IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEFFREY HAMBARIAN	)	No. S097450
	)	
Petitioner,	)	
	)	Ct. of Appeal No.
v.	)	G026447
	)	
ORANGE COUNTY	)	Orange Co. Sup. Ct. No.
SUPERIOR COURT,	)	98CF3696
	)	
Respondent	)	
	)	
and	)	
	)	
PEOPLE OF THE STATE	)	
OF CALIFORNIA	)	
	)	
Real Party in Interest)		

From the Court of Appeal, Fourth Appellate District, Division Three
and the
Orange County Superior Court
The Honorable Frank F. Fasel, Judge Presiding

AMICI CURIAE BRIEF OF THE NATIONAL INSURANCE CRIME BUREAU AND COALITION AGAINST INSURANCE FRAUD IN SUPPORT OF THE REAL PARTY IN INTEREST

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INTRODUCTION

This case addresses the extent to which a District Attorney may receive assistance from a crime victim in connection with the investigation and prosecution of the crime perpetrator. Petitioner Jeffrey Hambarian argues that the cooperation in this case went too far. In order to prevail in this argument in the face of longstanding authority giving prosecutors wide latitude and discretion in prosecutorial decision-making, Hambarian must demonstrate that the trial court abused its discretion as a matter of law in its finding that it is not "likely" the district attorney will treat Hambarian unfairly due to the assistance provided by the victim in this case. In order to prevail on this point, he must show that both prongs of the standard set out in *People v. Eubanks* (1997) 14 Cal.4th 580, 581, have been met: (i) there must be a conflict of interest for the District Attorney; and (ii) the conflict must be so severe as to disqualify the District Attorney from acting.

Simply put, Hambarian cannot demonstrate that the trial court abused its discretion as a matter of law. In the first instance, the cooperation and assistance provided by the victim in this case is routine, appropriate and common, under the guidelines established in *Eubanks* and across the country. The victim here provided expertise and resources that assisted the prosecution in investigating the allegations and bringing the indictment against Hambarian. This cooperation fits well established guidelines allowing victims of crime to aid in investigations being conducted by the prosecution, as long as the prosecution retains decision-making authority on whether to initiate charges against the defendant.

In addition, the assistance in this case falls well within the specific parameters set by this Court's decision in *Eubanks*. Unlike the *Eubanks* situation, there was no prosecution

debt that was assumed by the victim. Moreover, the assistance provided here fits within a specific "exception" identified by the *Eubanks* court, for "common" assistance provided by victim, including the hiring of "private investigators for external investigation of suspected crimes against the company." *Id*. at pp. 597-598. Last, the trial court took its decision even one step further than the *Eubanks* court; using the *Eubanks* standard, the trial court here found that there was no conflict of interest; even if there was, the trial court held that any such conflict "is not so grave as to render it unlikely that the defendant would receive fair treatment." Reporter's Transcript (RT) 205-206.

Accordingly, the trial court's decision is well within the boundary of its discretion, both because the cooperation provided by the victim fits routine and established patterns and because this assistance comports with this Court's standard from *Eubanks*. Any other ruling in this case would fundamentally affect the ability of victims to assist in law enforcement investigations, a result that is not required by any law in this state nor would fit with any rational public policy efforts to fight crime.

ISSUE PRESENTED

Whether the District Attorney's use of an expert investigator compensated by the victim, City of Orange, required recusal of the District Attorney under conflict of interest principles.

STATEMENT OF FACTS

Amici Curiae adopt the statement of facts as set forth by the Real Party in Interest in its Brief on the Merits.

There are a few key facts to highlight. This case stems from an investigation initially conducted by the City of Orange in connection with alleged financial irregularities by certain companies operated by the Hambarian family. This investigation resulted in Hambarian's indictment on 65 counts related to these irregularities, including grand theft, presenting false claims, breach of fiduciary duty, filing false tax returns and money laundering, with a total loss exceeding $2.5 million. *Hambarian v. Superior Court* (March 30, 2001) G026447, Slip Opn., at p. 4.

