No. 07-30443

In the United States Court of Appeals for the Fifth Circuit

JOHN THOMPSON

Plaintiff-Appellee

versus

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; EDDIE JORDAN, in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE

Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Action No. 2:03-CV-2045, Division "J"
the Honorable Carl J. Barbier, presiding

En Banc Brief for Appellants

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

I. Parties:

A. Harry Connick

B. Eric Dubelier

C. James Williams

D. Eddie Jordan

E. Orleans Parish District Attorney's Office

F. John Thompson

G. Leon A. Cannizzaro, Jr.

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Statement of Jurisdiction

This Court has jurisdiction over the law and facts applicable to this appeal pursuant to 28 U.S.C. § 1291. This is an appeal from a judgment of the district court based on a civil jury verdict and attendant motions.

Statement of Issues Presented for Review[1]

I. Whether and how Monell liability for failure to train, monitor, or supervise can be established by a single incident and how single-incident liability either applies or does not apply in this case?

II. Whether it would be obvious or self-evident to law-school educated, practicing criminal law attorneys that there was a Brady obligation to disclose the blood evidence to Thompson such that the district attorney could not be deliberately indifferent in failing to further train prosecutors on this application of Brady?

III. Whether the District Attorney's knowledge of a deficiency in the prosecutors' understanding of Brady obligations was necessary to create a duty to provide training on Brady obligations?

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[1] The first eight issues presented were posed directly by this Court in its letter to the parties dated March 18, 2009. In accordance with that same letter, Appellants have included seven additional issues for review.

IV. Whether the failure to train in Brady obligations is required to have resulted from a conscious or deliberate decision not to train?

V. What is the extent to which the failure to train must be the "moving force" behind the Brady violation?

VI. What effect, if any, do the alleged multiple Brady violations have on the Court's decision?

VII. Whether the jury charges correctly stated the law in relation to the issues presented?

VIII. Whether Defendants waived any objections that they now raise on appeal and how this would affect the standard of review?

IX. Whether any of Thompson's claim was barred by prescription?

X. Did the Court commit reversible error by excluding relevant evidence of Thompson's guilt?

XI. Was the jury's award excessive?

XII. Should the District Court have named the assistant district attorneys in the judgment as being liable?

XIII. Was the award for attorney's fees, expert fees and costs excessive?

XIV. Whether the District Court improperly denied Defendants' Motion for Summary Judgment?

Statement of the Case

In this case, John Thompson ("Thompson") has brought a civil rights action under 42 U.S.C. §1983, alleging that the Orleans Parish District Attorney ("the District Attorney") should be held liable in money damages for improperly training his prosecutors in the requirements of Brady v. Maryland, 373 U.S. 83 (1963), resulting in the withholding of exculpatory evidence and Thompson's ultimate conviction, and imprisonment, for murder.

This case was tried before a jury in the Eastern District of Louisiana with the Honorable Carl J. Barbier presiding. A verdict was returned in Thompson's favor and judgment was accordingly entered against the District Attorney's Office and various other individuals "in their official capacities" on February 12, 2007.

An appeal was brought in this Court and, on December 19, 2008, the panel issued its opinion, affirming in part and reversing in part the judgment rendered in the District Court. Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008). In its opinion, the panel agreed that the District Court erred in including the names of non-liable parties (i.e., everyone except for the Office of the Orleans Parish District Attorney and its then-present office holder Eddie Jordan in his official capacity) in the judgment. Id. at 843.

Petitions for panel and en banc rehearings were filed by the Defendants. This Court granted the Petition for Rehearing En Banc on March 11, 2009, and pursuant to Fifth Circuit Local Rule 41.3, the order vacated the Panel decision dated December 19, 2008. Oral argument is presently scheduled for May 22, 2009, at 9:00am.

Statement of the Facts

Two underlying criminal acts are relevant in this case: (1) the December 6, 1984, murder of Ray Liuzza and (2) the December 28, 1984, attempted robbery of Jay LaGarde and his siblings. Thompson, who was implicated in both, was first tried, and convicted, for the attempted armed robbery charge. He then stood trial, and was convicted, for the murder of Ray Liuzza. At his murder trial, he did not take the stand due to the risk of impeachment on the basis of his prior attempted armed robbery conviction. Considered an aggravating factor at sentencing, Thompson's prior conviction on the armed robbery charge resulted in the imposition of the death penalty. He was then sent to Louisiana's Death Row at the Louisiana State Penitentiary in Angola.

In 1999, fourteen years after his conviction, Thompson's private investigator discovered a 1985 New Orleans Police Crime Lab Report purporting to show that Thompson's blood type did not match the blood type of the

perpetrator in the attempted armed robbery case. (This test was run from a splatter of blood which had gotten on Jay LaGarde's pant leg and tennis shoe during a struggle with the perpetrator.)

Following this discovery, then-Orleans Parish District Attorney Harry Connick came to learn for the first time that a former prosecutor Gerald "Gerry" Deegan had intentionally withheld this evidence in the attempted armed robbery case. Deegan had apparently made this confession to Michael Riehlmann, a friend and colleague, after being informed that he had terminal cancer. Tr. T. at 726.

Harry Connick then filed a motion to vacate the armed robbery conviction due to Deegan's Brady violation, which the Criminal District Court of Orleans Parish granted. With this event, Thompson requested that his sentence be modified. The Criminal District Court granted his request, and reduced his sentence to life imprisonment. His murder conviction was subsequently reversed by the Louisiana Court of Appeal, Fourth Circuit, which found that the attempted armed robbery conviction, obtained as a result of Deegan's Brady violation, had deprived him of the ability to testify at his murder trial. Thompson was retried in 2003 and found not guilty.

Thompson then filed the present action, alleging that the nonproduction of the blood evidence in the armed robbery case was due to then District Attorney

Harry Connick's "deliberate indifference" to the need to adequately train his prosecutors on the requirements of Brady.

Standard of Review

This Court uses the following standards of review for the issues presented in this appeal:

Evidentiary Ruling: This Court reviews evidentiary rulings for an abuse discretion. District courts are given broad discretion in rulings on the admissibility of evidence, but this Court can reverse an evidentiary ruling when the district court has clearly abused this discretion and a substantial right of a party has been affected. Rock v. Huffco Gas & Oil Co., 922 F.2d 272, 277 (5th Cir. 1991).

Jury Instructions: This Court reviews an objection to the district court's jury instructions using a two-prong standard of review. The party challenging the instructions must: (1) demonstrate that the charge as a whole creates substantial and ineradicable doubt as to whether the jury has been properly guided in its deliberations; and (2) even where a jury instruction was erroneous, this Court will not reverse if it determines, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. Further, where a party argues on appeal that the district court erred in refusing to give a proffered

jury instruction, that party must show as a threshold matter that the proposed instruction correctly stated the law.

This Court reviews a non-objected-to jury instruction for plain error. Under the plain error standard, the Court may reverse only if the erroneous instruction affected the outcome of the case. To meet this standard, a party must show that (1) that an error occurred; (2) the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. Pelt v. U.S. Bank Trust Nat. Ass'n., 359 F.3d 764, 766 -767 (5th Cir. 2004); Russell v. Plano Bank & Trust, 130 F.3d 715 (5th Cir. 1997), cert. denied, 523 U.S. 1120, 118 S.Ct. 1801 (1998).

Jury Verdict: This Court may overturn a jury verdict only if it is not supported by substantial evidence, meaning evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. The Court can reverse a jury if no reasonable jury could have arrived at the verdict. Snyder v. Trepagnier, 142 F.3d 791, 795 (5th Cir. 1998), cert. granted in part, 525 U.S. 1098, 119 S.Ct. 826 (1999), cert. dismissed, 526 U.S. 1083, 119 S.Ct. 1493 (1999).

