No. 07-30443

In the United States Court of Appeals for the Fifth Circuit

JOHN THOMPSON

Plaintiff-Appellee

versus

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

Defendants-Appellants

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

En Banc Brief for *Amici Curiae* Orleans Parish Assistant District Attorneys in Support of Appellants

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STATEMENT OF IDENTITY OF *AMICI CURIAE*

The undersigned counsel state that this prospective *Amici Curiae* Brief is filed with this Honorable Court on behalf of the seventy-eight (78, as of filing) Assistant District Attorneys who daily represent the interests of the State of Louisiana in the various state and federal courts of Orleans Parish.

These seventy-eight *amici* have a profound interest in the continuing viability of the District Attorney's Office as a cornerstone of the maintenance of peace and order in the City of New Orleans. Based on the arguments made in Brief, *amici* contend that the verdict against the Orleans Parish District Attorney's Office is significantly flawed as a matter of law and that an opinion from this Court affirming the verdict would set an ominous precedent affecting municipal defendants in future civil rights actions. As such, *amici* submit that their interest is clear.

The source of *Amici*'s authority to file this brief is rooted in Federal Rule of Appellate Procedure 29 and this Court's Local Rule 29, which states that *amici* may file a brief by leave of court or with the consent of all parties. To that end, a Motion for Leave accompanies this brief, seeking the permission of this Honorable Court to file a brief for the reasons stated therein, which *amici* represent satisfy the criteria set out in Fed. R. App. P. 29(b).

Finally, the interests of the following Assistant District Attorneys are

represented by this brief:

Graymond Martin
Val Solino
Donna Andrieu
Andrew Pickett
Graham Bosworth
Alyson Graugnard
Stephen Hebert
George Bourgeois
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Brian Ebarb
Tanya Faia
Mary Catherine Glass
Kevin P. Guillory
Heather Holland
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Erica M. Lotz
Rachel Luck
Abigail MacDonald
Joseph Meyer
Margaret Parker
Eusi Phillips
David Pipes
Myles D. Ranier
Keith Sanchez
Nisha Sandhu
Seth Shute
Oliver Smith
Gregory Thompson
Angel Varnado

STATEMENT OF THE CASE

I. Criminal Proceedings 1985-2003

_____Appellee John Thompson (hereinafter "Thompson") was arrested and charged with the first-degree murder of Raymond T. Liuzza, Jr. ("Liuzza") on January 17, 1985. Subsequent to this arrest, Thompson was also charged with the unrelated armed robbery of Jay LaGarde, Marie LaGarde and Michael LaGarde. Thompson was tried for the armed robbery on April 11-12, 1985 by Orleans Parish Assistant District Attorneys James Williams ("Williams") and Gerry Deegan ("Deegan"). The jury returned a verdict of guilty to attempted armed robbery, and Thompson was sentenced to forty-nine and one-half years in prison.

From May 6-8, 1985, Williams and special prosecutor Eric Dubelier ("Dubelier") tried Thompson for the murder of Liuzza. At trial, a witness testified that Thompson shot Liuzza. Another witness testified that Thompson made self-incriminating statements about the Liuzza murder and that the witness sold the murder weapon at Thompson's request. Thompson elected not to take the stand in his defense due to his attempted armed robbery conviction. The jury convicted Thompson of first-degree murder, and Thompson was sentenced to death.

In the fourteen years from 1985 to 1999 Thompson exhausted all of his appeals for the first-degree murder conviction, and his execution was set for May 20, 1999.

In late April, 1999, an investigator working on Thompson's behalf obtained a microfiche copy of a New Orleans Police Department crime lab report containing the results of a blood typing analysis performed in connection with the armed robbery case. The perpetrator had left blood evidence at the scene, and the lab report showed it to be Type B. After the lab report's discovery, Thompson's blood was tested and determined to be Type O, indicating that he could not have been the perpetrator.

This information was presented to Connick, who immediately moved for a stay of execution. Connick later moved to vacate the armed robbery conviction outright and did not retry Thompson on that charge. Around the same time, Michael Riehlmann, a former Assistant District Attorney under Connick, disclosed that Deegan had five years earlier confessed to him that he had intentionally withheld the lab report that would have exculpated Thompson from the armed robbery. Shortly after having made the confession, Deegan died of cancer. Connick summoned the grand jury to investigate possible obstruction of justice and malfeasance charges against those involved in the Thompson case but ultimately concluded that there was insufficient evidence to substantiate charges against anyone but Deegan.

Thompson filed an application for state post-conviction relief on his murder conviction in Orleans Parish Criminal District Court and, in 2001, the district court resentenced Thompson to life in prison. In 2002 the Louisiana Court of Appeal for

the Fourth Circuit vacated Thompson's murder conviction and held that the tainted armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his defense at his 1985 murder trial. In 2003 the State retried Thompson for the Liuzza murder and a jury found him not guilty.

