No. 09-571

In The Supreme Court of the United States

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,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether, viewed in the light most favorable to the jury's verdict, there was sufficient evidence for the jury to find (1) that the district attorney was deliberately indifferent to the need to train, monitor, or supervise his prosecutors regarding their obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and (2) that the district attorney's deliberate indifference substantially caused the violation of John Thompson's constitutional rights by wrongfully depriving him of his liberty for 18 years and nearly leading him to be executed for crimes he did not commit.

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STATEMENT

This civil rights action arises out of John Thompson's 18 years of wrongful imprisonment and near execution for a murder he did not commit. The jury heard extensive evidence that the Orleans Parish District Attorney's Office—headed at the time by Harry F. Connick—failed to provide *any* training to prosecutors on their obligations to produce favorable evidence to accused citizens under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and subsequent cases. Connick was aware of the need for training, but he was deliberately indifferent to the requirements of *Brady*. The meager guidance he claims to have provided his prosecutors was objectively wrong—and, as his former assistants admitted, would not have required the production of the critical *Brady* evidence that ultimately exonerated Thompson.

Over a four-month period between Thompson's arrest and his separate convictions for capital murder and armed robbery, at least four prosecutors in Connick's office (including the third-highest-ranking assistant district attorney in the office) failed to produce more than a dozen pieces of favorable evidence, including a crime-laboratory report, police reports, witness statements, audiotapes, and other materials that would have been—and, many years after his original conviction, were—pivotal to Thompson's defense. Critically, prosecutors possessed—and did not turn over—blood evidence that conclusively proved Thompson's innocence of armed robbery. When that conviction was dismissed, and, when Thompson

was finally retried in the murder case based on all of the evidence, the jury returned a not-guilty verdict after just 35 minutes of deliberation.

The jury in Thompson's 42 U.S.C. §1983 case concluded that Connick's deliberate indifference to the need to train, supervise, and monitor his prosecutors on *Brady* violated Thompson's constitutional rights, deprived him of his liberty, and very nearly cost him his life. The jury awarded Thompson $14 million in damages—$1 million for each year Thompson spent in solitary confinement for 23 hours a day, seven days a week, in a six-by-nine foot cell on death row in Louisiana's Angola Prison.

1. In December 1984, Raymond T. Liuzza, Jr., a prominent businessman in New Orleans, was killed outside his home. Given the high profile of the crime, the district attorney's office was under considerable pressure to obtain a conviction.

Three weeks later, a college student, Jay LaGarde, and his two siblings were victims of an attempted armed robbery in their car outside the New Orleans Superdome.

In January 1985, Thompson and a co-defendant, Kevin Freeman, were arrested and charged with the Liuzza murder. JA12. When Thompson's photograph appeared in the newspaper following his arrest, the father of the LaGarde children wondered whether this was the man who had robbed his children three weeks earlier. The father contacted the district

attorney's office, and Thompson was charged with armed robbery. JA12-13.

2. The prosecutors "decided to use the armed robbery charge to the State's advantage in the murder case." JA13. They switched the order of the trials so they could secure a conviction for armed robbery and use it against Thompson in the murder case. *Ibid.*

Based solely on the weak identification by the LaGarde children, Thompson was convicted of attempted armed robbery and sentenced to 49½ years in prison. JA15, 523. Unbeknownst to Thompson and his attorneys, the district attorney's office possessed blood evidence that would have exonerated him of the robbery. JA14. At least four prosecutors who worked on Thompson's case—Eric Dubelier, Jim Williams, Bruce Whittaker, and Gerald Deegan—affirmatively knew of the blood evidence. JA15, 48, 189, 280.

Three weeks after the armed-robbery trial, Thompson was tried and convicted of the Liuzza murder. JA16. The prosecutors' strategy of obtaining an armed-robbery conviction worked as planned. JA15-16. Thompson, who was accused at trial of selling the murder weapon and the victim's ring, was effectively precluded from taking the witness stand to explain what really happened—that he had bought the ring and gun from the real killer, Kevin Freeman. JA16. Freeman, meanwhile, was free to testify without contradiction that he saw Thompson shoot Liuzza and that he (Freeman) fled the scene. *Ibid.* At the

penalty phase, young Marie LaGarde testified tearfully in response to Williams's questioning about the separate armed robbery, suggesting that Thompson would have killed her and her two brothers had her older brother not wrestled the gun from the perpetrator. JA689-96. Dubelier then argued that Thompson was already serving a near-life sentence for the armed robbery and urged the jury that the only way to punish him for the murder was to execute him. JA819. The jury sentenced Thompson to death.

3. After years of post-conviction proceedings—including multiple requests for *Brady* material and scientific evidence—a final execution date was set for May 20, 1999. JA17. Just weeks before the execution, Thompson's attorneys independently discovered one of many pieces of evidence that had not been produced to the defense at the time of the original trials: a crime-laboratory report addressed to assistant district attorney Bruce Whittaker. JA17. The report revealed that blood from Jay LaGarde's pant leg—which prosecutors knew came from the perpetrator—had been tested at the prosecutors' request and determined to be type "B." JA14, 17. Whittaker testified he had received the report from the crime laboratory two days before the April 1985 armed robbery trial and placed it on Williams's desk. JA178-79. Nevertheless, it is stipulated that "the prosecutors did not produce any scientific evidence or blood evidence" to Thompson's lawyers in 1985. JA14.

After Thompson's counsel discovered the crime-laboratory report in 1999, Thompson's blood was

tested, and it was determined to be type "O." JA14. Based on that evidence, which proved conclusively Thompson's innocence, the armed-robbery conviction was vacated. Recognizing that the armed-robbery conviction had been used against Thompson to obtain the murder conviction and death sentence, the trial judge stayed Thompson's execution and gave him time to conduct an additional investigation in the murder case. JA17-18.

Once they secured access to the State's files, Thompson's attorneys uncovered considerable information that had not been produced in the murder case, including police reports showing that the perpetrator matched Freeman's description and not Thompson's (JA569); revealing that Freeman had changed his story significantly by the time he testified at the murder trial (JA644, 657); and containing information that would have impeached another State witness based on his efforts to secure a reward in exchange for his testimony. See, *e.g.*, JA620-21, 627-28. The reports also identified witnesses who lived near the scene of the murder and were interviewed by the police but never identified to the defense. JA20-21.

The newly discovered evidence was presented to the jury at Thompson's 2003 retrial, along with testimony from the witnesses the jury had not heard in 1985. JA760-91. Thompson, no longer faced with impeachment by the invalid armed-robbery conviction, explained that he had bought the gun and the ring from Freeman. The jury heard compelling evidence

that Freeman (who was killed in 1995 by a security guard while breaking into parked cars) was the perpetrator of the murder, as he matched perfectly the description of the sole perpetrator contained in non-produced police reports, and his account of the crime was discredited by conflicting statements in the police reports. See, *e.g.*, JA569, 610 (description); JA598 (Freeman mug shot); JA575 (Thompson mug shot).

After deliberating just 35 minutes, the jury returned a "not guilty" verdict. JA19. After spending 18 years wrongfully in prison—including four years *after* his lawyers' discovery of the lab report demonstrating his innocence of armed robbery—Thompson was finally released.

4. Thompson then filed this §1983 action in the Eastern District of Louisiana. The week-long trial presented municipal-liability claims based on the failure of the district attorney, as the official policymaker, to train, supervise, or monitor his assistant district attorneys. The jury heard testimony from 17 witnesses, including Connick, three of his assistant district attorneys who prosecuted Thompson, two former first assistant district attorneys who served under Connick, two other former prosecutors from Connick's office, the then-current district attorney, and several expert witnesses. JA28-565.

The prosecutors who had worked on Thompson's cases did not identify any training whatsoever that Connick provided on a prosecutor's obligation to

comply with *Brady*. Moreover, the office had a presumptive rule of non-production that only evidence legally "required" to be turned over to the defense would be produced—and Connick provided no guidance on what, in fact, was legally "required."

Because none of the former prosecutors testified that Connick had directly instructed his assistants to conceal *Brady* evidence, the jury answered "no" to the question whether the violation of Thompson's rights was caused by an official policy of the district attorney. JA830.

However, the jury also found that Connick was deliberately indifferent to the need to train and instruct his assistants on their obligations under *Brady*, and that his deliberate indifference caused the violations of Thompson's constitutional rights. Specifically, the jury answered "yes" to the following question:

> Was the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?

JA830. The jury awarded Thompson $14 million to compensate him for the damage he suffered from his near-executions and the deprivation of his liberty for 18 years for crimes he did not commit. JA831.

5. The jury heard evidence that Connick was the sole policymaker for the office. JA192, 198, 338, 394, 469-70. It also heard direct evidence that even though he was responsible for all policy, including discovery under *Brady*, Connick was deliberately indifferent to his *Brady* obligations.

Connick admitted that he took no steps to familiarize himself with this Court's rulings on prosecutors' obligations to provide evidence to the defense. Although he was the sole policymaker, Connick stated that he "stopped reading law books" in 1974. JA144-45. Moreover, Connick's understanding of *Brady*, as reflected in his testimony and the instructions he claims to have given to prosecutors, was fundamentally wrong. For example, the jury heard Connick's testimony that *Brady* requires only the production of evidence that actually "exculpates the accused" (JA148-49), as opposed to evidence that is merely "favorable" to the defense, which this Court's precedents require be turned over. See, *e.g.*, *Giglio* v. *United States*, 405 U.S. 150 (1972) (*Brady* requires production of impeachment material).

