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

PETITIONERS' REPLY BRIEF ON THE MERITS

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
S. KYLE DUNCAN
Counsel of Record
Appellate Chief
ROSS W. BERGETHON
ROBERT ABENDROTH
Assistant Attorneys General
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, LA 70804
(225) 326-6716
duncank@ag.state.la.us

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
GRAYMOND F. MARTIN
First Assistant District Attorney
DONNA R. ANDRIEU
Chief of Appeals
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414

Counsel for Petitioners

September 7, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTRODUCTION

Gerry Deegan, the prosecutor who harmed John Thompson, is now dead. No one knows why Deegan buried evidence that would have cleared Thompson and no one knows who conspired with him. Blue Br. at 11-13. Deegan's former employer, the Orleans Parish District Attorney's Office, now stands liable for Thompson's injury, on the theory it should have trained prosecutors to disclose the kind of evidence Deegan buried. *See City of Canton v. Harris*, 489 U.S. 378 (1989). Once this case went to the jury on such a theory, the result was foreordained: Thompson was awarded millions for the wrong he suffered at Deegan's hands. Yet that verdict nullifies a basic principle of municipal liability and must be overturned.

Municipal liability may never be premised on employee fault. *See Bd. of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997) (stating "[w]e have consistently refused to hold municipalities liable under a theory of *respondeat superior*"). To avoid vicarious liability, a failure-to-train claim must ordinarily be proved by a history of employee misconduct. A single incident suffices only "in a narrow range of circumstances." *Id.* at 409-10. Those circumstances are not present here.

Classroom-style instruction of prosecutors may be an effective component of the many approaches to *Brady* compliance open to district attorneys. But not having such formal training does not prove a district attorney "deliberately indifferent" to constitutional rights. *Canton*, 489 U.S., at 389. Deliberate indifference can be shown only when a

district attorney is notified of a specific training deficiency by past incidents of prosecutor malfeasance. *Bryan Cty.*, 520 U.S., at 407-08.

Thus, the jury in this case should not have been allowed to rely on a single *Brady* violation to "substitute for the pattern of injuries ordinarily necessary to establish … culpability and causation." *Id.* at 409. But it was. This error allowed the jury to nullify the office's "immunity from *respondeat superior* liability," *Oklahoma City v. Tuttle*, 471 U.S. 808, 830 (1985) (Brennan, J., concurring), and hold the office liable for Deegan's malfeasance alone. The Court should reverse.

ARGUMENT

Evidently aware that the single-incident theory cannot support the verdict, Thompson runs from the theory altogether. First, Thompson erroneously reframes the question presented as evidence sufficiency. *See infra* part I. Next, he dilutes the exceptional nature of single-incident liability. *See infra* part II. He then claims the jury could have based liability on other *Brady* violations—violations which the jury was never asked to find and which Thompson never proved. *See infra* part III. Thompson also invents new theories of *Canton* liability. *See infra* part IV. He then speculates about alternate and irrelevant theories of causation. *See infra* part V. Finally, he implausibly denies that expanding single-incident liability to prosecutor errors will subject district attorneys to ruinous consequences. *See infra* part VI.

I. THE ISSUE IS LAW, NOT FACTS.

Thompson begins by reframing the question as a matter of fact, not law. Red Br. at i. The issue, however, is not whether the jury had sufficient evidence to impose liability, but whether the jury was wrongly allowed to consider single-incident liability at all. If, as petitioners contend, the single-incident theory had no place here, the verdict must be overturned because "there is no way to know that the invalid claim … was not the sole basis for the verdict." *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959); *see also Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) (because the Court "h[e]ld erroneous one theory of liability upon which the general verdict may have rested … it is unnecessary for us to explore the legality of the other theories").

This Court overturned a jury verdict in *Tuttle* on precisely that basis. In *Tuttle*, the jury was wrongly allowed to impose municipal liability for inadequate training based on one incident of excessive force. *See Tuttle*, 471 U.S., at 821 (plurality op.) (finding error because the instructions "allowed the jury to impose liability on the basis of … a single incident without the benefit of the additional evidence"); *id.* at 830 (Brennan, J., concurring) (finding error because "[u]nder the instruction in question, the jury could have found the city liable solely because [the officer's] actions … were so excessive and out of the ordinary"). The Court rejected respondent's argument that the verdict was nonetheless valid because the jury had

before it "independent evidence" of inadequate training beyond the incident itself. *Id.* at 821-22 (plurality op.); *id.* at 830 (Brennan, J., concurring). It was enough that the verdict could have been based on an impermissible training theory.