Statute of Limitations: This Court reviews a district court's ruling on the

statute of limitations *de novo*. In re Hinsley, 201 F.3d 638 (5th Cir. 2000).

Excessive Damages: This Court reviews an assessment of damages for a clear error. When the award is so large to be contrary to right reason, this Court can reverse a jury verdict for excessiveness. Ham Marine, Inc. v. Dresser Industries, Inc., 72 F.3d 454, 462 (5th Cir. 1995). Also, this Court reviews the district court's denial of remittitur for abuse of discretion.

Attorneys' Fees: This Court reviews an award of attorneys for an abuse of discretion. Bell v. Schexnayder, 36 F.3d 447, 449 (5th Cir. 1994).

Denial of Motion for Judgment as a Matter of Law: This Court reviews a denial of motion for judgment as a matter of law *de novo*. Judgment as a matter of law is proper where there is no legally sufficient evidentiary basis for a reasonable jury to find for a party on an issue. This Court can reverse the jury if no reasonable jury could have arrived at the verdict. Burge v. St. Tammany Parish, 336 F.3d 363, 369 (5th Cir. 2003), cert. denied, 540 U.S. 1108, 124 S.Ct. 1074 (2004).

Denial of Motion for New Trial: This Court reviews a denial of motion for new trial for an abuse of discretion. Rivera v. Union Pacific R. Co., 378 F.3d 502, 506 (5th Cir. 2004).

Denial of a Motion to Alter or Amend the Judgment: This Court reviews

a denial of a motion to alter or amend the judgment for an abuse of discretion. A district court abuses its discretion if it bases its decision on an erroneous view of the law or of the evidence. Ross v. Marshall, 426 F.3d 745, 763 (5th Cir. 2005), cert. denied, 127 S.Ct. 1125 (2007). However, where the ruling was a reconsideration of a question of law, the review is *de novo.*

Denial of a Motion for Summary Judgment: This Court review denials of motions for summary judgment *de novo.* Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MacLachlan v. ExxonMobil Corp., 350 F.3d 472, 478 (5th Cir. 2003), cert denied, 541 U.S. 1072, 124 S.Ct. 2413 (2004).

Summary of the Argument

In this case, the District Court allowed the jury to find "deliberate indifference" on the part of the District Attorney despite there being no evidence of a pattern of Brady violations by his office. The District Court allowed the very rarely used "single incident rule" to apply even though there were none of the "extreme circumstances" which the Supreme Court and Fifth Circuit has required in order for this rule to apply.

There were many reasons why a jury could not find "deliberate

indifference" on the part of the District Attorney. First, he had a right to rely on the competence of his prosecutors as gained from their law school educations, studying for and passing the Bar Exam, and criminal law practices. Second, there was no evidence that he even knew that his prosecutors possessed a fundamental misunderstanding of the terms of Brady. Finally, there was no evidence that any alleged failure to train was due to a conscious or deliberate choice by the District Attorney after being informed of his prosecutor's misunderstanding of Brady *and* inferring that it posed a risk to Thompson's constitutional rights. (In fact, the evidence presented at trial showed the presence of a very extensive training program in the District Attorney's Office.)

Thompson's evidence also failed to show that it was a failure to train by the District Attorney's Office, resulting from deliberate indifference, that was the cause or "moving force" of the suppression of the blood evidence in the attempted robbery case. There is no viable explanation other than that the violation occurred as a result of Gerry Deegan's intentional act, which he kept secret until confessing to a friend and colleague after being diagnosed with terminal cancer.

The other alleged Brady violations which Thompson references are simply meant to distract this Court, since they relate to the murder trial, and were not even considered to be Brady violations by those courts which reviewed them in

Thompson's post-conviction relief efforts.

At trial, the District Court erred in failing to provide the jury with adequate instructions governing deliberate indifference. The District Court's instructions only told the jury that "deliberate indifference" required more than simple or gross negligence, and then gave them a Second Circuit test which omitted many of the requirements set forth by established Supreme Court and Fifth Circuit precedent. Additionally, the District Court's response to the jury's question about the meaning of "deliberate" seems to have led the jury to incorrectly believe that a finding of deliberate indifference could be found as a result of a simple failure to monitor. Further, Thompson failed to meet his burden of proof relative to deliberate indifference. Specifically, he did not prove that there was a pattern of violations that should have made it obvious to the District Attorney that more training was needed on Brady.

Thompson's suit should have also been dismissed as untimely under the U.S. Supreme Court case of Heck v. Humphrey, 512 U.S. 477 (1994), since the conviction on which his suit was based (i.e., the murder conviction) and the alleged Brady violation (i.e., the nonproduction of the blood evidence in the attempted armed robbery prosecution) do not arise out of the same event or facts. Thus, his suit was filed too late.

The District Court also erred in precluding the District Attorney from presenting evidence of Thompson's guilt as the true cause of his incarceration, rather than the Brady violation. Had the District Attorney been allowed to introduce this relevant causation evidence, the jury verdict would have most likely been different.

The jury's award of $14,000,000 was also excessive and inconsistent with a rational review of the evidence. While there is no doubt that prison was an unpleasant experience for Thompson, in no way did it warrant such an award under the circumstances of this case.

The District Court's judgment was also erroneous by including the names of non-liable parties. Under Monell, any wrongdoing under §1983 is based on the wrongdoing of the governmental entity–not its employees. Therefore, it was error to include anyone else's names in the judgment other than the Office of the District Attorney and its then-officeholder Eddie Jordan.

The District Court also erred in awarding Thompson's attorneys exorbitant fees, even though they were relatively inexperienced in civil rights litigation. The District Court further erred in awarding Thompson money for expert's fees and costs when such an award was not based on the evidence.

Law and Argument

I. In the case at bar, liability under Monell for failing to train, monitor, or supervise cannot be established by a single incident.

A. Monell requires adherence to rigorous requirements of culpability and causation so that municipalities, as Congress intended, are only held liable for their deliberate, official violations of citizens' constitutional rights.

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 660-61 (1978), the plaintiffs brought an action pursuant to 42 U.S.C. §1983 challenging the defendant's policy of requiring pregnant employees to take unpaid sick leave before such leave was medically necessary, arguing that the policy violated the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court held (1) that a municipality is a "person" that can be held liable under §1983, and (2) that §1983 liability cannot attach to a municipal defendant through the acts or omissions of its employees (i.e., under the doctrine of *respondeat superior*). Monell, 436 U.S. at 691. The Court based its ruling, in part, on the text of §1983, which implies that it is a municipality or other entity's official regulation or practice which must motivate the violation of a citizen's constitutional right, not the individual, isolated action or intent of the person actually committing the violation. Id. at 692. Therefore, a municipal defendant is only responsible when execution of an official policy or custom,

whether made by its rule-makers or those whose edicts or acts can be said to represent official policy, inflicts the complained-of injury. Id. at 694.

The Supreme Court has strongly warned against diluting the dictate of Monell and effectively holding municipalities liable on *respondeat superior* grounds. The Court has stated that, where courts fail to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 415 (1997). The Court has also stated that, as recognized in Monell and repeatedly reaffirmed, Congress did not intend for municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. Id. (emphasis added). (This strict standard of liability stands as part of an arguably larger set of policies to help protect municipalities from potentially overwhelming §1983 liability, which includes the absolute immunity given to prosecutors so as to ensure their "independence of judgment required by public trust," and that their energies are not deflected from their public duties, or their decisions shaded due to the specter of money damages in a civil suit. See Van de Kamp v. Goldstein, —U.S. — (2009), 129 S. Ct. 855 (2009) (discussing absolute prosecutorial immunity in a §1983 claim alleging a failure to turn over material helpful to the defense); Imbler v. Pachtman, 424 U.S.

409 (1976).)