Connick testified that a *Brady* violation is committed only by *intentional* decisions not to produce evidence, as contrasted with "*inadvertent* conduct of [an] assistant * * * with a lot of case load[.]" JA159 (emphasis added). This testimony is, of course, directly contrary to *Brady* itself, which expressly states that the non-production of favorable evidence violates due process "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. He also said,

contrary to this Court's precedents, that prosecutors have no obligation to conduct an independent review of the evidence for *Brady* material, and that the *Brady* obligation does not extend to impeachment or other evidence favorable to the accused. JA148-49, 441.

Connick's deliberate indifference was exemplified by his reaction to this Court's decision in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), which reversed a capital-murder conviction because of *his office's* failure to comply with *Brady*. Ironically, *Kyles* concerned the conduct of Jim Williams, the very same prosecutor who played a leading role in both of Thompson's convictions. Connick conceded that he did not know if he had ever even read *Kyles*, he had no idea that it concerned *Brady*, he did not know it involved Williams, and he made no changes in office policy regarding *Brady* following this Court's reversal. JA152-54.

6. Connick's indifference to *Brady*'s requirements was perhaps most succinctly reflected in the *Brady* section of the office handbook adopted in 1987. Connick and his former first assistants, McElroy and Bane, claimed that the handbook "incorporated" or "codified" prior office memoranda and guidance from Connick that they said were in place during Thompson's 1985 criminal trials. JA392, 449-50, 467-68. The *Brady* section of the handbook consisted of just four sentences:

> 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 information possessed by the State.

JA704.

The handbook misstated the governing legal standard in at least three respects. First, the handbook incorrectly suggested that the obligation to produce favorable evidence was triggered solely by a request from the defense (even though *Brady* has long required prosecutors to turn over favorable information independent of defense requests). Second, it incorrectly suggested that the obligation applies only if the court orders production (even though there has never been such a restriction). Third, it incorrectly suggested that *Brady* is limited to exculpatory evidence (even though, since at least 1972, *Brady* has extended well beyond mere "exculpatory" information

to impeachment and other evidence that is favorable to the defense). JA482.

The handbook's *Brady* discussion was so riddled with error that Val Solino—the district attorney's designated representative whose admissions were binding on the office—expressly conceded that Connick's handbook was deficient as to *Brady*. JA482. Solino also conceded that a prosecutor attempting to follow Connick's guidance in the handbook would not have known to produce the crime-laboratory report. JA483-84. The same is true of the other *Brady* material, including police reports and reward information.

7. Connick's indifference to *Brady* was evident not only through his gross misunderstanding of the law and the deficient supposed guidance embodied in his handbook, but also by his handling of Thompson's case *after* the blood evidence was discovered in 1999. When confronted with documents showing that his prosecutors had failed to produce this critical *Brady* evidence 14 years earlier in Thompson's armed-robbery case, Connick refused to undertake any investigation of the murder case, even though both cases were handled by the same prosecutors and the armed-robbery case was an integral part of the prosecution's strategy in the murder case. JA155-56.

Moreover, although he initially convened a grand-jury investigation into his office's failure to produce the blood evidence (enabling him to conduct his investigation under grand-jury secrecy), Connick eventually squelched even that investigation. JA18. The

May 1999 grand-jury proceedings were led by one of Connick's assistants, John Jerry Glas (JA510), whose testimony at the §1983 trial shed considerable light on Connick's view of *Brady*.

Glas described a 1999 meeting in Connick's office the night before the grand jury was to convene for its second session of testimony. JA538-39. In contrast to Connick's concession throughout this litigation that the crime-laboratory report was *Brady* material,[1] Connick and his first assistant district attorney at the time (McElroy) both stated their views that the crime-laboratory report was *not Brady* material and did *not* have to be produced because, they said, the prosecutors may not have known Thompson's blood type in 1985. JA550-51. The jurors thus heard that what Connick claimed about *Brady* during the 2007 trial differed dramatically from what he said in 1999, when he was still district attorney.

Jurors also heard that Connick buried the truth by shutting down the grand-jury proceedings before

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[1] See, *e.g.*, Pet. i ("Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963)."); Pet. Br. 57 (citing JA154); see also Pet. 5th Cir. Br. 45 ("Any reasonable prosecutor would have recognized blood evidence as *Brady* material."); Pet. 5th Cir. En Banc Br. 23 ("It would have been obvious to any law school-educated practicing criminal attorney that the blood evidence and corresponding lab report * * * was *Brady* material."); Pet. Mot. for Judgment as a Matter of Law 9 ("[A]ny reasonable prosecutor would have recognized blood evidence as *Brady* material").

all the witnesses had testified. Glas had told Connick he had uncovered evidence of *Brady* violations by *at least three* of Thompson's former prosecutors and that he planned to explore that further with the grand jury. JA537. Over Glas's objection, Connick announced at the meeting that he was shutting down the proceedings and dismissing the grand jury without hearing testimony from the subpoenaed witnesses. JA542.

Glas was so disturbed that he resigned from the office that night, complaining to Connick that: "You're asking me not to show the Grand Jurors evidence in a case in which they are doing a probe into whether DAs hid evidence." JA544. Thompson, meanwhile, spent another four years in jail awaiting an appellate decision granting him a new murder trial, an outcome that Connick fought every step of the way.

8. The jury also heard testimony that Connick's office had a terrible record of complying with *Brady*. Although it was against his interest as then-current district attorney, Eddie Jordan admitted that he questioned whether Connick had done what he needed to do to ensure production of *Brady* material, and he further admitted Connick's *Brady* issues were so significant they had been a campaign topic for contenders vying for the office upon Connick's retirement. JA129-30. Jordan also testified that Connick's policy of not producing police and investigative reports increased the risk of *Brady* violations, and he acknowledged a study finding that Connick's office

had one of the "worst records" of *Brady* compliance in the Nation. JA130-33.

9. Connick's failure to provide accurate *Brady* guidance to his prosecutors about their *Brady* obligations was compounded by his restrictive discovery policy that intensified the risk of *Brady* violations. As Connick and several former prosecutors testified, the presumptive office policy was not to produce police reports and witness statements. JA433. One prosecutor admitted Connick had established a blanket practice of not turning over supplemental police reports and witness statements. JA172. Another prosecutor explained that files obtained from the police containing descriptions and witness statements, reports summarizing police investigations, and other investigative materials were helpful to prosecutors, but not typically turned over to the defense because of Connick's restrictive policy. JA38-40.

In his merits brief, Connick concedes that he adopted a presumption against the production of evidence to the accused: "Connick's disclosure policies were no mystery: turn over what was required by state and federal law, *but no more*." Pet. Br. 6-7 (emphasis added). Although that presumption against production was not unlawful on its face because it did not direct prosecutors to conceal *Brady* evidence, it significantly exacerbated the risk created by the lack of training and the flawed guidance that was supposedly later codified in the handbook. Thompson's expert witness explained to the jury that such presumptions against disclosure were particularly

dangerous given Connick's manifest indifference to *Brady*, the inaccurate *Brady* guidance codified in the handbook, and what several witnesses described as considerable pressure on prosecutors in the office to secure convictions in cases that had already been screened and adjudged trial-worthy. JA190, 256-57.

10. The admissions about Connick's presumption against discovery, his lack of knowledge of *Brady*, and the objectively flawed handbook were accompanied by other admissions that Connick was well aware of the need for *Brady* training and guidance. Connick testified that he was aware of risks created by his policy of presumptive nondisclosure, and he acknowledged the difficulty of some *Brady* decisions. JA151, 449. He conceded that many of his prosecutors lacked experience; that he knew they would come into possession of *Brady* material; that proper *Brady* decisions require a thorough review of the file and an understanding of the scope of *Brady*'s obligations; and that the failure of prosecutors to produce such evidence would violate the constitutional rights of the accused. JA439-42. And he admitted that his policy of presumptive non-production heightened the risk of *Brady* violations. JA159.

Connick was also aware of prior *Brady* violations in his office. He admitted that as of the date of Thompson's trials, there were at least four published opinions from the Louisiana Supreme Court reversing convictions secured during his tenure based on *Brady*

violations. He also admitted that most *Brady* violations never see the light of day, and that there were other unpublished trial court decisions disagreeing with his prosecutors on their *Brady* decisions. JA452-55.

11. Despite all the evidence showing an obvious need, Connick provided *no training or guidance—and certainly no accurate* training or guidance—on *Brady*. In fact, there was no evidence from any witness that Connick ever instructed or trained his prosecutors to do any more than was stated in the four flawed sentences on *Brady* in the handbook.

