No. 09-571

In The
Supreme Court of the United States

HARRY CONNICK, District Attorney, *et al.*

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Respondent.[1]

INTEREST OF *AMICUS CURIAE*

The NACDL is a non-profit organization with a direct national membership of more than 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice.

The integrity of the truth-seeking function of the criminal trial requires that the prosecutor comply with his fundamental constitutional obligation to disclose evidence favorable to the defense under

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Prosecutors' lack of compliance inhibits our members' ability to provide meaningful representation to our clients and increases the likelihood that innocent men and women will be convicted, spend lifetimes in prison, or face the awful finality of the death penalty. NACDL is deeply concerned that the Petitioners' arguments in this case, if accepted by the Court, would remove important incentives for municipalities to ensure that prosecutors are properly trained and motivated to comply with their *Brady* disclosure obligations, and would deny civil redress for Respondent, who was so grievously damaged due to a District Attorney's shocking indifference to his training obligations.

We rely on the facts set forth in Respondent's Brief.

SUMMARY OF ARGUMENT

I. *Certiorari* was granted on the broad question of whether a municipality can ever be subject to failure-to-train liability for a prosecutor's single *Brady* violation, in the absence of prior violations providing notice of a need for such training. However, the facts are not as the Court assumed. There were numerous *Brady* violations committed by four prosecutors during two trials of Respondent John Thompson, and a history of *Brady*

violations by the Orleans Parish District Attorney's Office before that, which were known to the District Attorney, Harry Connick. Thus, *certiorari* was improvidently granted.

Complicating matters further is that Petitioners' Brief has now changed the question the Court agreed to consider. Petitioners still incorrectly assume this is a single violation case, but now ask the Court to decide the narrower question of whether a municipality can ever be held liable for a prosecutor's *deliberate* violation of a known *Brady* obligation. Since the jury could have reasonably inferred that the *multiple Brady* violations that caused Respondent's murder and robbery convictions were not all wilful, but resulted instead from the prosecutors' failure to recognize their *Brady* obligations due to inadequate training, Petitioners' newly-framed question is not fairly presented by the facts of this case. Rather than issue an advisory opinion on the question presented, the Court should dismiss the appeal.

II. Petitioners assume that "single violation" liability under *City of Canton v. Harris*, 489 U.S. 378 (1978), only extends to a municipality's failure to train *police* in the use of deadly physical force, or an equivalent situation, but the Court's decision was far broader. All nine Justices agreed that a municipality could be held liable, even in the absence of a history of similar violations, for a failure

to train "employees" or "personnel" where the need for training was apparent. *Id.* at 390 (White, J., for majority); *id.* at 396 (O'Connor, J., concurring). The Court wrote that the arming of police to employ deadly force without training was an "example" of when such liability might be imposed, not a "benchmark" as Petitioners contend, and did not imply that a "single violation" theory was limited to *police* misconduct. *Canton*'s "single violation" theory applies just as readily to a municipality's failure to train *prosecutors* in their complex *Brady* obligations.

III. Petitioners and their *amici* are incorrect that prosecutors' attendance at law school, their professional responsibility to know and follow the law, and their "fear" of discipline if they violate their disclosure obligations, somehow relieve a municipality from training prosecutors concerning their *Brady* obligations. A prosecutor's duty to disclose evidence favoring the defense under *Brady* is far more complex than Petitioners acknowledge. Neither the general education that law schools provide, nor the general obligation to produce "exculpatory" evidence that the disciplinary rules recognize, prepares prosecutors to decide the kinds of specific *Brady* issues that regularly arise in criminal cases and that were presented by this case. Meanwhile, it is incorrect that the "threat" of professional or employer discipline will suffice to ensure that prosecutors learn and abide by their

Brady obligations. The evidence overwhelmingly shows that such discipline almost never occurs.

The harm that a prosecutor's incorrect application of *Brady* may cause a criminal defendant – a lengthy prison term, life imprisonment, or even execution – is just as severe as the harm that a police officer's mistake may cause a criminal suspect. At the same time, *Brady* violations by prosecutors are even more insidious than misconduct by police because they are committed secretly and are almost never discovered by criminal defendants, who usually lack any access to counsel after losing their direct appeal. Even when a *pro se* defendant, against all odds, learns about a *Brady* violation, the likelihood that he will be able to prove his claim in court while effectively marshaling the evidence to prove materiality or prejudice, and also successfully overcome complex state and federal procedural prerequisites to relief, is remote.

IV. Petitioners and their *amici* seek *de facto* immunity for municipalities, notwithstanding the Court's contrary holding in *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). Petitioners argue that a prosecutor's decision to withhold *Brady* material is always independent of his training, since it is dependent upon case-specific variables, such that lack of training can never be the proximate cause of a *Brady* violation. However, this ignores that there are principles of law under *Brady* in which line prosecutors must be trained so as to *constrain*

their exercise of judgment or discretion. A properly trained prosecutor's conclusion that potential impeachment evidence need not be disclosed because it is insufficiently material under the facts of the case, even if erroneous, would not subject a municipality to liability. However, the prosecutor's decision not to disclose the same evidence because he received no training, and therefore did not understand, that impeachment evidence falls under *Brady*, might. Consistent with the Court's analysis in *Owen*, the risk of failure-to-train liability for the municipality *should* be in the back of a policymaker's mind, especially since, under *Van de Kamp v. Goldstein*,129 S.Ct. 855 (2009), he need not have any fear of *personal* liability. This is consistent with the Court's teaching that prosecutors, when in doubt, should disclose. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995). If a culpable failure to train is the cause of a criminal defendant's grievous injuries, as in this case, the victim of the municipality's indifference should be able to obtain financial redress from the party that caused him the harm.