As part of the investigation, the Orange Police Department retained Jeffrey Franzen, a CPA, to perform certain accounting services in connection with the investigation of the Hambarian companies. (RT 35). Franzen's activities are the focus of this case. In performing his work, Franzen did not direct the criminal investigation. (RT 90, 99). He received investigatory instructions from the deputy district attorneys and lead investigators assigned to the case. (RT 64, 90, 92, 94-97, 99). The prosecutors made all decisions as to whether any analysis by Franzen demonstrated criminal conduct. (RT 139-140).

Based on these facts, the trial court found that no conflict of interest existed and that, even if one did exist, it was not disabling under the *Eubanks* standard. The key points in his findings were as follows:

- The prosecutor never solicited funds from the victim. (RT 202)
- The victim never paid any existing debt incurred by the district attorney (RT 202)
- The strength of this case is "quite the opposite" of the weak case in *Eubanks* (RT 204-205); and
- There is no "evidence to show that this district attorney's office is under the influence of any of these victims because of the financial considerations

> [involving] the City of Orange and their police department … I don't think there's any evidence that that's caused this district attorney's office not to be fair with Mr. Hambarian." (RT 206)

INTEREST OF AMICI CURIAE

The private insurance industry has made a longstanding commitment to assist law enforcement agencies in ferreting out one of the most substantial economic crimes in this country – insurance fraud. Estimates of the costs of insurance fraud very widely, but even the lowest of these estimates reflect the substantial economic costs of this problem, with costs at least in the billons of dollars annually.[1]

Amici National Insurance Crime Bureau and Coalition Against Insurance Fraud represent two leading components of the private sector's efforts to combat the crime of insurance fraud. The members of amici curiae are able to offer this Court a unique perspective, because they offer the views of the primary victims of insurance fraud – both insurance entities and consumers. Although neither group is actually a participant in a criminal insurance fraud prosecution, they (and their members) often provide significant assistance to federal and state prosecutors and investigators in efforts to combat this crime.

The National Insurance Crime Bureau is a not-for-profit organization that receives support from approximately 1,000 property/casualty insurance companies. The NICB

[1] The Coalition Against Insurance Fraud estimates that insurance fraud costs Americans at least $80 billion a year, or nearly $950 for each family. *See* http://www.insurancefraud.org.

partners with insurers and law enforcement agencies to facilitate the identification, detection and prosecution of insurance criminals.

The mission of NICB is to combat insurance fraud and theft for the benefit of its customers and the public through information analysis, forecasting, criminal investigation support, training and public awareness.

NICB has four core functions:

- Predictive knowledge, which prevents fraud and theft by focusing on analysis, trends and forecasting.

- Multi-claim, multi-carrier investigations of major criminal activity in concert with insurers and law enforcement, including Medical provider fraud/corrupt enterprises, interdiction and repatriation of stolen vehicles, crime groups that target insurance companies and major operations targeting cloned vehicles, theft rings, chop shops and vehicle salvage

- Training initiatives for insurers, law enforcement, regulators and NICB personnel.

- Public awareness activities designed to strengthen and foster a strong anti-fraud environment.

The Coalition Against Insurance Fraud is the only national organization dedicated exclusively to fighting insurance fraud through public advocacy and public education. The Coalition's mission is to combine the influence and resources of consumers, government organizations and insurers to combat fraud as a means to restrain insurance costs for consumers and insurers by reducing the financial impact of fraud.

The Coalition's objectives are:

- Enact new laws and regulations that directly and indirectly prevent, deter or help detect insurance fraud,

and seek appropriate remedies, including restitution and license revocation, against those who commit fraud. Such initiatives must be cost effective and practical.

- Communicate the scope of the fraud problem and potential solutions to all major audiences in order to increase awareness, provide deterrence, change attitudes and build support for the Coalition's initiatives.

- Serve as a clearinghouse of insurance fraud information; conducting research to enable the coalition and policymakers to make more informed decisions on how to combat insurance fraud effectively and efficiently.
- Power through diversity - As the only anti-fraud organization that includes insurers, consumer groups and government organizations, the Coalition has unsurpassed credibility in convincing legislators of the need for reform and in carrying the anti-fraud message to the public. Our initial efforts in dealing with state legislators confirm there is real strength in having diverse organizations advance an issue from a common strategy.