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." JA27. Former prosecutor Michael Riehlmann testified that he did not recall that he was "ever trained or instructed by anybody about [his] Brady obligations." JA369. Similarly, Williams and Whittaker testified that they were not trained on *Brady*. JA58, 171. Whittaker elaborated:

> Q. It would have been helpful to have a little training wouldn't it, to kind of show you when you started what the *Brady* rule was so you could deal especially with those gray areas?
>
> A. I think it would be a good thing, yes.
>
> Q. Because there wasn't training, young DAs like yourself were trying cases on their

> own, right? You would be out trying cases right away sometimes?
>
> A. Depending on your level of experience.
>
> Q. And decisions on whether to produce *Brady* material, whether material was *Brady* material and had to be produced, those kinds of decisions would sometimes get made by inexperienced lawyers, just a few weeks out of law school with no training?
>
> A. I imagine that's certainly possible, yes.

JA172. There was no testimony from Thompson's prosecutors that they were ever told to review police reports and witness statements to produce portions containing evidence favorable to the accused, as *Brady* requires, and indeed there was no testimony from these prosecutors that Connick ever stressed the importance of *Brady* compliance. Thus, while two of Connick's former first assistants (McElroy and Bane) suggested that there were periodic training sessions on other topics and various generic checks and balances in the trial process, the jury could have rejected their testimony in its entirety. Moreover, even these witnesses did not identify or describe the *substance* of any actual *Brady* training.

12. Although Connick attempts to confine the constitutional violations to the conduct of a single deceased junior prosecutor (Gerry Deegan), *Brady* violations were committed by every prosecutor involved in Thompson's cases. Multiple prosecutors knew about, but failed to produce, the blood evidence. The

crime-laboratory report showing that the armed robber had type "B" blood was delivered to Whittaker two days before the April 1985 trial. Whittaker testified that he put in on Williams's desk. JA178-79. Although Williams claimed that he did not remember seeing the crime-laboratory report, he admitted he knew about the blood evidence and *deliberately stayed* "*completely away*" *from it* in presenting evidence at the armed-robbery trial. JA73, 80-81 (emphasis added). Indeed, grand-jury prosecutor Glas testified that he learned from carjacking victim Jay LaGarde that he had been privately told by the prosecutor who questioned him at trial (Williams) that the test results were "inconclusive." JA526.

The blood evidence had been collected in December 1984, and various police documents identified its existence. JA576, 647. Prosecutor Whittaker wrote on an internal screening action form that the office "may wish to do blood test" on Thompson. That form was then reviewed by Dubelier—the third highest-ranking prosecutor in the office—who admitted he must have known there was blood evidence. JA279-80. The jury thus could reasonably have found that *no fewer than four prosecutors*—Dubelier, Williams, Whittaker, and Deegan—all knew about but failed to produce the blood evidence that would have exonerated Thompson of the robbery. Based on his investigation, grand-jury prosecutor Glas testified that the single rogue prosecutor theory was "ridiculous." JA536.

13. A similar pattern emerged with respect to the nondisclosure of evidence in Thompson's murder

trial. At the outset of the civil trial, the stipulation read to the jury listed 16 exhibits containing favorable information that was not provided to Thompson in 1985. JA20-21.

For example, prosecutors Dubelier and Williams failed to produce police reports with eyewitness descriptions of the murderer that were inconsistent with Thompson's appearance. JA20, 258-59, 569, 612. When confronted with both a description of the perpetrator in the police reports that matched Freeman and an inconsistent mug shot of Thompson taken only six days after the murder,[2] Dubelier claimed he had no obligation to produce the police reports under *Brady* because Thompson still could have been the murderer if he had been wearing his hair differently on the night of the murder. JA140-43. Setting aside the physical impossibility of Dubelier's explanation—that a perpetrator with "close-cut hair" could somehow grow a full "Afro" in six days—Dubelier's answer underscores his total confusion about *Brady* and the indifference to *Brady* that pervaded the office. Under Dubelier's view of *Brady*, if he could conjure up some hypothetical scenario in which the evidence did not conclusively prove Thompson's innocence, he did not have to produce it.

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[2] The police report described the perpetrator as having "close-cut hair." JA102, 612. That fit Freeman perfectly. JA612. Thompson, in contrast, wore his hair in a large "Afro" style. JA575.

Prosecutors Dubelier and Williams failed to produce police reports and witness statements that could have been used to impeach Freeman, the key witness against Thompson. JA20-25. And they failed to produce evidence concerning a reward that was promised and ultimately paid to another witness, Perkins, even though Perkins years later testified without contradiction that the prosecutors told him that he would get a reward. JA20-22, 755-59. Dubelier and Williams ignored defense requests for information about claims on the publicly posted reward and failed to produce the evidence. Williams even argued to the jury in his closing—contrary to fact—that there was no evidence of a reward being sought by or promised to Perkins. JA807-08.

Each assistant district attorney who prosecuted Thompson claimed to have followed what he understood to be the policy of the office and to have followed the rules established by Connick. But no one said that he looked through the 35-page supplemental police report, the witness statements, the police documents showing blood evidence, or the dozens of pages of police "daily" summaries to find evidence favorable to the defense—as prosecutors are required to do in fulfilling their *Brady* obligations.

14. The jury thus had evidence of Connick's stunning misunderstanding of *Brady*, a complete absence of training, objectively flawed supposed guidance codified in the handbook, widespread misunderstanding by the prosecutors regarding the requirements of *Brady*, and the ensuing multiple *Brady* violations by

no fewer than four prosecutors. The totality of this evidence allowed the jury to conclude that this was not an isolated bad act, but a consequence of the policymaker's indifference both to the constitutional duty itself and the need for training. Connick may have told prosecutors to "follow the law," as he and some of his former assistants claimed (JA194, 198), but his patently erroneous understanding and instructions about what the law required reflected his indifference to the constitutional rights of the accused. The result, as reflected in the jury verdict, was the failure to produce critical evidence that would have avoided Thompson's 18 years of wrongful incarceration and near execution.

15. Judgment was entered for Thompson on the verdict, and a panel of the Fifth Circuit unanimously affirmed. Rehearing en banc was granted, thereby vacating the panel opinion. The en banc court evenly divided, resulting in affirmance of the judgment for Thompson.

SUMMARY OF ARGUMENT

The behavior of the prosecutors in this case—from the district attorney on down—shocks the conscience. Four different prosecutors withheld evidence that would have proven John Thompson's innocence, and, as a result, he spent 18 years wrongfully imprisoned and was nearly executed for crimes he did not commit. But for a chance discovery by defense counsel weeks before Thompson's scheduled execution, the

prosecutors' misconduct never would have come to light, and John Thompson would be dead today.

For anyone who believes that capital punishment is a just punishment for the most egregious crimes, the integrity of the system depends on ensuring that the things that occurred here—from the deliberate indifference of the district attorney himself down to the multiple violations by multiple prosecutors—do not happen.

Ever since *Canton*, it has been clear that municipalities can be held liable under §1983 for failure to train employees if that failure reflects a deliberate indifference to an "obvious" risk that constitutional violations will result. These standards are exacting, and the circumstances under which liability has been allowed are narrow.

Connick cynically suggests that upholding liability here will usher in a host of lawsuits against district attorneys across the Nation. But there has been no torrent of judgments against municipalities in the 20 years since *Canton* was decided, and the facts here are—one very much hopes—unique. If ever there were a set of facts justifying an award of damages against a district attorney's office, it is presented in this case. These facts fit the narrow circumstances where liability is altogether justified.

The jury heard exhaustive evidence about the culture of indifference to *Brady* obligations that suffused the district attorney's office. Connick himself

provided direct evidence that he was, quite literally, indifferent to *Brady*. Starting in 1974, he had "stopped reading law books," even though he, alone, made office policy. He completely misunderstood *Brady*'s requirements. He provided no instruction whatsoever to his prosecutors on *Brady*. And he had adopted a presumption of nondisclosure, so that prosecutors could turn over only what was legally required, and no more.

Indeed, Connick's indifference was so deep that he did not even know if he had ever read this Court's decision in *Kyles* v. *Whitley*, which reversed a capital murder conviction because of *his own office's failure* to comply with *Brady*—by the very same prosecutor who took a leading role in Thompson's prosecutions. And, following *Kyles*, he changed nothing whatsoever in his office practice.

The office handbook, which allegedly "codified" office practice at the time of Thompson's trials, contained only four sentences on *Brady*—and they were manifestly incorrect. Indeed, as the office's own designee conceded, under the standards in that handbook a prosecutor would not have known to produce the blood evidence in this case or the many other pieces of evidence that should have been produced under *Brady*.

Connick also admitted facts demonstrating his awareness of the obvious need for training. He conceded that he had established a presumption against his assistants producing to the defense police reports,

witness statements, and other investigative materials, unless the assistants recognized that they were "required" to be produced under law, thus making it even more crucial for his assistants to understand what was "required."

And, pursuant to their faulty understanding of *Brady*, four separate prosecutors failed to turn over the blood evidence, which indisputably came from the perpetrator of the armed robbery. The jury heard that Connick and several of his assistants believed that, even when they knew the perpetrator's blood type was "B," they had no obligation to hand over the blood evidence, so long as they remained ignorant of Thompson's blood type. And so they "deliberately" avoided making any reference to the blood evidence at trial. These same prosecutors also failed to produce significant favorable evidence in the murder trial, that when ultimately presented to the jury in 2003, resulted in Thompson's swift acquittal.