Even if a prosecutor deliberately withholds evidence he knows he must disclose under *Brady*, as Petitioners argue occurred in this case, such a decision still might reasonably be attributed by a jury to a culpable lack of training. Prosecutors face intense pressure to achieve convictions, especially in high-profile cases involving heinous crimes such as this one, and require instruction on how to resolve

conflicts between this pressure and their constitutional obligation to ensure that a defendant receives favorable evidence necessary for him to obtain a fair trial. Specifically, the policymaker must instruct his staff that, no matter what the pressure to convict, disclosing *Brady* material in order to ensure the defendant a fair trial represents a higher obligation. Rather than provide such instruction, Petitioner Connick merely informed his staff to disclose "exculpatory" evidence upon defense request and court order, and to be concerned, not with ensuring a fair trial, but with doing just enough to insulate the office against appellate reversal.

V. Finally, Petitioners' "floodgates" argument is completely overblown. The level of indifference to training and *Brady* compliance that District Attorney Connick exhibited in this case was surely rare in 1985, and would be rarer still today. Prosecutors need not fear civil liability for other types of trial-related misconduct, since most such misconduct occurs in open court and is subject to independent court rulings that likely would be considered a superseding cause of harm. This would be true even if, as in this case, the individual prosecutor's misconduct could also be successfully linked to a policymaker's utter indifference to an inherent need for training. Furthermore, *Heck v. Humphrey*, 512 U.S. 477 (1994), will block many potential lawsuits, as will the need to plead sufficient

facts to survive a motion to dismiss under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

ARGUMENT

I. *CERTIORARI* WAS IMPROVIDENTLY GRANTED

Petitioners obtained *certiorari* by representing that this case involved a "single *Brady* violation." But, as Respondent contended, this is not a "single violation" case. Respondent's Brief in Opposition to *Certiorari* at 12, 18-20. There were an appalling *series* of *Brady* violations, during two separate but coordinated criminal prosecutions designed to result in the imposition of the *death penalty*. Not one, but *four* prosecutors withheld potentially exonerating blood evidence, withheld prior inconsistent statements by key witnesses, including an inconsistent physical description of the perpetrator, and withheld evidence of another key witness's motive to lie (the existence of a monetary reward offer, which the prosecutor's summation falsely denied). *See* Respondent's Br. at 18-20. Meanwhile, Connick's testimony acknowledged that he elected not to require any *Brady* training of his staff despite four prior appellate reversals on *Brady* grounds and additional, unspecified *Brady* rulings against his Office. JA452-55. The trial court permitted the jury to consider all of the *Brady* violations in this and in

the prior cases as evidence of lack of training, causation, or notice. JA826.

Having obtained *certiorari* on the incorrect premise that this is a "single violation" case, Petitioners now purport to re-frame the question presented, while relying on an additional, inaccurate factual assumption. Petitioners' Brief now asks the Court to decide whether "failure-to-train liability may be imposed on a district attorney's office for a prosecutor's *deliberate* violation of *Brady v. Maryland*, despite no history of similar violations in the office." Petitioners' Brief at i (emphasis added). But Respondent's principal theory of recovery was not that the violations in Respondent's case were "deliberate," but that they likely resulted from the prosecutors' failures to *recognize* their *Brady* obligations due to deficient training.

In contending that no amount of training could have prevented a "deliberate" violation of *Brady*, Petitioners and their *amici* make the remarkable assumption that the four experienced prosecutors who handled this case, including the third-ranking prosecutor in Connick's office, engaged in what they characterize as a *criminal* cover-up of potentially exonerating scientific evidence in a death penalty case – essentially, a conspiracy to cause the state-sanctioned "murder" of a potentially innocent man. *See* Petitioners' Br. at 20-21; *Amici Curiae* National Association of Cities, *et al.* Brief at 2-3; *Amicus*

Curiae Orleans Parish Assistant District Attorneys Brief at 3, 8-12. But the jury was not required to reach such a shocking conclusion. Rather, it could have inferred that the failure to disclose the blood evidence at Respondent's robbery trial resulted from Connick's inexcusable failure to train his staff concerning, and their consequent failure to understand, the requirement that they (a) disclose *potentially* exonerating evidence where its ultimate significance depended upon other evidence that the prosecutor did not then have, (b) follow up rather than consciously avoid obvious leads to exonerating evidence, and (c) turn over favorable evidence regardless of whether the defense had specifically requested such disclosure. Similarly, the jury could have inferred that lack of training, not deliberate misconduct, caused the prosecutors to withhold various items of impeachment evidence at Respondent's murder trial.

In sum, it appears that *certiorari* was improvidently granted based upon two false factual premises: that Respondent's injuries were caused by a "single violation" and that no prior violations put the District Attorney on notice of a need for training. Further, because Petitioners now ask the Court to decide a different, narrower issue that is not fairly based on the facts of the case, the Court's decision would be an advisory one. Therefore, the appeal should be dismissed.

II. THE COURT SHOULD NOT FORECLOSE 'SINGLE VIOLATION' *CANTON* LIABILITY FOR A MUNICIPALITY'S FAILURE TO PROVIDE ANY TRAINING TO PROSECUTORS CONCERNING THEIR *BRADY* DISCLOSURE OBLIGATIONS

A. Municipal Liability For *Brady* Violations Under A Failure-To-Train Theory, In The Absence Of Prior Similar Violations, Fits Comfortably Within This Court's Precedents

The question as to which the Court thought it was granting *certiorari* is whether failure-to-train liability under 42 U.S.C. § 1983 for a *Brady* violation may ever be imposed on a municipality where the line prosecutor's violation of the plaintiff's rights was not preceded by prior violations that provided the municipality with notice that its training program was deficient. We believe that, under *City of Canton v. Harris*, 489 U.S. 378 (1978), the answer is yes. There is nothing about the prosecutorial function that should immunize a municipality for a constitutional violation under *Brady* that was the highly predictable consequence of an obviously deficient training program.