Tuttle controls here. The district court treated this case as a candidate for single-incident liability and instructed the jury accordingly. *See infra* part III.A; Blue Br. at 14-16, 33-34. The question presented, then, is legal and not factual: whether allowing the jury to impose single-incident liability contravened the Court's municipal liability cases.

II. SINGLE-INCIDENT LIABILITY APPLIES IN NARROW CIRCUMSTANCES NOT PRESENT HERE.

Thompson can force his case into the single-incident paradigm only by diluting the concept. Thus, he claims single-incident liability is not a rare exception to the pattern rule, but instead one of many ways to prove deliberate indifference. He also argues that failing to formally train prosecutors on *Brady* is just like *Canton*'s paradigm single-incident scenario, which involved a complete failure to train police officers on using deadly force. Red Br. at 29-38, 49-50. Thompson is wrong on both counts.

Thompson's denial that single-incident liability applies only in rare cases flatly contradicts *Bryan County*. There, the Court left no doubt that pattern liability is the norm:

> If a [training] program does not prevent constitutional violations, municipal decisionmakers may *eventually be put on*

> *notice* that a new program is called for. Their continued adherence to an approach that they know or should know *has failed to prevent tortious conduct by employees* may establish the … "deliberate indifference"… necessary to trigger municipal liability.

520 U.S., at 407 (emphases added). By contrast, the Court deemed single-incident liability a "possibility" merely "hypothesized" for a "narrow range of circumstances." *Id.* at 409. It explained further that, in a single-incident scenario, one violation would "substitute for the pattern of injuries *ordinarily necessary* to establish municipal culpability and causation." *Id.* (emphasis added).[1]

This follows from *Canton*'s logic. A pattern shows policymakers should have known flawed training was causing employee misconduct, thus weeding out vicarious liability claims. *See id.* at 407-08 (explaining that a pattern may tend to show fault and causation). A single violation cannot function that way as *notice*. That is why the Court has confined single-incident liability to the "narrow range of circumstances" that cry out for training regardless of previous injuries. *Id.* at 409.

Canton's single-incident paradigm is nothing like this case. When a city offers no deadly force

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[1] Circuit decisions confirm this. *See, e.g., Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (CA5 2010) (explaining that failure-to-train "generally require[s] that the plaintiff demonstrate a pattern," and that the "single-incident exception" is "narrow") (citations omitted); *accord: Carr v. Castle*, 337 F.3d 1221, 1229 (CA10 2003); *Berg v. Cty. of Allegheny*, 219 F.3d 261, 276 (CA3 2000).

training to armed police officers, it announces a callous indifference to the rights of every person those officers will arrest. *See Canton*, 489 U.S., at 390 n.10. A chasm lies between that scenario and a prosecutor's *Brady* decision. Unlike police officers, prosecutors are already equipped by professional education and ethical safeguards to follow *Brady*. If a district attorney decides not to reinforce their existing skills with formal instruction, that does not conceivably put him in the same category as the city official who arms untrained officers and hopes for the best. *See* Blue Br. at 25-36.

This does not imply that district attorneys have no duty to train simply because prosecutors graduated law school. Red Br. at 47; Br. for *Amici Curiae* Fmr. DOJ Officials *et al.* ("Fmr. DOJ Br."), at 13. Petitioners have never claimed that prosecutors become *Brady* experts by passing the bar. They do, however, enter the job with a skill set that enables them to understand and apply legal principles. To the extent it assists them, additional *Brady* training is undoubtedly worthwhile, but that is far from saying district attorneys are *deliberately indifferent* for not instituting it. While it is evident how a city should train police, it is far less clear how a district attorney should, in the abstract, effectively train prosecutors to avoid erring in the course of complicated and fact-driven legal analyses. Basing *Canton* liability on such an error—absent a pattern of misconduct linking it to a specific training flaw—dissolves municipal into vicarious liability.