In City of Canton v. Harris, 489 U.S. 378, 387 (1989), the Supreme Court concluded that an "inadequate training" claim could be the basis for §1983 liability in "limited circumstances."

In order for liability to attach to the District Attorney in this case for allegedly failing to properly train his prosecutors, the plaintiff must show (1) that the defendant failed to train or supervise the officers involved, (2) a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights, and (3) that the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights. Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. 2003), citing, inter alia, City of Canton, supra.

In Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997), the Supreme Court intimated that, in order to ensure that liability attaches to a municipality for its own deliberate, official actions as mandated by Monell, there should generally be a *pattern* of constitutional violations to which it has been deliberately indifferent, rather than one particular occurrence. This is particularly relevant in failure-to-train claims where a "program" is alleged to be deficient. Board of County Commissioners of Bryan County, 520 U.S. at 407

(stating that, in City of Canton, the court spoke of a deficient training "program," necessarily intended to apply over time to multiple employees). Since a "program" takes place over a period of time and involves multiple individuals, any constitutional violations which result from it may more easily be detected by the municipality than only one particular violation. Id. The Court continued as follows:

> If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action-the "deliberate indifference"-necessary to trigger municipal liability. [City of Canton], at 390, n. 10, 109 S.Ct., at 1205, n. 10 ("It could...be that the police in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need"); *id.*, at 397, 109 S.Ct., at 1209 (O'CONNOR, J., concurring in part and dissenting in part) ("[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations..."). In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the "moving force" behind the plaintiff's injury. See *id.*, at 390-391, 109 S.Ct., at 1205-1206.
>
> Id. (citations and punctuation as in original).

The Fifth Circuit has followed the Supreme Court's pronouncement in Board of County Commissioners of Bryan County, and likewise requires that, for a plaintiff to show a municipality's deliberate indifference in a §1983 action based on a failure to train, he must show more than a single instance of a lack of training or supervision causing a violation of constitutional rights. Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. 2003), citing Thompson v. Upshur County, 245 F.3d 447, 459 (5th Cir. 2001). See also Cousin v. Small, 325 F.3d 627, 637 (5th Cir. 2003); Snyder v. Trepagnier, 142 F.3d 791, 798 (5th Cir. 1998). Rather, deliberate indifference requires that a plaintiff demonstrate "at least a pattern of similar violations" arising from training that is so clearly inadequate as to be "obviously likely to result in a constitutional violation." Burge, 336 F.3d at 370.

In this case, Thompson was unable to point to a sufficient "pattern" of constitutional violations to support an inference of deliberate indifference. Instead, out of an office that handled about 15,000 cases *per year*, there was evidence of only *four* cases from the Louisiana Supreme Court over a ten year period in which a conviction had been vacated based on a Brady violation. Tr. T., Vol. IV, p. 840-41, 864. This is insufficient to prove deliberate indifference. See Cousin v. Small, 325 F.3d 627, 637 (5th Cir. 2003) (stating that, in another case against Orleans Parish District Attorney Harry Connick's office, citations to a

small number of cases out of thousands handled over an extended period of time do not create a triable issue of fact with respect to Connick's alleged deliberate indifference to violations of Brady rights), cert. denied 540 U.S. 826 (2003).

B. While there is a "single incident exception" to the general rules governing §1983 liability based on a failure to train, it does not apply to the present case.

In Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 409 (1997), the Supreme Court acknowledged that, in City of Canton, it "hypothesized" that, in a "narrow range of circumstances," a plaintiff might succeed in a failure-to-train §1983 action without showing a pattern of violations if the complained-of constitutional violation was a "highly predictable consequence" of a municipality's failure to equip its officers with the specific tools needed to handle recurring situations. The likelihood of recurrence and the predictability of officers' unconstitutional actions due to inadequate training could, the Court said, potentially justify a finding of deliberate indifference on the part of the municipality to "obvious" constitutional violations which would result from its decision to inadequately train. Id. In its decision, the Court also reiterated that "deliberate indifference" is a "stringent standard of fault" which requires proof that the municipality disregarded a known or obvious consequence of its action. Id. at 410. It also voiced its reservations about a "single incident

exception" to the general rule that a pattern of prior violations exist before being able to find deliberate indifference, stating that, under such an exception, the danger of a municipality being held liable without fault is high, considering that (1) the municipality would have no prior notice of the inadequacy of its actions, and (2) there would be difficulty in determining causation because the plaintiff would be unable to point to other incidents tending to make it more likely that a constitutional violation flowed from municipal action rather than some other cause. Id. at 408.

The Fifth Circuit, consistent with the admonitions from the Supreme Court, has stated that the "single incident" exception is a narrow one which it has been reluctant to expand. Burge, 336 F.3d at 373. See also Pineda v. City of Houston, 291 F.3d 325, 334-335 (stating, "Charged to administer a regime without *respondeat superior*, we necessarily have been wary of finding municipal liability on the basis of [the single incident] exception for a failure to train claim"). After all, the single incident exception was, as the Supreme Court said in Board of County Commissioners of Bryan County v. Brown, a "hypothesis" based on some possible, unforeseen set of extreme circumstances.

In Brown v. Bryan County, 219 F.3d 450 (5th Cir. 2000), this Court upheld a finding of liability against a municipality under the single incident exception.

The circumstances, however, were, as the Supreme Court required, extreme. In Brown, a local sheriff decided to provide absolutely *no* training or supervision to a 21 year old reserve deputy with a known history of aggressive take-down arrests. Brown, 219 F.3d at 462. (This reserve deputy was also the sheriff's relative. Id. at 458. He had also been arrested prior to his employment for, among other things, assault and battery. Id. at 454-55. At the time he was hired, he was in violation of the terms of his probation and had a warrant issued for his arrest. Id.) During a traffic stop, the deputy removed Plaintiff from her vehicle with an "arm bar" technique, and threw her to the pavement, resulting in serious knee injuries. Id. at 454.

No such extreme circumstances exist in the case at bar to justify the application of the single incident exception to §1983 liability. First, there was no evidence that the District Attorney had any notice that his prosecutors had a history of withholding Brady material. Secondly, the District Attorney had a training program in place. In fact, as discussed below, the District Attorney's training program was quite extensive in order to ensure that his prosecutors properly performed their duties. Under these circumstances, any application of the "single incident exception" would be an improper expansion of Brown.

II. The District Attorney cannot be considered deliberately indifferent in failing to further educate his prosecutors on Brady since it would have been obvious to a law-school educated, practicing criminal law attorney that there was a Brady obligation to disclose the blood evidence.

One reason why the District Attorney could not have been deliberately indifferent in training his prosecutors in Brady is because there is a reasonable expectation that they, having finished law school, passed the bar exam, and begun practicing criminal law, would recognize that there is a constitutional obligation, rooted in principles of due process and fundamental fairness, to turn over exculpatory evidence.

While Thompson asserts that the obligations of Brady are oftentimes tricky to discern, requiring more thorough training for prosecutors, the District Attorney had a right to rely on the basic training that his prosecutors received while in law school, studying for the bar exam, and practicing criminal law. In fact, in Burge v. Parish of St. Tammany, 187 F.3d 452, 471-72, this Court acknowledged that reliance on assistant prosecutors' professional education, training, experience, and ethics relative to Brady obligations could be sufficient to defeat an assertion of deliberate indifference relative to training.

This Court also acknowledged the value of municipal employees' basic training in the case of Pineda v. City of Houston, 291 F.3d 325 (5th Cir. 2002).

In Pineda, this Court was presented with the argument that the defendant municipality should have been held liable in damages for the allegedly improper training of its police officers, who unconstitutionally entered a man's home and fatally shot him. In rejecting the plaintiff's claim that improper training or education led to the decedent's fatal shooting, the Court stated that the lack of specialized training on a topic does not mean that the training was inadequate since it would ignore the instruction officers receive while in basic training. Pineda, 291 F.3d at 334.

