Rptr.2d 823, 949 P.2d 920.) Necessary expenses
25 incurred by the district attorney in the prosecution
26 of criminal cases are considered county
27 charges. (Gov.Code, § 29601, subd. (b)(2).)

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Yet, after balancing the competing factors, and relying on *McMillian's* similar analysis, we concluded in *Pitts* that, when preparing to prosecute and prosecuting crimes, a district attorney represents the state, and is not considered a policy maker for the county. (*Pitts*, supra, 17 Cal.4th at p. 362, 70 Cal.Rptr.2d 823, 949 P.2d 920.) We similarly concluded that a district attorney does not represent the county when training staff and developing policy in the area of criminal investigation and prosecution. We stated that “[n]o meaningful analytical distinction can be made between these two functions [i.e., prosecuting crime on the one hand, and training/policymaking regarding criminal investigation and prosecution on the other]. Indeed, a contrary rule would require impossibly precise distinctions.” (Ibid.) Thus, the constitutional and statutory provisions discussed above give the Attorney General “oversight not only with respect to a district attorney's actions in a particular case, but also in the training and development of policy intended for use in every criminal case.” (Id. at p. 363, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

Venegas, 32 Cal.4th at 830-833 (emphasis in original).

Despite the importance of *Pitts* (reflected in the length of the foregoing

1 summary of that case in *Venegas*), *Pitts* does not control this Court’s analysis.
2 Liability under § 1983 is ultimately a federal question. *Streit*, 236 F.3d at 560.
3 Although the Ninth Circuit takes into account state courts’ analyses of state law, it
4 requires an “independent analysis of California’s constitution, statutes and case
5 law.” *Id.* at 561; *see also Weiner v. San Diego County*, 210 F.3d 1025, 1029 (9th
6 Cir. 2000); *Bishop Paiute Tribe v. County of Inyo, supra*, 291 F.3d at 562-65.
7 Indeed, the Ninth Circuit has sometimes diverged from the California Supreme
8 Court. Like *Pitts*, the Ninth Circuit has held that a California district attorney is
9 acting for the state when deciding whether to prosecute an individual. *Weiner*,
10 210 F.3d at 1031. Unlike *Pitts*, the Ninth Circuit has gone no further. A district
11 attorney is acting for the county, it has held, when investigating a crime, *Bishop*
12 *Paiute Tribe*, 291 F.3d at 565 (district attorney’s execution of a search warrant) or
13 when making personnel decisions unrelated to any particular prosecution or
14 ongoing judicial proceeding. *Ceballos v. Garcetti*, 361 F.3d 1168, 1184 (9th Cir.
15 2004), *rev’d on other grounds*, 126 S.Ct. 1951 (2006). *See Womack v. County of*
16 *Amador*, 551 F.Supp.2d 1017, 1027 (E.D. Cal. 2008) (describing the divergence
17 of California and Ninth Circuit authority).⁶

18 19 **D. Application of *McMillian* in Ninth Circuit**

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21 ⁶ The California Supreme Court and Ninth Circuit have also split on the question of
22 whether county sheriffs are state or county policymakers. The former court holds
23 that sheriffs act on behalf of the state when executing their law enforcement duties,
24 while the latter has consistently held that sheriffs act on behalf of the County.
25 *Compare Venegas v. County of Los Angeles*, 32 Cal.4th 820, 832-33 (2004) with
26 *Streit*, 236 F.3d at 564-65 (sheriffs’ management of county jails); *Brewster v.*
27 *County of Shasta*, 275 F.3d 803, 812 (9th Cir. 2001) (sheriffs’ investigation of
28 crimes); *Bishop Paiute Tribe*, 291 F.3d at 554 (sheriffs’ execution of search
warrant). As previously explained, the differences between prosecutive,
investigative and administrative functions are central to the issues of absolute
immunity and not to *Monell/McMillian* liability.

1 *Weiner v. San Diego County*, 210 F.3d 1025 (9th Cir. 2000) is the key case.
2 There, the plaintiff sued the county under Section 1983, claiming that the district
3 attorney had twice wrongfully prosecuted him for murder (the first time securing a
4 conviction, which was overturned, and the second time an acquittal). Plaintiff
5 claimed the district attorney’s office had withheld exculpatory evidence. The
6 Ninth Circuit held that “the district attorney acted on behalf of the state, not the
7 County, in deciding to prosecute Weiner, and as a result Weiner’s § 1983 claim
8 against the County for his alleged wrongful prosecution fails.” *Id.* at 1026-27.