II. Civil Proceedings 2003-2009

On July 16, 2003, Thompson filed a civil action under state and federal law against the Orleans Parish District Attorney's Office; Connick, Williams, Dubelier, and Eddie Jordan in their official capacities; and Connick in his individual capacity (hereinafter "Defendants"). Ultimately, this appeal arises from a jury verdict finding the Orleans Parish District Attorney's Office and the remaining Defendants in their official capacities liable under a 42 U.S.C. § 1983 failure to train claim for the eighteen years Thompson spent in prison, fourteen of which were served on death row.

LAW AND ARGUMENT

I. Thompson failed to show that deliberate action attributable to the District Attorney's Office directly caused the violation of Thompson's federal rights, as required by Monell v. Department of Social Services.

The district court erred when it denied Connick's motion for judgment as a matter of law because Thompson failed to show that deliberate action attributable to the District Attorney's Office directly caused the violation of Thompson's federal

rights, as required by Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). No reasonable jury, properly applying the facts to the law, could have arrived at the verdict in this case.

A. Thompson did not prove deliberate indifference.

Title 42 U.S.C. § 1983 provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, or any State . . ., subjects, or causes to be subjected, any citizen of the United States. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. In Monell v. Dep't of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court held that a municipality is a "person" that can be liable under § 1983. Id. at 690-91, 98 S. Ct. at 2035-36. The Court also established that a municipality cannot be held liable for the constitutional violations of municipal employees on a theory of *respondeat superior*. Id.; See also, Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626 (1997), citing City of Oklahoma City v. Tuttle, 471 U.S. 808, 818, 105 S. Ct. 2427, 2433, 85 L. Ed. 2d 791 (1985)(plurality opinion); Id. at 828, 105 S. Ct. at 2438 (opinion of BRENNAN, J.); Pembaur v. City of Cincinnati, 475 U.S. 469, 478-79, 106 S. Ct. 1292, 1297-98, 89 L Ed. 2d 452 (1986); St. Louis v. Praprotnik, 485 U.S. 112, 122, 108 S. Ct. 915, 923,

99 L. Ed. 2d 107 (1988)(plurality opinion); Id. at 137, 108 S. Ct. at 931 (opinion of BRENNAN, J.); City of Canton v. Harris, 489 U.S. 378, 392, 109 S. Ct. 1197, 1206, 103 L. Ed. 2d 412 (1989). Finally, the Court concluded that a municipality may not be found liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell, 436 U.S. at 691, 98 S. Ct. at 2036.

In Monell, the Supreme Court discussed the circumstances under which municipal liability could be imposed and held that only deprivations caused by municipal "custom" or "policy" could lead to municipal liability. Id. at 694, 98 S. Ct. at 2037-38. The Court held that the policy at issue in Monell was "unquestionably" "the moving force of the constitutional violation found by the District Court," and that it therefore had "no occasion to address . . . what the full contours of municipal liability may be." Id. at 694-95, 98 S. Ct. at 2038. Subsequent decisions of the Court have reaffirmed that the municipal policy must be "the moving force of the constitutional violation." See, e.g., Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981). Specifically, a § 1983 plaintiff must demonstrate that, "[T]hrough its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a causal link between the municipal action and the deprivation of federal rights." Brown, 520 U.S. at 404,

117 S. Ct. at 1388. The Court has referred to the culpability and causation requirements as "stringent." Id. at 415, 117 S. Ct. at 1394.

In Monell, the city's policy itself was held facially unconstitutional. The potential for municipal liability in a situation like Monell, where the policy itself is unconstitutional, is well-established because a constitutional violation flows directly from a policymaker's deliberate choice reflected in an official policy of custom. See, e.g., Pembaur v. City of Cincinnati, 475 U.S. at 480-84, 106 S. Ct. at 1298-1300. However, where an official policy is lawful on its face and does not compel unconstitutional action by an employee of the municipality, the Court has recognized that there exist difficult problems of proof. Brown, 520 U.S. at 406; 117 S. Ct. at 1389; Tuttle, 471 U.S. at 823, 105 S. Ct. at 2436. The Eighth Circuit, in Szabla v. City of Brooklyn Park, Minnesota, 486 F. 3d 385 (8th Cir. 2007), explained the Supreme Court's approach and standard in cases where an official policy is facially lawful:

> As a plurality of the Court remarked in [City of Oklahoma City v.] Tuttle, "[o]bviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official." [Tuttle] at 823, 105 S. Ct. 2427 (plurality opinion). Accordingly, "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell [foreclosing *respondeat superior* liability] will become a dead letter." Id.
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> The appropriate limitation was addressed in City of Canton v.

> Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989), which involved an allegation that constitutional violations resulted from a municipality's failure to adequately train its police force. The Court explained, "municipal liability under § 1983 attaches where - and only where- a deliberate choice to follow a course of action is made from among various alternatives by city policymakers." Id. at 389, 109 S. Ct. 1197 (quoting Pembaur [v. City of Cincinnati], 475 U.S. at 483-84, 107 S. Ct. 1292 (plurality opinion). Where a policy is constitutional on its face, but it is asserted that a municipality should have done more to prevent constitutional violations by its employees, a plaintiff must establish the existence of a "policy" by demonstrating that the inadequacies were a product of deliberate or conscious choice by policymakers. Id. The standard of fault in that situation is "deliberate indifference" to constitutional rights. Id. at 388, 109 S. Ct. 1197. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." Brown, 520 U.S. at 405, 117 S. Ct. 1382. "[A] plaintiff seeking to establish municipal liability on the theory that a *facially lawful* municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." Id. at 407, 117 S. Ct. 1382 (emphasis added).
>
> Szabla, 486 F.3d at 390.

In City of Canton v. Harris, the Court concluded that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." Harris, 489 U.S. at 387, 109 S.Ct. at 1204. The Court recognized two methods of proving deliberate indifference for a failure to train. First, the Court found that a plaintiff may prove deliberate indifference when there is a pattern of violations that makes it

obvious to municipal policymakers that more training is necessary. Secondly, the Court, in Harris, left open "the possibility that 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, could trigger municipal liability." Brown, 520 U.S. at 409, 117 S. Ct. at 1391; citing Harris, 489 U.S. at 390, n.10, 109 S. Ct. at 1205, no. 10 ("[I]t may be happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious. . . that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need"). Again, the Court stressed that the municipality could not be held liable unless *deliberate* action attributable to the municipality *directly caused* a deprivation of federal rights. Harris, 489 U.S. at 392, 109 S. Ct. at 1206.

Later, in Bd. of the County Commissioners v. Brown, the Court acknowledged that in certain *extreme circumstances* a single act by a municipal employee may form the basis for municipal liability in § 1983 actions absent a showing of a pattern of unconstitutional violations. Brown, 520 U.S. at 405, 117 S. Ct. at 1389. To rely on this exception, the Court warned, a plaintiff must prove that the need for training is obvious and the violation of rights is a highly predictable consequence of the failure to train, an exceptionally high standard. Id. at 407-08, 117 S. Ct. at 1390.

Accordingly, this Court has acknowledged that to satisfy the deliberate indifference element of a § 1983 claim, the plaintiff usually must demonstrate a pattern of violations. See, Cousin v. Small, 325 F.3d 627, 637 (5th Cir. 2003); Snyder v. Trepagnier, 142 F.3d 792, 798-99 (5th Cir. 1998). This Court has further adhered to the Court's directive that to rely on the narrow "single incident exception" to the requirement that there be a pattern of misconduct, the Plaintiff must prove that the highly predictable consequence of a failure to train would result in the specific injury suffered, and that the failure to train was the "moving force" behind the constitutional violation. See, Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 385-86 (5th Cir. 2005). Finally, this Court has held that a showing of deliberate indifference requires that the plaintiff "show that the failure to train reflects a 'deliberate' or 'conscious' choice to 'endanger constitutional rights.'" Snyder, 142 F.3d at 799 (citing Harris, 489 U.S. at 389, 109 S. Ct. at 1205). To this end, the actions of a municipal defendant are considered from an objective standpoint, as enunciated by the Supreme Court in Monell:

> Unlike the deliberate indifference standard applied to individual employees, this standard is an objective one; it considers not only what the policymaker actually knew, but what he should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff's rights.

436 U.S. at 674 (1978).

This Court has been reluctant to apply the single incident exception. See, Pineda v. City of Houston, 291 F.3d 325, 334-35 (5th Cir. 2002)("Charged to administer a regime without *respondeat superior*, we necessarily have been wary of finding municipal liability on the basis of [the single incident] exception for a failure to train claim"); Burge v. St. Tammany Parish, 187 F.3d 452, 471-72 (5th Cir. 1999). However, in Brown v. Bryan County, 219 F.3d 450 (5th Cir. 2000), this Court upheld a municipality's liability in a § 1983 case, identifying the narrow set of circumstances upon which it would find fault stemming from a single incident. That set of circumstances is extreme, as discussed later in this brief and as required by the Supreme Court.

In this case, Connick's policy is lawful on its face and did not compel unconstitutional action by his prosecutors. As such, Thompson must have proved at trial that Connick was aware or should have been aware that a failure to train his attorneys on Brady would result in the violation of Thompson's rights and that, despite this knowledge, Connick deliberately and consciously chose not to train his attorneys on Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Thompson utterly failed to meet that stringent standard.

At the outset, the record fails to support Thompson's allegation that the assistant district attorneys involved in his criminal cases were inadequately trained.

Former Assistants testified that they first encountered and learned Brady in law school. Tr.T., Vol. II, p. 359 (Williams, Whittaker); Tr. T, Vol. III, p. 578 (Dubelier); Tr. T. Vol. IV, p. 891 (Bane). Some also testified that they further encountered Brady as part of their summer employment in district attorney's offices and in studying for the Louisiana Bar Examination. Tr. T., Vol. II, p. 359 (Whittaker); Tr. T., Vol. III, p. 578 (Dubelier). Thus, from the very outset of his or her career in the office Connick could reasonably presume that each prosecutor had some modicum of exposure to Brady as an incident of their education and preparation for the bar exam—which were prerequisites for employment in the first place—as well as their pre-employment experience in some cases. Also a requirement for employment consideration was a written essay about Brady given in concert with the panel interview of each applicant. Tr. T., Vol IV, p. 893-4 (Bane). Moreover, each witness testified as to the training received once employed by Connick as a prosecutor.