Thompson thus offers no reason why the pattern requirement should not apply to the claim that a district attorney's office failed to train on *Brady*. Requiring a pattern does not create a "blanket exemption" for district attorneys, *see* Red Br. at 45, but simply means *Canton* applies to them as to other municipalities. Nor does it amount to a "request for one free *Brady* violation" before section 1983 liability can attach. Fmr. DOJ Br. at 30. Every violation demands judicial redress, but not necessarily in the form of civil liability. Thompson's *amici* cannot seriously contend that a *Brady* violation is "free" unless it results in money damages.

Thompson's argument boils down to this: Connick was "aware" that prosecutors routinely face *Brady* decisions; that such decisions are often difficult; and that getting *Brady* wrong violates the Constitution. Red Br. at 27, 39-40. But if *Canton* turned on mere "awareness" of these unremarkable facts, then single-incident liability would fasten to every significant decision a prosecutor makes. *Canton* focuses on something quite different. It requires awareness, not of risks in general, but awareness that a lack of specific *training measures* will make violations occur. *See* 489 U.S., at 390 (inquiring whether "the need for more or different training is so obvious" and whether "the inadequacy [is] so likely to result in the violation of constitutional rights"). Thompson simply misses that *Canton* is not concerned with "a generalized showing of risk," *Bryan Cty.*, 520 U.S., at 410, but rather with a particular, conscious disregard for training.

III. THE JURY WAS ALLOWED TO IMPOSE LIABILITY BASED ON THE BLOOD SUPPRESSION ALONE.

Besides diluting what single-incident liability means, Thompson also denies this is a single-incident case at all. Principally, he claims that there were numerous other *Brady* violations. These claims are not only baseless, *see infra* part III.B, but irrelevant: the jury was allowed to impose liability based on the blood suppression alone.

A. The jury instructions framed this as a single-incident case.

The district court ruled repeatedly that Thompson's claim qualified for single-incident treatment. Both in denying summary judgment and in crafting jury instructions, the court ruled that Thompson need prove no pattern. *See* Pet. App. 139a-142a. The court expressly relied on *Canton*'s single-incident hypothesis, *id.* at 139a (quoting *Canton*, 489 U.S., at 390 n.10), and drew its deliberate indifference instructions directly from *Walker v. City of New York*, 974 F.2d 293, 300 (CA2 1992), which first held that *Brady* could support single-incident liability. Joint Appendix ("App.") 828; Blue Br. at 33-34; *see also* Pet. App. 142a (relying on *Walker*). The jury was thus asked whether a *Brady* decision "*involved a difficult choice* or one that prosecutors had a history of mishandling." App. 828 (emphasis added). This allowed it to find the office deliberately indifferent to training based on a single violation.

The only possible candidate for that violation was the blood evidence. The court instructed the jury that "the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify in the murder case violated his constitutional rights as a matter of law." App. 825. It explained that "the only issue that you need to decide concerns whether a policy, practice, or custom of the District Attorney's Office, or a deliberately indifferent failure to train the office's prosecutors proximately caused the non-production of the evidence." *Id.* The court refused to instruct the jury whether other non-disclosures violated *Brady*. Transcr. Vol. IV, p. 1003 (explaining it "was not going to ask the jury … was this other stuff also *Brady*").

B. There were no other *Brady* violations.

Thompson, however, insists that the jury could have based liability on a "course" of additional violations in his murder trial. Red Br. at 5-6, 18-20, 25. Thompson's argument fails for numerous reasons. Most obviously, even *assuming* other violations, the instructions still erroneously allowed the jury to impose liability for the blood suppression alone. That requires overturning the verdict. *See supra* part I.

Moreover, the jury was never asked to find other violations. It was told the blood suppression violated *Brady* and that the "only issue" was whether the office caused it. App. 825; *see also* Transcr. Vol. IV, p. 1001-05. The jury was never instructed to decide whether Thompson's disconnected evidence constituted additional *Brady*

violations; it was merely told it could "consider all of the evidence" in assessing deliberate indifference. App. 828. Even had it been asked to find other violations, that is a question of law juries cannot decide. Blue Br. at 50.