In the face of the overwhelming evidence of indifference that was before the jury, Connick urges the Court to disregard it all, and instead to overrule longstanding precedent and create a blanket rule that would insulate district attorneys from any liability for misconduct unless a preexisting pattern of constitutional violations is proven.

The Court should decline Connick's unwarranted invitation. There is nothing in the text of §1983 or this Court's precedents to support any such absolute and categorical treatment of district attorneys as

opposed to other municipal policymakers. Nor does it make sense as a matter of logic that the only way to prove the deliberate indifference of a municipal policymaker—whether a district attorney or otherwise—is through evidence of a pattern of violations.

Under *Monell*, *Canton*, and *Bryan County*, proof of a pattern is one way to prove a policymaker's awareness, which in turn is needed to prove deliberate indifference. But it is one of at least three ways to do so. In addition to proof of a pattern, a plaintiff may also present (1) direct evidence of both awareness and deliberate indifference by the policymaker, or (2) proof that the risk of constitutional violation is so "obvious" that the policymaker can be deemed aware of it.

In the instant case, Thompson introduced extensive direct evidence of Connick's awareness and indifference, which is alone sufficient for liability. And he offered evidence that the risk of *Brady* violations without proper training was obvious, and the consequences potentially grave—up to and including executing an innocent man—such that Connick could be deemed fully aware. And, for full measure, Thompson demonstrated a course of conduct consisting of multiple *Brady* violations, by four prosecutors, for many months, across two criminal trials.

The exacting standard for failure-to-train liability articulated over 20 years ago in *Canton* (and faithfully applied by the lower courts ever since) strikes the right balance between properly holding

public officials accountable for their own misdeeds and impermissibly subjecting them to liability solely for the misdeeds of their employees. In the instant case, the jury heard extensive evidence of deliberate indifference and the jury's verdict should stand. If the extraordinary facts of this case do not satisfy that exacting standard, it is difficult to imagine any that ever would.[3]

ARGUMENT

I. CONNICK WAS DELIBERATELY INDIFFERENT.

More than 20 years ago, the Court recognized that liability may be imposed on a local government entity, such as a district attorney's office, for failing to train its employees so as to avoid violating the constitutional rights of citizens they serve. *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989). To assure that government entities are held accountable for their own misdeeds, and not merely those of their employees, the standard for liability is exacting. It requires a plaintiff to prove: (1) a failure to provide adequate training; (2) a causal connection between that failure and the constitutional violation suffered by the plaintiff; and (3) deliberate indifference to the

[3] Indeed, particularly when viewed through the governing standard of review, the record does not support the "single incident" premise upon which petitioners sought certiorari, warranting dismissal of the writ.

plaintiff's constitutional rights. *Ibid.* Only where there is solid proof of deliberate indifference can that standard be satisfied. This is such a case.

A. A Pattern Of Violations Is Not Always Required To Prove Deliberate Indifference.

Connick and his *amici* urge the Court to adopt a blanket rule that district attorneys can *never* be liable under §1983 unless there was a prior pattern of violations. This *per se* rule may have the virtue of simplicity, but it has no foundation in the statutory language or this Court's precedents. Indeed, to adopt Connick's proffered rule would represent a dangerous step backwards and would require overruling both *Canton* and *Monell*.

Under *Canton* and *Monell*, the touchstone is awareness. If the policymaker is aware of the need for training and the likelihood of constitutional injury, and he or she fails to provide the required training, liability attaches. There are at least three ways to satisfy the deliberate-indifference standard: (1) through direct evidence of actual indifference to a known need to train; and (2) through circumstantial evidence establishing either (a) a situation where the need to train is so obvious that knowledge can fairly be imputed to the decisionmaker, or (b) a pattern of prior violations, such that the decisionmaker can be deemed on notice of the need to train to avoid them going forward.

In *Monell* v. *Department of Social Services of New York*, this Court held that "municipalities and other local government units" are "included among those persons to whom §1983 applies." 436 U.S. 658, 690 (1978). Under *Monell*, liability attaches "when execution of a government's policy or custom * * * inflicts the [constitutional] injury." *Id.* at 694. The *Monell* Court did not limit §1983 to cases where an explicit policy violates the Constitution. Instead, the Court noted that it had not defined "what the full contours of municipal liability under §1983 may be" and left "further development of [§1983] action[s] to another day." *Id.* at 695.

Eleven years later, the Court decided *City of Canton* v. *Harris*. *Canton* concerned the circumstances under which inadequacy of training can form the basis of municipal liability under *Monell*. The plaintiff in *Canton* alleged that the city was liable under §1983 because inadequately trained police officers ignored her medical condition after her arrest. The Court noted that although the courts of appeals uniformly agreed that a §1983 claim could be based on a municipality's failure to train, there was a "substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality's inaction before liability will be permitted." 436 U.S. at 388 (emphasis in original).

In addressing that issue, the Court explained that liability could be predicated upon "deliberate indifference," which in this context means inaction in

the face of reasonably known or objectively identifiable conditions:

> But it may happen that in light of the duties assigned to specific officers or employees *the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights*, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390 (emphasis added). Thus, in determining whether local officials have been deliberately indifferent to constitutional rights, the focus is on (1) the obviousness or actual knowledge of the need for training, and (2) the likelihood that a failure to train will result in constitutional violations.

To illuminate those requirements, the Court offered two non-exclusive hypothetical situations in which the requisite "level of fault" for failure-to-train liability could be satisfied. First, the Court recognized that the need to train in certain circumstances "can be said to be 'so obvious' that a failure to [train] could properly be characterized as 'deliberate indifference' to constitutional rights." *Canton*, 489 U.S. at 390 n.10. The Court did not characterize this form of proof as an "exception" to any general rule requiring proof of a pattern of violations. Rather, it was the *first*

example the Court offered in explaining the deliberate indifference standard.

The Court also envisioned another basis for failure-to-train liability: "It could *also* be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Ibid.* (emphasis added). Again, whether "single-incident" or "pattern," the touchstone is awareness of the need—demonstrated in the Court's second hypothetical by a pattern of violations, and in the first by the obvious need for training itself.

In providing those examples of circumstantial proof, the Court did not purport to limit its analysis to claims against police departments. Nor did it announce a preference for one way of proving deliberate indifference over the other. Most important, the Court did not foreclose other ways of establishing the "level of fault"—such as by direct evidence of the policymaker's actual knowledge of the need for training or disregard for the constitutional obligation itself.

The Court made clear that the need for public officials to train their employees on avoiding constitutional violations may be so obvious in some situations that the failure to do so gives rise to §1983 liability and that a pattern of violations is unnecessary. The Court anticipated that training police officers in the proper use of deadly force might be one case in which the need to train was so obvious that a pattern would

not be necessary to prove deliberate indifference. In other instances, the need for training may not be so obvious—in which case, a pattern of violations could supply the requisite notice before a policymaker could properly be deemed "deliberately indifferent" to that need. Accordingly, although the plaintiff had not offered proof of a pattern at trial, the Court remanded to give the plaintiff "an opportunity to prove her case under the 'deliberate indifference' rule we have adopted." *Id.* at 392.

In *Board of County Commissioners of Bryan County* v. *Brown*, the Court contrasted the failure-to-train cases envisioned in *Canton*—where there is proof of an ongoing and deficient or non-existent training program—with so-called "single-incident" cases involving a failure to properly *screen* a *particular* candidate for employment. 520 U.S. 397, 407-10 (1997). In *Bryan County*, the plaintiff claimed that in deciding to hire a particular deputy, the county sheriff's office inadequately screened that specific candidate, who later violated the plaintiff's constitutional rights. The Court reaffirmed its earlier recognition of "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." *Id.* at 409 (citing *Canton*, 489 U.S. at 390 & n.10).

Against this background, the Court rejected plaintiff's attempt to analogize her improper screening-and-hiring claim to the failure-to-train claims described in *Canton*. *Ibid.* The Court went on to explain why pattern evidence is not required in all failure-to-train claims:

> The likelihood that the situation will recur *and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights* could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the *obvious consequence* of the policymakers' choice—namely, a violation of a specific constitutional or statutory right. The *high degree of predictability may also support an inference of causation*—that the municipality's indifference led directly to the very consequence that was so predictable.

Id. at 409-10 (emphases added). The Court observed that, unlike failure-to-train claims, inadequate screening claims present a "particular danger" that "a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself." *Id.* at 410. That is because "predicting the consequence of a *single hiring decision*, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties." *Ibid.* (emphasis added).

In failure-to-train cases, a pattern is not required in all instances because "the risk from a particular glaring omission in a training regimen" can be "'obvious' in the abstract." *Ibid.*; see also *Simpson* v. *Univ. of Colo.*, 500 F.3d 1170, 1178 (10th Cir. 2007) ("In applying this standard we take note of *Canton*'s discussion of what is meant by an 'obvious' need for training. It recognized that a need could be 'obvious' for reasons other than knowledge of previous incidents within the municipality.").

