No. 07-30443

In the United States Court of Appeals for the Fifth Circuit

JOHN THOMPSON,

Plaintiff-Appellee,

v.

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

BRIEF OF PLAINTIFF-APPELLEE JOHN THOMPSON

Robert S. Glass
GLASS & REED
530 Natchez Street
New Orleans, Louisiana 70130
504.581.9083 Telephone
504.527.6156 Facsimile

Michael L. Banks
J. Gordon Cooney, Jr.
Amanda M. Bruno
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
215.963.5000 Telephone
215.963.5001 Facsimile

Allyson N. Ho
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4200
Houston, Texas 77002
713.890.5000 Telephone
713.890.5001 Facsimile

Attorneys for Plaintiff-Appellee

CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

1. Plaintiff-Appellee John Thompson is represented by:

Michael L. Banks
J. Gordon Cooney, Jr.
Amanda M. Bruno
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
215.963.5000 Telephone
215.963.5001 Facsimile

Robert S. Glass
GLASS & REED
530 Natchez Street
New Orleans, Louisiana 70130
504.581.9083 Telephone
504.527.6156 Facsimile

Allyson N. Ho
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4200
Houston, Texas 77002
713.890.5000 Telephone
713.890.5001 Facsimile

2. Defendants-Appellants Harry F. Connick, Eric Dubelier, James Williams, Eddie Jordan, and the Orleans Parish District Attorney's Office are represented by:

William D. Aaron, Jr.
Richard A. Goins
DeWayne L. Williams
Scott C. Stevens
Candice M. Richards-Forest
GOINS AARON, APLC
201 St. Charles Avenue, Suite 3800
New Orleans, Louisiana 70170
504.569.1800 Telephone
504.569.1801 Facsimile

3. Orleans Parish Assistant District Attorneys are *amici curiae*, represented by:

Donna R. Andrieu
Andrew M. Pickett
ASSISTANT DISTRICT ATTORNEYS
PARISH OF ORLEANS
1340 Poydras Street, Suite 700
New Orleans, Louisiana 70112
504.571.2820 Telephone
504.571.2928 Facsimile

4. Louisiana District Attorneys Association are *amici curiae*, represented by:

Ralph R. Alexis, III
Porteous, Hainkel and Johnson, LLP
704 Carondelet Street
New Orleans, Louisiana 70130
504.581.3838 Telephone
504.581.4069 Facsimile

E. Pete Adams
LA District Attorneys Association
1645 Nicholson Drive
Baton Rouge, Louisiana 70802
225.343.0171 Telephone
225.387.0237 Facsimile

_____
J. Gordon Cooney, Jr.

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ISSUE PRESENTED

Viewed in the light most favorable to the jury's verdict, was there sufficient evidence for a reasonable jury to conclude that the district attorney's deliberately indifferent failure to train, monitor or supervise his prosecutors regarding their obligations under *Brady* and its progeny substantially caused the violation of Thompson's constitutional rights?

INTRODUCTION

The Orleans Parish District Attorney's Office ("the district attorney") seeks to overturn a jury verdict for John Thompson arising from eighteen years of wrongful imprisonment and numerous near executions for a murder he did not commit. Every federal judge that has considered this extraordinary civil case has reached the same conclusion and upheld the jury's verdict. That is not surprising, because the judgment is faithful to Supreme Court precedent, consistent with this Court's § 1983 jurisprudence, and respectful of the rule of law. Any other result would put the integrity of the criminal justice system at risk and significantly undermine public confidence.

Weeks before Thompson was set to be executed and fourteen years after his original conviction, a defense investigator discovered a crime laboratory report regarding blood evidence that exonerated Thompson from a separate armed robbery charge which prosecutors had used as part of their strategy in the murder case. The prosecutors failed to produce the blood-evidence report to Thompson, secured the armed robbery conviction, and used the threat of impeachment from that conviction to both keep Thompson from testifying in the murder trial and secure the death penalty.

At Thompson's murder retrial, he was finally able to testify in his own defense and demonstrated he had nothing to do with the murder. His attorneys also

presented more than a dozen pieces of exculpatory evidence that had not been provided to the defense at the original trial, and that showed the real killer was a man named Kevin Freeman, acting alone. The jury acquitted Thompson after just 35 minutes of deliberations.

Thompson brought this § 1983 action seeking damages for his eighteen years of wrongful imprisonment—fourteen of which were spent on death-row—and near-execution. During the week-long trial, the jury heard testimony from seventeen witnesses, including the former district attorney himself, on Thompson's claim that the district attorney had been deliberately indifferent to the need for training, monitoring and supervising his prosecutors about their *Brady* obligations:

- The district attorney, Mr. Connick, admitted he was fully aware that: (1) his prosecutors confronted difficult decisions involving *Brady* (TT 161-62, 851-52); (2) it was crucial for his prosecutors to make proper *Brady* decisions (TT 851-52); (3) if prosecutors made wrong *Brady* decisions, constitutional harm would result (*id.*); and (4) *Brady* issues were particularly difficult considering Connick's general policy discouraging production of certain types of documents, including police reports and witness statements (TT 62-64, 375-77, 380 (Williams), TT 533-44 (Dubelier));

- The district attorney stipulated that ***none*** of the many prosecutors involved in the case could recall ***any*** training sessions concerning *Brady* before the 1985 prosecutions of Thompson (RE 24, ¶ UU);

- Former prosecutors testified they could not recall *any* training regarding *Brady* (TT at 58-59 (Williams); 170-71 (Dubelier); 318-19 (Whittaker); 728-29 (Riehlmann)); and

- The district attorney admitted there was no written policy manual in his office until 1987 (RE 24, ¶ TT), and the office's designated representative conceded that the single paragraph on *Brady* in that policy manual was deficient in numerous respects and would not have required production of the blood evidence or the crime lab report (TT at 914-15).

Indeed, the 1987 policy manual highlighted the office's indifference to *Brady*. In the mere four sentences about *Brady* obligations, the manual included three fundamental errors about *Brady* and failed to even refer to the rights of the accused. RE 28.

After hearing the testimony and weighing the evidence, the jury properly found that the district attorney's deliberately indifferent failure to train, monitor and supervise the prosecutors in his office substantially caused the violation of Thompson's constitutional rights, and awarded damages. The judgment on that verdict should stand.

In our system of justice, the deference given to prosecutors is virtually unlimited—and properly so. Absolute immunity shields prosecutors in carrying out their duties so that fear of personal liability will not inhibit the performance of their critical role in maintaining law and order. Thus, when the constitutional rights of individuals are violated by prosecutorial misconduct, redress is generally available only through a suit against a government policymaker, such as a district attorney, in his official capacity. Even then, only the most extreme cases can

satisfy the stringent requirements for liability. Nothing less than proof of the policymaker's deliberate indifference to the accused's constitutional rights will suffice. Such cases will be rare. But this is such a case.

When deliberate indifference by the government comes to light, as it did in this case, public confidence in the integrity of the justice system is shaken. Congress has determined that, under appropriate circumstances, civil damage actions seeking redress for constitutional injuries caused by government misconduct have an important role to play in reinforcing the bedrock principle that we are a nation of laws, not men. Under the exceptional facts of this case, the jury's verdict vindicates that bedrock principle, reinforces the rule of law, and restores public confidence in the criminal justice system.

STATEMENT OF THE CASE

This is a § 1983 action arising out of John Thompson's eighteen years of wrongful imprisonment and near execution for a 1984 murder in New Orleans. Weeks before Thompson was to be executed in 1999, one of his investigators discovered exculpatory blood-test results relating to a separate armed robbery with which the New Orleans prosecutors had charged Thompson as part of their strategy in the murder case. Although the prosecutors had the blood-test results, they did not produce them to Thompson. Instead, they secured the armed robbery

conviction and used the threat of impeachment to keep Thompson from testifying in the murder trial and secure the death penalty.

Thompson's execution was then stayed, the armed robbery charges were dismissed, and Thompson was given access to the state's murder files. After reviewing those files, Thompson's counsel identified favorable evidence in the murder case that had not been produced either during the pre-trial period or the years of state post-conviction and federal habeas corpus proceedings.

In 2002, a state appellate court vacated Thompson's murder conviction, determining that the withholding of the blood evidence abridged Thompson's right to testify in his own defense. *State v. Thompson*, 825 So. 2d 552 (La. App. 4th Cir.), *writ denied*, 829 So. 2d 427 (La. 2002). In May 2003, Thompson was retried for the murder. Thompson presented the favorable evidence which had not been produced previously and testified in his own defense that he had nothing to do with the murder. The jury acquitted Thompson after only 35 minutes of deliberations.

Within one year of the state court's vacatur of the murder conviction, Thompson filed this action for damages arising from that conviction. The complaint alleged that under § 1983, the district attorney had been deliberately indifferent to the need to train, monitor and supervise prosecutors as to their obligations under *Brady*.

During the week-long trial, the jury heard testimony from seventeen witnesses. At the close of the evidence, the court carefully instructed the jury regarding the elements of Thompson's cause of action and submitted a special verdict form.

The jury returned a verdict in Thompson's favor for $14 million. The district court entered judgment, denied defendants' post-trial motions, and awarded attorneys' fees and costs. On appeal, a unanimous panel of this Court upheld the judgment in all material respects.