Assistant District Attorney James Williams testified that, while he could not recall any specific formal training on Brady at the District Attorney's office, he assumed—in light of the training he had received in law school on—that every lawyer in the office knew what Brady was. Tr.T., Vol. II, p. 364. He testified that all attorneys in the office received copies of advance sheets of opinions of appellate court decisions on Brady. Tr.T., Vol. II, p. 361. Bruce Whittaker testified that, in

addition to law school, Brady is also tested as a part of the Louisiana Bar Examination. Tr. T., Vol II, p. 359. While he did not remember any formal Brady training in the office, all Assistants received "on-the-job" training. Tr.T., Vol. II, p. 318. Further, he testified that all attorneys had to pretry cases before trial, and that pretial included Brady issues. Tr.T., Vol II, p. 344.

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

Michael Riehlmann testified that Gerry Deegan did not reference lack of training as his reason for intentionally withholding evidence. Tr.T., Vol. III, p. 735.

Timothy McElroy, Connick's First Assistant, testified that while could not remember formal training in the DA's office on Brady per se, the on-the-job training employed by the Orleans Parish District Attorney's Office mirrored the Brady

training utilized at the Terrebonne District Attorney's Office, where he had worked previously, and the Jefferson Parish District Attorney's Office where he was subsequently employed. Tr.T., Vol III, pp. 737-8; Tr.T., Vol. IV, pp. 785-86. However, he testified that training was a very substantial part of Connick's office and very important to Connick personally. Tr.T., Vol III, p. 757. Moreover, McElroy stated that "Brady in a prosecutor's world is something you study all the time." Tr. T., Vol III, p. 739.

McElroy specifically compared "formal" training—as the question was put to him by Thompson's attorney—to "classroom" training, to which characterization counsel agreed, Tr. T., Vol. III., p. 737, and deliberately drew a distinction between that more academic, decontextualized conception of training and Connick's "on-the-job" training scheme. McElroy testified that in Connick's senior/junior staffing dichotomy, the junior was supervised at all times by the senior, whose responsibility it was to train the junior. Tr. T., Vol. III, p. 741. As he made clear, this training occurred in real time, in the context of actual cases, and, as such, Assistants received training "[e]very day...[e]very waking, every hour." Id. McElroy further noted that "[e]very [Assistant] District Attorney...has a role in the analysis of Brady determination," Tr. T., Vol. III, p. 743. The fact that Connick's prosecutors were trained within the holistic environment of daily trial practice does not support the

notion that they were any less learned on or disciplined in Brady than one taught in the more removed atmosphere of the lecture room. Coupled as it was with the demonstrated high level of monitoring and supervision provided to younger Assistants through multiple layers of supervisors, one could argue that such training was in fact more beneficial to an actively practicing prosecutor, who must learn to handle Brady issues in real time and its real context.

McElroy also testified as to the structured progression of new Assistants through the divisions of the District Attorney's Office; that a new hire starts out in "support units"–such as juvenile or magistrate court–where they can learn the adjudicative process, including "marshalling evidence," before being moved into the felony trial divisions, thereby giving them a firm grounding in all issues related to handling a case from the outset. Id. McElroy noted specifically that a young prosecutor's first encounter with Connick's Brady policy occurred "when you walk[ed] in the door... You're instructed on Brady from the very beginning when you take your oath as a prosecutor." Tr. T., Vol III, p. 754.

McElroy further testified about the weekly trial meetings held at the office, in which various trial matters, including the evolving jurisprudence concerning Brady, were discussed. Tr. T., Vol III, p. 751. Specifically, the Chief of Appeals would review, digest, and disseminate the most recent decisions on Brady and, when

necessary, meet with the Trials Assistants to educate and train them about the latest Brady issues, among others. Tr. T., Vol III, p. 752. Connick personally addressed the assembled Assistants at various times when new case law regarding Brady was issued, and would also speak one-on-one with an Assistant if it was alleged that he had failed to comply with Brady. Tr. T., Vol IV, p. 784-5. Moreover, there were regular memoranda circulated around the office dealing with different issues, including Brady. Tr. T., Vol III, p. 753. McElroy also testified about his role in creating the office's first formal policy manual in 1987, which was a compendium of already existing written office policies, including that on Brady. Tr. T., Vo. III, p. 753-4. Thus, a written policy regarding Brady was already in effect in the District Attorney's Office before the formal policy manual was produced.