9 In *Weiner*, the Ninth Circuit relied heavily on the California Supreme
10 Court’s opinion in *Pitts*. *Id.* at 1028-29. Indeed, the Ninth Circuit adopted the
11 *Pitts* Court’s assessment of at least five aspects of California constitutional and
12 statutory law to which *Pitts* pointed in concluding that a district attorney is a state
13 officer: (1) Art. V, section 13 of the California constitution (conferring direct
14 supervision over every district attorney on the State Attorney-General), *id.* at
15 1029; (2) Gov’t Code § 12550 (same), *id.*; (3) Gov’t Code § 12524 (authorizing
16 Attorney-General to call into conference district attorneys for the purpose of
17 achieving uniform enforcement of state laws), *id.*; (4) Gov’t Code §25303
18 (prohibiting county boards of supervisors from obstructing the *investigative and*
19 *prosecutorial* functions of the district attorney), *id.* (emphasis added); (5) Gov’t
20 Code §100(b) (all suits are to be conducted in the name of the state), *id.*

21 On the other hand, *Weiner* also discussed at least four of the “provisions
22 that weigh . . . against concluding that the district attorney is a state officer” that
23 *Pitts*, too, had considered: (1) Gov’t Code § 24000(a) (listing district attorneys as
24 county officers), *id.*; (2) Gov’t Code § 25300 (counties set district attorneys’
25 salaries), *id.*; (3) Gov’t Code § 24001 (district attorneys must be registered to vote
26 in their respective counties), *id.*; and (4) Gov’t Code § 25303 (counties supervise
27 district attorneys’ use of public funds), *id.*. The Ninth Circuit went on to cite two
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1 additional statutes that could support the conclusion that under California law
2 district attorneys are county officers: Gov't Code §§ 3060 and 3073 (county
3 grand juries can initiate proceedings to remove a district attorney). *Id.* at 1029-
4 30.⁷

5 Having reviewed these factors, the Ninth Circuit concluded,
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7 Balancing the foregoing constitutional and statutory factors leads us
8 toward the conclusion that under California law a district attorney
9 acts as a state official when deciding whether to prosecute an
10 individual . . . [This is so because] the function of the district
11 attorney, including who can control the district attorney's conduct is
12 the issue.

13 *Id.* at 1030. Given that determination, the Ninth Circuit held that the “district
14 attorney was acting as a state official in deciding to proceed with Weiner’s
15 criminal prosecution. Weiner’s § 1983 claim against the County, therefore, fails.”
16 *Id.* at 1031.

17 Should *Weiner* be limited only to a district attorney’s decision to proceed
18 with a prosecution, as opposed, for example, to decisions about how his office
19 investigated or continued to pursue a prosecution? The short answer is “no.”

20 To start with, *Weiner* itself twice cited Gov’t Code § 25303, which provides
21 that a county may not obstruct *both* “the investigative and prosecutorial function
22 of the district attorney” *Id.* at 1029-30. *Weiner* also stated, “All relevant
23 California cases, including *Pitts*, have held that district attorneys are state officers
24 for the purpose of *investigating and* proceeding with criminal prosecutions.” *Id.*
25 at 1030 (emphasis added).

26 In this regard, the pithy summary of *Weiner* that Judge Whyte provided in
27 *MK Ballistics Systems v. Simpson*, 2007 WL 2022025, at *3; (N.D. Ca. 2007) is

28 ⁷ However, *Weiner* later noted that under Gov’t Code § 3073 the state court must
appoint a prosecutor to conduct such removal proceedings. *Id.* at 1030.