STATEMENT OF FACTS

I. THE PROSECUTORS FAIL TO PRODUCE EXCULPATORY BLOOD EVIDENCE.

In December 1984, Raymond T. Liuzza, Jr., was killed outside his home in New Orleans. RE 24, ¶ A. Three weeks later, a college student, Jay LaGarde, and his two younger siblings were victims of an attempted armed robbery in their car. *Id.* at ¶ F.

Thompson and a co-defendant, Kevin Freeman, were arrested and charged with Liuzza's murder. RE 24, ¶ E. The next day, the New Orleans newspaper ran a front-page photograph of Thompson, identifying him as a suspect in the murder. The father of the LaGardes showed the photograph to two of his children, who said that Thompson might have been their attacker. *Id.* at ¶ F. The father contacted the district attorney's office, and Thompson was charged with the armed robbery.

Eric Dubelier and James Williams were prosecutors in both the Liuzza and LaGarde cases. According to the stipulated facts, Dubelier and Williams "decided to use the armed robbery charge to the State's advantage in the murder case." RE 24, ¶ G. Dubelier "decided that a conviction of Mr. Thompson on the armed robbery charge would effectively preclude Mr. Thompson from taking the stand in his own defense at the murder trial, and that the armed robbery conviction could be used in the penalty phase of the murder trial to obtain a death sentence." *Id.* Dubelier and Williams "moved to reverse the order of the trials, so that the armed robbery trial would be held approximately three weeks before the murder trial." *Id.* Based solely on the purported eyewitness identifications, Thompson was tried on the armed robbery charge, convicted, and sentenced to 49½ years in prison without the possibility of parole. *Id.* at ¶ N.

It is now known that shortly before the armed robbery trial, the prosecutors sent a bloody swatch from Jay LaGarde's pants to the crime laboratory. RE 24, ¶ K. A crime lab report addressed to prosecutor Bruce Whittaker revealed that the swatch contained type "B" blood. *Id.* Whittaker placed the crime lab report conspicuously on Williams' desk two days before the robbery trial. TT 330. At trial, Williams admitted that he knew there was blood evidence, and that he steered witnesses away from mentioning it at the armed robbery trial. TT 101-102.

The existence of blood evidence was mentioned on the internal screening form that Whittaker prepared in the armed robbery case. RE 30. The form indicated that the prosecutors "may wish" to have Thompson's blood tested. *Id.* Blood evidence was also mentioned in the crime scene technician report that was prepared when the bloody swatch was cut from Jay LaGarde's pants. RE 29. Although no fewer than four prosecutors—Dubelier, Williams, Whittaker and Gerald Deegan—knew of blood evidence, Thompson and his attorneys were never told about or shown the blood evidence or any of the documents that referred to the collection or testing of that evidence. RE 24, ¶ L.

II. PREVENTED BY THE ARMED ROBBERY CONVICTION FROM TESTIFYING IN HIS OWN DEFENSE, THOMPSON IS SENTENCED TO DEATH FOR LIUZZA'S MURDER.

Thompson's attorneys then submitted a pre-trial motion to preclude prosecutors from using the armed robbery conviction in the murder trial. RE 24, ¶ P. The trial court denied the motion, ruling that the state could use the conviction if Thompson testified. *Id.* at ¶¶ P, Q. According to the stipulated facts, "[a]s a result of his conviction three weeks earlier for attempted robbery and the denial of the motion to preclude the introduction of such evidence, Mr. Thompson did not take the stand and deny his guilt in the murder case." RE 24, ¶ Q.

During the murder sentencing phase, Marie LaGarde testified that she and her brothers were nearly killed by Thompson in the robbery. TT 112-13. Dubelier

argued to the jury that because Thompson had already been sentenced to 49½ years without parole in the robbery case, the only way to punish him for the murder was to impose the death penalty. TT 115-16. The jury sentenced Thompson to death.

III. THE DISCOVERY OF THE BLOOD EVIDENCE LEADS TO REVERSALS OF THOMPSON'S CONVICTIONS.

Thompson spent the next fourteen years on death row at the Louisiana State Penitentiary in Angola, Louisiana, exhausting all of his post-conviction and habeas appeals. During those fourteen years, Thompson lived in solitary confinement in a six-by-nine foot cell. TT 270-71. A final death warrant was issued in April 1999. RE 24, ¶ U.

A few days later, an investigator for Thompson's attorneys unearthed the crime lab report showing that the perpetrator of the armed robbery had type "B" blood. RE 24, ¶ W. Thompson's blood was type "O," making it impossible for him to have been the robber. Given the obvious link between the murder and the robbery case, the execution was stayed. *Id.* at ¶¶ V, W, X. The district attorney moved to vacate the armed robbery conviction and did not retry Thompson for that crime. *Id.* at ¶ X.

At the suggestion of prosecutor John Jerry Glas (TT 945), the district attorney convened a grand jury to investigate "the conduct of his own office and the former [prosecutors] who were involved in the prosecution of Mr. Thompson in

the armed robbery case." RE 24, ¶ Z. Even though the same prosecutors were involved in both the armed robbery and the murder cases—and the armed robbery case was part of the strategy for the murder prosecution—the district attorney saw no need for an investigation into possible *Brady* issues in the murder case. TT 187. Before the grand jury had heard from all witnesses the district attorney ended the investigation and dismissed the grand jury, over Glas' objection. *Id.* at 977-78.

After Thompson's investigator discovered the blood evidence, a former prosecutor, Michael Riehlmann, reported that in 1994, Gerry Deegan said to Riehlmann that Deegan had failed to turn over evidence that in some way may have exculpated Thompson. TT at 717; *id.* at 718 (Riehlmann testimony that Deegan said he failed to produce "stuff that might have been exculpatory"). On the witness stand, Riehlmann was unclear about precisely what Deegan had said about the blood evidence and could not say whether Deegan had mentioned the involvement of other prosecutors. *Id.* at 717 ("He [Deegan] may have said that someone else was involved, but I don't recall."); *see also id.* at 728-39. Deegan reportedly made the statement to Riehlmann after being told he had only months to live as a result of cancer. *Id.* at 717. Riehlmann did not tell anyone about Deegan's revelation until five years later, after the blood evidence had been discovered by Thompson's investigator.

After extensive further investigation by Thompson's attorneys, the state trial court heard Thompson's application for relief with regard to the murder conviction. *Id.*, ¶ BB. During the hearing, Thompson presented the court with evidence that had not been revealed during the 1985 murder trial (*see, e.g.*, *id.* ¶¶ HH-II), and further urged that the non-production of the blood evidence and resulting armed robbery conviction deprived him from exercising his right to testify in the murder case. The court vacated Thompson's death sentence but left the murder conviction intact.

On July 17, 2002, the state appellate court reversed the murder conviction. *State v. Thompson*, 825 So. 2d at 557-58. The court held that Thompson "was denied his right to testify in his own behalf based upon the improper actions of the State in the [armed robbery] case." *Id.* at 557. According to the court, the non-production of the blood evidence "led to [Thompson's] improper conviction in that case and his subsequent decision not to testify in the [murder] case because of the improper conviction." *Id.*

IV. THOMPSON IS RETRIED FOR THE LIUZZA MURDER AND FOUND NOT GUILTY.

In 2003, the district attorney's office retried Thompson for the Liuzza murder. RE 24, ¶ EE. Free of the robbery conviction, Thompson took the stand in his own defense. The jury heard and saw thirteen pieces of evidence that

prosecutors had not turned over during the first murder trial. RE 24, ¶ MM, HH, KK. That evidence included several police reports containing eyewitness descriptions of the murderer that did not match Thompson's description—reports that were not turned over despite Thompson's requests for all police reports containing descriptions inconsistent with Thompson's appearance. *Id.*

The evidence also included photographs, statements by Freeman and Perkins, and information regarding the monetary reward given to a key witness for the state. (At the original trial, prosecutors had suggested that the witness was not going to receive reward money. (TT 147.)). The jury heard the testimony of three eyewitnesses to the murder who were interviewed by police and listed in the undisclosed police reports, but who had not been disclosed to Thompson at or before the 1985 trial. RE 24, ¶ II.

The jury returned a verdict of not guilty in 35 minutes. RE 24, ¶ FF. Thompson was released from prison eighteen years after his initial arrest. *Id.* at ¶ GG.

V. THE JURY FINDS THAT THE DISTRICT ATTORNEY'S DELIBERATELY INDIFFERENT FAILURE TO TRAIN, MONITOR OR SUPERVISE HIS PROSECUTORS ON THEIR *BRADY* OBLIGATIONS WAS THE SUBSTANTIAL CAUSE OF THOMPSON'S DAMAGES.

During the week-long civil trial, the jury heard evidence demonstrating that the district attorney failed to train, supervise, and monitor the prosecutors in his

office. The district attorney stipulated that "[n]one of the district attorney witnesses recalled any specific training session concerning Brady prior to or at the time of the 1985 prosecutions of Mr. Thompson." RE 24, ¶ UU. Dubelier, Williams, Whittaker and Riehlmann all admitted they could not recall a single training session while in the district attorney's office, nor could they recall any training regarding *Brady*:

- "I don't recall that I was ever trained or instructed by anybody about my *Brady* obligations, no." (TT 729) (Riehlmann).
- "I don't recall specifically any training." (TT 171) (Dubelier);
- "I don't recall there being specifically any training on criminal law and procedure, no, sir." (TT 58) (Williams); and
- "I don't recall anything on a formal training basis." (TT 318); *see also id.* ("Q: Did you get any training when you started? A: Not that I recall.") (Whittaker).