Harry Connick testified like McElroy that both pre-trying of cases for trial and weekly Trials meetings were essential elements of his office policy, as was the circulation of updated appellate decisions regarding various trial issues. Tr. T., Vol IV, p. 827. Regarding the formal policy manual ultimately created, Connick noted that his office, "didn't just divine a policy manual overnight on February the 1st of 1987. Something had to take place before that. And that was a lot of work." Tr. T., Vol. IV, p. 862.

Finally, Bridget Bane testified that, as Chief of Trials under Connick from 1984

to 1986, one of her primary duties was to train and monitor the Trials Assistants on a daily basis. Tr. T., Vol. IV, p. 887. Bane explained that, "[w]ith respect to training, Mr. Connick had developed a system of tremendous checks and balances," which included in part the junior/senior Assistant dichotomy and the pre-trial system. Tr. T., Vol. IV, p. 888-9. The junior/senior dichotomy was part of a larger hierarchy in place to ensure that responsibilities were handled properly; every employee in the office below the District Attorney himself had an immediate supervisor. Tr. T., Vol IV, p. 895. The mandatory pre-trial of all cases before they could proceed to trial required the satisfaction of a checklist of some 70 items covering every aspect of trial, including lab reports, before the Chief of Trials would sign off on the case. Tr. T., Vol IV, p. 889. A further aspect of Connick's training regimen was the "Saturday sessions," which, "were designed to give special trainings when they were needed" on a variety of issues. Tr. T., Vol IV, p. 890.

Regarding Brady in particular, Bane testified, as the others, that she first encountered the doctrine in law school. Tr. T., Vol IV, p. 891. However, once at the District Attorney's Office, "everyone in the office was available" for an individual Assistant to approach and discuss a particular trial issue with, up to and including Bane and Connick themselves. Tr. T., Vol IV, p. 892. Connick himself in fact had an "open door" policy such that any Assistant who had a question or concern

regarding a case could bring it directly to him. Tr. T., Vol IV, p. 898. Bane illustrates Brady's nature as an *ad hoc* doctrine, which necessarily presumes a minimal amount of uncertainty in determining whether, as applied to a particular case, a specific piece of evidence is discoverable, no matter how well trained in its tenets an individual prosecutor may be. To hold out the fact, as Thompson does, that in every case a prosecutor will likely have to make subjective, sometimes difficult, decisions as to what constitutes Brady as evidence of a lack of training is improper. Rather, the fact, as demonstrated, that Assistants would seek out their superiors with Brady questions evidences that they were quite aware of what Brady required of them and were able to spot potential Brady issues before taking a case to trial.

Finally, Bane testified about her implementation of the panel interview system in the office's hiring practices. As part of the new evaluation process, each candidate was required to provide a writing sample for consideration of the panel, which never changed after it was instituted. Tr. T., Vol IV, p. 893. Specifically, starting in 1984 or 1985, each candidate was required to answer two questions, one on the exclusionary rule and one regarding Brady. Tr. T., Vol IV, p. 893-4. Thus, candidates for Assistant District Attorney positions had to demonstrate a sufficient understanding of Brady in order to be considered for employment in the first place.

Accordingly, Assistant District Attorneys in Connick's office were subject to

training, monitoring, and supervision. However, even if this Court were to find that Thompson showed that Connick's prosecutors were inadequately trained, for Thompson to have properly prevailed on his action he still would have to have shown that Connick should have been aware of the lack of training and that it should have been obvious to him that the lack of training would result in Thompson's constitutional violation. In that knowledge, Connick must then have deliberately and consciously chosen to inadequately train, showing a deliberate disregard for Thompson's rights. Based on the above, Thompson failed to make this showing.

First, the evidence adduced at trial failed to establish that Connick should have known that more training was required on Brady. As stated above, each prosecutor entered the office with a basic knowledge of Brady. Further, the evidence, as offered by Thompson, revealed a total of *four* convictions during the ten years of Connick's term between 1974 and 1984 that were vacated due to Brady violations. For an office that prosecuted roughly 150,000 cases (approximately 15,000 per year) in that time span, Tr. T. Vol IV, pp. 840-41, the existence of only four[1] conclusive Brady violations is insufficient to support the allegation that Connick should reasonably have known that the need for additional Brady training was obvious.

[1] This total represents approximately one four-hundredth of one percent of all cases prosecuted by Connick's office between 1974 and 1984.

Each of the above witnesses testified as to Connick's official policy regarding Brady material. Williams, Whittaker, Dubelier, Connick and Bane all iterated the foundational premise of that policy: follow the law—under Brady, under the Louisiana Constitution, under the Code of Criminal Procedure, under the Canon of Ethics—as to what the State is required to disclose to the defense. Tr. T., Vol I, p. 119-20, 345 (Williams); Tr. T., Vol II, p. 317, 345 (Whittaker); Tr. T., Vol III, p. 576 (Dubelier); Tr. T., Vol IV, p. 834, 851 (Connick); Tr. T., Vol IV, p. 857 (Bane). This doctrine was expounded not simply as a matter of internal policy, but was viewed by Connick as part of the prosecutor's professional obligation of practicing law in the first place. Tr. T., Vol I, p. 348. Those in breach of their Brady requirement were not just "violating" his office policy, but outright "breaking" it by not following the law. Tr. T., Vol IV, p. 850.