ARGUMENT

I. VICTIM PARTICIPATION IN THE PROSECUTION OF CRIMES IS BOTH ROUTINE AND APPROPRIATE

The cooperation and participation of crime victims in the prosecution of crimes is a frequent and appropriate occurrence, supported by a long history of court decisions across the country. This Court should uphold the decision of the Superior Court, which recognizes that the victim participation in the prosecution of Hambarian's crimes was both necessary and appropriate. Moreover, as a more general rule, providing investigative assistance to a prosecutor by itself cannot create a conflict of interest for that prosecutor.

A. Crime Victim Participation is Necessary and Appropriate for the Administration of Justice.

From the inception of the criminal justice system, victims of crime have played an integral role in the administration of justice. At one time, victims routinely brought "private prosecutions," based on the "common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family."[2] Although under the contemporary American system of justice the power to prosecute is delegated exclusively to the State, the necessity of crime victim involvement in criminal prosecutions, as a source of the most critical evidence surrounding certain crimes, has remained constant.

Typically, the victim provides some of the most important information and evidence to the prosecuting team. In routine street crimes, it is often the victim of the crime who initially calls the police or investigating officials, gives statements, describes the circumstances of the criminal act, and testifies as a government witness at trial. Although the victim is not compensated by the State, thereby providing in some sense a "subsidy" to the government, criminal cases simply could not be prosecuted effectively and efficiently without this involvement. Therefore, "[r]outine cooperation from a victim of a crime is …

[2] *See* Juan Carlos, *The Crime Victim in the Prosecutorial Process* (1986) 9 Harv. J.L. & Pub. Pol'y 357, 359 ("The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition.")

often necessary and should be encouraged." *Commonwealth v. Ellis* (1999) 429 Mass. 362, 369, 708 N.E.2d 644, 649.[3]

Clearly, no questions have been raised about victim cooperation and participation in these "routine" cases. Across the country, officials of the justice system rely upon victim cooperation to prosecute all sorts of crimes, ranging on the spectrum from minor to very serious offenses. Shoplifting, embezzlement, and insurance fraud are examples of crimes where victim participation is especially imperative to law enforcement efforts. In shoplifting cases, the victim of the crime (the owner of the store) bears almost all costs associated with investigation. Shop owners often install cameras in their stores to record thefts, private security guards are almost always the agent initially detaining the shoplifting suspect, and employee testimony is used at trial to identify the perpetrator and corroborate that the criminal activity occurred.

As the complexity of criminal activities increases, the importance of victim participation also increases, even as far as determining whether any problematic activity has taken place at all. In sophisticated white-collar crimes (such as that involved in this case), more assistance from the victim is often required in order to effectively prosecute certain crimes against businesses by virtue of these crimes' complex nature. Technical or other advanced expertise may be critical, beyond the typical skills of law enforcement personnel.

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[3] Victim participation is critical to an effective law enforcement process, and the law enforcement system often depends on the voluntary participation of crime victims in order to investigate and prosecute criminals successfully. See R. Elias, The Politics of Victimization 134 (1986) (estimating that approximately 95% of all reported crimes involving specific victims are discovered from citizen complaints, usually from the victims themselves). The willingness of victims to come forward is vital to the successful prosecution of criminals. Without this assistance in reporting crime, more crime effectively will go unpunished, as the criminal justice system is "absolutely dependent" on victim cooperation. Karen L. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dipositions* (1989) 77 Cal. L. Rev. 417, 425 n.42 (quoting President's Task Force on Victims of Crime, Final Report V (Dec. 1982)).

See, e.g., *Eubanks* (prosecution and investigators needed specific computer skills). Often, detailed knowledge of the particular industry in question is required. *See, e.g.*, *People v. Marghzar* (1987) 192 Cal. App. 3d 1129 (National Automobile Theft Bureau assisted prosecutors and testified as expert witness for prosecution in connection with identification of stolen vehicles); *Logan v. State* (Miss. 2000) 773 So. 2d 338 (NICB senior special agent assisted prosecution and testified as expert witness on vehicle identification). In these situations, courts routinely accept that:

> [v]ictims of commercial or corporate crimes may assist the prosecution by collecting and organizing necessary information and even may properly hire private investigators for external investigation of suspected crimes.

Ellis, supra, 429 Mass. at p. 369, 708 N.E.2d at p. 249.[4] Because of the complex nature of business fraud and embezzlement, "very large expenditures of funds and resources are often necessary before a *bona fide* suspicion of fraud can be established." *Id.* Accordingly,

> there is no reason why those victims who have resources and willingness to pursue their own investigation and enforce their own rights should be precluded either from doing so or from sharing the fruits of their efforts with law enforcement agencies.