That a municipality may be held liable for inadequate training under § 1983 absent a prior

pattern of similar violations, and that such a theory of liability is not limited to police misconduct cases, was *unanimously* established by the Court in *Canton*. Both Justice White's majority opinion for six members of the Court, and Justice O'Connor's concurrence, which was joined by Justices Scalia and Kennedy, made clear that municipal liability could be based upon a policymaker's deliberate indifference to an obvious need for training. As Justice White explained in Part III of his opinion, which the entire Court joined, "it may happen that in light of the duties assigned to specific *officers or employees* the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390 (emphasis added). Agreeing, Justice O'Connor separately wrote that liability may attach where there is "a clear constitutional duty implicated in recurrent situations that a particular *employee* is certain to face . . . [and where] the failure to inform *city personnel* of that duty will create an extremely high risk that constitutional violations will ensue." *Id.* at 396 (emphasis added). Each opinion then added, as a *second* method for showing notice of a need for better training, that a plaintiff could prove a history of similar violations. *See id.* at 389-90 n.10 (majority opinion); *id.* at 396-97 (concurring opinion). In sum, the Court established the principles (a) that *Monell* liability may be imposed for lack of training even

where there was no history of similar constitutional violations, and (b) that such a theory was applicable not just to police but generally to municipal "officers or employees" or "personnel".

The Court's only other decision discussing "single-incident" liability is *Bd. of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997). There, the plaintiff sought to hold a municipality liable for the single decision to hire a deputy sheriff who later assaulted him. The Court, this time with Justice O'Connor writing for the majority, rejected any analogy "between failure-to-train cases and inadequate screening cases." *Id.* at 398. "Unlike the risk for a particular glaring omission in a training regimen," Justice O'Connor reasoned, "the risk from a single instance of inadequate screening of an applicant's background is not 'obvious' in the abstract." *Id.* at 410. The Court *reiterated* its discussion in *Canton* "leaving open . . . the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations." *Id.* at 409. Subsequently, the plaintiff succeeded in showing that the Bryan County Sheriff's inadequate *training* program had resulted in an employee's violation of plaintiff's right to be free of excessive force, and the Fifth Circuit upheld the judgment under *Canton*'s "single violation" theory. *Brown v. Bryan County, Okl.*, 219 F.3d 450, 465 (5th Cir. 2000).

Nothing in *Canton* suggests that "single violation" liability would be inappropriate for a municipality's complete failure to train prosecutors in their *Brady* obligations. Contrary to Petitioners' contention, Br. at 32, the Court did not use the need to train police officers in the use of deadly force to apprehend fleeing felons as a "benchmark" of when training might be constitutionally required; it *wrote* that it was using it as an "example." *See Canton*, 489 U.S. at 390 n. 10; id. at 396 (O'Connor, J., concurring). Indeed, in *Canton* itself, by remanding the case for a new trial, the Court left open the possibility of "single incident" liability for a municipality's failure to train police concerning when to summon medical care for an injured detainee.[2] But even assuming *Canton* set a benchmark, the complexity and difficulty in applying *Brady* principles, the certainty that such situations will arise and that, without training, wrong decisions will be made, and the extreme harm that such wrong decisions will cause, makes it incumbent on

[2]Petitioners assert that the "lower courts' chief mistake was to divorce *Canton*'s hypothetical from its facts. . . . *Canton*'s untrained officers were essentially asked to intuit deadly force standards." Petitioners' Br. at 35. But in their myopic focus on *Canton*'s hypothetical, Petitioners lose sight of the fact that *Canton* was not a deadly force case – it involved whether officers received insufficient training in providing emergency medical care to detainees – and the Court remanded the case for a new trial on that issue.

municipalities to train prosecutors to recognize and to fulfill their *Brady* obligations.

B. The Need To Train Prosecutors In Their *Brady* Obligations Exceeds, Or Is At Least Equal To, The Need To Train Police Officers Concerning The Constitutional Constraints On Their Discretion

Petitioners and their *amici* contend that municipal policymakers are entitled to assume, in the absence of a history of violations, that prosecutors, in contrast to police, need no training under *Brady* because they attend law school and are professionals with an obligation to know and to follow constitutional and ethical rules of behavior. *See* Petitioners' Br. at 28-31. For the following reasons, we disagree.

1. Prosecutors Are Specialists Who Require Particularized Training In Their Constitutionally-Required Functions, Including *Brady*

Petitioners and their *amici* contend that lawyers, unlike police, are professionals, like doctors, and that therefore a municipality need no more train a lawyer concerning *Brady* than a doctor in "diagnostic nuances." Petitioners' Br. at 30 (quoting

Judge Clement's dissent, Pet. App. 29a); *Amicus* National Ass'n of Cities, *et al.* Brief at 3. They presume that lawyers are adequately educated about *Brady* in law school just as doctors are adequately educated about medicine in medical school. This reasoning makes no sense.

A criminal prosecutor is a specialist in a discrete area of law, just as a surgeon, an anesthesiologist, an oncologist, or a psychiatrist is a specialist in his or her area of medical specialization. A municipality cannot take a general medical practitioner, provide him no training in surgery, charge him with performing operations at a city-run clinic, and then escape liability when he kills or maims a patient. The doctor's attendance at medical school, "on-the-job" training, and professional responsibility to provide competent care are obviously inadequate preparation for carrying out such a specialized function on behalf of his municipal employer. Similarly, criminal prosecutors have specific responsibilities, and must make a myriad of judgments, based upon a range of knowledge that they do not obtain at law school, such as the specific principles that govern disclosure under *Brady*. There is nothing in the trial record in this case establishing that Connick had any reason to believe that law school alone prepared his prosecutors for such duties.