1 worth quoting:

2 With the exception of prosecuting suits under the name of the state of
3 California, all of the constitutional and statutory provisions the Ninth
4 Circuit considered in *Weiner* apply to both investigations and
5 prosecutions. See also *Brewster v. County of Shasta*, 275 F.3d 803,
6 810 (9th Cir.2001). In distinguishing *Weiner* to find that a sheriff
7 acted for the county in conducting investigations, the court in
8 *Brewster* drew the line not between investigations and prosecutions
9 but between sheriffs and district attorneys. *Id.* It found that California
10 law “establishes a closer relationship between the Attorney General
11 and district attorneys than between the Attorney General and county
12 sheriffs,” stressing that the Attorney General could “take full charge
13 of any investigation or prosecution, in which case [he] would have all
14 the powers of a district attorney.” *Id.* (emphasis added) (citing Cal.
15 Const. art. V, § 13 and Cal. Gov.Code § 12550). *Brewster* thus
16 implicitly accepts the proposition that *Weiner* applies to district
17 attorneys acting in both investigations and prosecutions.

18 In *MK Ballistics*, the Section 1983 claim against the district attorney arose out of
19 the conduct of an investigator. Judge Whyte nevertheless concluded that the
20 claim should be dismissed because the district attorney had acted as a state officer.
21 He reached the same conclusion in *Walker v. County of Santa Clara*, 2005 U.S.
22 Dist. LEXIS 42118 (N.D. Cal. 2005), where he noted that in *Pitts* “[t]he California
23 Supreme Court went on to find that there was no reasonable distinction between a
24 district attorney’s actions when prosecuting violations of state law, and the district
25 attorney’s training and developing policy in these areas. Thus, a district attorney
26 also represents the state when training *and developing policies related to*
27 *prosecuting* violations of state law.” *Id.* at *11. (emphasis added).

28 **E. Conclusion.**

As noted above, Goldstein’s claims basically are that the District Attorney
and his office violated Goldstein’s constitutional right to due process by not
creating and maintaining systems necessary to assure that if a jailhouse informant
has an agreement with the District Attorney, the agreement is disclosed to the
defendant. In light of *Weiner* and the two decisions of Judge Whyte construing it,

1 the Court reluctantly concludes that these claims must be dismissed because the
2 District Attorney was acting as a state officer.

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4 **IV.**

5 **POSSIBLE INTERLOCUTORY APPEAL**

6 This Court is profoundly concerned that the foregoing conclusion could
7 result in a terrible injustice. Plaintiff Goldstein spent 24 years in custody for a
8 crime that, the evidence now available strongly suggests, he did not commit.
9 Goldstein alleges that the evidence that led to his release after that very lengthy
10 incarceration had been withheld from him prior to and during his trial as a result
11 of the policies and practices of the then-District Attorney (Van de Kamp) and his
12 Chief Deputy (Livesay). Because of the U.S. Supreme Court’s recent ruling in
13 *Van de Kamp v. Goldstein, supra*, those two individuals recently have been
14 relieved of potential liability; they are entitled to absolute immunity. Now, the
15 County of Los Angeles, for whose District Attorney Office Van de Kamp and
16 Livesay were *the* highest ranking policymakers, will also be relieved of potential
17 liability, as a result of an entirely different legal doctrine (*McMillian*).

18 Unfortunate and even inequitable consequences of a district court’s rulings
19 do not warrant interlocutory review under 28 U.S.C. § 1292(b). But an “order
20 [that] involves a controlling question of law as to which there is substantial
21 ground for difference of opinion and [as to which] an immediate appeal from the
22 order may materially advance the ultimate termination of the litigation” does
23 warrant such review. It appears to this Court that this ruling may meet that
24 standard, for the following reasons.

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26 **A. Provisions Not Cited in *Weiner* Indicate District Attorneys Are**
27 **County Officers.**
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California’s 58 district attorneys serve both the state and their respective counties. *See Ceballos*, 361 F.3d at 1182 (noting that district attorneys serve both the state and the county). The Ninth Circuit has not squarely addressed the part of the *Pitts* holding dealing with the district attorney’s “preparing to prosecute” and “training and developing policy” for prosecutions. Its previous decisions concerning district attorneys, - - *Weiner*, *Bishop Paiute Tribe*, and *Ceballos*, - - dealt with a specific decision whether to prosecute an individual, a specific decision about a search warrant during an investigation, and personnel decisions alleged to be retaliation against one prosecutor, respectively. In short, the Ninth Circuit has not had occasion to apply the *McMillian* framework to a claim, such as Goldstein’s here, of failure on the part of a prosecutor to enact policies and procedures, including training and supervision, that were constitutionally required.