The Court additionally stated that, to succeed on a §1983 action premised on a failure to train, it will not suffice to "prove that an injury or accident could have been avoided if an officer had better or more training," pointing out the reality that "such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal." Id. Additionally, as the Court pointed out, even adequately trained officers occasionally make mistakes, and the fact that they do says little about the training program or the legal basis for holding a municipality liable. Id.

Brady requires that a prosecutor turn over exculpatory evidence. One of the car-jack victims in Thompson's armed robbery case indicated to police that he

fought with the car-jacker and that some of the car-jacker's blood ended up on his pant leg and tennis shoe. If Thompson was the car-jacker, then the blood on the victim's pant leg and tennis shoe would have been Thompson's. It would have then been obvious to any law school-educated practicing criminal attorney that the blood evidence and corresponding lab report might exculpate Thompson, and, hence, was Brady material which had to be turned over to Thompson's lawyer. There are at least three law school courses which address Brady: Criminal Law, Criminal Procedure, and Professional Responsibility.

Because the blood evidence was obviously Brady material, there would have been no need for the District Attorney to provide further training on Brady, and hence the failure to provide further training could not support a finding of deliberate indifference.

III. In order for the District Attorney to have had a duty to provide further training to his prosecutors on the requirements of Brady, he would have had to know that their understanding was deficient. At the time of Mr. Thompson's robbery trial, the District Attorney had no knowledge of any such deficiency in his prosecutors' understanding of Brady.

In this case, the District Attorney's knowledge of his assistants' lack of understanding of their Brady obligations was necessary in order to create a duty on him to provide further training. See Smith v. Brenoettsy, 158 F.3d 908, 912

(5th Cir. 1998), citing Farmer v. Brennan, 511 U.S. 825, 837 (1994) (stating that, to establish deliberate indifference, it must be shown that the official actor (1) was aware of *the facts* from which the inference could be drawn that a substantial risk of serious harm existed to the plaintiff, and (2) drew *the actual inference* that a substantial risk of serious harm existed) (emphasis added); Lewis v. Pugh, 289 Fed. Appx. 767, 772 (5th Cir. 2008), citing Estate of Davis v. City of North Richland Hills, 406 F.3d 375, 381 (5th Cir. 2001) (stating the same standard).

There is no evidence in the record that the District Attorney had any knowledge that his assistants lacked understanding of Brady. As mentioned above, his office handled over 15,000 cases per year. Testimony at trial indicated that over a ten year period prior to Thompson's armed robbery trial, only a handful of cases (i.e, four) were overturned by the Louisiana Supreme Court based on a failure to turn over Brady material. Tr. T., Vol. IV, p. 840-41, 864.

IV. In order for liability to attach to the District Attorney, it must be shown that he made a conscious or deliberate decision not to further train his prosecutors on the requirements of Brady. Plaintiff failed to make such a showing.

In order for the District Attorney to have been found liable, the plaintiff needed to show, as part of his burden of proving "deliberate indifference," that any failure by the District Attorney to properly train his prosecutors reflected a

deliberate or conscious choice to endanger citizens' constitutional rights. See City of Canton v. Harris, 489 U.S. 378, 389 (1989); Mesa v. Prejean, 543 F.3d 264, 274 (5th Cir. 2008); Estate of Davis v. City of North Richland Hills, 406 F.3d 375, 383 (5th Cir. 2005); Snyder v. Trepagnier, 142 F.3d 791, 799 (5th Cir. 1998).

By failing to make an adequate showing that the District Attorney took deliberate action which, in turn, directly caused the deprivation of his federal rights, Thompson failed in establishing deliberate indifference. For Thompson to have proven deliberate indifference, he must have proven the following: First, he must have shown that the attorneys who prosecuted Thompson's cases were inadequately trained in Brady. Thompson would then have had to show that Harry Connick knew that the violation of Thompson's rights was a highly predictable consequence of his failure to train his prosecutors. Finally, Thompson would have needed to show that the District Attorney, with the knowledge that a violation of Thompson's federal rights was a highly predictable consequence of his failure to adequately train his attorneys, deliberately and consciously chose not to train them in Brady.

There is no evidence in the record that the District Attorney consciously and deliberately failed to train his assistants on Brady. At trial, Prosecutor Jim Williams testified that he first learned of Brady in law school. Tr. T., Vol, II, p.

359. While he could not recall any specific training on Brady at the District Attorney's office, he assumed that every lawyer in the office knew what Brady was. Id. at 364. He testified that all attorneys in the office received copies of advance sheets of appellate court decisions on Brady. Id. at 361.

Bruce Whittaker testified that, in addition to law school, Brady is also tested as part of the Louisiana Bar Examination. Id. at 359. While he did not remember any formal Brady training in the office, all assistants received "on the job" training. Id. at 318. Further, he testified that all attorneys had to pre-try cases before trial, and that pretrial included Brady issues. Id. at 344.

Eric Dubelier testified that he first learned Brady in law school, and that he additionally learned Brady during his internship with the Manhattan District Attorney's office. Tr. T., Vol. III, p. 578. Dubelier also testified that attorneys received on-the-job training with constant oversight, and that junior assistant prosecutors–such as Gerry Deegan–were not permitted to take any action on a case without first discussing the matter with a more experienced senior assistant or the chief or deputy chief of trials. Id. at 579. Such discussions also involved Brady issues. Id. Finally, Dubelier testified that attorneys were responsible for staying up to date on case law about Brady, and the Appeals Division would circulate Brady decisions around the office. Id. at 580.

Michael Riehlmann testified that Gerry Deegan did not reference lack of training as his reason for intentionally withholding evidence. Id. at 835.

Timothy McElroy, Harry Connick's First Assistant, testified that, while he could not remember formal training in the DA's office on Brady *per se,* the situation in Orleans Parish mirrored that at the Terrebonne District Attorney's Office, where he had worked previously. Id. at 737-38. However, he testified that training was a very substantial part of Connick's office, and was very important to Connick personally. Id. at 757. Moreover, McElroy stated that "Brady in a prosecutor's world is something you study all the time." Id. at 739.

McElroy also testified that, with regard to the structured progression of new assistant prosecutors through the divisions of the District Attorney's office, new hires start out in "support units" such as juvenile or magistrate's court, where they can learn the adjudicative process, including "marshaling evidence," before being moved into the felony trial divisions, thereby giving them a firm grounding in all issues related to handling a case from the outset. Id. McElroy noted specifically that a young prosecutor's first encounter with Connick's Brady policy occurred "when you walk[ed] in the door...You're instructed on Brady from the very beginning when you take your oath as a prosecutor. Id. at 754.

McElroy further testified about the weekly trial meetings held in the office,

in which various trial matters, including the evolving jurisprudence concerning Brady, were discussed. Id. at 751. Specifically, the Chief of Appeals would review, digest, and disseminate the most recent decisions on Brady and, when necessary, meet with the Trial Assistants to educate and train them about the latest Brady issues, among others. Id. at 752. Connick personally addressed the assembled Assistants at various times when new case law regarding Brady was issued, and would also speak one-on-one with an Assistant if it was alleged that he failed to comply with Brady. Tr. T., Vol. IV, p. 784-85. Moreover, there were regular memoranda circulated around the office dealing with different issues, including Brady. Tr. T., Vol. III, p. 753. McElroy also testified about his role in creating the office's first formal policy manual in 1987, which was a compendium of already existing written office policies, including that on Brady. Id. at 753-54. Thus, a written policy regarding Brady was already in effect in the District Attorney's Office before the formal policy manual was produced.