Connick's policy, however, went beyond the bare commandment to "follow the law," which in fact served only as the "framework" of that policy. Tr. T., Vol IV, p. 834. Eric Dubelier, for instance, testified that Connick's standard operating procedures specifically *required* his Assistants to disclose all lab reports to defense counsel. Tr. T., Vol II, p. 189 (Connick); Tr. T., Vol III, p. 523 (Dubelier). Former Assistant John Jerry Glas, testifying on behalf of Thompson, acknowledged that "the policy in the office as [he] understood it at the time" required prosecutors to turn over

lab reports. Tr.T., Vol IV, p. 917. Bruce Whittaker testified that police reports and statements of witnesses were also required to be given over. Tr. T., Vol II, p. 317. Dubelier further testified that even when office policy forbade disclosing the name and address of a witness to defense counsel for safety reasons, Connick put upon his Assistants the "obligation to make sure that defense counsel would have an opportunity to have access to that witness." Tr. T., Vol III, p. 596. This was true when a witness had exculpatory information as well as inculpatory. Id. Thus, to the extent that a formal policy could account for the myriad nuances of any given case as relates to Brady, the evidence demonstrates that Connick's Assistants were provided specific guidelines as to what types evidence had to be turned over to the defense. Tim McElroy confirmed this when he testified that any Assistant who mistakenly believed that Connick's policy was as simplistic as "follow the law" was "in trouble." Tr. T., Vol IV, p. 805.

Beyond his enunciation of specific policy guidelines as pertained to Brady evidence, Connick was prepared to, and in cases indeed did, enforce that policy through stringent means. Both Jim Williams and Eric Dubelier testified that a lawyer who contravened Connick's Brady policy, among others, could and would be fired. Tr. T., Vol II, p. 349 (Williams); Tr. T., Vol III, p. 576 (Dubelier). Connick himself demonstrated the seriousness with which he regarded adherence to his policy when

he filed a complaint against Mike Riehlmann with the Louisiana State Bar Association for failing to disclose Gerry Deegan's admission that he had intentionally suppressed the exculpatory blood results. Tr. T., Vol III, p. 720. Connick further evidenced his commitment to enforcing his Brady policy by calling for a Grand Jury to investigate the possible wrongdoing by his Assistants, so that all evidence adduced in his internal investigation would be presented, on the record, to members of the community at large, with the goal of turning over any viable case against those responsible for Mr. Thompson's wrongful conviction to the Attorney General. Tr. T., Vol IV, p. 867-9.

Rather than a policy of deliberate indifference toward the need to train his Assistants on Brady issues, the testimony demonstrated Connick's proactive, written policy regarding such evidence, his near-constant pressure on his prosecutors to learn, know and follow that law, a rigorous hierarchy of checks and balances designed to ensure that every case was fully prepared to take to trial, including dealing with Brady issues, and the serious measures to which Connick resorted when dealing with one of the few cases that "slipped through the cracks." Tr. T., Vol. IV, p. 841. Accordingly, the evidence adduced at trial failed show that Connick knew or should have known of a need for additional training.

Further, the nature of the evidence suppressed by Gerry Deegan was so

obviously within the purview of Brady, that, policy aside, Connick would have been reasonable in assuming that his assistant district attorneys, as law school graduates, would have known of their obligation to disclose potentially exculpatory blood evidence to a defendant. See, Tr.T., Vol. II, p. 359; Tr. T, Vol. III, p. 578; Tr. T. Vol. IV, p. 891. In fact, in Burge v. St. Tammany Parish, supra, this Court acknowledged that reliance on law school education, training, experience, and ethics relative to Brady obligations could be sufficient to defeat an assertion of deliberate indifference relative to training. Accordingly, for this reason as well, the evidence adduced at trial failed to prove that Connick acted with deliberate indifference.

Finally, in Brown v. Bryan County, supra, this Court identified the narrow set of circumstances upon which it would find deliberate indifference in a single incident case. In Bryan County, the plaintiff brought a § 1983 action for injuries resulting from excessive force by an arresting reserve deputy. Bryan County, 219 F. 3d at 452. The municipality was found liable by the trial court on the basis of the municipality's failure to provide *any* training to the deputy, who was allowed to make arrests. Id. The deputy, an inexperienced reserve sheriff's deputy, participated in a car chase and arrest involving the use of force and, during a take-down, used a violent "arm bar" technique that resulted in the suspect's sustaining significant knee injuries. Id. at 454. On appeal, this Court found that the county sheriff was deliberately indifferent to the

health and safety of county citizens by failing to train the deputy in light of the obvious need to provide *some* training to police officers. Id. at 465.