The concepts of "obviousness" and breadth of impact supply the key distinctions between the failure-to-train claims the Court envisioned with approval in *Canton* and the inadequate screening claims the Court rejected in *Bryan County*. In failure-to-train claims, a non-existent or glaringly inadequate training program can rightly be said to be a municipal policy, the deficiency of which can be objectively obvious and the impact of which can be far-reaching, regardless of whether previous violations are shown. In such cases, the actions that form the basis for municipal culpability are not a "single incident." It is an ongoing and either non-existent or grossly deficient training program that has the potential to affect an entire category of municipal employees and harm countless citizens. See *Canton*, 489 U.S. at 390 & n.10; see also *Woodward* v. *Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 929 (7th Cir. 2004) (evidence of a single injury caused by a failure to train was evidence that the government actor "was fortunate, not that it wasn't deliberately indifferent").

By contrast, a single-incident screening-and-hiring claim is disfavored because it premises culpability on an isolated act by a municipal policymaker, whose impact is limited to the actions of the specific hired employee, rather than on an ongoing municipal program potentially impacting many employees.

Because failure-to-train claims present difficult questions of fault and causation, the lower courts have rightly subjected them to the searching review required by this Court. As Connick's own *amici* correctly observe, the "exacting standard" the Court established in *Canton* "for finding liability under a failure to train theory where there is no pattern of previous constitutional violations" has been "repeatedly reaffirmed by the federal courts." Br. of *Amicus Curiae* Orleans Parish Assistant District Attorneys 5.

Under that "well-established analytical framework" (*ibid.*), a pattern of similar violations is not the only way to prove deliberate indifference—as every court of appeals to have addressed the issue has held.[4] But like virtually all standards based on "state

[4] *Young* v. *City of Providence*, 404 F.3d 4 (1st Cir. 2005); *Walker* v. *City of New York,* 974 F.2d 293 (2d Cir. 1992); *Berg* v. *Cnty. of Allegheny*, 219 F.3d 261 (3d Cir. 2000); *Buffington* v. *Baltimore Cnty.*, 913 F.2d 113 (4th Cir. 1990); *Cousin* v. *Small*, 325 F.3d 627 (5th Cir. 2003); *Plinton* v. *Cnty. of Summit*, 540 F.3d 459 (6th Cir. 2008); *Woodward* v. *Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004); *Larkin* v. *St. Louis Hous. Auth. Dev. Corp.*, 355 F.3d 1114 (8th Cir. 2004); *Tanner* v. *Heise*, 879 F.2d 572 (9th Cir. 1989); *Simpson* v. *Univ. of Colo.*, 500 F.3d 1170 (10th

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of mind," deliberate indifference may be proven by either direct evidence of indifference or circumstantial evidence where the need for training is "obvious" and constitutional injury is the "'highly predictable' consequence" of failing to provide it. *Bryan County*, 520 U.S. at 409. This Court has never limited plaintiffs to proving fault in the unduly restrictive manner urged by Connick.

Connick relies heavily upon Justice O'Connor's separate opinion in *Canton*. See, *e.g.*, Pet. Br. 41, 60-61. If anything, Justice O'Connor's opinion supports liability here. Justice O'Connor agreed that where, as here, "a §1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission [in training] is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied." 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part). According to Justice O'Connor, "it could be shown that the need for training was obvious in one of two ways," including where, as here, the municipality "fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." *Ibid*. The "use of deadly force by police officers present[s] one such situation" because the "constitutional

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Cir. 2007); *Young* v. *City of Augusta, Ga.*, 59 F.3d 1160 (11th Cir. 1995); *Daskalea* v. *Dist. of Columbia*, 227 F.3d 433 (D.C. Cir. 2000).

duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue." *Ibid.*

The claim in *Canton*—"that police officers were inadequately trained in diagnosing the symptoms of emotional illness"—fell "far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference to constitutional rights on the part of the city." *Id.* at 396-97. Unlike *Brady* obligations, the Court had not yet addressed the precise nature of the due process obligations of police in the *Bryan County* situation, and the "diagnosis of mental illness" was not a "usual and recurring situation[ ]" with which subordinate officials must deal. *Ibid.* Moreover, the plaintiff in *Canton* "presented no testimony * * * indicating that there had been past incidents of 'deliberate indifference' to the medical needs of emotionally disturbed detainees *or that any other circumstance had put the city on actual or constructive notice* of a need for additional training in this regard." *Id.* at 398-99 (emphasis added). Justice O'Connor thus expressly contemplated "other circumstances" in addition to a pattern that could put a policymaker on notice of the need for training.

B. This Case Presents Precisely The Circumstances Envisioned By This Court Where Failure-To-Train Liability Is Appropriate.

This case involves the type of failure-to-train claim approved in *Canton* and reaffirmed in *Bryan County*. Not only was the need for some *Brady* training obvious and not provided, but Connick as policymaker was manifestly indifferent to the constitutional obligation itself and also admitted facts establishing that he knew he needed to provide training on *Brady*'s requirements.

Connick's own direct testimony concerning his fundamental misunderstanding of *Brady*, and the demonstrably wrong office handbook concretely reveals Connick's indifference towards the constitutional obligation itself. Indeed, the sort of direct evidence of policymaker fault introduced in this case even more powerfully demonstrates deliberate indifference than the circumstantial inferences of knowledge and fault that may arise from a pattern.

This case is not really a "single incident" case at all. To be sure, it involves the violation of "only" one citizen's rights. But Connick's testimony and actions directly establish the fault of the policymaker, and there were numerous *Brady* violations by at least four prosecutors over a period of several months in the Thompson pretrial proceedings. Thus, the very premise upon which petitioners sought certiorari is flawed. This case fits even more comfortably within

the *Canton* failure-to-train framework than the hypothetical example provided by the Court in *Canton*—a single police officer who shoots a single suspect in a single incident with no direct evidence of policymaker indifference.

In this case, a culture of indifference suffused the office, and it came from the top. The district attorney read no law books and paid no attention to the constitutional standards. Prosecutors were told to produce only what was legally "required," and then were given no guidance about what was "required." And the instruction that Connick claims to have given, supposedly memorialized in the handbook, was demonstrably wrong.

The jury had ample evidence that four prosecutors knew about the blood evidence, and none produced it. This behavior was entirely consistent with the culture of the office, Connick's own testimony about what was required, and Connick's own handbook. And the non-produced evidence was not merely peripheral evidence that might have a tangential impact on the trial; it was evidence that could conclusively prove guilt or innocence.

The parties *stipulated* that the blood was from the perpetrator of the armed robbery. JA14-15. Had Thompson committed the crime, the blood would have been compelling evidence of his guilt. But the prosecutors had it tested, and then did nothing further with it. Indeed, Williams *deliberately* avoided mentioning the blood at trial. JA73, 80-81. Only two

inferences are reasonably possible: first, that the prosecutors suspected that Thompson was not the perpetrator, and were afraid the blood evidence would confirm it; or second, that the prosecutors simply did not care.

From the testimony of all witnesses, one sees a consistent picture—from Connick down, they believed that *Brady* was a narrow standard and that *Brady* violations were limited to the knowing and intentional concealment of evidence that is conclusively exculpatory on its face. This gross misunderstanding was not isolated, but rather manifested in the conduct of every prosecutor in this case.

1. Connick Actually Knew Training Was Required.

Connick—the sole policymaker for his office—admitted on cross-examination the requisite facts under *Canton* establishing his awareness of facts creating an obvious need for *Brady* training: (1) that his prosecutors regularly confronted decisions involving *Brady* (JA439); (2) that it was crucial for his prosecutors to make proper *Brady* decisions (*ibid.*); (3) that *Brady* was an "elastic thing" for which it was difficult to find a "standing definition" (JA151); (4) that *Brady* required his young and inexperienced prosecutors to understand *Brady*'s requirements (JA442); and (5) that if prosecutors made wrong *Brady* decisions, constitutional harm would result. JA439. Connick also acknowledged that his restrictive

discovery policy could lead to *Brady* violations and thus made it even more important for his assistants to understand their constitutional obligations. JA159.

Connick thus admitted each fact necessary to establish actual awareness of a training need as explained in *Canton*.

2. Despite His Actual Knowledge, Connick Provided No Training Or Correct Guidance.

The jury heard extensive evidence that, despite this awareness of the need for training, Connick nonetheless failed to provide any training or even any clear message regarding *Brady*. See, *supra*, pp. 16-18. None of the prosecutors involved in Thompson's cases identified any *Brady* training or instruction from anyone in the office, and 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." JA27. The jury thus properly could conclude that despite Connick's actual awareness of the need for training, none actually was provided.

Connick makes extensive factual arguments about supposed generic training and guidance that allegedly was provided, but he ignores both the applicable standard of review and the record evidence

that there was absolutely no *Brady* training or guidance at the time of Thompson's prosecutions.[5]

Thus, although former first assistants McElroy and Bane claimed that the office provided *Brady* training, the jury was free to reject that testimony, given the conflicting contrary evidence. See *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 115 (1963) (cautioning that courts "are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences and conclusions").

3. Even If The Jury Credited Petitioners' Accounts Of Supposed *Brady* Guidance, That Testimony Actually Supports An Independent Basis For Liability.

Even if the jury were to have credited testimony about supposed *Brady* guidance, the only evidence offered as to the *substance* of any such *Brady* guidance consisted of Connick's and McElroy's assertions that the *Brady* guidance at the time of Thompson's trials was codified in the 1987 office handbook. JA393 (office *Brady* practice "from the very beginning,

[5] Indeed, most of the testimony referenced in Connick's brief concerns procedures and structures unrelated to *Brady*. The only testimony about the *substance* of *Brady* guidance was that it ultimately was codified in the objectively deficient handbook.