Harry Connick testified like McElroy that both pre-trying of cases for trial and weekly trials meetings were essential elements of his office policy, as was the circulation of updated appellate decisions regarding various trial issues. Tr. T., Vol. IV, p. 827. While there was no single policy manual in existence before 1987, despite Connick's insistence, he pointed out that all of the office policies

were reduced to writing by him and the First Assistant: "[E]very time we had a thought, we would put it into written form." Id. at 828. Regarding the formal policy manual ultimately created, Connick noted that his office "didn't just divine a policy manual overnight on February 1st of 1987. Something had to take place before that. And that was a lot of work." Id. at 862.

Finally, Bridget Bane testified that, as Chief of Trials under Connick from 1984 to 1986, one of her primary duties was to train and monitor the Trials Assistants on a daily basis. Id. at 887. Bane explained that, "[w]ith respect to training, Mr. Connick had developed a system of tremendous checks and balances," which included in part the junior/senior Assistant dichotomy and the pre-trial system. Id. at 888-89. The junior/senior dichotomy was part of a larger hierarchy in place to ensure that responsibilities were handled properly; and every employee in the office below the District Attorney himself had an immediate supervisor. Id. at 895. The mandatory pre-trial of *all* cases before they could proceed to trial required the satisfaction of a checklist of some 70 items covering every aspect of trial, including lab reports, before the Chief of Trials would sign off on the case. Id. at 889. Pre-trials were complemented with post-trial conferences on cases that were lost so that Assistants could learn from their mistakes in order to better handle cases in the future. Id. at 809-10. A further

aspect of Connick's training regimen was the "Saturday sessions," which "were designed to give special training when it was needed"on a variety of issues. Id. at 890.

Regarding Brady in particular, Bane testified, as the others, that she first encountered the doctrine in law school. Id. at 891. However, once at the District Attorney's Office, "everyone in the office was available" for an individual Assistant to approach and discuss a particular Brady issue, including Bane and Connick themselves. Id. at 892. Connick himself, in fact, had an "open door" policy such that any Assistant who had a question of concern regarding a case could bring it directly to him. Id. at 898. Critically, Bane testified that the fact that Assistants would occasionally encounter a gray area in dealing with possibly exculpatory evidence "was understandable because even though they knew about Brady...and that they had to abide by it, they sometimes needed a little help or more than a little help in trying to figure out if they should turn it over." Id. Bane illustrated Brady's nature as an *ad hoc* doctrine, which necessarily presumes a minimal amount of uncertainty in determining whether, as applied to a particular case, a specific piece of evidence is discoverable, no matter how well-trained in its tenets an individual prosecutor may be. To hold out the fact, as Thompson does, that in every case a prosecutor will likely have to make subjective,

sometimes difficult, decisions as to what constitutes Brady material as evidence of a lack of training is improper.

Bane additionally testified about her implementation of the panel interview system in the office's hiring practices. As part of the new evaluation process, each candidate was required to provide a writing sample for consideration by the panel, which never changed after it was instituted. Id. at 893. Specifically, starting in 1984 or 1985, each candidate was required to answer two questions: one on the exclusionary rule and one regarding Brady. Id. at 893-894. Thus, candidates for Assistant District Attorney positions had to demonstrate a sufficient understanding of Brady in order to be considered for employment in the first place.

Each of the above witnesses also testified as to Connick's official policy regarding Brady material. Williams, Whittaker, Dubelier, Connick, and Bane all iterated the foundational premise of the policy: follow the law–under Brady, the Louisiana Constitution, the Code of Criminal Procedure, and the Canon of Ethics–as to what the State is required to disclose to the defense. Tr. T., Vol. I, p. 119-20, 345 (testimony from Williams); Tr. T., Vol. II, p. 317, 345 (testimony from Whittaker); Tr. T., Vol. III, p. 576 (testimony from Dubelier); T. Tr., Vol. IV, p. 834, 851 (testimony from Connick); Tr. T., Vol. IV, p. 857 (testimony from Bane). This doctrine was expounded not simply as a matter of internal policy, but

was viewed by Connick as part of the prosecutor's professional obligations of being a lawyer in the first place. Tr. T., Vol. I, p. 348. Those in breach of their Brady obligations were not just technically "violating" his office policy, but outright "breaking" it by not following the law. Tr. T., Vol. IV, p. 850.

Connick's policy, however, went beyond the bare commandment to "follow the law," which in fact served only as the "framework" of the policy. Id. at 834. Eric Dubelier, for instance, testified that Connick's standard operating procedures specifically *required* his Assistants to disclose all lab reports to defense counsel. Tr. T., Vol. II, p. 189 (testimony from Connick); Tr. T., Vol. III, p. 523 (testimony from Dubelier). Former Assistant John Glas, testifying on behalf of Plaintiff, acknowledged that "the policy in the office as [he] understood it at the time" required prosecutors to turn over lab reports. Tr. T., Vol. IV, p. 917. Bruce Whittaker testified that police reports and statements of witnesses were also required to be given over. Tr. T., Vol. II, p. 317. Dubelier further testified that even when office policy forbade disclosing the name and address of a witness to defense counsel for safety reasons, Connick put upon his Assistants "the obligation to make sure that defense counsel would have an opportunity to have access to that witness." Tr. T., Vol. III, p.596. This was true when a witness had exculpatory information, as well as inculpatory. Id. Thus, to the extent that a

formal policy could account for the myriad nuances of any given case as it relates to Brady, the evidence demonstrates that Connick's Assistants were provided specific guidelines as to what types of evidence had to be turned over to the defense. Tim McElroy confirmed this when he testified that any Assistant who mistakenly believed that Connick's policy was as simplistic as "follow the law" was "in trouble." Tr. T., Vol. IV, p. 805.

Beyond his enunciation of specific policy guidelines pertaining to Brady evidence, Connick was prepared to, and indeed did, enforce that policy through stringent means. Both Jim Williams and Eric Dubelier testified that any lawyer who contravened Connick's Brady policy, among others, could and would be fired. Tr. T., Vol. II, p. 349 (testimony from Williams); Tr. T., Vol. III, p. 576 (testimony from Dubelier). Connick himself demonstrated the seriousness with which he regarded adherence to his policy when he filed a complaint against Mike Riehlmann with the Louisiana State Bar Association for failing to disclose Gerry Deegan's admission that he had intentionally suppressed the exculpatory blood results. Tr. T., Vol. III, p. 720. Connick further evidenced his commitment to enforcing his Brady policy by calling for a grand jury to investigate the possible wrongdoing by his Assistants, so that all evidence adduced in his internal investigation would be presented, on the record, to members of the community at

large, with the goal of turning over any viable case against those responsible for Mr. Thompson's wrongful conviction to the Attorney General. Tr. T., Vol. IV, p. 867-69.

Rather than a policy of deliberate indifference toward the need to train his Assistants on Brady issues, the testimony demonstrated Connick's pro-active, written policy regarding such evidence; his near-constant pressure on his prosecutors to learn, know, and follow that law; a hierarchy of checks and balances designed to ensure that every case was fully prepared to take to trial (including dealing with Brady issues); and the serious measures to which Connick resorted when dealing with one of the few cases that "slipped through the cracks." Tr. T., Vol. IV, p. 841.

V. The District Attorney's alleged failure to properly train his prosecutors in Brady was not the "moving force" behind the nonproduction of the blood evidence.

To succeed on his §1983 claim, Thompson must not only prove the District Attorney's culpability; he must also prove a *direct causal link* between the District Attorney's actions and the deprivation of his federal rights. Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 404 (1997) (emphasis added); Hinojosa v. Butler, 547 F.3d 285, 296 (5th Cir. 2008) (emphasis added). As alternatively stated by the courts, he must show that the District Attorney

himself, through his deliberate conduct, was the "driving" or "moving" force behind the nonproduction of the blood evidence. Id.; Polk County v. Dodson, 454 U.S. 312, 326 (1981). The Supreme Court has referred to this causation requirement as "stringent" and "rigorous." Board of County Commissioners of Bryan County, 520 U.S. at 415.