In any event, Thompson proved no other violations. He points to police reports supposedly exculpating him or impeaching two witnesses at the murder trial. *See, e.g.,* Red Br. at 5-6; 19-20. Yet Thompson made virtually the same arguments on federal habeas and was rejected. *See Thompson v. Cain*, 1997 WL 79295, *9-*16 (E.D. La. Feb. 24, 1997) (unpublished); *Thompson v. Cain*, 161 F.3d 802, 805-08 (CA5 1998).[2]

Nonetheless, Thompson claims that such non-existent violations somehow impugned prosecutors' grasp of *Brady*. For instance, he relies heavily on witness Paul Schliffka's description of the murderer (recorded in police reports) with "close-cut" or "short" hair. App. 569, 612. Thompson says the reports were *Brady* material since Schliffka's description differed from Thompson's "full 'Afro'"

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[2] Moreover, the habeas courts rejected *Brady* claims as to a wider range of materials than the police reports. *See* 1997 WL 79295, at *9 (cataloguing seven items); 161 F.3d, at 806 (cataloguing nine items). Thompson suggests that the parties stipulated in his civil trial that non-disclosure of these items violated *Brady*. *See* Red Br. at 19; App. 20-21 (citing "stipulation" that listed "16 items containing favorable evidence that was not provided to Thompson in 1985"). He is mistaken: the stipulation merely stated the items "were not provided" to Thompson but explicitly reserved whether the items were admissible and whether they "constitute[d] *Brady* material." App. 20-24 nn.1-5.

hairstyle. Red Br. at 19. Because lead prosecutor Eric Dubelier disagreed, *see* App. 140-43, 293-300, 307-35, 349, Thompson denounces Dubelier's "total confusion about *Brady* and the indifference to *Brady* that pervaded the office." Red Br. at 19.

It is Thompson who is confused: there was no *Brady* violation concerning the Schliffka description. The description was not even "suppressed" because Thompson's defense counsel was actually aware of it during the murder trial. *See, e.g., United States v. LeRoy*, 687 F.2d 610, 618 (CA2 1982) (material not suppressed if defendant "either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence").[3] Thompson also fails to note that the prosecution disclosed Schliffka's identity; that Schliffka himself testified; that he went into far more detail than the reports about the perpetrator's hairstyle; that he was cross-examined about it; and that he admittedly could not identify Thompson from a photo array. *See* App. 313-18, 328-35, 349; Transcr. Ex. 137, at 91-105, 94-97, 103-05 (*State v. Thompson*, May 7, 1985). Thus, the description also could not have impeached Schliffka nor materially affected the outcome. *See, e.g., Wilson v. Whitley*, 28 F.3d 433, 442 (CA5 1994) (undisclosed report immaterial where witness testimony is largely consistent with it); *accord: United States v. Bolden*, 545 F.3d 609, 623 (CA8

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[3] A testifying officer used the report to refresh his memory of what Schliffka had said. App. 666-68. Thompson's counsel was thus entitled to inspect the report and use it to cross-examine the officer. LA. CODE EVID. art. 612(B) (2006).

2008); *United States v. Ellis*, 121 F.3d 908, 916-18 (CA4 1997).

The debate over the Schliffka description was thus entirely artificial. Even assuming the description was not disclosed (*but see* App. 293-94, 304, 314), that did not violate *Brady*. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (explaining that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense").[4] In any event, the real issue was not Dubelier's grasp of *Brady* in this instance, but whether the office's record showed Connick consciously ignored the need for formal training. How that was shown by debates over materials whose non-disclosure did not violate *Brady* is a mystery.

IV. THOMPSON INVENTS NEW FORMS OF *CANTON* LIABILITY.

In another attempt to distance himself from the single-incident theory, Thompson rewrites *Canton*. He claims a "third way" of demonstrating deliberate indifference: "direct evidence" of "actual" policymaker indifference to training. Red Br. at 27. Related to this, Thompson also claims that liability can be shown by a "culture of indifference." Red Br. at 22. Neither theory is supported by the Court's precedents.

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[4] It is ironic that Thompson would place such weight on this claim, since he did not even raise it on federal habeas. *See* Ex. 21 to Pl. Mem. in Opp'n to Summ. J. at 36-45 (making different *Brady* arguments as to the report).