That criminal prosecutors must receive specific training to be qualified to handle criminal

prosecutions in accordance with their constitutional, statutory, and ethical responsibilities was recognized by the American Bar Association at the time of Thompson's trial. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function Standards, § 3-2.6 & Commentary (3d ed. 1993) ("Training Programs").[3] In recommending that prosecutors' offices establish "training programs . . . for new personnel and for continuing education of the staff," the ABA commented that "[e]ven lawyers with extensive experience in the trial of civil cases must undergo new training . . . before they can function effectively in the trial of a criminal case." *Id.* The ABA also advised that "it is critical, furthermore, that training within the prosecutor's office emphasize professional responsibility." *Id.* Although Connick, in his trial testimony, tried to pander to the jury by dismissing the ABA as some "liberal" group, JA443, this Court has cited the ABA's standards as a significant source for determining the minimum requirements of the profession, *see, e.g., Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010) (ABA standards are "guides to determining what is reasonable") (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). *Amicus* National District Attorneys Association ("NDAA") similarly has recognized that "legal positions" in prosecutors' offices "require . . . specialized expertise." NDAA,

[3]This standard is "unchanged," *id.*, from the prior edition, which was published in 1980.

National Prosecution Standards, Commentary to § 9.1, *et seq.* Ironically, the NDAA, in its *amicus* brief here, ignores its own standards.

Despite his dismissal of such standards in his trial testimony, Connick plainly recognized, while he was D.A., that law school graduates had to be trained in numerous areas of responsibility before they would be qualified to handle significant criminal cases. Indeed, Connick, in his brief, congratulates himself on the extensive training and supervision his new prosecutors received in virtually every type of function. Petitioners' Br. at 5-6. There was just one area missing: *Brady*. That Connick would recognize the need to instruct prosecutors in virtually every facet of prosecution, but provide no training about compliance with *Brady*, was a powerful piece of evidence before the jury proving his deliberate indifference to whether such compliance actually occurred. Obtaining *convictions* obviously mattered far more.

Certainly by 1985 it should have been obvious to any District Attorney in this country that the *Brady* requirement was far more complex, and required far more subtle decision-making, than simply disclosing "exculpatory" evidence that had been specifically requested by the defense and ordered by the court, which was all that Connick's policy suggested was necessary, JA703-05. The Supreme Court had advised in *Giglio v. United*

States that prosecutors' offices "establish" "procedures and regulations" to ensure that *Brady* information is disclosed to defendants. 405 U.S. 150, 154 (1972). Court decisions in Louisiana involving Connick's own office,[4] as well as decisions elsewhere,[5]

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[4] *Hudson v. Blackburn*, 601 F.2d 785, 709 (5th Cir. 1979) (prosecutor erroneously failed to disclose discrepancy in lineup identification, but error was insufficiently material to require reversal); *Davis v. Heyd*, 479 F.2d 446, 453 (5th Cir. 1973) (prosecution required to disclose prior inconsistent statement of its witness despite absence of specific defense request; conviction vacated), abrogated on other grounds, *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976); *State v. Perkins*, 423 So.2d 1103, 1107-08 (La. 1982) (conviction reversed due to D.A.'s refusal to produce potentially exculpatory statement of uncalled witness); *State v. Curtis*, 384 So.2d 396, 398 (La. 1980) (conviction reversed due to D.A.'s failure to reveal eyewitness's initial inability to identify defendant during a photo array); *State v. Falkins*, 356 So.2d 415, 417 (La. 1978) (court reversed conviction after prosecutor erroneously testified that she was not required to disclose that prosecution eyewitnesses initially identified someone other than the defendant); *State v. Carney*, 334 So.2d 415, 418-19 (La. 1976) (conviction reversed due to D.A.'s failure to disclose witness's non-prosecution agreement); *State v. Hammler*, 312 So.2d 306, 309-10 (La. 1975) (conviction reversed after prosecutor violated *Brady* by telling potentially exculpatory witness not to talk with the defense).

[5] *United States v. Agurs*, 427 U.S. 97, 106-07 (1976) (prosecutor must turn over material favorable evidence even without specific request, and is responsible for discovering and disclosing such information in the government's files regardless of individual good or bad faith); *Giglio v. United*

already had reflected the wide array of issues that could arise under *Brady* (including the very issues that would arise in this case), and the difficulties prosecutors had in fulfilling their responsibilities properly. Connick should have been aware of these decisions in determining whether to train his staff –

States, 405 U.S. 150, 154-55 (1972) (government required to disclose impeachment evidence involving understanding or agreement with witness); *Walker v. Lockhart*, 763 F.2d 942, 955 (8th Cir. 1985) (*Brady* obligation continues post-conviction); *Chaney v. Brown*, 730 F.2d 1334, 1353 (10th Cir. 1984) (FBI report containing witness statements that tended to exculpate defendant); *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983) (impeachment evidence showing witnesses' financial interest in testifying for government), *rev'd, United States v. Bagley*, 473 U.S. 667 (1985) (reversing on "materiality" grounds); *United States v. Herberman*, 583 F.2d 222, 229-30 (5th Cir. 1978) (prosecutor has duty when in doubt to allow court to examine potential *Brady* material); *United States v. Butler*, 567 F.2d 885, 888-89 (9th Cir. 1978) (government must disclose its knowledge of witness's expectation of leniency when it conflicts with his testimony denying same); *Boone v. Paderick*, 541 F.2d 447, 451-52 (4th Cir. 1976) (promise of favorable treatment must be disclosed whether made by prosecutor or police); *United States v. McCrane*, 547 F.2d 204, 206 (3d Cir. 1976) (preferential treatment of government witnesses); *Grant v. Allredge*, 498 F.2d 376, 377-78 (2d Cir. 1974) (leads to possible exculpatory evidence); *United States v. Poole*, 379 F.2d 645 (7th Cir. 1967) (physical examination contradicting rape victim's story); *Barbee v. Warden*, 331 F.2d 842, 847 (4th Cir. 1964) (ballistics and fingerprint reports casting doubt on defendant's criminal involvement).

although, in fact, his testimony revealed that he lacked any interest in *Brady* and had acquired only inaccurate "knowledge" of it. *See* Respondent's Br. at 8-11. If Connick had used his own ignorance of *Brady* as a guide, he would have realized the need to provide at least some training to his employees in *Brady's* specific requirements.