In the context of a plaintiff's claim that a municipal defendant failed to adequately train its officers, the identified deficiency in the training program must be "closely related to the ultimate injury." Hinojosa v. Butler, 547 F.3d 285, 296-297 (5th Cir. 2008) (citations omitted). The plaintiff, therefore, must show more than that the training program is wanting in a general sense. Id. at 297. Rather, he must prove an affirmative answer to the question, "Would the injury have been avoided had the employee been trained under a program that was not deficient in the *identified respect*?" Id. (emphasis in original).

Failure to train must be the "moving force" behind the Brady violation in Thompson's armed robbery case. There is no evidence but that the Brady violation was caused by the criminal and unethical act of a rogue prosecutor, Gerry Deegan, who, after being diagnosed with terminal cancer, confessed to Riehlmann that he *intentionally* suppressed the blood evidence in Thompson's armed robbery case. Deegan's confession was clear: he *intentionally* suppressed

the evidence, showing that he understood his Brady obligation and wilfully violated it, then keeping it a secret until he was faced with the life-altering news that he was facing a certain death from cancer. He did not say that he failed to turn over the blood evidence because of his ignorance of Brady due to his failure to be trained as to the same by the District Attorney. Consequently, a failure to train is not the "moving force" behind Thompson's injury.

VI. The other alleged Brady violations to which Thompson refers are a red herring and irrelevant to the issues in this case.

The evidence of other alleged Brady violations should not have been introduced as it is irrelevant to Thompson's § 1983 action. In this case, Thompson was allowed to introduce to the jury evidence of other *alleged* Brady material from his first-degree murder case that was unrelated to the withheld blood evidence in which Thompson's § 1983 claim is rooted. Thompson introduced evidence that allegedly was not disclosed to his defense counsel in 1985, including supplemental police reports containing eyewitness descriptions of one of the perpetrators that arguably did not match Thompson's physical description, and evidence that a State witness received a monetary award from the Liuzza family for identifying the murderer.

The record in this case reflects no finding by the state courts that

Thompson's rights were materially affected by any alleged failure to disclose statements or by any witness' monetary award. Accordingly, any evidence of any other alleged Brady violations in Thompson's criminal case was irrelevant. The court erred in allowing Thompson to suggest to the jurors that his rights were materially infringed by the alleged withholding of the statements and evidence of a monetary award. No court had ever found such suppression, let along that such evidence was material under Brady. Accordingly, the introduction of this evidence substantially prejudiced Connick and rendered the verdict unreliable.

Thus, the alleged multiple other Brady violations did not occur in connection with Thompson's armed robbery case, but rather in connection with his murder case. Those alleged multiple violations were analyzed in detail by the various state and federal courts which considered Thompson's petitions for post-conviction relief. Not a single court determined these alleged violations to, in fact, be Brady violations. With respect to this case, the alleged multiple other Brady violations are a complete red herring. When Judge Barbier of the District Court charged the jury in this case, he specifically noted that only one Brady violation was proven, and that violation was the failure to turn over the blood evidence in Thompson's armed robbery case. See Appellant's Records Excerpts at Tab 18, p. 22.

VII. The jury charges provided by the District Court did not adequately state the law, and therefore failed to properly guide the jury in its deliberations.

The charges given by the District Court did not sufficiently apprise the jury of the elements needed to be satisfied in order to find that the District Attorney acted with deliberate indifference to Thompson's constitutional rights. As such, the jury's determination was erroneous and inconsistent with applicable law. If it is determined that a jury was improperly guided and that error may have occurred, it is proper to reverse the jury's finding if the record reflects that the outcome of the case was affected by the challenged instruction. Igloo Products Corp. v. Brantex, Inc., 202 F.3d 814, 816 (5th Cir. 2000).

At trial, the District Attorney proposed a jury instruction on deliberate indifference which stated, in relevant part, that, in order to make a finding of deliberate indifference, Thompson must prove (1) that the failure to train reflected a deliberate or conscious choice on the part of the District Attorney, (2) that the District Attorney disregarded a known or obvious consequence of his failure to train, and (3) that the District Attorney knew of the facts which could give rise to an inference that a failure to train would risk violating Thompson's constitutional rights *and* actually drew the inference that Thompson's constitutional rights were at risk. See District Attorney's Proposed Jury Instruction #23, Docket Entry #94.

The proposed instruction also stated that, to find deliberate indifference, (1) there generally must be more than one occurrence of a constitutional violation, and (2) a single incident of a constitutional violation is usually insufficient. Id.

The District Court rejected this proposed instruction, which reflected longstanding U.S. Supreme Court and Fifth Circuit precedent, and instead adopted a jury instruction which merely stated that deliberate indifference requires a showing of "more than negligence or even gross negligence." See Appellant's Record Excerpts, Tab18, at 26. The Court also embraced a standard for deliberate indifference out of the Second Circuit which states that, in order to find deliberate indifference, a plaintiff need only show (1) that a policymaker knows to a moral certainty that his employees will encounter a particular situation, (2) that the situation will present his employees with a difficult choice that training will make less difficult (or there is a history of mishandling a particular situation), and (3) that an incorrect choice by the employee will frequently cause a deprivation of constitutional rights. See Appellant's Record Excerpts, Tab 18, at 26-27; Walker v. City of New York, 974 F.2d 293, 297-98 (2nd Cir. 1992). These instructions on deliberate indifference did not properly inform the jury as to what the law

required in deciding the issue.[2]

After receiving its instructions and beginning deliberations, the jury sent a question to the District Court judge asking, "What does 'deliberate' indifference mean? Does it mean intentional or would 'failure to monitor' be considered deliberate?" See Appellant Rec. Excerpts at Tab 20 (internal quotations and emphasis in original). Counsel for the District Attorney pointed out that the jury was confused, and suggested that the Court try to define deliberate indifference for the jury as "intentional," showing "reckless disregard," or "not caring." Id. at Tab 21, Court Reporter Page Numbers 1111-1115. Instead, the Court gave the following answer to the jury: "'Deliberate indifference' does not necessarily mean intentional, but does require more than mere negligence or even gross negligence. Please refer to pages 26 and 27 of the legal instructions for further guidance." Id. at Tab 20. Pages 26 and 27 of the legal instructions, to which the Court referred the jury, only reiterated what the judge had already written to them: that deliberate indifference requires a showing of more than negligence or even gross negligence. Id. at Tab 18, p. 26-27. Within fifteen minutes, the jury returned a verdict in favor of Thompson, finding that the District Attorney acted with deliberate indifference.

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[2] Appellants objected to the trial court's jury instructions on the afternoon of Thursday, February 8, 2007. See Appellant Rec. Excerpts at Tab 19. These objections were re-urged on Friday, February 9, 2007. See Tr.T., Vol. V, pp. 1032-1034.

Id. at Tab 4. The jury's confusion, and the prejudice the District Attorney suffered as a result of it, was further evidenced by the fact that, on the jury form, it originally checked "No," that the District Attorney had not acted with deliberate indifference, later crossing it out and choosing "Yes," that he had. Id.

The jury's question to the Court was a question about the meaning of the word "deliberate," i.e., whether it means "intentional," or "a failure to monitor." Because the District Court answered the jury's question in a way that ruled out deliberate indifference as "intentional" (without discussing the other component of the question about a failure to monitor), the jury strongly appears to have believed that deliberate indifference was established by a mere failure to monitor.