Although the district attorney and two of his former first assistants claimed there were regular training programs, not a single prosecutor from the hundreds who worked under them over the years testified about any training or instruction on *Brady* obligations.

The jury also heard evidence of confusion among the prosecutors in the office concerning their *Brady* obligations. Although the district attorney argued that "any reasonable prosecutor would have recognized blood evidence as *Brady*

material" (Defendants' Memorandum in Support of the Renewed Motion for Judgment As Matter After Trial, Dkt. #147, at 9), several of the district attorney's own witnesses—including the office's Rule 30(b)(6) designee—testified that the blood evidence was not *Brady* material in the absence of knowledge of Thompson's blood type. TT 393 (Williams); 419 (Solino). The jury also heard testimony that Connick and his first assistant shared that view. *See id.* at 986.

Dubelier and Williams both reflected their misunderstanding of *Brady*. For example, Williams testified that he believed *Brady* did not require the production of impeachment material (TT 381); and Dubelier claimed that *Brady* did not require the production of eyewitnesses' descriptions of the perpetrator if he could posit a theory why the accused may have changed his appearance at the time of the crime. *See* TT, at 171-74. Williams' misunderstanding of *Brady* was so fundamental that the district court visibly registered surprise, prompting Williams to change his testimony before the jury. TT 381-82. Not only was *Brady* training in the district attorney's office non-existent, but there was also no supervision or monitoring of "special" prosecutors, such as Dubelier and Williams, who were entirely exempt from supervision, even though they were only a few years out of law school. *Id.* at 409, 806.

The jury also heard the undisputed evidence that there was no written policy manual in the district attorney's office when Thompson was prosecuted.

According to the stipulated facts, the office did not have a policy manual until 1987, two years after Thompson's trial. RE 24, ¶ TT. The 1987 policy manual, which was described by the defense as a supposed compilation of prior policies (TT 753-54, 861-62), included just four sentences devoted to *Brady*:

> In most cases, ***in response to the request of defense*** attorneys, ***the Judge orders the State to produce*** so called Brady material—that is, information in the possession of the State which is ***exculpatory*** regarding the defendant. The duty to produce Brady material is ongoing and continues throughout the entirety of the trial. Failure to produce Brady material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of Brady issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each Assistant must be familiar with the law regarding exculpatory evidence possessed by the State.

RE 28, § 5.25 (emphasis added). Thompson's expert witness, Joseph Lawless, testified that the 1987 policy contained multiple errors of law, failed to communicate the importance of *Brady* compliance, and failed to give proper guidance to prosecutors in the office. TT 439-40. Lawless testified that not only did the policy incorrectly limit *Brady* to instances where a request was made and ordered to be produced, but it also incorrectly suggested that the legal requirement was limited to "exculpatory" evidence. *Id.* at 439. On the witness stand, the designated witness of the district attorney's office, Val Solino, conceded that this

paragraph was deficient and would not have required production of the crime lab report. *Id.* at 914-15.

The jury also heard evidence of the district attorney's knowledge of the need to train and supervise his prosecutors. The district attorney acknowledged that he knew prosecutors confronted difficult situations requiring decisions about their *Brady* obligations. TT 851. He also testified he knew it was not always easy to determine whether evidence was required to be produced under *Brady*. *Id.* at 182. Others similarly noted the "gray" areas under *Brady* and the need for training to delineate the contours of the rule. *Id.* at 318-19; 383-84. Former first assistant Timothy McElroy, for example, testified that *Brady* compliance is dependent upon the adequacy of the training provided, because it is sometimes difficult for a prosecutor to determine whether evidence is exculpatory. TT 806-807.

The district attorney compounded those difficulties by imposing a policy that strongly discouraged the production to the defense of police reports and witness statements; the prosecutors involved in Thompson's trials stated they were following that policy when they did not produce the police reports to the defense in the murder case. TT 62-64, 67, 375-77, 380 (Williams); TT 533-44 (Dubelier). And the district attorney admitted his policy of selective disclosure made it crucial for his prosecutors to make proper *Brady* determinations. *Id.* at 851-53.

The district attorney thus knew the danger of *Brady* violations was real, and that if prosecutors made wrong decisions under *Brady*, constitutional harm would result. TT 852. He admitted that before the 1985 prosecutions against Thompson, there were at least four cases leading to published opinions of the Louisiana Supreme Court finding *Brady* violations by prosecutors in his office. *Id.* at 863-64. The district attorney also admitted that most *Brady* issues never lead to published opinions, and that *Brady* violations had occurred in other cases not described in published opinions. TT at 864-65. Nevertheless, no witness was able to identify a single, specific corrective measure taken in response to any *Brady* violation by prosecutors in his office. TT 182, 836.

The jury also heard evidence from which it could conclude that multiple prosecutors had been involved in the non-production of the blood evidence at the original trial. Whittaker testified he saw the crime lab report and placed it conspicuously on Williams' desk. TT 330. Williams denied seeing the report, but admitted he knew of the blood evidence and that he deliberately avoided mentioning the blood evidence in his questioning of witnesses and argument at the armed robbery trial. *Id.* at 101-102. Dubelier, too, was aware of blood evidence. RE 24, ¶ L. None of those witnesses offered any credible explanation for why they did not produce the blood evidence to Thompson. Moreover, the district attorney stipulated that numerous pieces of evidence, including police reports and witness

statements, were not turned over to Thompson during his murder trial. *Id.* at ¶¶ HH, II, JJ, KK.

SUMMARY OF ARGUMENT

Nearly 20 years ago, the Supreme Court recognized that under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), civil liability may be imposed in certain circumstances for a municipality's failure to train, monitor or supervise its employees. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). A successful claimant must prove three elements: (1) a failure to train, monitor or supervise; (2) a causal connection between that failure and the constitutional violation suffered by the claimant; and (3) deliberate indifference to the claimant's constitutional rights. *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003). After being properly instructed on the law, the jury reasonably found each element satisfied. The district attorney makes numerous arguments why that verdict should be overturned. But those arguments ignore the applicable standards of review, disregard the evidence actually before the jury, and misapprehend the controlling law.

First, the Supreme Court and this Court have made clear that a failure-to-train claimant like Thompson need not prove a pattern of similar violations, where, as here, the need for the training is "obvious" and the violation of constitutional rights is the "highly predictable consequence" of the failure to train. *Bd. of Commissioners of Bryan Cty. v. Brown*, 520 U.S. 397, 407-409 (1997); *Canton*,

489 U.S. at 390 & n.10. The district attorney has admitted in this case that he was fully aware that: (1) his prosecutors confronted decisions involving *Brady* (TT 161-62, 851-52); (2) it was crucial for his prosecutors to make proper *Brady* decisions (TT 851-52); (3) if prosecutors made wrong *Brady* decisions, constitutional harm would result (*id.*). These *Brady* issues were particularly difficult considering Connick's general policy discouraging production of certain types of documents, including police reports and witness statements (TT 62-64, 375-77, 380 (Williams), TT 533-44 (Dubelier)).

Second, viewed in the light most favorable to the jury's verdict, there was ample evidence that, despite Connick's awareness of the need for training, he nevertheless failed to provide any training or any clear message regarding *Brady*. Several prosecutors involved in the Thompson prosecution testified that they received no *Brady* training or instruction from anyone in the office, and the parties stipulated that "none of the district attorney witnesses recalled any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." RE 24, ¶ UU.

Moreover, deliberate indifference was evidenced not only from Connick's awareness and failure to provide any training, but also from the content of the *Brady* section of the policy manual created a mere two years after Thompson's prosecution. That section, consisting of a total of four sentences, grossly

understated and misstated the requirements of *Brady* and its progeny, and entirely failed to mention the rights of the accused. RE 28, § 5.25. The jury could properly find deliberate indifference to *Brady's* requirements from the treatment of *Brady* contained in the manual.

The fact that prosecutors must attend law school does not insulate the district attorney from his failure to provide any training. Many law schools provide theoretical grounding in principles of law but do not provide the substantive and practical grounding that is necessary for prosecutors to honor their constitutional obligations in the day-to-day, rough-and-tumble world of state criminal litigation. Particularly in an environment where a premium is placed on securing convictions, it is incumbent upon the district attorney to both send a clear message about the importance of *Brady* compliance and to provide young prosecutors with some substantive guidance. The jury heard ample evidence that the district attorney's office did neither during the relevant time period.

The jury properly rejected the district attorney's theory that Deegan acted alone and that Thompson's injuries were caused by Deegan's allegedly intentional constitutional violation. The district court correctly charged the jury, stating, among other things, that "the fault must be in the training program itself, not in a particular prosecutor." RE 18, 26. Contrary to the district attorney's assertions, Riehlmann did not recall exactly what Deegan supposedly said and could not recall

whether Deegan told him that other prosecutors may have been involved. Three other prosecutors—Whittaker, Williams and Dubelier—all knew about the blood evidence yet failed to produce it. Indeed, Deegan was the most junior member of the team, and the jury properly could have concluded that the most junior member would not have acted unilaterally to withhold evidence known to exist by more senior prosecutors in this high-profile case.