2. The Principles That Determine Whether Information Must Be Disclosed Under *Brady* Are Far More Complex Than The Rules Governing The Use By Police Of Deadly Physical Force

The rules governing *Brady* compliance are more complex than the rules governing police use of deadly physical force, and *Brady*'s complexity should have been apparent to Connick. As demonstrated in the prior section, *see* pp. 19-20, nn. 4-5, prior to 1985 (and even more so today), there were numerous court decisions applying *Brady* where the outcome was not obvious under the *Brady* decision itself. *Brady*, which referred to evidence material to "guilt or innocence" or punishment, 373 U.S. at 89, did not discuss what evidence fell under these two broad categories. Would evidence that was not "exculpatory," such as impeachment evidence, have to be disclosed, and if so, what types of impeachment? Would evidence that was exculpatory on its face, such as a recantation, or that was otherwise inconsistent

with the prosecutor's theory, have to be disclosed even though the prosecutor either believed that it lacked reliability or that it could be reconciled with his other evidence? What about evidence that, while not exculpatory by itself, might exonerate the defendant if combined with other information known by the defense or ascertainable by the prosecution? What would be the prosecutor's obligation, if any, to obtain and disclose *Brady* material in the possession of an outside police agency? When must *Brady* material be disclosed? Would a defense request for the evidence affect the obligation to disclose? How would materiality be measured? Would materiality be judged cumulatively or based on each individual piece of evidence?

Given the extraordinary range of questions that the *Brady* decision itself left unanswered, but that subsequent court decisions addressed, it was absolutely *certain*, in the absence of any training by Connick, that his line prosecutors would make erroneous decisions affecting the liberty, or even the very life, of criminal defendants. On the other hand, training about the specific principles governing application of *Brady* would have made the violations that occurred in this case much less likely. The prosecutors would have understood, contrary to Connick's own erroneous belief and to the limited disclosures required by his vague, general "policy," that blood evidence had to be turned over because of the significant possibility that, in combination with

other evidence (the defendant's blood type), it would prove exculpatory; that such evidence had to be disclosed even in the absence of a specific defense request and a court order; and that an eyewitness's inconsistent description of the perpetrator, as well as a witness's hope for a monetary reward, had to be disclosed for the purpose of impeachment.

3. In Many Instances, *Brady* Violations May Be More Harmful To The Victims Than Unlawful Conduct By Police

If police trying to apprehend fleeing suspects misuse deadly physical force, death or serious bodily injury may result. This, of course, is the most extreme example of injuries to civilians that may be caused by police. But police engage in all sorts of other functions that may violate the constitutional rights of individuals short of killing or maiming them, where training nevertheless may be constitutionally required. It is not, for example, intuitively obvious when police, consistent with the Constitution, may enter a home to make an arrest, conduct searches incident to arrest, inventory searches, body cavity searches, or "searches" of a computer, give *Miranda* warnings and cease (or resume) questioning, or make arrests for loitering or obscenity. It is hard to imagine that there would be no municipal liability if, in these recurrent areas of police responsibility, officers were not trained at the

Police Academy or otherwise in the applicable constitutional rules.

Prosecutors who violate their constitutional obligations under *Brady* are highly likely to inflict injuries at least as serious as the harm that police may cause. In this case itself, Thompson was imprisoned for 18 years, and was just a few weeks away from *execution*, before the evidence that the prosecutors had withheld was fortuitously discovered. Had he been executed, he would have been no less dead than the victim in *Tennessee v. Garner*, 471 U.S. 1 (1985). Even in a non-capital case, a prosecutor who withholds *Brady* material may cause an innocent man to spend the rest, or a significant portion, of his life in prison.

Connick acknowledged in his testimony that *Brady* decisions must be made in many cases, and that errors in judgment may have terrible consequences for the defendant, JA451. But there is one further consideration that makes *Brady* violations even more insidious: the inherent secrecy with which they are committed.

4. *Brady* Violations Are Especially Harmful Because They Are Committed In Secret And Almost Never Discovered

Unlike police errors in the course of investigating crime, which usually are the subject of defense motions before and during criminal trials, *Brady* violations almost always occur in secret, and will almost never be discovered by the defense. Whether the prosecutor's error is deliberate or inadvertent, the defense will generally never know that any violation has occurred. *Brady* establishes an honor system; no one independent of the prosecutor searches his files. And once the trial is over, there is no further discovery. The defendant may appeal his conviction, but he is limited to the appellate record. After his appeal is denied, he no longer even has access to counsel to investigate or advocate for him.

The lack of access to counsel after direct appeal makes it virtually impossible for criminal defendants to uncover *Brady* violations, let alone obtain any remedy for them. Neither states nor the federal government have any obligation to supply counsel for an indigent defendant once he has lost his direct appeal, except in death penalty cases. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1990); *McFarland v. Scott*, 512 U.S 849, 853-54 (1994). Thus, the vast majority of defendants – poor and

uneducated in the law – are on their own. While some jurisdictions permit limited access to police or prosecutorial records pursuant to Freedom of Information Act requests, the officials who field such requests are often the same officials who have withheld the evidence in the first place. *See, e.g.,* New York Public Officer's Law § 87(1)(b) (McKinney's 2009) (requiring public agencies to establish their own rules for disclosure of records to the public). And *pro se* inmates lack the legal expertise to enforce such requests.