[*Brady* instruction] was codified in the policy manual as Article 5.2"); see also JA407-08, 448-50. That handbook included nothing other than an objectively wrong explanation of *Brady*'s requirements. *Supra*, at pp. 9-11.

The handbook included one sentence devoted to the substance of *Brady*'s requirements: "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." JA704. But *Brady* does not require either a request from defense counsel or an order from the court. *United States* v. *Agurs*, 427 U.S. 97, 107 (1976). And, contrary to the manual and Connick's testimony, *Brady* long has required production not just of "exculpatory" evidence, but of all information that is "favorable to the accused," such as impeachment information. *Giglio*, 405 U.S. at 154-55.

Even the official designee of Connick's office conceded that the handbook's *Brady* description was deficient (JA481-82), and that the handbook would not have alerted prosecutors that the blood report should have been produced. JA483-84. Thus, although the jury properly could have found this to have been a "no training" case, it also could have found this to have been a "completely wrong training case," and that the demonstrably wrong guidance later "codified" in the handbook was a substantial cause of Thompson's injuries. Far from supporting Connick's theory, a careful review of the proffered

testimony actually provides an independent basis for liability.

4. Thompson Established Connick's Actual Indifference To The Underlying Constitutional Obligation Itself.

This is not a case in which a jury was asked to find the indifference of the policymaker by extrapolating from a "single incident" of a single municipal employee. On the contrary, this case involved the rare circumstance where the policymaker's own testimony and actions demonstrated indifference toward the constitutional obligation itself.

Although Connick alone was responsible for all office policies, he admitted he "stopped reading law books" when he became district attorney. JA144. He erroneously and narrowly believed *Brady* extended only to "exculpatory evidence," which he described as "evidence that he's not guilty of the crime with which he [was] charged." JA147-48. And, in a remarkable statement totally at odds with the very foundation of *Brady*, Connick claimed that *Brady* and his office policy only precluded the "intentional" concealment of evidence, which he distinguished from "the inadvertent conduct of [an] assistant under pressure with a lot of case load * * * ." JA159. Connick's own testimony reflected such a fundamental misunderstanding of *Brady* that by that alone he

could be found to have been indifferent to the obligation.

Because Connick deliberately ignored this Court's *Brady* teachings, he provided objectively erroneous guidance in the 1987 handbook, which supposedly codified prior office guidance. Consistent with Connick's grossly flawed understanding of *Brady,* the handbook misstated *Brady*'s obligation to such an extreme extent that the jury could properly view it as also reflecting indifference.

Moreover, when this Court reversed the conviction obtained by his office in *Kyles*, Connick admitted he was unaware that *Kyles* even involved *Brady* issues even though both the underlying conduct and this Court's decision occurred while he was district attorney. JA152-53. As a result, it is not surprising that Connick also testified that he made no changes to enhance office policy as a result of this Court's decision. JA154.

Although *Monell* and *Canton* do not require a plaintiff to establish by direct evidence the actual indifference of the policymaker to the constitutional obligation itself, in the instant case there was ample evidence for the jury to conclude just that. Concerns about imposing *respondeat superior* liability are not present in this case, in part due to the rare but disturbing evidence from the policymaker himself.

C. Connick's Request For A Blanket Exemption Is Dangerous And Contrary To Precedent.

Ignoring both the Court's analysis in *Canton* and the direct evidence of deliberate indifference in this case, Connick seeks to impose a rigid and artificial rule that deliberate indifference can be established against a district attorney only through circumstantial proof of a history of assistant district attorneys injuring citizens through *Brady* violations. Connick's proposed rule is inconsistent with precedent, makes no sense as a matter of logic, and would effectively insulate district attorneys from any accountability.

In this case, the need for training was not only objectively obvious, but Thompson also offered *direct evidence*—mostly from Connick himself or based on Connick's own 1987 handbook—that Connick was both actually indifferent to the underlying constitutional obligation and actually aware of the need to provide training or guidance. Such direct evidence, although rare, is far more powerful than the circumstantial inferences that arise through proof of a pattern.

Encouraging government policymakers to take a proactive approach to safeguarding constitutional rights decreases both the instance of constitutional violations and the number of §1983 lawsuits. *Owen* v. *City of Independence*, 445 U.S. 622, 656 (1980); *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 317-18 (2d Cir. 1999) ("A judgment against a municipality

not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue."). Connick's proposed restrictive rule would remove these important safeguards.

If, as Connick urges, *Monell* liability for failure to train is essentially a dead letter in the absence of a pattern of constitutional violations—no matter how obvious the need for training, no matter how clearly the policymaker actually perceived the need, no matter how easy it would be to provide, no matter how predictable the consequences, and no matter how grave the consequences—then essentially the only way a municipality can be held liable under *Monell* is if substantial numbers of citizens are injured first or explicit policies cause constitutional injury.[6]

Under Connick's proposed rule, a plaintiff who had not demonstrated a history of violations could not recover against a district attorney, even if he or she testified: "I know my assistants need training, and that they will violate the Constitution without training, but I don't know and really don't care what our constitutional obligations are. I'm not going to provide any training." Although that hypothetical might seem

[6] The Fifth Circuit, for example, concluded in another case that 13 prior *Brady* violations did not constitute a pattern sufficient to put Connick on notice. See *Cousin*, 325 F.3d at 637.

unlikely, that is precisely what the jury could have found Connick to have thought and done in this case.

1. Connick Should Not Be Relieved Of Responsibility To Train His Employees Merely Because They Are Lawyers.

Connick and his *amici* argue that district attorneys should receive a special exemption from failure-to-train liability because their employees went to law school—and can be "presumed" to need no training as a matter of law. Pet. Br. 25-31. There are many problems with that argument.

Although law schools provide theoretical grounding in principles of law, many do not provide the substantive and practical grounding necessary for prosecutors to honor their constitutional obligations in the rough-and-tumble world of state criminal litigation. Cf. *United States* v. *Bagley*, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting) (for *Brady* purposes, prosecutors "must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt"). It strains credulity that lawyers—who may or may not even have encountered *Brady* during a first-year criminal procedure class—would require no additional training to be able to understand how to go about fulfilling their *Brady* obligations as actual prosecutors.

Despite being under pressure to "get convictions" (JA190), the prosecutors in Connick's office were

given neither accurate, substantive guidance nor the kind of clear message about *Brady* compliance that could counteract that intense pressure. The jury heard testimony from Connick that *Brady* required prosecutors to make difficult choices, and heard other testimony that Connick compounded that difficulty by imposing a policy that strongly discouraged the production to the defense of police reports and witness statements. Connick admitted that his selective-production policy made it even more crucial for his prosecutors to make proper *Brady* determinations. Connick's failure to deliver a clear message about the importance of *Brady* compliance or to provide accurate, substantive guidance is not excused merely because his prosecutors graduated from law school and passed the bar examination.

The idea that lawyers should be presumed to understand *Brady* also is refuted by Connick's own seriously inaccurate testimony about *Brady*, the facially incorrect articulation of *Brady* in the office handbook, and the mistaken assertions about fundamental *Brady* principles made by prosecutors Dubelier and Williams. If lawyers all can be presumed to understand *Brady*, none of those serious *Brady* misunderstandings would have been possible.

Particularly where a district attorney chooses a policy of turning over only what "state and federal law require" and "no more," it is incumbent upon him to provide a clear message about the critical importance of *Brady*. He must also provide some correct, substantive guidance about what they must do to

determine whether or not they have *Brady* material. The jury heard ample evidence that Connick's office did none of that. In fact, what Connick claims to have told his prosecutors in the guidance ostensibly codified in the handbook was palpably wrong, and would have misled even those who encountered *Brady* in law school.

Connick and his *amici* argue that training would not have made a difference in this case because it would have been "obvious" that *Brady* required production of the evidence here. Pet. Br. 54-60. But both the office's designated witness and Connick himself *disputed* the constitutional obligation to produce the blood report if prosecutors did not know Thompson's blood type. JA487, 550-51. And the office's designated witness admitted that the handbook would not have required the production of the evidence either. JA483-84.

In the end, Connick's argument misunderstands the examples provided by this Court in *Canton*. Connick argues there is a difference between the need for training of police officers on the use of deadly force as discussed with approval in *Canton*, and the need for training of prosecutors as to *Brady*, because the latter are "professionals." See, *e.g.*, Pet. Br. 40. But if anything, *Canton*'s hypothetical of a single incident of force by a single police officer in the heat of the moment comes much closer to the line of *respondeat superior* than this case. Even so, the Court indicated with approval in *Canton* (and later re-affirmed in

Bryan County) that liability could properly attach to a municipality in such a situation.

Here, there was no such "heat of the moment," but a course of conduct over two criminal trials involving multiple prosecutors and numerous nondisclosures. Prosecutors had months to decide what to do with the blood samples and police reports and days to produce the crime-laboratory report. And, by any measure, the consequences of Connick's deliberately indifferent failure to train in this case—the unjust imprisonment and near-execution of an innocent man—are no less perilous than police use of deadly force in the *Canton* hypothetical.