In fact, in Estate of Davis, this Court noted:

> We did find a single incident to suffice in Brown v. Bryan County, concluding that there was an utter failure to train and supervise. We later observed that we found liability in Brown for a single incident when the county 'failed to provide *any* training or supervision for a young, inexperienced officer with a record of recklessness,' while noting that 'there is a difference between a *complete failure to train*, as in [Brown v. Bryan County], and a failure to train in one limited area.

Estate of Davis, 406 F. 3d at 386. (Emphasis in original; citations omitted).

Thus, this Court was willing to find a single incident to suffice a finding of liability only where there was specifically a *complete failure to train a young, inexperienced officer with a record of recklessness*.

However, the facts in this case do not give rise to a single incident exception. Unlike the reserve deputy in Bryan County, who assumed his position as a deputy with no training whatsoever and then received no training by the municipality, Gerry Deegan, the assistant district attorney who confessed to withholding Brady material in Thompson's armed robbery case, began employment in the Orleans Parish District Attorney's Office as all assistants: with a law school education, duly trained and admitted to practice law in the State of Louisiana. He, like all assistants, was then subject to training in Connick's office. For this Court to equate Deegan's level of

training and his known understanding of Brady with the *complete* lack of training of the reserve deputy in Bryan County, and to necessarily conclude that it was obvious that Deegan, because of a lack of training, was highly likely to infringe Thompson's constitutional rights, would be an improper expansion of Brown and of this Court's own decision in Bryan County.

Thompson's wrongful conviction was caused by the actions of a lone prosecutor who knew exactly what his obligation was and that he was abrogating it. Given the facts and circumstances surrounding Connick's official policies toward training, supervision, and disclosure and their potential impact on Thompson's rights, it would be unreasonable to find that Connick should have known either that Gerry Deegan required additional specific training on the importance of disclosing exculpatory crime lab reports or that Deegan actions—contrary to those of his Assistants in all but four confirmed cases in the decade preceding the one in question—were a highly predictable *consequence* of his policies. Wholly to the contrary, Deegan was not a product of any Connick policy of deliberate indifference, but rather was an example of the type of rogue Assistant best summed up by Tim McElroy: "They may have practiced differently and for that I'm sorry if they practiced contrary to policy." Tr. T., Vol. IV, p. 783.

B. Thompson did not prove actual causation.

In City of Canton v. Harris, the Supreme Court confirmed that plaintiffs asserting a § 1983 failure-to-train claim have to prove that a deficiency in training "actually caused" the deprivation of constitutional rights; that is, that the "injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." Harris, 489 U.S. at 391, 109 S. Ct. at 1206.

In this case, the infringement of Thompson's rights cannot be said to have been caused by an inadequacy in training on the part of Harry Connick. As argued above, each prosecutor who testified at trial spoke to his training, both before and during their employment; the rigorous and mandatory pre-trial process; the disbursement of appellate opinions; and as to Connick's policy which mandated that crime lab reports were *always* to be disclosed to a defendant.

On the other hand, to the extent that a Brady violation occurred in Thompson, in that undeniably exculpatory blood evidence was not produced to defense counsel in his armed robbery case, the ultimate source of the violation was Gerry Deegan himself. This fact is borne out both through Deegan's words and actions. His plain admission to Michael Riehlmann—that he *intentionally* withheld evidence that he *knew* to be exculpatory—demonstrates preponderantly, if not conclusively, that he was fully aware of his Brady obligation and violation at the time it occurred.

Likewise, documentary and testimonial evidence adduced at trial clearly show Deegan's actions on the morning of Thompson's armed robbery trial to be those of a prosecutor who knew exactly what he was doing and knew it was illegal and against office policy such that he needed to conceal those actions until he was practically upon his death bed.

Deegan checked out seven pieces of evidence from Central Evidence and Property on the morning of Thompson's armed robbery trial, including the blood-stained swatch of pants leg and the blood lab report. Deegan examined the crime lab technician—the only witness through whom he could authenticate and introduce the report into evidence against Thompson—at trial, yet did not mention the lab report, let alone offer it into evidence. Deegan then checked all of the evidence back into Central Evidence and Property after Thompson's guilty verdict, with the glaring exception of the bloody swatch of pants leg and the blood report. Finally, no copy of the blood report was ever placed in the District Attorney's case file before it was closed out. Deegan's actions on their face make the argument specious that he was simply unschooled in what Brady required and operating in a fog of oblivious ignorance due to Connick's failure to train him. If, for example, he had unwittingly believed that his failure to disclose the lab report and bloody swatch was not a major constitutional infraction, common sense dictates that he would have seen no reason

not to return that evidence to Central Evidence and Property with the other five items and no reason not to mention that evidence for nearly a decade after the fact.

Accordingly, the evidence adduced at trial clearly demonstrated that Deegan's actions, and not any failure to adequately train on the part of District Attorney Connick, caused Thompson's constitutional infirmity.