IBM v. Brown (C.D. Cal. 1994) 857 F. Supp. 1384, 1389.

For the insurance industry, this cooperation has been written into law and practice. For decades, many insurance companies (through NICB, the Coalition or on their own) have participated in fraud prevention programs which involve cooperative efforts with law

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[4] As such, arguments that allowing crime victims to assist district attorneys would result in the justice system catering more to wealthier victims miss the mark. Primarily, "a defendant does not have a right or expectation of falling through the cracks for want of resources or lack of prosecutorial zeal." *People v. Prakash Vallabhdas Parmar* (2001) 86 Cal. App. 4th 781, 797. The very idea of a generally applicable criminal code requires that all individuals who break the law be subject to possible criminal prosecutions, regardless of the wealth or other resources of the victim.

enforcement officials. These cooperative efforts have resulted in a wide range of immunity statutes across the country, designed to protect insurers from suit in connection with providing information and assistance to law enforcement.[5] California law in this area is particularly supportive of these cooperative efforts. The State Legislature of California, for example, has recognized that "the business of insurance involves many transactions which have potential for abuse and illegal activities" and that "insurers and their policyholders ultimately pay the cost of fraudulent insurance claims." Cal. Ins. Code §§ 1875.10(a), (b). Separate legislation has been designed "to confront aggressively the problem of insurance fraud in this state by facilitating the detection of insurance fraud." Cal. Ins. Code §1879. In support of these efforts:

> No person shall be subject to civil liability for libel, violation of privacy, or otherwise by virtue of the filing of reports or furnishing of other information, in good faith and without malice.

Cal. Ins. Code § 1879.5(b). *See also* Cal. Ins. Code § 1872.5 ("No insurer … shall be subject to civil liability for libel, slander, or any other relevant tort cause of action by virtue of providing [information on suspected fraud] without malice").

Even beyond these immunity statutes, public policy across the country consistently and strongly encourages private actions to support public law enforcement efforts. While the

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[5] Civil immunity statutes represent one form of protection afforded to insurers in support of a general public policy supporting the encouragement of victims to participate in the effort to fight crime. One of the best statutes in this area is in Pennsylvania. The Pennsylvania insurance immunity statute provides that no civil liability can arise for furnishing information to other insurers or law enforcement officials related to suspected fraudulent insurance acts "[i]n the absence of fraud or bad faith." 40 P.S. § 474.1(a). Similar statutes can be found in other states, such as Florida (Fla. Stat. Ann. § 626.989(4)(c) (West 1984 and 1992 Supp.)), New York (N.Y. Ins. Law § 406 (McKinney 1984)), and Ohio (Ohio Rev. Code Ann. § 3999.31B). New Hampshire has added an important wrinkle to this provision, by requiring the target of an investigation to pay attorney's fees if an insurer against whom suit is brought is entitled to immunity. N.H. Stat. Am. § 400-A:36-b (1988). Wisconsin has a similar provision. Wis. Stat. § 895.486. Arkansas also adds to this immunity by requiring that any allegation of "actual malice" be pled "specifically," which means that a casual mention of malice will be insufficient to remove immunity. Ark. Code § 23-66-506 (1987).

immunity statutes focus on the insurance industry's anti-crime efforts, public policy encourages victim participation in the criminal process across the board, reflected in part through significant burdens on tort actions against those who assist in the prosecution of crime:

> [P]ublic policy has developed an immunity to protect those who act in a reasonable manner in bringing to justice those they believe are criminals. That immunity cannot be broken down upon a mere allegation of negligence or even gross negligence.

Jestic v. Long Island Sav. Bank (App. Div. 1981) 440 N.Y.S.2d 278, 281. No cause of action can arise for any such alleged negligence because:

> [t]o allow an action in negligence against a citizen who makes an honest mistake in reporting to the police would stifle citizen cooperation.