In finding the district attorney functioned as a state official in *Weiner*, the Ninth Circuit did not cite certain state law provisions that could warrant the opposite conclusion it had reached in *Ceballos* and *Bishop Paiute*. Thus, in addition to Gov’t Code § 25303, in California district attorneys are beholden to, and serve as a guardian of, the county treasury and county interests. The District Attorney’s Office submits a proposed budget to the county board of supervisors each fiscal year. *Cf. Streit*, 236 F.3d at 562 (citing Los Angeles County Code, subch. 4.12.070). (In Alabama, in contrast, sheriffs’ and district attorneys’ salaries are set by the state legislature. *McMillian*, 117 S.Ct. at 1739.) Necessary expenses incurred by the district attorney in prosecuting criminal cases are county charges. Gov’t Code § 29601(b)(2). *See also id.* § 26520. The district attorney must defend the county treasurer and auditor from legal claims. *Id.*, § 26520. He cannot advocate or present claims against the county. *Id.*, § 26527. He may

1 defend the county against claims of the State of California in a state eminent
2 domain proceeding. *Id.*, § 26541. Moreover, counties are required to defend and
3 indemnify the district attorney in an action for damages. Cal. Gov. Code § 825.
4 *Cf. Brewster*, 275 F.3d at 808 (noting that a similar provision in Gov’t Code §
5 815.2 indicates the state legislature considered the sheriff to be a county actor). It
6 is also significant that if Goldstein *were* entitled to pursue his claims against the
7 County because of the District Attorney’s alleged constitutional violations, the
8 county, not the state, would be liable for any monetary judgment, a “crucial factor
9 [that] weighs heavily[.]” *Streit*, 236 F.3d at 562 (citing Cal. Gov. Code § 815.2).

10 These various budgetary and funding provisions certainly suggest that the
11 county government and county residents have not just an “element of control”
12 over the district attorney, *McMillian*, 117 S.Ct. at 1740, but an array of tools and
13 powers that assure the district attorney is truly answerable to the county. (Of
14 course, in any event he is answerable to the voters in the county.) Moreover, as
15 described in the next section, most of the laws treating district attorneys as state
16 officers are not as wide-ranging or direct.

17 **B. The state law provisions providing for Attorney General**
18 **supervision do not necessarily establish that district attorneys act**
19 **for the state in making policies for their offices.**

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21 California law does not confer on the Attorney General the power to direct
22 the activities of any district attorney, only the power to assume the district
23 attorney’s powers and responsibilities. *See* Cal. Const., art. V, § 13; Cal Gov.
24 Code § 12550. Turning first to Article V, § 13 of the constitution, the Ninth
25 Circuit has cautioned against placing much weight on that constitutional
26 provision. The original purpose of the provision “was to ease the difficulty of
27 solving crimes, and arresting responsible criminals, by coordinating county law
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1 enforcement agencies and providing the necessary supervision by the Attorney
2 General over them.” *Brewster*, 272 F.3d at 809 (quoting *Pitts*, 17 Cal.4th at 357
3 n.4). Since this constitutional provision applies to “all law enforcement officers
4 in California,” it is not helpful in determining whether a particular local law
5 enforcement entity is subject to § 1983 liability. *See id.* Indeed, the Ninth Circuit
6 has found that California sheriffs are county actors, notwithstanding Article V,
7 section 13. *See, e.g., Brewster*, 275 F.3d 807-08; *Streit*, 236 F.3d at 555-56.

8 Government Code §§ 12550 and 12524, which implement Article V,
9 section 13 of the constitution, merely entitle the Attorney General to assist and
10 coordinate across local jurisdictions or to take over a district attorney’s role of
11 prosecuting criminal violations; they do not explicitly grant the Attorney General
12 the power to direct the manner in which the district attorney carries out his duties.