A. Connick's personal grasp of *Brady* is irrelevant.

It is axiomatic that *Monell* and *Canton* define liability for municipalities, not for individuals. *See, e.g., Monell v. Dept. of Social Serv's*, 436 U.S. 658, 690 (1978) (holding that "municipalities and other local government units [are] included among those persons to whom § 1983 applies"). To be sure, a municipal policymaker may be one person, whose order therefore constitutes "official policy." *See, e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986) (holding county prosecutor's order as "final decisionmaker" could create liability). But that person's actions *not* done in a policymaking capacity—"personal" actions or opinions—have nothing to do with liability of the entity itself.

Thompson's novel "actual indifference" prong blurs this distinction. It glosses over the uncontradicted evidence of Connick's actions *as policymaker* taken over his 29-year tenure, in favor of evidence of Connick's *personal* understanding of *Brady*. The latter is patently irrelevant to anything that Connick did as policymaker and thus has no bearing on the office's liability. *Cf. Monell*, 436 U.S., at 694 (concluding that a local government may be sued for a "policy or custom … made … by those whose edicts or acts may fairly be said to represent official policy").

Nothing shows this better than Connick's remark that he "stopped reading law books" in 1974, which Thompson recycles four times. Red Br. at 8, 23, 38, 43. But Thompson gives only a fragment of Connick's statement:

> If you understand the way the office operated, I, I was not practicing law there. I was running an office. It was a big staff of well over 200 people. And I stopped reading law books when I was – when I became the DA, and looking at opinions. And my concern was the operation, the total operation of the office.

App. 144. The remark, in other words, has no bearing on the substance of Connick's *policymaking* role.

Connick did many things as policymaker. For instance, he streamlined how the office handled its massive caseload and he improved prosecutors' supervision and instruction, earning the praise of a widely cited *Stanford Law Review* article. Blue Br. at 3-9, 42-45; Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002). But Connick's policymaking role—as his "stopped reading law books" remark conveyed—did not extend to issuing detailed judgments about prosecutors' legal obligations. For instance, Connick stationed "junior" and "senior" prosecutors in each court section as a teaching tool; he did not supervise the junior attorneys himself. He improved the process for screening thousands of cases; he did not prepare the screening forms himself. He had advance sheets distributed to prosecutors; he did not deliver lectures on the latest jurisprudence. *See, e.g.,* Blue Br. at 4-6, 8-9.

On Thompson's view, however, Connick's remark that he "stopped reading law books" meant that no one in the office read them. This confuses

evidence of Connick's own personal grasp of *Brady* with his role as policymaker. Merely because Connick was "the sole policymaker," it cannot follow that any confusion of his about *Brady* sent cracks running through every prosecutor's judgment. Merely because Connick may have garbled *Brady*'s requirements at times, *see* App. 148-54, 441-42, 550-51, this cannot mean the office's prosecutors—over 700 of them—had been similarly misinformed by Connick himself over his 29-year tenure. Connick was an administrator, not an oracle.

B. The verdict forecloses Thompson's "culture" argument.

Thompson also argues that the jury could have based liability on a "culture of indifference" to *Brady*. *See* Red Br. at 22-23. But this fails the most basic requirement of municipal liability. Under *Canton* a plaintiff must prove more than a municipal "culture"; he must demonstrate a municipality's "deliberate choice to follow a course of action." *See* 489 U.S., at 389 (quoting *Pembaur*, 475 U.S., at 483-84 (plurality op.)).

As a major part of this argument, Thompson says the jury could have based liability on erroneous guidance provided by the 1987 office handbook. Red Br. at 9-11, 41-43. This is impossible, first, because the jury found that Thompson was not injured "by an official policy of the District Attorney." App. 830. The handbook unquestionably expressed office policy—*see, e.g.,* App. 392-93, 449-50, 467-68—and Thompson

cannot circumvent the verdict by using the handbook as a surrogate for training.[5]