By not stating that deliberate indifference required intent, the District Court inexplicably kept the jury in the dark on what the law requires to be shown before the District Attorney could have been found liable. Deliberate indifference has been frequently discussed in the Supreme Court and Fifth Circuit's §1983 jurisprudence, and sets forth the need for the defendant's having made a *conscious choice* to put citizens' constitutional rights at risk. See e.g., City of Canton v. Harris, 489 U.S. 378, 389 (1989); Estate of Davis v. City of North Richland Hills, 406 F.3d 375, 383 (5th Cir. 2005); Snyder v. Trepagnier, 142 F.3d 791, 799 (5th Cir. 1998). (Even the raw wording of the phrase "deliberate indifference," by

having the word "deliberate" in it, implies the need for an element of intent, since it can hardly be said that something can be "deliberate" without it being *intended*.)

Even more directly to the point, the Supreme Court has acknowledged that proving fault under §1983 requires a showing of intent. In Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 405 (1997) (emphasis added), the Supreme Court stated, "In any §1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality's legislative body or authorized decisionmaker has *intentionally* deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably."

Because of the inadequate instructions provided by the District Court on deliberate indifference, the jury was not properly guided as to what the law required before finding the District Attorney liable. The jury's verdict, therefore, is erroneous, inconsistent with established law, and should be vacated.

VIII. The District Attorney did not waive any of the objections now being raised on appeal.

The District Attorney did not waive any objections that he now raises on appeal. Each objection now advanced was raised at the trial court level, thereby preserving the objection with this Court.

IX. Thompson did not prove deliberate indifference.

Given the fact that the single incident exception does not apply in this matter, Thompson did not prove deliberate indifference. Title 42 U.S.C. § 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, or any State . . . , subjects, or causes to be subjected, any citizen of the United States. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. In City of Canton v. Harris, the Court concluded that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." Harris, 489 U.S. at 387, 109 S.Ct. at 1204.

The Court recognized two methods of proving deliberate indifference for a failure to train. Specifically, the Court found that a plaintiff may prove deliberate indifference either: (1) through a pattern of violations that makes it obvious to municipal policymakers that more training is necessary; or (2) the single incident exception. Since it has already been established that the single incident exception does not apply, Thompson must show that there was a pattern of violations that should have made it obvious to the District Attorney that more training was necessary. Thompson presented no evidence of a pattern of violations relative to the District Attorney's Office withholding Brady material.

Consequently, he did not satisfy his burden of proof relative to the deliberate indifference standard in this matter.

X. Thompson's claim is barred by the statute of limitations.

The relevant dates to keep in mind when analyzing the timeliness of Thompson's suit are the following:

June 29, 1999: The Criminal District Court of Orleans Parish vacates the armed robbery conviction due to the non-production of the blood evidence.

May 26, 2001: The Criminal District Court vacates Thompson's death sentence and sentences him to life imprisonment in the murder case since the attempted armed robbery conviction was used as an aggravating factor to impose the death penalty.

July 17, 2002: The Louisiana Court of Appeal, Fourth Circuit, overturns Thompson's murder conviction due to the deprivation of his right to testify in his own defense.

July 16, 2003: Thompson files his §1983 action.

In determining the limitations period in §1983 actions, federal courts look to the period given for personal injury torts in the state in which the cause of action arose. Wallace v. Kato, 549 U.S. 384, 387 (2007). In Louisiana, the relevant limitations period is one year. La. Civ. Code, Art. 3492.

Because the Supreme Court has ruled that a convicted criminal may not

attack the validity of his conviction through the use of a §1983 action, he can only pursue a §1983 claim after his conviction has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." Heck v. Humphrey, 512 U.S. 477, 487 (1994). It is only after a conviction is accordingly set aside that a plaintiff's cause of action accrues, and the limitations period begins. Id. at 489-90. Heck therefore supplies two sets of rules: one which bars §1983 actions until the conviction is set aside, and another which gives a claimant a limitations period for his §1983 action which does not commence until the conviction is set aside. As the Fifth Circuit has recognized, the rules in Heck apply to convictions and the accompanying constitutional violations alleged in the accompanying §1983 claims which are "interconnected" in that they *arise from the same event*. See Bush v. Strain, 513 F.3d 492, 495, 497 (5th Cir. 2008) (stating that Heck barred §1983 claims of excessive force and conspiracy due to a conviction for resisting arrest *arising from the same events* upon which the civil claims are based; and that, absent a vacatur of the conviction, plaintiff could not recover for an alleged constitutional violation if that violation *arose from the same facts attendant to the charge for which she was convicted*) (emphasis added); Ballard v. Burton, 444 F.3d 391, 396 (5th Cir.

2006) (stating that it is well-settled under Heck that a convicted criminal cannot recover damages for a constitutional violation under §1983 if the violation *arose from the same facts attendant to the charge for which he was convicted*) (emphasis added).

In this case, the alleged constitutional violation which forms the basis of Thompson's §1983 action is the suppression of the blood evidence, contrary to the requirements of Brady, in the armed robbery prosecution (which resulted after the attempted car-jacking of the LaGardes). Therefore, the limitations period began when Thompson's conviction for *that crime* was set aside, i.e., June 29, 1999. Under the one year limitations period set forth by Louisiana law, he therefore had until June 29, 2000, to file a §1983 action based on the non-production of the blood evidence. He did not file his claim until July 16, 2003, which was about three years after his claim was already time-barred.

Thompson argues that the limitations period did not begin until his conviction for murder (which arose out of the shooting of Ray Liuzza, a completely separate set of events or facts) was set aside on July 17, 2002, thereby making his July 16, 2003, filing timely under Louisiana law. Despite Thompson's claims (and the District Court's acceptance of them) as to the interconnectedness of the suppression of the blood evidence in the armed robbery case and his

ultimate conviction for murder, this argument must fail. Claimants under §1983 cannot seek to extend limitations periods by claiming that a constitutional violation "spilled over" or had effects in later convictions, thereby getting until the vacatur of their latest conviction to file a claim. As the Fifth Circuit has intimated, when applying Heck, particular attention must be given to the issue of whether the constitutional violation alleged in the §1983 action has arisen from *the same facts attendant to the charge for which the claimant was convicted*. In this case, the violation is the suppression of evidence which occurred in the armed robbery case which followed the attempted car-jacking of the LaGardes–not the murder trial which followed the separate, unrelated shooting of Ray Liuzza. Therefore, it was after the vacatur of the armed robbery conviction (on June 29, 1999) when the limitations period began to run, and ultimately expired on June 29, 2000. Thompson's July 16, 2003, filing was therefore untimely under Heck and those Fifth Circuit cases which have applied it.

XI. The District Court erred in precluding the District Attorney from showing that it was the evidence of Thompson's guilt which was the cause of his conviction.

At trial, the District Attorney wished to introduce evidence of Thompson's guilt to show that it was the existence of such evidence that led to his murder conviction–not any Brady violation by his prosecutors. The District Court

prohibited the use of any such evidence, saying that Thompson's guilt or innocence was irrelevant. See Appellant's Records Excerpts at Tabs 8, 11.

The evidence which the District Attorney wished to use included the following:

(1) Kevin Freeman knew Thompson and was with him at the time of the murder. Freeman testified that he watched Thompson pull out a gun and mug Liuzza. Freeman ran, but heard Thompson shooting Liuzza as he pled for his life. The coroner found that the victim was shot five times (three in the back and twice in the front) at close range.

(2) Richard Perkins also knew Thompson, and helped him sell the murder weapon. Perkins also heard Thompson make several statements which incriminated him in Liuzza's murder.

(3) Junior Harris also knew Thompson and bought the murder weapon from Perkins. Harris also bought the victim's ring directly from Thompson.

(4) Harris then sold the gun to Jessie Harrison, which police later obtained. A ballistics expert said that the weapon retrieved from Harrison killed Liuzza.

(5) Thompson wrote a letter to a friend asking him to lie by testifying that Thompson had in fact gotten the victim's ring from Freeman. A handwriting expert said that Thompson wrote the incriminating letter.