13 The Attorney General is not authorized to supervise a district attorney in the
14 same manner that a district attorney is required to supervise the activities of junior
15 prosecutors in his office, or even in the way the Attorney General may “*direct the*
16 *activities* of any *sheriff* relative to the investigation or detection of crime within
17 the jurisdiction of the sheriff . . .” Cal. Gov. Code § 12560 (emphasis added). In
18 contrast, in *McMillian* the Alabama Attorney General had “direct control” over
19 sheriffs by virtue of being able to direct them to conduct investigations.
20 *McMillian*, 117 S.Ct. at 1739.

21 California case law confirms this interpretation. *People v. Brophy*, cited in
22 *Brewster*, 275 F.3d 810-11 and *Bishop Paiute Tribe*, 291 F.3d at 563-64,
23 addressed at length (albeit in *dicta*) the relationship under Government Code §
24 12550 between the Attorney General and county sheriffs and district attorneys.
25 The Court of Appeal in *Brophy* wrote that the Attorney General’s “direct
26 supervision over every district attorney and sheriff . . . does not contemplate
27 absolute control and direction of such officials,” because district attorneys and
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1 sheriffs are officers created by the Constitution, “with public duties delegated and
2 entrusted to them. . . . the performance of which is an exercise of the
3 governmental functions of the particular political unit for which they, as agents,
4 are active.” 49 Cal.App.2d 15, 28 (Cal. Ct. App. 1942). The Court of Appeal
5 further stated that “sheriffs and district attorneys cannot avoid or evade the duties
6 and responsibilities of their respective offices by permitting a substitution of
7 judgment.” *Id.* The provision allowing the Attorney General to assume the
8 powers of a district attorney could allow a substitution of judgment, *Brophy*
9 noted, but “even this provision affords no excuse for a district attorney or a sheriff
10 to yield the general control of his office and duties to the Attorney General.” *Id.*

11 Government Code § 25303, which also applies to both district attorneys and
12 sheriffs, authorizes the board of supervisors “to supervise the official conduct of
13 all county officers,” although it goes on to prohibit the board from obstructing the
14 investigative and prosecutorial functions of the sheriff and district attorney. The
15 Ninth Circuit has noted that the limitation on obstruction “appears to be directed
16 at preserving the independence of the sheriff from political pressure. The
17 provision thus is akin to a separation of powers provision, and as such, has no
18 obvious bearing on whether the sheriff should be understood to act for the state or
19 the county. . . Merely because a county official exercises certain functions
20 independently of other political entities within the county does not mean that he
21 does not act *for* the county.” *Brewster*, 275 F3d. at 809-10 (emphasis in original).
22 The *Brewster* characterization of the limitation in Gov’t Code § 25303 could also
23 apply to district attorneys.

24 Although the Attorney General unquestionably has the authority to take
25 over a particular case or institute prosecutions himself, nothing in these California
26 statutory and constitutional provisions indicates that he has the authority to
27 prescribe a jailhouse informant policy that county district attorneys would have to
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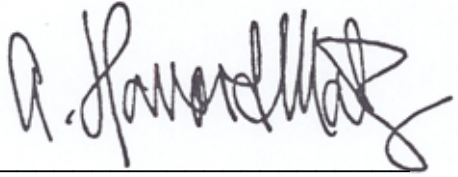
1 follow, or to proscribe the one that the District Attorney followed here. In short,
2 these provisions do not establish that the Attorney General has the authority to
3 formulate policies and procedures applicable to the day to day conduct of a
4 District Attorney office.

5 **C. Choice Available to Plaintiff**

6 This difficult lawsuit has been pending for some five years, in large
7 measure because it has triggered several important and precedential decisions
8 (including by the United States and California Supreme Courts). Typically, a
9 plaintiff abhors delay. But if in light of this Section IV Goldstein wishes to
10 request the Ninth Circuit to grant interlocutory review of this ruling, this Court
11 would probably certify it for such review (although first giving the County an
12 opportunity to oppose certification). Accordingly, by not later than October 2,
13 2009, Plaintiff shall specify in writing whether he seeks interlocutory review. If
14 he does, the County shall file its written response to that request not later than
15 seven days after plaintiff's request has been filed. The Court will thereafter
16 decide whether to certify the matter for interlocutory review.

17 IT IS SO ORDERED.

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19 DATE: September 23, 2009



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21 A. Howard Matz
22 United States District Judge
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