Moreover, in finding a causal connection between the district attorney's deliberately indifferent failure to train and Thompson's injuries, the jury properly considered the other *Brady* violations committed by Williams and Dubelier in the murder case, as well as the testimony demonstrating their failure to understand *Brady's* requirements. The numerous *Brady* violations by multiple prosecutors in this case further reflected the failure of the office to provide *Brady* training.

Defendants argue that training would not have made a difference, saying that "[i]t 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." (Br. 23.) The actual evidence, however, demonstrates that both the district attorney's Rule 30(b)(6) designee and Mr. Connick actually disputed the constitutional obligation to produce the blood report if the prosecutors did not know Thompson's blood type.

The evidence thus demonstrated both that the district attorney was deliberately indifferent to the need to train the prosecutors in his office on their *Brady* violations, and that his failure to train caused the violation of Thompson's constitutional rights. The district court's jury instructions followed the law and properly explained the requisite elements of proof. And the district attorney failed to assert in the district court most of the objections he now raises.

Third, Thompson's § 1983 action was timely filed. Under *Heck v. Humphrey*, 512 U.S. 477 (1994), a § 1983 action seeking damages associated with a criminal conviction cannot be brought until that conviction is reversed or vacated. *Id.* at 486-87. Because Thompson sought damages arising from his murder conviction and death sentence, this action could ***not*** have been filed under *Heck* until after the state court vacated the murder conviction. This action was undisputedly filed within one year of that date.

Fourth, the award of damages was not excessive. The jury's award is proportionate to the harm Thompson sustained over 18 years of wrongful incarceration and near executions.

Finally, the district court properly calculated attorneys' fees and costs. The court reviewed the time records, correctly determined the lodestar, and properly exercised its discretion to adjust the lodestar, awarding fees amounting to less than 10% of the damages verdict.

ARGUMENT

I. VIEWED IN THE LIGHT MOST FAVORABLE TO THE JURY'S VERDICT, THE EVIDENCE DEMONSTRATES THAT THE DISTRICT ATTORNEY'S DELIBERATELY INDIFFERENT FAILURE TO TRAIN CAUSED THE VIOLATION OF THOMPSON'S CONSTITUTIONAL RIGHTS.

A. This Exceptional Case Comes Within The Circumstances Identified By The Supreme Court Where Liability May Be Premised On A Failure to Train, Monitor Or Supervise.

To succeed on a § 1983 claim premised on a municipality's failure to train, monitor or supervise its employees, a claimant must prove (among other things) that the government's official policymaker was "deliberately indifferent" to that need. *Canton*, 489 U.S. at 388. The Supreme Court has identified two ways to make that showing.

First, a claimant can point to a pattern of similar constitutional violations. *Bryan Cty.*, 520 U.S. at 407-08 (citing *Canton*, 489 U.S. at 397 (O'Connor, J., concurring)). The existence of a pattern demonstrates that government employees "so often violate constitutional rights that the need for further training must have been ***plainly obvious*** to [government] policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Canton*, 489 U.S. at 390 n.10 (emphasis added).

Second, a claimant may offer "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its

employees to handle recurring situations presenting an obvious potential for such a violation." *Bryan County*, 520 U.S. at 409 (citing *Canton*, 489 U.S. at 390 & n.10). The Supreme Court has explained:

> The likelihood that the situation will recur and the predictability that [a government employee] lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train . . . reflected 'deliberate indifference' to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right.

Id. The Court has thus made clear that a "pattern" of constitutional violations is not always necessary to prove deliberate indifference. Instead, the Court has recognized that a "single" incident of misconduct can give rise to liability in circumstances where the need for training is "obvious" and the violation of constitutional rights is the "highly predictable consequence" of the failure to train. *Bryan County*, 520 U.S. at 409; *Canton*, 489 U.S. at 390 & n.10.

This Court's precedents are in accord. Although this Court has noted that deliberate indifference "generally requires" a pattern of similar violations, *see*, *e.g.*, *Rios v. City of Del Rio*, 444 F.3d 417, 427 (5th Cir. 2006), it has repeatedly recognized that even a single incident of misconduct can suffice in the narrow circumstances where the need for training is "obvious" and the '"highly predictable' consequence" of failing to provide it is the violation of constitutional

rights. *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005); *Burge v. St. Tammany Parish*, 336 F.3d 363, 373 (5th Cir. 2003); *Brown v. Bryan County*, 219 F.3d 450, 463 (5th Cir. 2000).

Accordingly, there can be no serious question that under the precedents of the Supreme Court and this Court: (1) that a single incident of misconduct can give rise to municipal liability under § 1983 in appropriate circumstances; and (2) that those circumstances include instances where the need for training is "obvious," and the failure to provide it will "predictably" result in constitutional violations.[1] The district attorney concedes as much. *See* Br. 43.

Indeed, the district attorney does not dispute that the circumstances specifically identified by the Supreme Court and this Court, in which a pattern of similar violations need not be proved—*i.e.*, where the need for training is "obvious," and the consequences for failing to provide it are "predictable"—are present in the case at bar. Nor could he, as there is ample evidence—including

[1] The Supreme Court's recent decision in *Van de Kamp v. Goldstein*, ___ U.S. ___ (2009), 129 S. Ct. 855 (2009), is not to the contrary. That case involved the entirely different issue of absolute prosecutorial immunity from personal, individual liability. Although *amicus* Louisiana District Attorney's Association ("LDAD") concedes, as it must, that *Goldstein* "did not address a *Monell* claim" like Thompson's, LDAD nonetheless insists that *Goldstein* "prohibits *Monell* claims against district attorneys alleging failure to train or supervise assistants arising out of alleged constitutional violations occurring during a prosecution." LDAD Br. 3, 6. The argument that *Goldstein* should be extended to such claims would effectively overrule *Monell* and *Bryan County* and must be rejected for that reason alone.

admissions by the district attorney himself—that he was fully aware that prosecutors in his office would be required to confront *Brady* issues on a regular basis, that *Brady* issues can be difficult, and that failure to properly handle *Brady* issues would result in constitutional violations. *See supra* at pp. 19-20. Instead, the district attorney attacks the jury's verdict under a variety of alternative theories, but, as demonstrated below, all lack merit.

B. The Evidence Fully Supports The Jury's Finding That The District Attorney Was Deliberately Indifferent To The Need To Train, Monitor And Supervise His Prosecutors.

1. The jury heard ample evidence that the district attorney offered no *Brady* training whatsoever.

The district attorney devotes the bulk of his brief to arguing that the jury's verdict must be overturned because "[t]here is no evidence in the record that the District Attorney consciously and deliberately failed to train his assistants on *Brady*." Br. at 25. Ignoring the abundant evidence to the contrary, the district attorney argues that he "had a training program in place" that was "quite extensive in order to ensure that his prosecutors properly performed their duties." *Id.* at 20. This Court has made clear, however, that "[a] jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 296-97 (5th Cir. 2005) (internal quotation marks and citations omitted). Because the jury heard

substantial evidence that the district attorney provided no *Brady* training whatsoever, the district attorney's selective recitation of the record must be rejected.

The parties stipulated that "[n]one of the district attorney witnesses recalled any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." RE 24, ¶ UU. Dubelier, Williams, Whittaker and Riehlmann all admitted they could not recall a single training session while in the district attorney's office, nor could they recall ***any*** training regarding *Brady*. TT 58-59 (Williams); 170-71 (Dubelier); 318-19 (Whittaker); 728-29 (Riehlmann). Riehlmann, for example, testified that there was no *Brady* training, either through formal presentations or on-the-job training: "I don't recall that I was ever trained or instructed by anybody about my *Brady* obligations, no." *Id.* at 728. Although the district attorney and two of his former first assistants claimed there were regular training programs, not a single prosecutor from the hundreds who worked under them over the years testified about any training or instruction on *Brady* obligations.

Further, the district attorney admitted his office had no written policy manual until 1987, two years after Thompson's trials. RE 24, ¶ TT. And the content of the eventual manual underscores the office's utter indifference to *Brady*. The entirety of the 1987 manual devoted to *Brady* included just four sentences, and

it flatly misstated the scope and impact of *Brady*, suggesting that the requirement applied only where, "in response to the request of defense attorneys, the Judge orders the State to produce so called *Brady* material--- that is, information in the possession of the State which is exculpatory regarding the defendant." RE 28, § 5.25. Not only did the manual improperly limit *Brady* to instances where a request is made and a judge orders production, but it also incorrectly stated that the legal requirement is limited to "exculpatory" evidence. Since at least 1976, it has been established that *Brady* does not require a request from the defense or order of the court, *United States v. Agurs*, 427 U.S. 97, 110 (1976), and that it is not limited to exculpatory information. *Calley v. Callaway*, 519 F.2d 184, 221 (5th Cir. 1975) (*Brady* obligations extend to impeachment information). The district attorney's designated witness conceded that the paragraph on *Brady* in the 1987 manual was deficient and would not have required production of the crime lab report. TT 914-15.