(6) Thompson presented no alibi as to his whereabouts on the night of the murder.

Due to the District Court's ruling, the jury was not told that the 2003 retrial

of the murder case lacked much of the incriminating evidence presented in the original 1985 trial. The murder weapon was missing and, due to the passage of time, several key prosecution witnesses were either dead or otherwise unable to testify. Furthermore, with the Criminal District Court's permission, Thompson's defense attorney cross-examined an empty chair (supposed to represent a then deceased, absent Kevin Freeman), asking him, "Isn't it true you killed Ray Liuzza?" Not surprisingly, the deceased, absent witness failed to offer an answer, leaving the jury with the impression that perhaps Freeman was the real murderer. The original jury from 1985 rejected such a notion.

While the District Court forbade the District Attorney from presenting evidence of Thompson's guilt, it allowed Thompson to present evidence in trying to prove his innocence. This evidence included police reports (which Thompson alleged had been withheld by prosecutors) which contained witness accounts that they had seen Kevin Freeman running from the scene of the crime. Thompson used these to argue that, because Freeman was present and seen fleeing, it must have been he who murdered Liuzza. (Thompson of course failed to mention that both he *and* Freeman were present at the scene, and that he ran in one direction after the shooting and Freeman in another.)

If evidence concerning Thompson's guilt had been allowed, the jury would

have more likely than not found that it was indeed the presence of such evidence that led to his incarceration, rather than any alleged Brady violation by the District Attorney's office. The District Court therefore erred in excluding such causation evidence on the grounds that it was irrelevant.

XII. The jury's award was excessive.

The jury awarded Thompson $14 million in damages. This amount is inconsistent with reasonable deliberations of the evidence and should be set aside or at least reduced. DP Solutions, Inc., v. Rollins, Inc., 353 F.3d 421, 432-33 (5th Cir. 2003) (stating the "reasonable deliberations of the evidence" standard).

First, the award was excessive in light of the fact that the District Attorney was not allowed to put on evidence of Thompson's guilt. Additionally, Thompson presented none of the evidence normally produced in a civil case where damages are sought, such as lost wages, past medical expenses, future medical expenses, etc. In the absence of such proof of loss, a general damage award of $14 million dollars is clearly excessive.

XIII. The District Court's judgment is erroneous by including the names of non-liable parties.

In light of the jury verdict, the District Court entered judgment in favor of Thompson and against "*Harry F. Connick*, *Eric Dubelier*, *James Williams*, and

Eddie Jordan, *in their official capacities*, and the Orleans Parish District Attorney's Office, jointly and in solido in the amount of $14,000,000.00." See Appellant's Records Excerpts at Tab 5 (emphasis added). This judgment is unnecessarily misleading and inconsistent with the basic principles behind §1983 liability under Monell.

Harry Connick, Eric Dubelier, and James Williams should not have been included in the judgment, even with the "in their official capacities" language. As intimated in Monell, under §1983, it is the employing, official governmental entity which is to be cast in any eventual judgment under §1983–not any of its employees. Even if an employee is cast in judgment "in his official capacity," it still means that the liability is the governmental defendant's–not the employee's. Therefore, there was no need to include these individuals' names in the judgment at all. A judgment against the Orleans Parish District Attorney's Office (or even then-officeholder Eddie Jordan, in his official capacity) would have sufficed. (The naming of Connick, Dubelier, and Williams in the judgment also gives rise to multiple practical–and unnecessary–potential problems for them, including professional ridicule or increased insurance rates or credit-related difficulties due to the presence of a preexisting judgment.)

For the above reasons, the District Court erred in including the names of

Harry Connick, Eric Dubelier, and James Williams in the judgment, which should be amended to exclude them.

XIV. The District Court's award for attorneys' fees, expert fees, and costs was excessive.

The District Court erred in awarding Thompson's attorneys fees which exceeded those of experienced civil rights litigators in the Eastern District of Louisiana. In response to Thompson's attorneys' initial request for their base fee (which was $405-$625/hour for experienced attorneys; $180-$285/hour for associates; and $135-$225/hour for legal and technical assistants), the District Court noted that these rates, while possibly representative of those in the Philadelphia area where Thompson's attorneys were based, were "nowhere near" the rates of Greater New Orleans attorneys. See Appellant's Records Excerpts, Tab 6 at 5. The District Court then awarded Thompson's attorneys 50% of their requested rates and, under the factors set out in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), adjusted the amount upward, awarding 75% of their requested rates, totaling $1,031,841.79. See Id. at 7-9. (This was done even after the Court noted that Thompson's attorneys were relatively inexperienced litigators in the area of §1983 actions. Id.)

The District Court based its "upward" adjustment on its appreciation that

(1) Thompson and his attorneys had a fourteen year relationship during which they represented him *pro bono* in his criminal proceedings, (2) Thompson "arguably" had two months from his acquittal to file his action before prescription ran (and his attorneys were already familiar with the underlying facts), and (3) this case was factually complicated, legally difficult, and required special skill. Id.

These considerations are insufficient to justify an upward adjustment. First, agreeing to represent someone *pro bono* is not a relevant factor under Johnson. Second, Thompson's counsel was unable to show that local counsel was unavailable or incapable of drafting a complaint in two months (which frankly does not appear to be an unreasonably short period of time to draft a complaint). Finally, this particular case of prosecutorial misconduct, while arduous (as is all litigation), did not present any truly new or novel issues.

Thompson further failed to show that the hours billed, and the expert fees and costs for which recovery was sought, were reasonable and supported by the evidence. As such, the District Court's award was excessive and made in error.

XV. The District Court erred in failing to grant the Defendants' Motion for Summary Judgment on these issues prior to trial.

Prior to the trial in this matter, the Defendants filed a Motion for Summary Judgment relative to Thompson's claims. The District Court granted the Motion

for Summary Judgment relative to Thompson's state law claims, but erroneously denied the Motion for Summary Judgment relative to all other claims. The grounds for Defendants' Motion for Summary Judgment were the same as those grounds previously articulated in this brief - i.e. statute of limitations, no deliberate indifference, no causal link, lack of liability under Monell, absence of unconstitutional policy, custom, or practice, etc. As these issues have been previously examined in this brief, the District Attorney will not re-argue these points and simply raises the issue out of an abundance of caution so as to not waive the argument.

Conclusion

The final judgment and interlocutory rulings in this case resulted from the District Court's rulings, which expanded the liability of prosecutors well-beyond any interpretation of long-standing Fifth Circuit precedent. This Court and others have previously scrutinized Harry Connick's administration, and other than this jury, no court has ever found that Harry Connick acted with deliberate indifference.

The improper jury instructions, and lack of complete instructions, misguided the jury and caused it to render a verdict which was contrary to the facts of this case and the applicable law. Had the jury been properly guided, no

reasonable jury could have found that Connick acted with deliberate indifference.

The District Court and the jury committed manifest error, and this Court should reverse the Judgment, thereby finding the Defendants not liable.

In the alternative, in the event this Court finds in favor of Thompson, then: (1) the Judgment should be amended to name the only party capable of liability, the District Attorney's Office; and (2) the damages, including the award for attorneys' fees, expert fees and costs, should be reduced to a reasonable amount. For the foregoing reasons, the District Court's judgment should be reversed, with judgment entered in favor of the District Attorney.

Respectfully submitted,

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Certificate of Service

Undersigned counsel does hereby certify that he has on this 8th day of April, 2009 transmitted twenty (20) copies of the foregoing Appellant's *En Banc* Brief to this Court, in both paper and electronic PDF format, by hand delivery, and one (1) copy, in both paper and electronic PDF format, to each counsel for any represented party by mailing same, postage pre-paid and dispatched by first class mail to the following addresses:

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