The rare uncovering of a prosecutor's withholding of *Brady* material almost always is a result of an inmate's extraordinary perseverance or pure luck. In this case, Thompson was represented for many years by tenacious and talented *pro bono* death penalty counsel who, *14 years* after Thompson's conviction, miraculously found the exculpatory blood-analysis evidence in the microfiche records of the police. Had Thompson received life in prison without parole instead of a death sentence, he would have had no counsel at all and the violation would never have been discovered. In *People v. Ramos*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994), the *Brady* evidence that ultimately freed a young teacher, after he spent seven years in prison for a child rape that almost certainly never occurred, surfaced only because the child's mother brought a civil suit, insurance attorneys disclosed the exculpatory evidence to the defendant, and he had a

mother who worked day and night to save funds with which to retain counsel to collaterally attack his conviction. *See* Stephen Gillers, *In the Pink Room,* in Legal Ethics: Law Stories, at 1 (David Luban & Deborah L. Rhode eds., 2006).

In the rare case that an unrepresented inmate somehow learns of *Brady* material, insuperable obstacles will almost always block his road to release. Unassisted by counsel, he will have to complete his investigation of the violation and its circumstances and, from prison, obtain the evidentiary material with which to prove it in court. He will then have to prepare a written motion to vacate his conviction demonstrating, through a comprehensive analysis of the trial record, that the violation was "material." If his motion is denied, he will then have to pursue an appeal while taking care to exhaust his federal claims. And finally, if he has been able to figure out how to properly exhaust his remedies in state court, he will have to perfect his federal habeas corpus petition within the strict one-year statute of limitations while meeting all the other complex procedural requirements of the federal habeas statute, including overcoming the difficult burden of showing why AEDPA deference need not be accorded to any state court decision. *See* 28 U.S.C. § 2254(d)(1) (1996).

In sum, training (and the potential for municipal liability) is all the more essential in the

prosecutorial, as opposed to the police, context, to ensure that secret, extraordinarily harmful, and almost always irremediable *Brady* violations do not occur.

5. The Pressure On Prosecutors To Obtain Convictions Requires Training Concerning The Competing Value Of Fairness To The Accused

Petitioners argue that the *Brady* violation they concede occurred in this case – the withholding of the blood analysis evidence – resulted from wilful misconduct that training about substantive disclosure obligations would not have averted. Even if they are correct that the withholding was wilful, reasonable training likely would have averted it. Just as police are under pressure to solve a heinous crime, prosecutors are expected to get a conviction. They need to be *trained* to understand and accept that, when a conflict inevitably arises between their obligation to fight for a conviction and their obligation to ensure a fair trial for the accused, the latter obligation must take precedence. In a recent article discussing the importance of "prosecutorial regulation" and "accountability," one expert recommended that prosecutors' offices conduct "training exercises" to "reinforce" the message that prosecutors should refrain from an unchecked "notches-on-the-belt conviction mentality."

Stephanos Bibas, *Prosecutorial Regulation, Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 1009 (2008-09). Indeed, this Court has taught that, when in doubt, prosecutors should disclose possible *Brady* material. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence" and that "is how it should be"); *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("the prudent prosecutor will resolve doubtful questions in favor of disclosure").

Rather than provide such instruction, Petitioners' explicit *policy* – to withhold all documents not explicitly required by state law to be disclosed while revealing *Brady* material necessary to avoid an appellate reversal or successful collateral attack – encouraged gamesmanship. It implied that *Brady* material should be disclosed for strategic reasons to benefit the prosecution, rather than to ensure a fair trial for the accused, even at the risk of an acquittal.

6. Prosecutors Are Rarely Disciplined For Violating *Brady* And The Rules Of Professional Responsibility Alone Do Not Provide Sufficient Guidance

Petitioners and *amicus* NDAA argue that in-office training is not necessary because published

ethical rules suffice and because prosecutors have strong incentive to learn and to follow the rules or else face professional sanction. Petitioners' Br. at 13, 28; NDAA Br. at 10-11. However, these propositions are incorrect. As the NACDL's *amicus* brief submitted in *Pottawattamie County, Iowa v. McGhee*,547 F.3d 922 (8th Cir. 2008), *cert. granted,* 129 S.Ct. 2002 (2009), *appeal dismissed*, 130 S.Ct. 1047 (2010), at 19-40, conclusively shows, prosecutors are far less likely to be sanctioned than police officers who engage in misconduct and are subject to investigation and discipline by civilian review boards and internal affairs units.

First, most states' rules of professional conduct contain broad pronouncements that prosecutors have special obligations, including to disclose *Brady* material, but lack guidance any more specific than Petitioners' vague written policy of how to perform this obligation. *Compare* Model Rules of Professional Conduct, § 3.8(d) (1983) ("Model Rule § 3.8) ("The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"), *with* JA704 (Orleans Parish's *"Brady* Material" policy

containing similarly limited language, discussed in Respondent's Br. at 9-11). As Fred C. Zacharias pointed out before Thompson's criminal trials, the Model Rule's "special prosecutorial duty is worded so vaguely that it obviously requires further explanation . . . In effect, code drafters have *delegated to prosecutors* the task of resolving the special ethical issues prosecutors face at every stage of trial." Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 46 (1991) (emphasis added).