At most, the district attorney offered testimony of two of his former first assistants that prosecutors in his office received training. But that showing does not come close to satisfying the stringent standard for overturning the jury's verdict, given the ample evidence, viewed in the light most favorable to the verdict, from which the jury was entitled to conclude that in 1985, prosecutors in

the district attorney's office received no *Brady* training at all, whether through formal sessions or on-the-job instruction.

2. The district attorney's failure to provide any *Brady* training cannot be excused because prosecutors went to law school.

Implicitly conceding the lack of any *Brady*-specific training, the district attorney contends that he was entitled "to rely on the basic training that his prosecutors received while in law school, studying for the bar exam, and practicing criminal law." Br. 21. The district attorney cites no Supreme Court authority that even suggests, let alone establishes, such a stunningly broad proposition.

The district attorney correctly notes that in *Burge v. St. Tammany Parish*, 187 F.3d 452, 471-72 (5th Cir. 1999), this Court stated in *dicta* that reliance on law school education, training, experience and ethics concerning *Brady* could be sufficient to defeat an assertion of deliberately indifferent failure to train. Br. 21. But *Burge* did not involve a wholesale failure by a district attorney to train his prosecutors to understand either *Brady* or the importance of *Brady* compliance, but rather a claim that the district attorney failed to implement procedures to "insure the acquisition of *Brady* material from the Sheriff's Office." *Burge*, 187 F.3d at 473. *Burge* offers scant support for the district attorney's theory that as long as prosecutors have graduated from law school and passed the bar examination, he had no obligation to provide any *Brady* training, guidance or supervision.

Many law schools teach at a highly theoretical level, with little emphasis on applying specific substantive principles to the realities of day-to-day practice. For that reason, it strains credulity that lawyers who may or may not have encountered *Brady* during a first-year criminal procedure class would require no additional training to be able to make correct *Brady* decisions in the rough-and-tumble world of state criminal trial practice.

Despite being under constant pressure to "get convictions" (TT 317)—and, no doubt, to secure closure for victims—the prosecutors in the district attorney's office were given neither substantive guidance nor the kind of clear and unequivocal message about *Brady* compliance that would counteract that intense pressure. The jury heard testimony from the district attorney that *Brady* was an evolving and elastic doctrine requiring difficult choices (TT 182), and heard other testimony that Connick compounded those difficulties by imposing a policy that strongly discouraged the production to the defense of police reports and witness statements. *Id.* at 62-64, 375-77, 380 (Williams), TT 533-34 (Dubelier). And Connick admitted his selective-production policy made it crucial for his prosecutors to make proper *Brady* determinations. *Id.* at 852-53. The district attorney's failure to deliver a clear message about the importance of *Brady* obligations or provide substantive guidance is not excused merely because the prosecutors graduated from law school and passed the bar examination.

The district attorney's argument ignores that the failure to provide any training on *Brady* obligations can manifest deliberate indifference and establish causation even if "the proper course is clear" in a particular case, because prosecutors may have "powerful incentives to make the wrong choice." *See Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992). Recent events, unfortunately, bear out the point. *See* Joe Palazzolo, *Attorney General To Ramp Up Training For Prosecutors*, LEGAL TIMES, Apr. 15, 2009 (U.S. Attorney General announces he will institute "supplemental training to federal prosecutors" after indictment against former U.S. Senator Ted Stevens is dismissed because federal prosecutors improperly withheld evidence from the defense).

Moreover, the evidence demonstrates that it was hardly self-evident to the prosecutors that *Brady* required the production of the blood evidence. The district attorney contends that because "the blood evidence was obviously *Brady* material, there would have been no need" for further training on *Brady*. Br. 23; *see also* Defendants' Memorandum in Support of the Renewed Motion for Judgment As Matter After Trial, Dkt. #147, at 9 (post-trial motion stating that "any reasonable prosecutor would have recognized blood evidence as *Brady* material"). Although the defendants have repeatedly conceded that the blood evidence report constituted *Brady* material, the office's own Rule 30(b)(6) designee testified that it was ***not*** *Brady* material unless the prosecutors actually knew Thompson's blood type. *See*

TT 410. Similarly, Glas testified that during the grand jury investigation, Connick and first assistant McElroy tried to persuade him that the report was not *Brady* material if the prosecutors did not know Thompson's blood type. *Id.* at 986.

In those circumstances, reliance on law school background was not an adequate substitute for substantive guidance and a clear message from the top about the importance of *Brady* compliance. And, despite defendants' concession that the blood report clearly constituted *Brady* material, the jury heard abundant evidence showing that key district attorney witnesses ***still*** felt the report did not have to be produced absent prosecutors' actual knowledge about Mr. Thompson's blood type.

3. The district attorney's other attempts to excuse his failure to provide any *Brady* training are similarly flawed.

The district attorney makes several other attempts to excuse his failure to provide any *Brady*-specific training (*see* Br. 20, 22-24), but his arguments in that regard are all similarly flawed.

As an initial matter, the district attorney repeatedly refers to the "duty" or "decision" at issue as "not to further train his prosecutors on the requirements of *Brady*" (*see*, *e.g.*, Br. 23-24), but, as demonstrated above, there was overwhelming evidence from which the jury could have concluded that the district attorney provided ***no*** *Brady*-specific training. Thus, the pertinent issue is not whether the

district attorney was deliberately indifferent for failing to provide "further" training, but whether he was deliberately indifferent for failing to provide ***any*** training on *Brady*. That distinction alone is fatal to the district attorney's claim that the jury could not have found him deliberately indifferent.

Moreover, the district attorney has failed to preserve this argument. Although the district attorney states generically that he "objected to the trial court's jury instructions" (Br. 40 n.2), he objected to the instructions on deliberate indifference only insofar as they: (1) did not instruct on what the district attorney claimed was a requirement of a pattern of similar acts (RE 19, 1013); and (2) supposedly departed from the district attorney's suggested treatment of his contention that Deegan was a "rogue" prosecutor." *Id.* at 1011-12. Accordingly, the district attorney's argument on this point must fail unless the district court plainly erred. *United States v. Fields*, 483 F.3d 313, 353 (5th Cir. 2007).

The district court did not err. The Supreme Court has made clear that it is entirely proper to allow a jury to "***infer*** the existence" of deliberate indifference "from the fact that the risk of harm is ***obvious***." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (emphasis added). In this case, the district attorney has admitted knowing that: (1) his prosecutors confronted difficult decisions involving *Brady*; (2) *Brady* involved many gray areas; and (3) if prosecutors made wrong *Brady* decisions, constitutional harm would result. *Id.* at 851-53. The district attorney further

admitted that: (1) there were at least four cases leading to published opinions of the Louisiana Supreme Court finding *Brady* violations by prosecutors in his office (TT 863-64); and (2) *Brady* violations had occurred in other cases not described in published opinions because most *Brady* violations never lead to published opinions. *Id*. at 863-65. The district attorney's contentions that there was "no evidence" that he knew his prosecutors' understanding of *Brady* was deficient, and "no evidence" that he made a "conscious or deliberate choice" not to provide training on *Brady*, ignore the ample record evidence to the contrary from which the jury could properly have inferred that the risk of harm was not only obvious, but also that the district attorney—by his own admission—was actually aware of that risk.

The district attorney's position is not only at odds with the facts, but also with the law. The district attorney mistakenly relies upon *Farmer v. Brennan*, 511 U.S. 825 (1994), and other cases involving the Eighth Amendment. *See* Br. 23-24 (citing cases). But those cases are inapposite. In *Farmer*, the Supreme Court imposed a significant burden of proof in § 1983 actions brought in the Eighth Amendment context, holding that a plaintiff must show that from a subjective standpoint, the prison official must actually be aware of the risk to the inmate. That additional requirement is imposed in the Eighth Amendment context because the plain text of the Amendment prohibits only cruel and unusual ***punishment***, so

that to prove a § 1983 claim based on a violation of that constitutional provision, the claimant must prove that ***punishment*** was inflicted. *Farmer*, 511 U.S. at 841. Accordingly, "deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of ***punishment*** carry liability." *Id.* (emphasis added).

But the Supreme Court has expressly distinguished § 1983 claims under *Canton*, like Thompson's, that do not allege Eighth Amendment violations:

> Canton's objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases. Section 1983, which merely provides a cause of action, 'contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.' And while deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of ***punishment*** carry liability, the 'term was used in the Canton case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents,' a purpose the Canton Court found satisfied by a test permitting liability when a municipality disregards 'obvious' needs. Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a government official.

Id. at 841 (citations omitted and emphasis added). Accordingly, the Supreme Court has expressly rejected the notion of a "subjective intent" requirement for municipal liability outside the distinguishable Eighth Amendment context. For

that reason, too, the district attorney's attempt to evade responsibility for his failure to train must be rejected.

C. The Evidence Fully Supports The Jury's Finding That The District Attorney's Deliberately Indifferent Failure To Train Substantially Caused The Violation Of Thompson's Constitutional Rights.

The Supreme Court requires that a § 1983 claimant prove that the deliberately indifferent failure to train, monitor and supervise was the substantial cause of the constitutional violation. *Bryan County*, 520 U.S. at 404. As the district attorney correctly notes (Br. 34-35), courts have phrased the causation requirement in various ways. Most relevant in the context of this failure-to-train case, the Supreme Court has articulated the key question as: "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Canton*, 489 U.S. at 391; *see also Hinojosa v. Butler*, 547 F.3d 285, 297 (5th Cir. 2008). In this case, the jury had ample evidence from which to answer that question in the affirmative.