In any event, it is not true that the handbook provided "objectively wrong" *Brady* guidance. Red Br. at 42. The handbook, on its own terms, does not purport to instruct prosecutors on *Brady* at all. The very paragraph Thompson attacks shows this: it commands prosecutors to "be familiar with the law regarding exculpatory information possessed by the State." App. 704.[6] Moreover, the sentence[7] on which Thompson trains his criticism is merely descriptive and does not purport to define the reach of *Brady*.[8] Similarly, the paragraph uses the word

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[5] The verdict also forecloses Thompson's argument that Connick's "restrictive disclosure policy" supported liability. Red Br. at 39-40, 14-15. Moreover, Connick did not testify that this policy "heightened the risk" of *Brady* violations: he merely agreed that not producing every police report "can lead to *Brady* violations," but "it doesn't follow that it will." App. 159.

[6] This is precisely what office representative Val Solino tried to explain. Solino was asked to address the hypothetical of a prosecutor "looking to the handbook for guidance" on *Brady*, but he rejected the premise that a prosecutor would have used the handbook in that way. *See* App. 483-84 (urging that "[i]f you're asking what I would have done in 1985, I wouldn't have been resorting to this").

[7] "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." App. 704.

[8] Solino never "conceded" that this sentence was "deficient," Red Br. at 42, but testified only that it did not "completely describe *Brady*" and agreed that *Brady* is "much broader." App. 482.

"exculpatory" to refer generically to *Brady* material, not to define *Brady*'s legal parameters. This Court has used "exculpatory" in the same sense. *See, e.g., United States v. Ruiz*, 536 U.S. 622, 628 (2002) (explaining that "*exculpatory* evidence includes 'evidence affecting' witness 'credibility'") (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (explaining that "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose *exculpatory* evidence") (emphases added).

V. THE JURY WAS ALLOWED TO INFER CAUSATION FROM ONE INSTANCE OF PROSECUTORIAL MISCONDUCT.

The single-incident theory also allowed the jury to nullify *Canton*'s stringent causation standard. Thompson had to prove that a lack of formal *Brady* training was the "moving force" behind the violation. *Bryan Cty.*, 520 U.S., at 404. But the jury was allowed to infer that causal link from the blood suppression alone. *See* App. 826 (allowing jury to find an actionable policy based on a failure to act "so likely to result in the very violation that occurred in this case"); Blue Br. at 54-60. That is an inadequate basis for causation. *See, e.g., Tuttle*, 471 U.S., at 821 (plurality op.); *id.*, at 830 (Brennan, J., concurring). It is no response to say the jury could have relied on other evidence of causation. *See, e.g.,* Red Br. at 56-61. Because the jury could have relied on the single violation alone, the verdict must be invalidated. *See supra* part I.

Additionally, Thompson's alternate causation theories fail for the same reasons as his fault arguments. For instance, supposedly inaccurate guidance from the handbook could not have caused the violation because the jury rejected "office policy" as a cause. Red Br. at 59; *see supra* part IV.B. Nor could the jury have inferred causation from "the sheer number of [*Brady*] violators and violations," because Thompson failed to demonstrate any violation beyond the blood evidence. Red Br. at 60; *see supra* part III.B.

Thompson ultimately retreats to speculation. He theorizes the jury could have rejected overwhelming evidence that a "single rogue prosecutor" buried the report, and instead have linked the suppression to three or four prosecutors' poor grasp of *Brady*—a defect supposedly caused by bad training. Red Br. at 57. This flimsy chain of inferences ignores the evidence, but, even if it were plausible, it would fall short of *actual* causation.

At most, Thompson would have proven that four prosecutors misunderstood *Brady*'s application to the blood evidence. But he showed no direct link between that putative misunderstanding and a training deficiency, which is what *Canton* requires. Thompson merely claims that, had these prosecutors been better instructed, that may have prevented the suppression. Under *Canton* that is not enough. Causation cannot rest on evidence merely that certain employees were poorly trained, made mistakes, negligently administered office processes, nor "that [the] injury … could have been avoided if an officer had had better or more

training, sufficient to equip him to avoid the particular injury-causing conduct." *Canton*, 489 U.S., at 391.