Second, "most commentators agree that professional discipline of prosecutors is extremely rare." Bennett T. Gershman, *Reflections on Brady v. Maryland*, 47 S. Texas L. Rev. 685, 722 (2006). *See, e.g.*, Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275, 296 (2007) (terming the discipline that occurred in the notorious "Duke lacrosse" case the "Mike Nifong exception" because "the case undoubtedly has left the public with misperceptions about prosecutorial misconduct and the extent to which it is punished"); Shelby A.D. Moore, *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold*?, 47 S. Tex. L. Rev. 801, 807 (2006) ("prosecutors are rarely, if ever, punished" by professional disciplinary bodies, even when engaged in "egregious misconduct"); Fred C. Zacharias, *The*

Professional Discipline of Prosecutors, 79 N.C. L. Rev. 721, 755 (2001) ("discipline rarely occurs").

Recently, task forces convened in New York and California to examine the causes of wrongful convictions came to the same troubling conclusion: prosecutorial misconduct is a substantial cause of wrongful convictions, errant prosecutors are virtually never disciplined, and the widespread lack of discipline causes such misconduct to occur. *See* Final Report of the New York State Bar Association's Task Force on Wrongful Convictions 7, 19, 29-31 (2009) ("Task Force Report"),*available at* http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf; Final Report, California Commission on the Fair Administration of Justice 70-73 (Gerald Uelmen ed., 2008)("Justice Commission Report"), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

Petitioners emphasize that one Orleans Parish assistant district attorney was disciplined for failing to disclose his knowledge of the withholding of blood evidence during Thompson's prosecution while Thompson was facing execution. Petitioners' Br. at 13, 28; *see In Re Riehlmann*, 891 So.2d 1239, 1248-49 (La. 2005). But this was a rare exception to the norm of no discipline. Indeed, none of the three surviving prosecutors who actually *committed* the numerous *Brady* violations during the course of Thompson's

case has ever been disciplined, either by the Orleans Parish District Attorney's Office or the bar. Testimony at the trial revealed that Connick himself called off the grand jury's investigation of those prosecutors. JA18, 539.

C. The Withholding of *Brady* Material By A Prosecutor Is Not An Inherently 'Independent' Act For Which A Municipality Is Essentially Immune

Petitioners and their *amici* contend that, because a prosecutor is a professional who has to exercise reasonable judgment and discretion in relation to the unique facts presented by each case, a municipality is essentially immune for the prosecutor's unlawful decision to withhold *Brady* material because it is inherently independent of his defective training. Petitioners' Br. at 37-39, D.A.'s Ass'n of State of New York *Amicus* Br. at 12-15; D.A.s' Ass'n of New York *Amicus* Br. at 7 (inviting Court to extend prosecutorial immunity to municipalities). Indeed, *amicus* D.A.'s Ass'n. of New York sees each *Brady* decision as so independent of training and supervisory policy that each Assistant D.A. is a "final policymaker" for the individual case. Br. at 10. Petitioners and *amici* essentially are making an end-run around *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980), which rejected absolute immunity for *municipalities* for the constitutional violations of their individual

prosecutor-employees, while also disregarding that the Court declined to grant *certiorari* on this very question. Petitioners' position is plainly incorrect.

Petitioners do not dispute that Connick was the final policymaker with respect to *Brady* compliance by members of the office. If, as can be inferred from the evidence, he abdicated his training responsibility by leaving it to individual prosecutors to make their own *Brady* "policy" on a case by case basis, then the correctness of the jury's verdict is beyond doubt. "[A] city's lawful policymakers [may not] insulate the government from liability simply by delegating their policymaking authority to others . . . ." *City of St. Louis v. Paprotnik*, 485 U.S. 112, 126 (1988). It is such policymakers who are responsible for reasonably constraining their subordinates' exercise of discretion. Just as it would be an abdication of policymaking responsibility for a police commissioner to "train" his officers that they may use force to apprehend a fleeing felon without providing more specific training to guide such behavior, it is an abdication of policymaking responsibility for a District Attorney to tell line prosecutors nothing more than to comply with their unspecified obligations under *Brady*.

The responsibility of a prosecutor to apply *Brady* principles to a set of facts presented by an individual criminal prosecution is no different than the responsibility of any other municipal employee to

exercise discretionary authority on behalf of his employer. In each instance, the factual context to which the rules of behavior must be applied may be complex, so that there is room for the reasonable exercise of individual discretion, or the obligation may be unambiguous, in which case the employee may not have any discretion. If the employee has been reasonably trained, then the municipality cannot fairly be blamed if he errs in exercising his discretion, or if he deliberately ignores his training. But if the employee has not been trained at all in the constraints governing his decision, then his discretion will be unguided and subject to his individual whim. Where such an unguided and unconstrained exercise of discretion leads to harm, the evidence may permit the jury to infer causation arising from culpable lack of training.

The Petitioners' argument that causation for *Brady* misconduct can never be shown because prosecutors exercise "independent" or discretionary judgment would create *de facto* absolute immunity for municipalities, contrary to *Owen* and *Monell*. In *Owen*, the Court squarely rejected any municipal immunity for discretionary governmental functions under § 1983. 445 U.S. at 648-49. "Elemental notions of fairness," the Court reasoned, "dictate that one who causes the loss should bear the loss." *Id.* at 654. The Court found no history of municipal immunity at the time Congress enacted § 1983 and, absent such a history, recognized that the Court was

not free to adopt such a rule for "policy" reasons. *Id.* at 635; *see also Monell v. Department of Social Services*, 436 U.S. 658, 659 (1978). Moreover, policymakers, who are protected by immunity principles from personal responsibility, *see, e.g., Van de Kamp*, 129 S.Ct. at 858-59, should be forced to weigh the risk of inaction to the *municipality*'s coffers, *see Owen*, 445 U.S. at 656.