The district attorney admitted he knew his prosecutors would be confronted with difficult *Brady* decisions and it would be important for his prosecutors to understand and follow *Brady* and its progeny in order to avoid imposing constitutional harm on criminal defendants. TT 851-52. Yet, none of the witnesses who worked under former district attorney Connick could recall any

training sessions involving *Brady*, RE 24, ¶ UU; TT 58-59, 170-71, 318-19, 728-29. As a result of the complete lack of training, it is not surprising that the prosecutors involved in Thompson's trials stated that they were following the office's policy when they did not produce the police reports to the defense in the murder case. TT 62-64, 67, 375-77, 380 (Williams); TT 533-44 (Dubelier). It is also not surprising that at least four prosecutors—Dubelier, Williams, Whittaker and Deegan—knew about the blood evidence yet each failed to disclose it. RE 24, ¶ L.

When Dubelier responded to Thompson's discovery request in the armed robbery case, he saw the screening action form prepared by Whittaker noting that a bloody swatch was cut from the pant leg of Jay LaGarde; yet, even though Dubelier signed the written discovery response, he took no steps to produce the evidence. TT 330. The jury was certainly free to infer that Dubelier, the special prosecutor in charge of both cases, knew but chose not to reveal there was blood evidence. Even Williams admitted that if there were a decision by the prosecutors not to use the blood evidence, it must have been made by Dubelier, who was firmly in charge. TT at 104.

The evidence was even more compelling as to Williams' and Whittaker's knowledge of the blood evidence. The crime lab report was addressed to Whittaker, who admitted receiving it and put it on Williams' desk just two days

before the carjacking trial, in which Williams was the lead prosecutor. TT 330. Williams admitted he knew about the blood evidence, and that he deliberately stayed away from talking about blood in his questioning of witnesses and argument at the armed robbery trial. TT 101-02. Based upon that evidence, the jury was free to infer that both Whittaker and Williams received the crime lab report, but did not produce it.

Nonetheless, the district attorney insists "[t]here is no evidence but that the *Brady* violation was caused by the criminal and unethical act of a rogue prosecutor, Gerry Deegan." Br. 35 (emphasis added). As demonstrated above, however, that assertion is contradicted by the record. Viewed in the light most favorable to the jury's verdict, the evidence was more than sufficient for the jury to reject defendants' "rogue prosecutor" theory and conclude that the district attorney's failure to provide any training about what *Brady* requires was the substantial cause or "moving force" behind Thompson's injury. Based on the evidence, the jury could find that Deegan did not act alone, that he did not acknowledge a knowing *Brady* violation, and that there was a pattern of *Brady* violations by the prosecutors in this case which reflected a lack of training.

The district attorney's argument ignores the hierarchy of the prosecution team. Dubelier was the third-highest ranking prosecutor in the office at the time. TT 494. Williams was a senior homicide prosecutor. *Id.* at 56, 99. Whittaker was

a screener. *Id.* at 314. Deegan was a "junior assistant," making him the most junior member of the team. *Id.* at 99, 340. Particularly given the evidence about the other three prosecutors' awareness of blood evidence, the jury properly rejected the notion that the most junior person made a unilateral decision not to produce evidence in a case that was part of the strategy for the high-profile Liuzza murder prosecution.

The non-production of additional *Brady* evidence by Dubelier and Williams in the murder case further supports the jury's finding that the lack of training on *Brady* in the district attorney's office substantially caused the *Brady* violation. For example, Dubelier and Williams had statements from witnesses and police reports indicating that only one perpetrator was involved in the murder; a description of Liuzza's murderer that was inconsistent with Thompson's appearance but fully consistent with Freeman's; and statements showing that Freeman had told conflicting stories. RE 24, ¶¶ HH, II; RE 31. Consistent with the policy established by the district attorney that strongly discouraged the production to the defense of police reports and witness statements, TT 852, Williams and Dubelier did not produce the documents. TT 62-63, 174-75. Dubelier and Williams also failed to produce evidence that showed a key witness's interest in a reward. TT 144-47; RE 24, ¶¶ HH, KK.

The number of prosecutors who knew of the blood evidence yet failed to produce it, and the treatment by Dubelier and Williams of the *Brady* material in the murder case, demonstrate that Deegan was not a rogue prosecutor; instead, all four prosecutors in the case were involved in multiple *Brady* violations in Thompson's case. Coupled with the district attorney's policy of non-production and the testimony by prosecutors that the blood evidence was not *Brady* evidence in the absence of knowledge of Thompson's blood type, the evidence demonstrates that the jury properly concluded that: (1) the prosecutors in the district attorney's office were not adequately trained and supervised regarding *Brady* compliance; (2) the failure to train and supervise was sufficiently pervasive as to further reflect the lack of training and supervision; and (3) the failure to train and supervise was a proximate cause of—or "moving force" behind—the violation of Thompson's constitutional rights.

1. The jury was free to reject the district attorney's "rogue prosecutor" theory.

The district attorney contends that Riehlmann's account of Deegan's confession, which was offered by the district attorney during his case-in-chief, requires the jury verdict for Thompson to be overturned. Br. 35. But viewed in the light most favorable to that verdict, Riehlmann's testimony does not change the outcome.

As an initial matter, the jury was free to reject Riehlmann's account of Deegan's statement in its entirety. In addition, Riehlmann was hardly clear about what Deegan allegedly told him years before the civil trial. Riehlmann repeatedly explained that "I don't remember exactly what [Deegan] said." TT 731; *see also* TT 717, 729, & 730. Riehlmann testified that "Gerry told me that he had failed to turn over stuff that ***might have been*** exculpatory . . . ." *Id.* at 718 (emphasis added). And Riehlmann conceded that he could not say whether Dubelier, Williams or other prosecutors were involved in the non-production of the evidence. *Id.* at 729-30; *id.* at 717 ("He may have said that someone else was involved, but I don't recall.").

As noted by the panel, there are any number of reasonable possibilities about what Deegan was thinking at the time of his alleged statement to Riehlmann, if the testimony is credited at all. Just by way of example, Deegan could have had serious misgivings about not producing the report, even if he had been instructed by the other prosecutors or otherwise believed that they were not required to produce it unless they knew Thompson's blood type. Riehlmann's uncertainly about Deegan's alleged statement certainly does not foreclose that possibility or others explained by the panel.

Drawing all inferences in favor of the verdict, a reasonable jury easily could have believed the *Brady* violation was not solely attributable to Deegan's actions,

but instead was the result of the district attorney's failure to offer any *Brady*-specific training, monitoring or supervision to his prosecutors.

2. The district attorney's "rogue prosecutor" theory ignores the non-production of other evidence.

The district attorney's theory that the violations of Thompson's constitutional rights were solely attributable to Deegan also does not account for the fact that police reports and other evidence were not turned over by Dubelier and Williams in the murder prosecution, with which Deegan was not involved. *See supra* at pp. 42-43. Instead, the district attorney takes issue with the introduction of that evidence, arguing it is "irrelevant" to Thompson's § 1983 claims. Br. 36-37. That argument fails for at least two reasons.

First, the district attorney did not object to the evidence on that basis at trial. Nor did he object to: (1) instructions informing the jury that in evaluating the issue of deliberate indifference, "you are not limited to the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify at the murder trial" but "may consider all of the evidence presented during this trial" (TT 1099); or (2) the special verdict question asking the jury whether the *Brady* violation in the armed robbery case "or any infringements of John Thompson's rights in the murder trial" was substantially caused by the district attorney's deliberately indifferent failure to train (*id.* at 1116). Any current complaint by the district

attorney about the introduction of that evidence is reviewable only for plain error. *See Fields*, 483 F.3d at 353.

Second, the district court did not err. The district attorney cites no authority for the proposition that evidence of alleged *Brady* violations involving the same prosecutors, the same § 1983 claimant, and the same time frame would somehow be "irrelevant" to the sole issue in this case: whether the district attorney's deliberately indifferent failure to train, monitor and supervise his prosecutors on their *Brady* obligations was the "moving force" behind the violation of Thompson's constitutional rights. That is particularly true given that the district attorney's own theory was that Deegan acted alone in withholding the exculpatory blood evidence. The evidence about which the district attorney now complains demonstrates that the senior members of the Thompson prosecution team failed to produce the blood evidence as well as other favorable evidence.

Moreover, the district attorney's argument rests on a series of mischaracterizations. First, the district attorney contends that "[n]ot a single court" that presided over Thompson's petitions for post-conviction relief following the discovery of the blood evidence "determined these alleged violations to, in fact, be *Brady* violations." Br. 37. But the district attorney neglects to mention that the state appellate court that reversed Thompson's murder conviction had no ***need*** to make any such findings because it held that the abridgement of Thompson's right

to testify in his own defense in the murder trial—which was caused by the non-production of blood evidence and invalid robbery conviction—was structural error requiring reversal of the murder conviction. *See State v. Thompson*, 825 So. 2d at 557 (citing *State v. Hampton*, 818 So. 2d 720 (La. 2002) (holding that denial of right to testify is structural, not harmless)). It also disregards that the federal courts which reviewed Thompson's convictions in federal habeas corpus proceedings, never saw the totality of withheld evidence.