The admitted absence of any pattern of violations destroys Thompson's theory. Over Connick's 29-year tenure, anywhere from fifty to seventy prosecutors a year handled thousands of blood tests and other scientific reports. Yet Thompson could point to only four published opinions reversing convictions on *Brady* as of Thompson's 1985 trial, and none of those concerned the kind of evidence here. *See* Red Br. at 15-16; Blue Br. at 46-48. Thompson's other evidence impugning the office's *Brady* record is shockingly thin: *i.e.*, the testimony of Connick's political opponent based on cases whose names he could not remember and on a supposed study by "[s]ome kind of national group" which appears nowhere in the record. *See* Blue Br. at 51; App. 129-30, 133.[9]

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[9] Thompson's *amicus*, the Innocence Network, fares no better. *See* Brief of the Innocence Network as *Amicus Curiae*, at 24-25. It claims a "shockingly high" rate of *Brady* violations under Connick, but the decisions it cites show the opposite. Of the nineteen cases in which *Brady* violations were *alleged*, the claims were rejected in fifteen. In four of those, the *Brady* claims were so meritless that the Louisiana Supreme Court did not mention them in its published opinion. *See*, *e.g.*, *State v. Deboue*, 552 So.2d 355 (La. 1989); *State v. Anthony*, 1998-0406 (La. 4/11/00); 776 So.2d 376; *State v. Frank*, 99-KA-0553 (La. 1/17/01); 803 So.2d 1; *State v. LaCaze*, 99-KA-0584 (La. 1/25/02); 824 So.2d 1063. Of the four remaining decisions, one was reversed on other grounds. *See State v. Cousin*, 96-KA-2973 (La. 4/14/98); 710 So.2d 1065. Of the three decisions finding a *Brady* violation, one is *this* case (*State v. Thompson*, 2002-K-0361 (La. App. 3 Cir.

If Thompson's accusation of "broad" *Brady* misconceptions were valid, he should have easily amassed ample material for a pattern argument. Yet the evidence showed that prosecutors were routinely complying with *Brady* in general, and were disclosing all lab reports regardless of whether they fell under *Brady*. *See* Blue Br. at 58-59 (discussing uncontradicted evidence that office policy was to disclose all lab reports). The irresistible conclusion is that the tragic suppression in Thompson's case arose from "factors peculiar to the [employees] involved in [that] particular incident," *Bryan Cty.*, 520 U.S., at 408, and had nothing to do with a training deficiency.

Indeed, one need not speculate about what actually caused the suppression. The dramatic and uncontradicted evidence showed that one of the robbery prosecutors, Gerry Deegan, confessed that he had "intentionally suppressed blood evidence" exculpating Thompson. Other testimony showed that Deegan removed the evidence from the evidence room and failed to return it. Blue Br. at 11-13, 55-56.

Thompson understandably tries to minimize this shocking revelation. He speculates that Deegan might have harbored "misgivings" about following other prosecutors' orders not to produce

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7/17/02); 825 So.2d 552); the other two (*Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Bright*, 2002-KP-2793 (La 5/25/04); 875 So.2d 37) involved violations adjudicated long after 1985 and which had nothing to do with the kind of suppression in Thompson's case.

the report. Red Br. at 58-59. This ignores what Deegan said and did. Deegan did not express vague remorse: he unburdened his conscience of a wrong he had deliberately committed. Furthermore, even assuming Deegan left open the possibility that others conspired with him, that still fails to connect the suppression to training. It only means there may have been four malefactors instead of one. Thompson's brief is particularly evasive on this point. He quotes the testimony of prosecutor John Jerry Glas, who as a result of his investigation deemed the single rogue prosecutor theory "ridiculous." Red Br. at 61. Thompson omits that Glas thought it "ridiculous" only because he believed *two other* prosecutors had conspired with Deegan. App. 535. Glas, in fact, prepared indictments against them for obstruction of justice and malfeasance in office. App. 536-39.

VI. EXPANDING *CANTON* WILL EXPOSE DISTRICT ATTORNEYS TO RUINOUS CONSEQUENCES.

Thompson implausibly minimizes the impact of extending *Canton* to single instances of prosecutor error. Red Br. at 53-55. But this expansion would encompass myriad legal judgments made by prosecutors, exposing district attorneys to ruinous liability and to federal management of their training practices.