Zamora v. Creamland Dairies, Inc. (N.M. Ct. App. 1987) 747 P.2d 923, 930. Because of this policy, claims against those who provide information about suspected crimes have "never been regarded with any favor by the courts, and [are] hedged with restrictions which make [them] very difficult to maintain." W. Keeton, Prosser and Keeton on Torts § 119 at 876 (5th Ed. 1984). "This disfavor of [these] actions represents a value choice based on public policy considerations." *Williams v. Ryder/P.I.E. Nationwide, Inc.* (8th Cir. 1986) 786 F.2d 854, 857 (citation omitted). Therefore, "[s]ound public policy and the ends of justice require the uncovering of crime and the prosecution of criminals." *Id.* Generally, these actions are disfavored because such actions "have an undesirable tendency to unduly discourage citizens from seeking redress in the courts," *Chittenden Trust Co. v. Marshall* (1986) 146 Vt. 543, 549, 507 A.2d 965, 969-70, (citing Anello v. Vinci (1983) 142 Vt. 583, 586-87, 458 A.2d

1117, 1119) and because they tend to discourage prosecution of crime. *See Kimbley v. City of Green River* (Wyo. 1983) 663 P.2d 871, 882. As one court noted:

> [t]here is almost universal agreement that sound public policy dictates that the law should encourage the uncovering and prosecution of crime. Any 'policy that discourages citizens from reporting crime or aiding in prosecution would be undesirable and detrimental to society in general.'

Sanders v. Daniel Int'l Corp (Mo. 1984) 682 S.W.2d 803, 806 (citation omitted).

In addition, at the federal level, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") actually provides a mandatory requirement of public-private cooperation. The HIPAA requires that law enforcement officials "consult with, and arrange for sharing of data with representatives of health plans [in connection with health care fraud investigations]." 42 U.S.C. § 1320a-7c(a)(2). Beyond the statutory mandates, the Departments of Justice and Health and Human Services have issued guidelines encouraging information sharing between private entities and members of their respective departments. *See* Kirk Nahra, *The Brave New World of Information Sharing in Health Care Fraud Investigations* (November 4, 1998) BNA's Health Care Fraud Report . The policy behind statutes such as the Health Insurance Portability and Accountability Act acknowledges that "[m]any so-called white collar crimes are complicated transactions." *Ellis, supra*, 708 N.E. 2d at p. 373. As such, "[k]nowledgeable people are needed to detect and explain them." *Id.* Therefore, in the case of insurance fraud and virtually all other significant economic crimes, crime victim participation in investigations is necessary and appropriate to administer justice.

B. Crime Victim Participation Facilitates Prosecutorial Discretion and is Necessary for Prosecutorial Efficiency.

In overseeing the criminal justice system, the key requirement is that prosecutors must bear the decision-making responsibility in determining who should be prosecuted and for what offenses. *See Dix v. Superior Court* (1991) 53 Cal.3d 442, 451. In exercising this solemn responsibility, district attorneys should have broad discretion to cooperate with crime victims in order to fully understand whether or not to prosecute a case. The ability of prosecutorial agents to elicit assistance from private parties has been endorsed by many jurisdictions and comports with the nature and duties of the prosecutor's responsibilities. Inherent in "our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States* (1984) 470 U.S. 598, 607 (quoting *United States v. Goodwin* (1982) 457 U.S. 368, 380). Generally:

> so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Bordenkircher v. Hayes (1978) 434 U.S. 357, 364. In relation to victim cooperation with prosecutorial officials, therefore the "important point is that, in the process, the prosecutor must retain total control over the course of the investigation and all discretionary decisions." *Ellis, supra*, 429 Mass. at p. 373, 708 N.E.2d at p. 651.

Accordingly, in determining whether a prosecutor's discretion has been compromised, there is an "extreme deference that Courts must give to prosecutorial charging decisions" and the trial judge must "approach the inquiry with appropriate respect for the judgments exercised by officers of a coordinate branch of government." *United States v. Redono-Lemos* (9th Cir. 1994) 27 F.3d 439, 444 ; *see also People v. Birks* (1988) 19 Cal.4th 108, 134.