Third, the district attorney asserts that the district court's jury charge "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." Br. 37 (emphasis added). In actuality, however, the district court instructed the jury—based upon the district attorney's own concessions—as follows:

> In this case, I have determined that the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify in the murder case violated his constitutional rights as a matter of law. With regard to the non-production of the blood evidence, therefore, the only issue that you need to decide concerns whether a policy, practice, or custom of the district attorney's office, or a deliberately indifferent failure to train the office's prosecutors proximately caused the non-production of the evidence.

RE 18, 22.

Contrary to the district attorney's assertion, the district court did not instruct the jury that "only one" *Brady* violation was proven, but simply (and without objection) that it need not consider whether the withholding of the blood evidence amounted to a *Brady* violation. What is more, as discussed above, the district court's instructions made clear the jury ***could*** consider the evidence of other violations of Thompson's rights in making its findings both on deliberate indifference and causation—with no objection from the district attorney. In all events, the complained-of evidence was at most cumulative, as there was ample other evidence to support the jury's verdict.

D. The District Court Provided Proper Instructions Concerning Deliberate Indifference.

The district attorney contends the district court's jury instructions 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." Br. 38-42. The district attorney's argument fails, however, because it ignores the standard of review, the record and controlling Supreme Court precedent.

Standard of Review: "When called upon to review the adequacy of jury instructions, an appellate court must examine the instructions as a whole, rather than merely viewing the failure to give any one instruction independently." *United*

States v. Cronn, 717 F.2d 164, 170 (5th Cir. 1983). When a party does not object to an instruction, "his claim is reviewed for plain error" and he must prove that "the error affected his substantial rights." *Fields*, 483 F.3d at 353.

The district court's instructions were faithful to the pertinent requirements for deliberate indifference. The district court explained to the jury that liability under § 1983 "must have been caused by an official policy, practice or custom." RE 18, at 23. Consistent with *Canton* and *Bryan County*, the court instructed that Thompson could satisfy that requirement "where an official policymaker has failed to act when the need is so obvious and the failure to act so likely to result in the very violation that occurred in this case that the failure to act rises to deliberate indifference." *Id.*

Contrary to the district attorney's assertions (Br. 39-42), the district court then provided a thorough definition of deliberate indifference. RE 18, 25-27. Consistent with controlling precedent, the court explained that Thompson was required to prove that, among the other elements of his § 1983 claim, "the District Attorney's failure to adequately train, monitor or supervise amounted to deliberate indifference to the fact that inaction would obviously result in a constitutional violation." *Id.* at 25. The district court specifically followed the Supreme Court's ruling in *Bryan County* by instructing the jury that "[d]eliberate indifference requires a showing of more than negligence or even gross negligence" (*id*. at 26),

and that the deliberate indifference must be to the "fact that inaction would ***obviously result*** in a constitutional violation." *Id.* at 25 (emphasis added).

Moreover, explaining that the district attorney could ***not*** be held liable under *respondeat superior* for the rogue acts of a prosecutor, the district court informed the jury that: (1) "[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in a particular prosecutor" (*id.* at 26); and (2) the situation at hand must have involved a difficult choice (*id.*), and that liability could attach only if it was "more likely than not, the *Brady* material would have been produced if the prosecutors involved . . . had been properly trained." *Id.* at 29. Consistent with *Canton* and *Walker*, the court further instructed the jury that it must find:

> First: the District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to an accused.
>
> Second: the situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed.
>
> Third: the wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights.

RE 18, 26-27. Those instructions were fully in accord with applicable law. The district attorney's current objections simply ignore the reality of the actual instructions.

Moreover, the district court's handling of the jury's question (*see* Br. 40) was entirely proper.[2] Contrary to the district attorney's arguments now, defense counsel specifically encouraged the district court to answer the jury's question with instruction provided by the court:

> Mr. Aaron: ***So I thought your jury charge hit it, the way you told them.*** It's okay, this is what you said, you said, "Deliberate indifference requires - -
>
> The Court: Where are you reading from?
>
> Mr. Aaron: Page 26, Judge. 'Deliberate indifference requires a showing of more than negligence or even gross negligence for a liability to attach because of a failure to train, the fault must be in the training program itself, not in a particular prosecutor.'
>
> Anyway, then you go into it. And I guess maybe they are getting confused because remember that thing said train, monitor, or supervise, and so they are focusing on monitoring and they are saying, Well, maybe he wasn't watching them carefully enough. But I think it has to be more than just watching them carefully. It has to be, you know, if not completely intentional, I think it should be

[2] The district attorney and his *amici* mistakenly assume the jurors changed their decision. Br. 41. Orleans Parish Assistant District Attorneys' *Amicus* Brief at 30-31. There is no basis to assume that the correction marked on the verdict form was to address anything other than a clerical mistake of erroneously checking the wrong box initially.

> either intentional or reckless disregard, he just didn't care about it. Yeah.

TT 1113 (emphasis added). Adopting the suggestion of the district attorney's counsel, the district court advised the jury that "[d]eliberate indifference does not necessarily mean intentional but does require more than mere negligence or even gross negligence." *Id.* at 1115.

The district attorney finds fault with the district court's jury instructions for not including an "intent" requirement (Br. 42-43), but that argument ignores the facts that: (1) the district attorney's own proposed jury instructions did not include an intent requirement (RE 25, 14-16); (2) the district attorney did not object to the jury charge on those grounds (RE 19); and, as previously noted, (3) defense counsel conceded that culpability need not be intentional. TT 1115. The district attorney cannot now complain that the district court mishandled the jury instructions when it followed precisely the approach advocated by defense counsel. *See United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998) (finding no error when judge charged jury as party requested).

In all events, the district court's instructions were not erroneous, much less plainly so. The district attorney's argument that deliberate indifference requires a showing of "intent" would effectively eliminate the word "indifference" from the culpability standard altogether. This Court has recognized as much by describing

deliberate indifference as a "***lesser*** form of intent." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 n.7 (5th Cir. 1994) (en banc) (citation omitted and emphasis added). Consistent with that teaching, the district court instructed the jury that deliberate indifference "requires a showing of more than negligence *or* ***even gross negligence***." RE 18, 26 (emphasis added). Several cases cited by the district attorney stand for the same proposition. *See* Br. 41-42. In sum, the district court's instructions properly articulated the controlling law and, taken as a whole, provided the jury with guidance for understanding the level of conscious appreciation that is necessary to impose liability for deliberate indifference. *See Cronn*, 717 F.2d at 170.

II. THE DISTRICT ATTORNEY'S REMAINING CHALLENGES TO THE JUDGMENT LACK MERIT.[3]

A. This Action Is Not Time-Barred.

It is undisputed that Thompson filed this action seeking damages arising from his fourteen years of wrongful imprisonment on death row and near execution within one year of the date his conviction for murder was vacated. Nonetheless, the district attorney argues Thompson's action is untimely because it should have

[3] Thompson does not object to Connick's request (Br. 50-52) that the judgment be amended to exclude the names of Harry Connick, Eric Dubelier, and James Williams because they no longer work for the district attorney's office and therefore their official capacities are non-existent.

been filed within one year of the 1999 dismissal of the armed robbery charges, but before the murder conviction was vacated in 2002. Br. 44-47.

Standard of Review: The Court reviews the denial of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-movant, which in this case is Thompson. *See United States v. Corpus*, 491 F.3d 205, 209 (5th Cir. 2007).

The district attorney's prescription argument conflicts with the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Court held that a § 1983 action seeking damages associated with a criminal conviction cannot be brought until that conviction is reversed or vacated. *Id.* at 486-87. Here, Thompson seeks damages arising from his murder conviction and death sentence. The non-production of the blood evidence not only affected Thompson's robbery case, but it precluded him from testifying in the murder case and precluded him from rebutting the testimony in the penalty phase that he was an armed robber. *See* RE 24, ¶ G (stipulating that prosecutors "decided to use the armed robbery charge to the State's advantage in the murder case" to "preclude Mr. Thompson from taking the witness stand in his own defense at the murder trial" and to "obtain a death sentence"). The non-production of the blood evidence was a constitutional violation in ***both*** cases. The murder conviction was not vacated until July 17, 2002. Under *Heck*, this action seeking damages for Thompson's fourteen years on

death row and near-execution in connection with the murder charge could ***not*** have been filed until after the state court vacated the murder conviction on July 17, 2002.

The district attorney resists that conclusion by arguing that the attempted robbery of the LaGardes and the murder of Ray Liuzza were "separate" and "unrelated" events. (Br. 47.) But as discussed above, the parties stipulated that the armed robbery conviction was part of the state's strategy for the murder trial, and the reason Thompson chose not to testify at that trial. RE 24, ¶ G. The state not only failed to produce the blood evidence in the robbery case, but also failed to produce it in the murder case.

Indeed, the state appellate court held that Thompson "was denied his right to testify in his own behalf [in the murder trial] based upon the improper actions of the State in the [armed robbery] case." *State v. Thompson*, 825 So. 2d at 557. Because Thompson's § 1983 action necessarily turned on the invalidity of his murder conviction, *Heck* ***prohibited*** Thompson from filing this action until his murder conviction was overturned on July 17, 2002.