Although Chief Justice Rehnquist worried in his dissenting opinion in *Owen* that policymakers would be overly inhibited by "strict liability for their [municipality's] torts," *id.* at 665, the Court's subsequent adoption of a deliberate indifference standard has alleviated that concern, *see Bryan County*, 520 U.S. at 419. The Court should not accept *amici*'s invitation to use causation as an indirect means for "overruling" *Owen* by extending *de facto Goldstein* immunity to municipalities. A properly instructed jury should be permitted to consider whether a prosecutor's commission of a constitutional violation directly resulted from a policymaker's culpable decision not to train him – as in any other *Monell* case.

Finally, Petitioners and their *amici* argue that Orleans Parish cannot be held liable for the *Brady* violations that occurred in this matter because they were deliberately made in *defiance* of Connick's *Brady* policy, not because of any deficiency in training. However, a reasonable jury could have

found that the violations were not intentional, but resulted from a lack of awareness, due to deficient training, that the material was subject to disclosure under *Brady*. *See supra*, pp. 8-9. Regrettably, nothing in Connick's *Brady* policy required prosecutors to disclose the information that was erroneously withheld in this case. Moreover, even if the erroneous withholding was wilful, a reasonable jury could have found that it resulted nevertheless from insufficient *Brady* training in how to resolve the conflict between the obligation of a prosecutor as an advocate to obtain a conviction and his higher obligation to ensure the defendant a fair trial. *See supra,* pp. 9-10.

D. Allowing *Canton* Liability In The Rare Prosecutorial Case That Satisfies Its Exacting Prerequisites Will Not Open Any 'Floodgate' To Such Lawsuits Or Threaten Municipal Budgets

Permitting so-called "single violation" liability for prosecutorial *Brady* violations caused by the deliberate indifference of policymakers to the obvious need for training will open no "floodgate" to lawsuits for *Brady* violations or any other kind of prosecutorial trial error, contrary to Petitioners' warning. Petitioners' Br. at 41. There has been no "flood" of "single violation" cases since *Canton* involving any arena of government, let alone involving District

Attorneys who have failed to train their staff concerning *Brady.* For numerous reasons, the likelihood of future such "single violation" cases is remote.

First, whatever the practice was in 1985 when Thompson's trials were conducted, it is clear that today virtually all District Attorneys' offices train their staff concerning *Brady*.

Second, as we have noted, *Brady* violations are almost impossible to discover, and the procedural obstacles a prisoner faces in obtaining relief from his conviction, a prerequisite to any civil suit, *see Heck v. Humphrey*, 512 U.S. 477 (1994), are daunting.

Third, many criminal defendants who successfully raise a *Brady* claim will plead guilty to obtain their release from custody or avoid a re-trial, and will not be in a realistic position to press a damages lawsuit.

Fourth, *Monell/Canton* lawsuits are extraordinarily complex, time-consuming, and difficult. Considering the uncertainty of a favorable outcome and therefore of compensation, attorneys will be loathe to undertake them except when they appear clearly meritorious.

Fifth, permitting "single violation" *Brady* lawsuits will not open the door to *Monell* lawsuits for

other prosecutorial trial violations, making "liability into the norm," with "ruinous implications for prosecutorial offices." Petitioners' Br. at 35-36. Other constitutional violations by prosecutors – the use of illegally-obtained evidence, reliance on hearsay, or summation misconduct – occur openly and can be litigated on the spot. In such instances, the court's ruling almost always will be viewed as an independent or supervening cause of harm that would protect the municipality from liability. Moreover, prosecutors certainly *are* trained regarding such issues. Tellingly, in the Second Circuit, in the nearly 20 years since the court decided *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), there have been no successful lawsuits for non-*Brady* constitutional violations committed by prosecutors at trial (and no reported "single violation" *Brady* case).[6]

Sixth, many lawsuits will be stopped in their tracks under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Few plaintiffs will be in a position to show a

[6]The only reported case involving non-*Brady Monell* liability for a prosecutorial policy is *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998). There, the Second Circuit upheld a judgment against a municipality based upon an Equal Protection claim of an explicit, unlawful policy of the District Attorney, on behalf of the county, to always favor an initial complainant over a cross-complainant. That was not a "deliberate indifference" training case.

reasonable possibility of success on a "single violation" training claim at the pleading stage.

Petitioners and *amici* NDAA worry that the judgment in this case will be ruinous to Orleans Parish, but the municipality, through Petitioner Connick, is responsible for allowing its insurance policy to lapse, Respondent's Br. at 64 n.7, a singularly reckless or inept act that should neither inure to the municipality's *benefit* nor serve as a basis to foreclose this or any other meritorious lawsuit. In general, a lawsuit against a municipality for *Brady* violations at trial, under which a plaintiff may recover only for post-conviction damage, will involve a smaller recovery than a malicious prosecution lawsuit against a police detective under which pre-conviction damages may be assessed as well. Indeed, lawsuits for police misconduct, slips and falls, injuries to firefighters, and other acts by municipalities or their employees are far more costly than extraordinarily rare § 1983 lawsuits for *Brady* violations by prosecutors. Petitioners and *amici* present no evidence that "single violation" municipal liability under *Brady* will have any significant financial impact on municipalities or their taxpayers.

CONCLUSION

Brady disclosure by properly trained prosecutors is essential to the truth-seeking function of a criminal trial and to fulfill our commitment as a

civilized society to avoid convicting and punishing the innocent. Relying on evidence that a deplorable pattern of *Brady* violations by four separate prosecutors resulted from the District Attorney's utter indifference to his obligation to train his staff members in their *Brady* obligations, a jury properly awarded substantial damages to the victim of this pervasive misconduct. This was a just result that was faithful to the principles of municipal liability laid down in *Canton*, and it should be affirmed.

Respectfully submitted,

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