Courts normally must defer to prosecutorial decisions as to whom to prosecute. The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. *See Wayte, supra*, 470 U.S. at p. 607. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Because these decisions "are not readily susceptible to the kind of analysis the courts are competent to undertake," the Supreme Court has been "properly hesitant to examine the decision whether to prosecute." *Id*., at pp. 607-608; *see also Goodwin, supra*, 457 U.S. at p. 373; *Town of Newton v. Rumery* (1987) 480 U.S. 386, 396. Moreover, it is clear that disqualification of a criminal prosecutor "is a drastic measure which courts should hesitate to impose except when absolutely necessary." *In the Matter of Grand Jury Subpoena* (7th Cir. 1989) 873 F.2d 170, 176 (quoting *Freeman v. Chicago Musical Instrument Co.* (7th Cir. 1982) 689 F.2d 715, 721).

In evaluating whether this discretion has been compromised inappropriately, there is no mandate that a prosecutor be truly "disinterested," in the sense of maintaining neutrality on a defendant's guilt. Prosecutors " [i]n an adversary system … are necessarily permitted to be zealous in their enforcement of the law." *Marshall v. Jerrico* (1980) 446 U.S. 238, 248. "True disinterest on the issue of such a defendant's guilt," on the other hand, "is the domain of the judge and the jury, not the prosecutor." *Eubanks, supra*, 14 Cal.4th at p. 590. A complete disinterest is therefore not a desirable quality in a prosecutor. If a prosecutor is:

> honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means.

Id. Reconciling this "zealous" advocacy with the appropriate decision-making statute, a district attorney should therefore not be disqualified unless:

> it appears likely that the prosecutor's discretionary decisionmaking has been placed within the influence or control of an interested party.

Prakash, supra, 86 Cal. App. 4th at p. 795.

Cooperation between crime victims and prosecutors should be seen as facilitating, not hindering, prosecutorial discretion. When a victim of crime assists in an investigation, important facts are usually brought to the attention of the District Attorney. Until such facts are within the scope of the prosecutor's knowledge, the prosecutor will not be able to make an informed decision as to whether or not to bring charges against a possible offender. In the absence of investigatory assistance on the part of the crime victim, the District Attorney will not likely have the time and resources to devote to determining whether a white-collar crime actually occurred.

Accordingly, private party cooperation and participation in government investigations should be encouraged because:

> the ultimate result of such private investigation is that criminals can be brought to justice with a minimum diversion of public resources, [and] the interests of society are irrefutably served.

IBM, supra, 857 F. Supp. at p. 1389. "It is in the public interest that victims and others expend their time, efforts, and resources to aid public prosecutors." *Ellis, supra*, 708 N.E.2d at p. 372.

> Where private investigation reveals that a crime has been committed, why should the government be precluded from using the investigation as a basis for prosecution simply because the government has not paid for it?

IBM, supra, 857 F. Supp. at p. 1389. Indeed, "[i]f the ultimate result of such private investigation is that criminals can be brought to justice with a minimum diversion of public resources," it can be argued that "the interests of society are irrefutably served." *Id.* Consequently, "it would not serve the public interest to have a rule that inhibited close cooperation between prosecutors and victims." *Ellis,* 708 N.E.2d at p. 373.

Moreover, crime victim cooperation with prosecutorial officials facilitates prosecutorial discretion because it deters crime and alleviates an already burdened criminal justice system. In many cases, it is often "difficult and virtually impossible for large corporate victims to secure prosecution of crimes committed against them…" *IBM, supra*, 857 F. Supp. at p. 1388. Therefore, often "[t]he result has been that crimes against large corporations may be committed with criminal impunity…" *Id*. Such impunity minimizes the deterrence effect of the criminal code, likely resulting in the increase in business related crimes in recent years. *See id.* Furthermore, the importance of the deterrent effect provided by private investigation:

> may be more important than the result of the investigation. People may be less likely to engage in insurance fraud if they know that their activities will be aggressively investigated and, where appropriate, prosecuted.

Fox, *Technology: The New Weapon in the War on Insurance Fraud* (2000) 67 Def. Couns. J. 237, 243.