B. The District Court Did Not Abuse Its Discretion In Its Pre-trial Evidentiary Ruling.

The district attorney contends the district court "erred" in precluding him from introducing evidence of Thompson's guilt "to show that it was the existence

of such evidence that led to his murder conviction" and "not any *Brady* violation by [the] prosecutors." Br. 47-50.

Standard of Review: The Court will not reverse a district court's evidentiary ruling unless it has clearly abused its discretion. *McNeese v. Reading Bates Drilling Co.*, 749 F.2d 270, 274 (5th Cir. 1985).

Completely disregarding the swift not-guilty verdict in the murder retrial, the district attorney made it clear during pre-trial proceedings that he intended to re-try the murder case in the civil action. Thompson therefore filed a motion requesting the court to "issue an Order: (1) precluding defendants from arguing that Thompson was guilty of the murder of Liuzza; and (2) directing that evidence "***bearing solely on Mr. Thompson's guilt or innocence***" be excluded. *See* Plaintiff's Motion in Limine to Preclude Defendants' Attempts to Re-Litigate Guilt or Innocence in the Murder Case, Dkt. #97, p.5 (emphasis added). The district attorney's response failed to cite any authority for the proposition that he had the right to re-litigate the not-guilty verdict, or to identify any specific exhibit or testimony that he intended to offer. *Id.* at 99.

The district court granted Thompson's motion, noting that "[t]he issue of the plaintiff's guilt has already been decided at the second murder trial." RE 11, 2. The district court's ruling did not preclude evidence offered for a different purpose, such as the police reports Thompson offered not to "prove his innocence," as the

district attorney asserts (Br. 49), but to show that other evidence besides the blood evidence had been withheld by prosecutors. At no point did the district attorney offer specific proof for another purpose or seek to clarify whether the ruling would preclude the introduction of such evidence.

In all events, the district attorney's office is collaterally estopped from contesting the jury's not guilty verdict in the murder retrial. Collateral estoppel applies where: (1) the prior decision resulted in a judgment on the merits; (2) the same fact issue was actually litigated; and (3) the disposition of that issue was necessary to the outcome of the prior litigation. *American Home Assur. Co. v. Chevron, USA, Inc.*, 400 F.3d 265, 272 (5th Cir. 2005). Those requirements are satisfied here because: (1) Thompson's re-trial resulted in a judgment on the merits; (2) the same fact issue—Thompson's "guilt"—was actually litigated, and (3) the disposition of Thompson's "guilt" was necessary to the prior litigation. Therefore, collateral estoppel precludes relitigating these issues.

In addition, the state court determined as a matter of law that the withholding of the blood evidence and consequential infringement of Thompson's right to testify caused Thompson's wrongful conviction. *State v. Thompson*, 825 So. 2d at 557. Under *Heck*, Thompson's cause of action with regard to the murder conviction arose when that reversal took place. 512 U.S. at 486-87, 489. Given that the state court reversal established as a matter of law the causal connection

between the withholding of the blood evidence and Thompson's 1985 conviction, relitigating issues of guilt was unnecessary and irrelevant.

Finally, the specific evidence identified by the district attorney (Br. 48) was: (1) actually presented to the jury during proceedings in the district court (*see*, *e.g.*, Ex. 50 (Freeman's testimony from the 1985 trial)); (2) irrelevant to the issue of guilt in the murder case (*e.g.*, the number of times Liuzza was shot); or (3) not in dispute in the murder case and explained by the testimony that was suppressed by the invalid armed robbery conviction.[4] The trial of this case properly examined the relevant issues. The district court did not abuse its discretion.

C. The Jury's Damages Award Was Not Clearly Erroneous.

The district attorney argues that the jury's damages award was excessive (Br. 50).

Standard of Review: "An assessment of damages is not reversed unless it is clearly erroneous." *Ham Marine, Inc. v. Dresser Indus.,* 72 F.3d 454, 462 (5th

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[4] Thompson acknowledged in his trial testimony during the murder re-trial that he bought the gun and ring from Freeman and re-sold them. He also acknowledged writing the letter to "Big Daddy Red," but explained his reasons for writing it. Over Thompson's objection in the murder re-trial, the prosecutors were permitted to read to the jury Freeman's 1985 trial testimony because Freeman had been killed during an armed robbery attempt. Although the state trial court overruled Thompson's confrontation clause objection and permitted the state to read Freeman's former testimony, it did permit Thompson to read to the jury questions that could have been asked of Freeman if the *Brady* impeachment material had been produced in 1985.

Cir. 1995). Only where the award of damages is so large "as to shock the judicial conscience, so gross or inordinately large as to be contrary to right reason, so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive" will this Court reverse for excessiveness. *Id.* (citation omitted). Where, as here, the district court has already rejected a defendant's excessiveness argument, the scope of this Court's review is even more limited. *Id.*

Thompson was wrongfully imprisoned for eighteen years, fourteen of which were spent on death row. During those fourteen years, Thompson lived in solitary confinement, for 23 hours a day, seven days a week, in an un-air-conditioned, six-by-nine foot cell. TT 270-71. He witnessed inmates being raped, and lived with commotions by inmates who threw human waste, urine and bleach, and who frequently needed to be subdued with pepper spray and medication. *Id.* at 274-75, 278.

When Thompson was sent to prison in 1985, his sons, John Jr. and Dedrick, were four and six years old. TT 223. When Thompson was released, his sons were young men of 22 and 24 years of age. Thompson testified that the convictions hit him "hard" because he realized he "wasn't going to be there for my children." *Id.* at 255. Thompson also testified that in prison, he wasn't able to be the kind of father that he wanted to be for his sons because he "wasn't able to

participate in the things a father and son [are] supposed to participate in." *Id.* at 282.

Thompson's final execution date was set for the day before his youngest son's high school graduation. *Id.* at 284. Thompson testified he asked his attorneys to try to move the execution date because he "didn't want to take a happy moment in my son's life and give him something to remember the rest of his life, that his father was executed the day before he graduated." *Id.* When Thompson's attorneys informed him they could not move the date, he asked them to attend his son's graduation, because "John was a smart little boy so I wanted, I was hoping that I could convince one of y'all to help him to go through college or get him into college. I just asked y'all to be there for him for me." *Id.* at 285. Shortly afterward, the blood evidence was discovered and Thompson's execution was stayed.

The $14 million the jury awarded for Thompson's eighteen years of wrongful imprisonment, fourteen years on death row, and many near-executions is not so large as to "shock the judicial conscience" or so exaggerated as to indicate bias or some other improper motive.[5] Based on the evidence and applicable standard of review, the jury's award of damages was not clearly erroneous.

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[5] The district attorney's *amicus* expresses concern about the potential impact of the monetary judgment on the district attorney's office. *See* Br. of

D. The District Court Did Not Abuse Its Discretion In Awarding Attorneys' Fees.

The district attorney acknowledges the district court awarded fees based on only 50% of the requested rates, but challenges the district court's upward adjustment of that amount to 75%. Br. 52-53.

Standard of Review: This Court reviews the district court's adjustment of the lodestar for abuse of discretion. *Migis v. Pearle Vision*, 135 F.3d 1041, 1047 (5th Cir. 1998).

The district court found the amount of attorneys' fees requested by Thompson's attorneys was not unreasonable or excessive. RE 6, 5-7. The district court then determined that the basic local rate should be 50% of the requested rate, and that an upward adjustment of 75% was appropriate based (among other things) on the "special skill required to win this case." *Id.* at 7-9. The district attorney takes issue with that finding (Br. at 53), but otherwise does not meaningfully challenge the district court's determination of the lodestar, which cannot be said to

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LDAD, 7. This argument both ignores the devastating impact of the injury to Thompson and the district attorney's deliberately indifferent failure to fulfill his constitutional obligation. Moreover, although Louisiana law requires district attorneys to maintain liability insurance (La. 42:1441.2(B)), Connick chose to ignore the statute. Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, Dkt. #44, p. 24 (citing Connick Depo. at 236-37).

be in clear error, or the adjustment, which cannot be said to be an abuse of discretion.

CONCLUSION

For the foregoing reasons, the district court's judgment on the jury verdict should be affirmed.

Respectfully submitted,

Allyson N. Ho
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4200
Houston, Texas 77002
713.890.5000 Telephone
713.890.5001 Facsimile

Michael L. Banks
J. Gordon Cooney, Jr.
Amanda M. Bruno
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
215.963.5000 Telephone
215.963.5001 Facsimile

Robert S. Glass
GLASS & REED
530 Natchez Street
New Orleans, Louisiana 70130
504.581.9083 Telephone
504.527.6156 Facsimile

ATTORNEYS FOR PLAINTIFF-APPELLEE

CERTIFICATE OF SERVICE

I certify that on May 5, 2009, twenty (20) copies of the foregoing Brief of Plaintiff-Appellee John Thompson have been filed with this Court by United Parcel Service and one copy has been serviced on all counsel of record via United Parcel Service overnight.

_____
J. Gordon Cooney, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and 5th Cir. R. 32.3, I certify that this brief complies with the applicable type-volume word count option limitations. This certificate was prepared in reliance on the word count of Microsoft Office Word used to prepare this brief.

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