2. Holding Connick Accountable For Failing To Train His Prosecutors Is Consistent With Prosecutorial Immunity.

Contrary to the assertions of Connick and his *amici*, holding a district attorney's office accountable under *Monell* for a deliberately indifferent failure to train prosecutors to avoid violating citizens' constitutional rights is fully consistent with the absolute immunity accorded individual prosecutors. This Court has long held that municipalities cannot claim the same immunities that shield individuals from damages liability under §1983. See *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) (citing *Owen* and *Monell* and stating that these decisions "make it quite

clear that, unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under §1983"). The Court's recent decision in *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009), did not alter that longstanding rule. The only claims before the Court in *Goldstein* involved the personal liability of individual prosecutors. *Id.* at 858-59. The Court was not presented with municipal liability claims under *Monell*.

Claims against municipal policymakers in no way undermine the rationale for affording immunity to individual prosecutors addressed in *Goldstein*. The "basic fear" underlying prosecutorial immunity is "that the threat of damages liability would affect the way in which individual prosecutors carried out their basic court-related tasks." *Goldstein*, 129 S. Ct. at 862. But that rationale loses force when the liability of the municipality, not the individual, is at issue. As the Court has explained in the analogous context of qualified immunity:

> [C]onsideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Owen, 445 U.S. at 656 (original emphasis omitted). The argument that *Goldstein* should be extended to

foreclose Thompson's claim would effectively overrule *Monell, Canton*, and *Bryan County*. It would also improperly expand absolute prosecutorial immunity far beyond the bounds set by the Court. And, it would ignore the distinctions between municipal and personal liability recognized in *Leatherman* and *Owen*.

That conclusion is confirmed by an *amicus* brief filed on behalf of 49 States (including Louisiana) and the District of Columbia in *Goldstein*, arguing against expanding individual liability to include supervisory attorneys precisely *because* of the availability of municipal liability under the very theory of liability in this case: "[I]f a supervisory prosecutor is a 'final policymaker' for a county or city, the municipal entity itself may be liable for the prosecutor's actions, making supervisory liability duplicative and unnecessarily expansive." Brief for the States of Kansas, et al., as *Amici Curiae* in Support of Petitioners 21. "Though municipalities cannot be held liable on a *respondeat superior* basis," the States explained, "they can be liable when an 'official policy or custom' causes a constitutional deprivation." *Ibid.* Where, as here, "a supervisory prosecutor is a 'final policymaker' for a municipality, then that official's decisions may create policy that results in constitutional harm for which the municipality is liable under Section 1983." (Internal citation omitted.) And, the States observed, "[s]uch a 'policy' may include the 'failure to train or supervise' municipal employees." *Ibid.* (citing *Canton*). Because, in the States' view, "a municipality itself may sometimes be subject to the remedies of

Section 1983," the Court did not need to "expand" the statute to "include individual supervisory prosecutors." *Ibid.* It necessarily follows that the Court need not, and should not, narrow the statute here to exclude municipal liability when district attorneys act as policymakers.

Holding a district attorney accountable for being deliberately indifferent to constitutional rights in failing to train his prosecutors is fully consistent with *Goldstein*. For one thing, supervisory liability is not necessary under *Goldstein* precisely because *Monell* liability *is* available in narrow cases like this one. For another, both share the same goal of protecting individual prosecutors—one by ensuring they can perform their jobs without undue fear of liability, and the other by ensuring they have the tools they need to perform their jobs without violating the rights of the citizens they serve.

D. This Court's Exacting Standard For Proving Failure-To-Train Claims Allows Municipal Liability Only In Rare Cases.

Although Connick and his *amici* claim that allowing the verdict to stand would open the floodgates to liability, they have pointed to no evidence that in the 20 years since the Court first recognized the prospect of municipal liability for failure to train, either municipalities in general—or district attorney's offices in particular—have faced a torrent of liability for such claims. If anything, the available evidence confirms that the existing legal framework—

including the exacting standard for pleading and proving failure-to-train claims against municipalities—strikes the proper balance between holding public officials accountable for violating citizens' constitutional rights, on the one hand, and protecting the public fisc on the other. Twenty years of actual experience with *Canton* underscores that Connick's proposed new rule is not only unwise, but also unnecessary.

Connick suggests that holding the district attorney's office liable for failing to provide any training concerning *Brady* would subject district attorney's offices to claims for routine decisions on search and seizure, interrogations, and sentencing. Pet. Br. 35. That concern is misplaced. Some of those prosecutorial decisions—concerning, for example, the use of other-crimes evidence and expert witnesses—hardly ever implicate constitutional rights. Others—such as those concerning search and seizure—are not prosecutorial in nature at all, as they typically involve investigative processes and fall on the police side of the line. As for the rest, the potential consequences of any failure to train—which the Court's hypothetical in *Canton* necessarily implies should be a key factor in the deliberate-indifference analysis—are significantly less harmful. And in all of the examples cited by petitioners, the prosecutor's decisions are subject to court review *before* the evidence can be used at trial.

The nature of a prosecutor's *Brady* decision, however, is materially—perhaps uniquely—different.

In most instances, a *Brady* decision is in the private hands of the prosecutor alone, and there may be no judicial review except in the rare instance where a judge orders *in camera* inspection of the entire State file, or, as here, by fortuitous circumstances. Review of a prosecutor's *Brady* determinations almost always occurs post-trial, after the accused has already been deprived of his liberty—and even then usually only in the most significant of crimes and if the defendant somehow gains access to some or all of the State's file.

Unlike *Miranda* protections, search and seizure restrictions, and the many other constitutional rights implicated in a criminal trial, *Brady* claims concern the central question of guilt and innocence. Indeed, while in the other examples evidence of guilt may be excluded as a constitutional remedy, *Brady* violations deprive a citizen of evidence that may help establish innocence. Here, because prosecutors failed to turn over the blood evidence and other documents favorable to Thompson, the wrong man was convicted and nearly executed. *Brady* violations, predictably, undermine the integrity of a trial and increase the chances that an innocent man will be punished or even executed—making *Brady* the prosecutorial equivalent of the police use of deadly force cited by the *Canton* Court as the *exemplar* of failure-to-train liability.

II. CONNICK'S DELIBERATE INDIFFERENCE CAUSED PROSECUTORS TO VIOLATE THOMPSON'S CONSTITUTIONAL RIGHTS.

A §1983 claimant must prove that the policymaker's deliberate indifference was a substantial cause or "moving force" of the constitutional violation. *Bryan County*, 520 U.S. at 404. Although courts have phrased the causation requirement in various ways, the Court described the key question in *Canton* as: "[w]ould 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. The jury in this case had ample evidence from which to answer that question in the affirmative. See *Gallick*, 372 U.S. at 115 (jury entitled to weigh evidence and draw inferences).

Connick admitted that he knew that his prosecutors would be confronted with difficult *Brady* decisions and that it would be important for his prosecutors to understand and follow *Brady* to avoid violating citizens' constitutional rights. Yet none of the *Thompson* prosecutors who worked under Connick at the time could recall any training involving *Brady*.

As a result of the complete lack of training and the flawed guidance that Connick claimed to have memorialized in the handbook, it is not surprising that the prosecutors involved in Thompson's criminal trials were fundamentally wrong when they were asked to explain *Brady*'s requirements. For example, until the district judge literally reared back in surprise at trial, Williams claimed that *Brady* did not

require production of impeachment material. JA217. Dubelier said that *Brady* did not require the production of police reports describing the murder perpetrator as having "close-cut hair" (JA140-43), even though he had a contemporaneous mug shot of Thompson with a large "Afro" style haircut (JA575), as long as Dubelier could conjure up in his own mind some explanation of how the two could be reconciled. JA142. This type of confusion and misunderstanding about *Brady* was fully consistent with Connick's own misunderstanding.

As a result of broad misconceptions about *Brady*'s requirements, at least four prosecutors—Dubelier, Williams, Whittaker, and Deegan—knew about the blood evidence and yet failed to disclose it. When Dubelier responded to Thompson's discovery request in the armed-robbery case, he had documents from the police investigation noting that a bloody swatch was cut from the pant leg of Jay LaGarde; yet, he took no steps to produce the evidence. JA279-80. The jury was free to conclude that Dubelier, the special prosecutor in charge of both cases, knew but chose not to reveal there was blood evidence. Indeed, Williams admitted that if there were a decision by the prosecutors not to use the blood evidence, it must have been made by Dubelier. JA83-84.

The evidence was even more compelling as to Williams's and Whittaker's knowledge of the blood evidence. The crime-laboratory report was addressed to Whittaker, who admitted receiving it and putting it on Williams's desk just two days before the armed-robbery trial. JA179. Williams conceded that 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. JA80-81. Indeed, after the robbery victim asked Williams about the blood evidence, Williams responded by saying it was "inconclusive." Whether Williams actually lied to Jay LaGarde or somehow justified his statement because he may have chosen not to ascertain Thompson's blood type, Williams's assertion that the results were "inconclusive" puts to rest any claim that he was unaware of those results.