II. The district court erroneously instructed the jury on the deliberate indifference standard.

This Court has held that the standard of review when challenging a district court's jury instruction is whether the charge as a whole creates "substantial and ineradicable doubt that the jury was properly guided in its deliberations." Bender v. Brumley, 1 F. 3d 271, 276-77 (5th Cir. 1993). Further, in Igloo Products Corp. v. Brantex Inc., 202 F. 3d 814, 816 (5th Cir. 2000), this Court ruled that the appropriate remedy in a case where the jury was improperly guided by a challenged instruction from the court, and the record reflects that the outcome of the case was affected by the challenged instruction, is reversal of the jury's finding.

In this case, the court erroneously charged the jury on the applicable "deliberate indifference" standard. The record reflects that the challenged instruction improperly guided and confused the jury, which ultimately rendered an unreliable verdict. As such, the verdict should be reversed.

The court read to the jury an instruction which Appellants' counsel had challenged by initially proposing his own charge. Appellant's proposed charge correctly laid out the elements that Thompson had to prove in order for the jury to find Appellants liable: that any failure to train by Connick represented a *deliberate or conscious choice* on his part; that Connick disregarded a known or obvious consequence of that failure to train; that Connick knew of facts from which he could infer that a failure to train would risk violating Thompson's rights; and that Connick *actually drew* that inference. See Appellants' Proposed Jury Instruction #23, Docket Entry #94.

Appellants' proposed charge was rejected by the district court, which instead instructed the jury that:

> In order to hold the District Attorney's Office liable for the violation of Mr. Thompson's rights, you must find that Mr. Thompson has proved each of the following things. . . :
>
> .....
>
> Second, 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.
>
> .....

Tr.T., Vol V, p. 1098.

The court continued:

> Deliberate indifference requires a showing of more than negligence or even gross negligence. . . In order to find that the district attorney's failure to adequately train, monitor or supervise amounted to deliberate indifference, you must find that Mr. Thompson has proved each of the following three things by a preponderance of the evidence:
>
> First, that 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 the accused.
>
> Second, that 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, that the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights.

Tr.T. Vol. V, p. 1098-99.

The charges are erroneous. The deliberate indifference standard requires a showing that "[a] failure to train reflects a 'deliberate' or 'conscious' choice to 'endanger constitutional rights.'" Snyder, 142 F.3d at 799 (citing Harris, 489 U.S. at 389, 109 S. Ct. at 1205). Therefore, a proper jury charge in this case would have necessarily included an instruction that, for the jury to find Connick liable, Thompson must have proved not only the three above-mentioned facts, but that Connick *deliberately* and *consciously* chose to disregard Thompson's constitutional rights by failing to train. This crucial instruction was omitted. The record evidences that this omission led to jury confusion that was never remedied and that it affected the verdict.

During deliberations, the jury posed a single question to the court: "What does deliberate indifference mean? Does it mean *intentional* or would 'failure to monitor' be considered deliberate?" Appellants again suggested that the court instruct the jury in the manner they had initially proposed, especially with regard to the meaning of "deliberate," and once more the court rejected their offer and instead gave the following erroneous instruction:

> Deliberate indifference does not necessarily mean intentional, but does require more than mere negligence or gross negligence.

Tr.T., Vol. V, p. 1098, 1111-15.

This vague response, again, omitted the pertinent language that properly defines deliberate indifference and failed to answer that failure to monitor would not be considered deliberate.[2] Moreover, the court's describing deliberate indifference as an extension of negligence, while assuring the jurors that it did not "necessarily" mean intentional, lowered the burden of proof that Thompson was required to meet in the minds of the jurors.

Finally, the record reflects that the challenged instruction affected the outcome

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[2] The jury's very question evidences its fundamental confusion as to the nature of the "deliberate indifference" standard, as "failure to monitor" and "deliberate" are not even comparable legal concepts; the former represents an act and the latter a level of *mens rea* which serves to *modify* the former. As such, even were a jury to find evidence of a "failure to monitor" on the part of Connick, it still would have to further find that Connick had *deliberately* failed to monitor his Assistants, a task for which they still lacked the correct instruction.

of the trial. The verdict form used by the jury demonstrates that the jury initially voted that Connick had not acted with deliberate indifference. Appellant's Rec. Excerpts, Tab 4. After posing their sole question to the court and receiving its challenged instruction, the jury returned quickly with a verdict form on which their original verdict had been reversed and now found that Connick *had* acted with deliberate indifference. Id. It is evident that the district court's erroneous instruction on "deliberate indifference" was the *sine qua non* of the jury's about face both on that issue and on their determination of the trial's outcome. As such, the verdict in this case must be vacated and the district court's judgment reversed.

CONCLUSION

Based on the foregoing, *Amici* Orleans Parish Assistant District Attorneys respectfully pray that this Court reverse the judgment of the district court and enter a judgment in favor of Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certify that a copy of this Motion Of Orleans Parish Assistant District Attorneys for Leave to File *Amici Curiae* Brief in Support of Appellants has been served upon counsel for Appellants and Appellee by electronic PDF format and by placing a paper copy of same in the United States mail, postage prepaid, addressed to:

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