The answer to the problems of business crimes, where law enforcement resources are exceedingly limited, can be met by encouraging cooperation between the corporations that

have fallen victim to crime and the District Attorney's office. Recent developments at the federal level resulting from the War on Terrorism have made this reality abundantly clear. Law enforcement resources are being diverted to matters where only a law enforcement/ governmental reaction is appropriate. To ensure even modest enforcement of many white-collar criminal laws, victim and private sector involvement in criminal investigations will become even more important, as law enforcement simply will not have the resources or expertise to investigate complicated economic or white collar crimes such as financial frauds. Absent the ability of prosecutors and law enforcement to utilize the skills and resources of the private sector, the impact on criminal enforcement will be dramatic. While this ability to cooperate with private victims may not be unlimited, the key to drawing an effective line, recognizing the appropriately broad discretion of prosecutors to initiate criminal prosecutions, is for the courts to act only where this key decision-making structure has been tainted. Absent a finding that "the district attorney failed to retain control and management over the case," *Hughes v. Bowers* (N.D. Ga. 1989) 711 F. Supp. 1574, 1583, there has been no inappropriate activity through cooperation with crime victims.

C. The Cooperation In This Case was Appropriate.

In the case at bar, the cooperation between the City of Orange and the District Attorney's Office is necessary for the exercise of the District Attorney's prosecutorial discretion. Here the cooperative efforts of the district attorney's office and the victim of the crime fulfill the "legitimate expectation that [the prosecutor's] zeal … will be born of objective and impartial consideration …." *People v. Conner* (1983) 34 Cal.3d 141, 146. There is no evidence whatsoever that the cooperation presently considered by the Court has

affected the District Attorney's objective and impartial consideration of whether to pursue this case. Unlike the *Eubanks* case, the District Attorney in the present case did not incur a financial obligation to the crime victim, nor did the crime victim assume debts already incurred by the prosecutor. In fact, other than the "volume" of assistance, little distinguishes this case from the ordinary crime victim/prosecutorial official cooperative situation. Although Franzen may uncover important evidence to the prosecution team, such provision of information does not in any way mean that the prosecutor is actually under the influence of Franzen or Franzen's employer. As long as the District Attorney in all such cases still must consider the information provided by the independent investigator to determine whether there is sufficient evidence that a crime occurred, no conflict of interest arises.

Likewise, in the present case the cooperation of Franzen with the district attorney's office actually aided the District Attorney's ability to exercise prosecutorial discretion. Franzen's services provided data and information to the District Attorney's office. From this information, the District Attorney was able to determine that there was enough evidence to bring charges against Mr. Hambarian. In short, Franzen's assistance facilitated the collection of evidence sufficient to allow the District Attorney to decide whether to charge the Petitioner in an informed manner.

II. THE FINDING OF THE TRIAL COURT ACCORDS WITH THIS COURT'S EUBANKS DECISION.

Beyond the general appropriateness of the victim's cooperation, the Trial Court's decision should be sustained because it accords with this Court's prior decision in *Eubanks*. Putting aside the question of whether *Eubanks* itself limits victim cooperation too much, the

key elements cited by this Court in *Eubanks* are not present here. Accordingly, *Eubanks* itself requires that the prosecutor's actions be validated in this action.

According to Pen. Code § 1424, a District Attorney may not be disqualified "unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." According to this Court's decision in *Eubanks* and *Conner*, this language establishes a two-part test: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?" *Eubanks*, *supra*, 14 Cal.4th at p. 594. This Court has held that a:

> 'conflict,' for purposes of section 1424, 'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.'

Id. at p. 592 (quoting *Conner*, *supra*, 34 Cal.3d at p. 148). *Eubanks* also held that a conflict "warrants recusal only if 'so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.'" *Eubanks*, *supra*, 14 Cal.4th at p. 592 (quoting *Conner, supra*, 34 Cal.3d at p. 141). A conflict warranting recusal must therefore be "real, not merely apparent, and must rise to the level of a *likelihood* of unfairness." *Eubanks*, *supra*, 14 Cal.4th at p. 592. This Court made clear that a:

> district attorney is not disqualified [from a case] simply because, in an effort to overcome budgetary restraints, he or she has accepted assistance from the public in investigating or prosecuting a crime.

Id. at p. 597.

This Court should find that the Superior Court was correct when it found that a prosecutorial conflict did not exist on the facts of this case. Despite the extent of Franzen's

involvement in the criminal investigation and the access provided to some of the District Attorney's facilities in order to facilitate his investigative responsibilities, there is no basis for a finding that the District Attorney suffered a conflict of interest.