Connick insists that "[n]othing [his] office did could have conceivably caused" the "evil act" of a "prosecutor—perhaps acting with others, perhaps acting alone—knowingly bury[ing] evidence that would have cleared Thompson." Pet. Br. 60. Connick's attempt to re-argue the facts suffers from several basic flaws.

First, although Connick points to Michael Riehlmann's account of Deegan's statement to support this argument, the jury was free to reject that account in its entirety. More importantly, Riehlmann was hardly clear about what Deegan allegedly told him years before the civil trial. JA362-63, 367. Indeed, Riehlmann testified that "Gerry told me that he had failed to turn over stuff *that might have been* exculpatory." JA363 (emphasis added). Moreover, Riehlmann conceded that he could not say whether or not Williams, Dubelier, or other prosecutors were

involved in the non-production of the evidence. JA362, 369-70.

There are any number of reasonable inferences that could be drawn from Riehlmann's testimony about Deegan's thinking at the time of his alleged statement, if the testimony is to be credited at all. For example, Deegan could have had misgivings about not producing the report, even if he had been instructed by other prosecutors or otherwise believed they were not "required" to produce it unless they knew Thompson's blood type.

Second, although Connick has repeatedly argued in this civil litigation that the crime-laboratory report "obviously" was *Brady* material, the district attorney's own designated witness testified on behalf of the office that *Brady* did *not* require the production of the crime-laboratory report unless the prosecutors knew Thompson's blood type. JA487. And, as Glas testified, Connick and McElroy both held similar views at various times. JA550-51.

Third, the district attorney's designated witness testified that if the prosecutors had been following the guidance supposedly codified in the 1987 office handbook, they would not have known to produce the crime-laboratory report. JA483-84. Indeed, a jury could have predicated a finding of causation *on those facts alone*. If the jury credited Connick's and McElroy's claims that the handbook "codified" egregiously incorrect prior *Brady* guidance that would not have required production of the crime-laboratory report or

other withheld evidence, it could have found that the constitutional injury in this case occurred *because* the assistants simply followed that erroneous guidance.

Fourth, the evidence shows that multiple prosecutors failed to meet their *Brady* obligations by not only failing to produce the blood evidence, but also by failing to produce other items of *Brady* material. The sheer number of violators and violations strongly suggests causation. Two of those prosecutors—lead prosecutors Williams and Dubelier—were among the highest-ranking members of the office. Dubelier was the number three person in the office, and Williams was a senior homicide prosecutor. Dubelier and Williams had witness statements and police reports indicating that only one perpetrator was involved in the murder (conflicting with Freeman's trial testimony that both he and Thompson were at the crime scene); they had a description of Liuzza's murderer that was both inconsistent with Thompson's appearance (as reflected by a contemporary photograph of Thompson in the State's possession), and fully consistent with Freeman's appearance; they had statements showing that Freeman had told conflicting stories about what occurred on the night of the Liuzza murder; and they had impeachment evidence about another State witness's effort to collect a reward.

The jury was certainly free to determine causation from the number of actors, the number of violations, and the actors' total confusion about the *Brady* standard. It was also free to conclude that what

occurred here was not an "isolated incident" by one rogue employee. Deegan was far and away the most junior person on the Thompson prosecution team. As grand-jury prosecutor Glas testified, it was "ridiculous" to believe that Deegan took action on his own. JA536. The jury properly rejected the dubious notion that the most junior person on the prosecution team made a unilateral decision not to produce critical evidence in a high-profile prosecution.

Fifth, Connick's position is squarely at odds with the recognition that a failure to train can be a moving force behind constitutional injury, even if "the proper course is clear" in any particular case, because prosecutors may have "powerful incentives to make the wrong choice." See *Walker,* 974 F.2d at 297. The purpose of training is not just to instruct, but also to send a clear message about the priorities of the municipal agency. Unfortunately, although it would have been easy to do so, that message was never delivered in Connick's office at the time of Thompson's prosecutions.

In the end, Connick's theory that there was only one *Brady* violation by one prosecutor fails to account for the actual evidence or the standard of review. Not only does it ignore that no fewer than four prosecutors were involved in the non-production of the blood evidence, but it also fails to account for the stipulated facts that police reports and other evidence were not turned over by Dubelier and Williams in the murder prosecution, with which Deegan was not involved. That extensive evidence rebuts Connick's

rather remarkable assertion that Thompson produced *no* evidence that "a specific, systemic flaw in Connick's approach to *Brady* compliance actually caused the violation in this case." See Pet. Br. 60.

Connick's attempts to minimize the numerous *Brady* violations rest not on the evidence, but rather on mischaracterizations of it. Connick contends that "these alleged nondisclosures have never been adjudicated *Brady* violations to begin with." Pet. Br. 49. But the state appellate court that reversed Thompson's murder conviction stated that it 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. *State* v. *Thompson*, 825 So. 2d 552, 557 (2002). Connick's argument also disregards that the federal habeas courts which reviewed Thompson's convictions never saw the totality of the withheld evidence. See *Kyles*, 514 U.S. at 437-38 (cumulative effect of all non-produced evidence is to be considered rather than each item individually).

Although Connick also attempts to defeat causation by arguing that the "office policy was to disclose all scientific reports * * * " (Pet. Br. at 7, 58-59), the jury was free to reject the convenient notion that this was the *one* exception to Connick's presumption against nondisclosure. Not only did Glas's account of Connick's statements refute such a notion (JA550-51), but the 1987 office handbook included no such policy,

referring instead only to the discovery articles of the Louisiana Code of Civil Procedure. In turn, the Louisiana Code of Criminal Procedure only required production of scientific test reports that are "intended for use at trial" or "exculpatory," with the latter standard raising many of the same failure-to-train issues. LA. CODE CRIM. PROC. ANN. art. 719A (1977).

III. REVERSAL UNDER THE DISTURBING FACTS OF THIS CASE WOULD UNDERMINE THE INTEGRITY OF THE JUSTICE SYSTEM AND PUBLIC CONFIDENCE IN THE RULE OF LAW.

Connick seeks to overturn a jury verdict arising from Thompson's 18 years of wrongful imprisonment—14 of them on death row—and multiple near-executions for a murder and robbery he did not commit. Those prosecutions were marked by repeated *Brady* violations by multiple prosecutors, broad misunderstanding of *Brady*'s requirements, and total indifference by the policymaker. As demonstrated above, the judgment below is faithful to this Court's precedent. It poses no danger of unleashing a torrent of similar claims. And it is respectful of the rule of law.

In our system of justice, great deference is accorded to prosecutors—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. When the constitutional rights of individuals are violated by prosecutorial misconduct, redress is generally available only through the narrow window of a suit against a government policymaker acting 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 constitutional rights will suffice.

When such deliberate indifference by government officials 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 in reinforcing the bedrock principle that we are a nation of laws, not men. The jury's verdict in this case to compensate Thompson for the deprivation of his liberty vindicates that principle, reinforces the rule of law, and restores public confidence in the criminal justice system.[7]

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[7] Connick's *amici* express concern about the potential impact of the $14 million judgment on the current district attorney's office (and others). Those concerns gloss over Connick's disregard for the law in yet another respect—his failure, contrary to the requirements of Louisiana law (LA. REV. STAT. ANN. § 42:1441.2.B (1995)), to carry liability insurance for his office—a failure the Fifth Circuit characterized in another case as "remarkabl[e]." *Hudson* v. *City of New Orleans*, 174 F.3d 677, n.12 (5th Cir. 1999). When Connick and his first assistant were

(Continued on following page)

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 a six-by-nine foot cell. When Thompson was sent to prison in 1985, his sons, John Jr. and Dedrick, were four and six years old. When Thompson was released, his sons were men of 22 and 24 years of age. Thompson testified that the wrongful convictions hit him "hard" because he realized he "wasn't going to be there for my children." Thompson also testified that in prison he wasn't able to be the kind of father 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." During this time, he received eight separate writs of execution and came within weeks of execution before the crime-laboratory report was unearthed.

Thompson's final execution date was set for the day before John Jr.'s high-school graduation. 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." When Thompson's attorneys informed him it was unlikely they could move the date, he asked them to attend his

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deposed six years later in this case, they continued to profess not to be aware of the statute, even in the face of the Fifth Circuit's opinion from just a few years before.

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." Shortly afterward, the blood evidence was discovered and Thompson's execution was stayed.

Any suggestion by Connick's *amici* that a $14 million jury award for Thompson's eighteen years of wrongful imprisonment, fourteen of which were on death row, is somehow "unfair" rings hollow.

Throughout the months of pre-trial and trial proceedings against Thompson, there was a course of conduct that showed a pervasive disregard for *Brady* by multiple prosecutors. And there was ample evidence of both the district attorney's indifference to *Brady* and his wholesale failure to train, supervise, or monitor his prosecutors on what *Brady* requires. As a result, John Thompson was deprived of his liberty for 18 years and nearly executed by the State of Louisiana for crimes he did not commit.

The Reconstruction Congress intended §1983 to protect individuals such as John Thompson from just such wholesale disregard of their constitutional rights. See *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) ("[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights"). Providing categorical immunity to a municipality whose policymaker created a culture of indifference in his public office that nearly cost an innocent man his life

would have been intolerable to the Reconstruction Congress that enacted §1983.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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