Thompson offers no plausible basis for limiting training liability to *Brady* violations. *See* Red Br. at 54-55. The jury was allowed to find liability where a district attorney knows prosecutors confront a "difficult choice" that "will frequently cause" constitutional violations. App. 828. That

lays the groundwork for liability based on prosecutors' routine judgments respecting, for instance, search and seizure, *see, e.g., Burns v. Reed,* 500 U.S. 478, 49-92 (1991), probable cause, *Kalina v. Fletcher*, 522 U.S. 118, 121 (1997), *Miranda* rights, *Johnson v. Rex*, 474 U.S. 967 (1985) (Burger, C.J., dissenting from denial of cert.), initiating a prosecution, *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976), evaluation and presentation of evidence, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993), and trial arguments, *Caldwell v. Mississippi*, 472 U.S. 320, 335-36 (1985).

Thompson overlooks another consequence of expanding *Canton*: it would "engage the federal courts in an endless exercise of second-guessing [district attorneys'] employee-training programs." *Canton*, 489 U.S., at 392. Thompson does not specify what sort of training regime would shield district attorneys from *Canton* liability. While certain former Justice Department officials identify a recently undertaken "comprehensive, multi-part approach designed to provide federal prosecutors with tools to address their discovery obligations," they assure the Court that district attorneys need not adopt the totality of such measures. Fmr. DOJ Br. at 12 (conceding that, due to lack of resources, "local offices cannot be expected to replicate DOJ's extensive training efforts"). *Which* measures they would have to adopt on pain of section 1983 liability would presumably be worked out over years of federal litigation.

Thompson's urged expansion of *Canton* actually risks discouraging prosecutors from remedying earlier errors. In the *Brady* context, for example, a prosecutor assigned to post-conviction proceedings might be reluctant to search for exculpatory information for fear that its disclosure would trigger a lawsuit, like Thompson's, with the potential to shutter his office. *Cf. Warney v. Monroe County*, 587 F.3d 113, 126 (CA2 2009) (noting, in the prosecutorial immunity context, that "[p]rosecutors facing tough choices as to whether or not to seek exculpatory information post-conviction, should not have to fear . . . liability," because "such a peril would be an incentive to avoid exculpatory inquiries"). Just as the "public trust of the prosecutor's office would suffer if [the prosecutor] were constrained in making every decision by the consequences in terms of his own potential liability," *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976), prosecutors should not be made to choose between remedying an injustice and bankrupting their office.

When someone is wrongfully convicted, state compensation schemes—not awkward expansions of *Canton*—are the proper means of redress. Louisiana is among 27 states, in addition to the federal government and the District of Columbia, that have adopted statutory compensation schemes. *See* http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf, p. 15 (citing LA. REV. STAT. ANN. § 15:572.8 (2010) (last visited Sept. 7, 2010)). One advocate for such measures, the Innocence Project, rightly observes that "[a]fter years of fighting to prove their innocence, exonerees

need a safety net, not another long legal battle." *Id.* at 13. Louisiana has already agreed to settle Thompson's state wrongful conviction claim for the statutory limits. Pet. at 6 n.6.

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Judge John Minor Wisdom once observed that "[i]n reviewing [a] … case when the plaintiff has been injured grievously, hard as our sympathies may pull at us, our duty to maintain the integrity of substantive law pulls harder." *Turner v. Atl. Coast Line R.R. Co.*, 292 F.2d 586, 589 (CA5 1961); *see* Pet. App. 43a. John Thompson was grievously injured by a prosecutor's wrongdoing. The massive verdict against his former employer, however, rests on vicarious liability and nothing more. This was never a failure-to-train case, and pretending otherwise invited nullification of the principle that a municipality is never liable for employee fault. *See Canton*, 489 U.S., at 399 (O'Connor, J., concurring) (observing that "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*"). The verdict must be overturned.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
S. KYLE DUNCAN
Appellate Chief Counsel of Record
ROSS W. BERGETHON
ROBERT ABENDROTH
Assistant Attorneys General
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, LA 70804
(225) 326-6716
DuncanK@ag.state.la.us

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
GRAYMOND F. MARTIN
First Assistant District Attorney
DONNA R. ANDRIEU
Chief of Appeals
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414

Counsel for Petitioners