First, as the Court of Appeal noted, "the district attorney did not ask the City to pay Franzen." *Hambarian v. Superior Court* (2001) 105 Cal. Rptr. 2d 566, 571. In comparison, the district attorney in *Eubanks* petitioned the victim of the crime to pay a debt incurred by the district attorney's office prior to the disposition of the case. The *Eubanks* court placed great emphasis on the "district attorney's solicitation and acceptance of financial assistance to satisfy an already incurred obligation." *Eubanks*, *supra*, 14 Cal.4th at p. 598. Indeed:

> the solicited contributions … are of a different order and pose a far greater risk of improperly influencing the district attorney's exercise of charging and prosecuting discretion.

Eubanks, 14 Cal.4th at p. 602 (George, C.J., concurring). On the other hand, the *Eubanks* court explained that it did not generally see a conflict in the "common practices" of:

> victims of commercial and corporate crimes sometimes assist[ing] the prosecution by collecting and organizing necessary information from internal sources, *and may even hire private investigators for external investigation of suspected crimes against the* company.

Eubanks, 14 Cal.4th at p. 598 (emphasis added). In the present case, the crime victim did no more than the *Eubanks* Court endorsed. The City merely volunteered the services of Franzen "for … investigation of suspected crimes against the company." *Id.*

Secondly, the District Attorney in this case, unlike *Eubanks*, was not in any way indebted to the crime victim. "[D]isqualification is not required merely because financial

assistance has made prosecution economically feasible." *Prakash*, *supra*, 86 Cal. App. 4th at p. 795. In *Eubanks*, this Court noted that while decisions:

> from other jurisdictions have approved of some forms of victim assistance, … none involved the public prosecutor's request for the victim's assistance to satisfy a monetary debt incurred.

Eubanks, *supra*, 14 Cal. 4th at p. 600. As previously stated, the fact that the district attorney in *Eubanks* requested the funds after the debt was already incurred was highly material to the outcome of that case. In such a situation it could be argued that the district attorney felt he should repay the crime victim for the willingness to pick up the tab for debts already owed by the prosecutor's office. Here, however, the prosecutor was not in any way indebted to the crime victim. According to the *Eubanks* Court, it is the "district attorney's solicitation and acceptance of financial assistance to satisfy an already incurred obligation" that distinguished the concerns in that case from the "common practices" and "routine cooperation" shown by the victim in this case. *Id.* at p. 598.

Conversely, the Petitioner's argument would drastically extend the *Eubanks* decision to such a degree as to throw into question any significant cooperation between the victims of crime and officials of the criminal justice system. A finding that the district attorney could not cooperate with the alleged victim of the crime in this case would therefore place substantial obstacles in the path of law enforcement efforts to collect evidence. Under the Petitioner's proposed reading of *Eubanks*, a prosecutor could be disqualified if the crime victim invests virtually any time or money in facilitating a district attorney's investigation. On the other hand, if crime victims do not cooperate with prosecution officials, law enforcement efforts would be greatly hindered and certain types of crimes, such as business

and insurance fraud would be rendered virtually unenforceable. No decision of this Court (or any other) requires such a dramatic and harmful result.

CONCLUSION

This Court therefore should find that the Superior Court was within its discretion in its decision not to disqualify the district attorney because the result of the Superior Court's ruling accords with this Court's prior *Eubanks* holding. A finding otherwise would extend *Eubanks* to bar virtually any assistance provided by a crime victim and would severely hamper law enforcement efforts to investigate crime.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEFFREY HAMBARIAN, Petitioner, vs. ORANGE COUNTY SUPERIOR COURT, Respondent; THE PEOPLE, Real Party in Interest.	)	NO. S097450 **PROOF OF SERVICE**

I am a citizen of the United States and a resident of Prince George's County, Maryland; I am over the age of eighteen years and not a party to the within entitled action; my business address is: Wiley Rein & Fielding, 1776 K Street, N.W., Washington, D.C. 20006

On December17, 2001, I served the AMICI CURIAE NATIONAL INSURANCE CRIME BUREAU AND COALITION AGAINST INSURANCE FRAUD'S BRIEF IN SUPPORT OF THE REAL PARY IN INTEREST on the interested parties in said action listed below by placing a true copy thereof enclosed in a sealed envelope and sent by common carrier, postage prepaid, that same day .

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I certify under penalty of perjury that the foregoing is true and correct. Executed on the 18th day of December, 2001 in Washington, D.C.

_____

Laila Turner