

No. 09-571

IN THE

Supreme Court of the United States

HARRY F. CONNICK, District Attorney, et al.,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

*On Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit*

**BRIEF OF THE INNOCENCE NETWORK
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?

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INTEREST OF *AMICUS CURIAE*¹

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The forty-nine current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members² are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions and procedures of the criminal justice system to ensure that future wrongful convictions are prevented.

Its affiliate, the Innocence Project, is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has

¹ The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

² The member entities are listed in the appendix.

a specific focus on exonerating long-incarcerated individuals through use of DNA evidence, including newly-developed DNA testing methods. It also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system—including identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions not only destroy innocent lives but also allow the actual perpetrators to remain free, the Innocence Project's work both serves as an important check on the awesome power of the state over criminal defendants and helps ensure a safer and more just society. As perhaps the Nation's leading authority on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating state and local crime laboratories), are regularly consulted by officials at the federal, state and local levels.

In this case, the Innocence Network seeks to present its perspective on the issue presented in the hope that the risk of future wrongful convictions will be minimized and that the salutary incentives to the proper functioning of prosecutors' offices (as well as the compensatory function) of relief under *Monell v. City of New York Dep't of Soc. Services*, 436 U.S. 658 (1978), will be maintained. The organization works to ensure that innocent persons are not wrongfully convicted or incarcerated (or deprived of the *Monell*

remedy that this Court has recognized); and thus has an interest in proper training, monitoring, and supervision of prosecutors in district attorneys' offices, especially regarding issues relating to *Brady v. Maryland*, 373 U.S. 83 (1963).

The experience of the Innocence Network has demonstrated the unfortunate but substantial role that *Brady* violations repeatedly play in wrongful convictions. Indeed, Innocence Network research shows that a significant number of the thirty-six death penalty convictions obtained in the precise local jurisdiction here at issue—under Harry Connick's tenure as District Attorney in Orleans Parish—were later found to involve *Brady* violations; and in several instances, those defendants were exonerated or pardoned.³ Such cases highlight the degree to which violations of *Brady* can undermine our system of justice, and the concomitant necessity of both enforcing defendants' rights to all evidence in the government's possession that is material and favorable to their defense and providing compensation where such a defendant can overcome the high hurdles to proving a §1983 case.

³ *State v. Bright*, 875 So. 2d 37 (La. 2004); *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *State v. Thompson*, 825 So. 2d 552 (La. App. 4 Cir. 2002).

In *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988), no *Brady* violation was found but the prisoner's sentence was commuted to life in prison due to substantial doubts about his guilt. Two other prisoners had their convictions reversed on other grounds. *State v. Smith*, 600 So. 2d 1319 (La. 1992), *Smith v. City of New Orleans*, 1996 WL 34136 (E.D. La., Jan. 29, 1996); *Louisiana v. Scire*, 1993 WL 192206 (E.D. La., May 28, 1993).

Placing too high a barrier on holding prosecutors' offices liable for *Brady* violations will remove a rarely implicated but nevertheless vital incentive for those offices to meet their *Brady* obligations and will only exacerbate the tragedy of wrongful convictions. Individual prosecutors are already immune from personal liability for such violations:⁴ refusing to sustain a well-founded *Monell* claim against the prosecutors' office eliminates one of the few accountability incentives, and thus increases the likelihood that systemic problems, such as those that afflicted the Orleans Parish District Attorney's Office, will affect compliance with *Brady*.

STATEMENT OF THE CASE

We note, at the outset, that (i) the "question presented" in Petitioners' brief was not the one as to which certiorari was sought or granted; and (ii) the question on which Petitioners did seek and on which this Court did grant review (like Petitioners' reframed question) is, in reality, *not* presented by the facts of this case. Equally important, however, the jury's finding of liability under *Monell* for failure of the Orleans Parish District Attorney's Office to train, monitor and supervise *Brady* compliance is amply supported by the actual evidence, and cannot be reversed under this Court's precedents as to proper appellate review of jury verdicts.

⁴ *Van de Kamp v. Goldstein*, No. 07-854, 555 U.S. ____ (January 26, 2009).

Indeed, this is the archetypal situation for a jury to find *Monell* liability, especially because the jury here was specifically charged that it could not impose liability simply because the underlying conviction resulted from a single act of wrongdoing of a single prosecutor. First, at the time of Mr. Thompson's prosecutions, there was no effort by the Orleans Parish District Attorney's office directed at training or supervising assistant district attorneys as to their *Brady* obligations. And the jury had the opportunity to hear Connick himself in assessing his indifference in that regard. Moreover, four different prosecutors worked on Mr. Thompson's two separate trials for armed robbery and murder: yet each of those four prosecutors failed to reveal to Mr. Thompson's counsel multiple items of favorable evidence and witness-impeachment information proving that Mr. Thompson did not commit either crime. And none of them testified that they were deliberately violating *Brady*; to the contrary, the trial testimony of those prosecutors who took the stand established that they still just do not understand *Brady*. Because this *Brady* material was not turned over, Mr. Thompson was convicted first of armed robbery, then murder, and then sentenced to death.

The significance of the *Brady* violations is underscored by the dramatic fact that once the evidence that had been withheld was disclosed, Mr. Thompson (who fortuitously had not yet been executed) was fully exonerated of both the armed robbery and murder charges. Meanwhile, however,

Mr. Thompson had spent almost eighteen years on death row.

SUMMARY OF ARGUMENT

First, to the extent that this Court reaches the merits, the jury verdict in the District Court should be upheld in all respects. Both the jury instructions and the evidence were fully consistent with the standards this Court established for a finding of *Monell* liability in *Canton v. Harris*, 489 U.S. 378 (1989), and *Bryan County v. Brown*, 520 U.S. 397 (1997).

Juries are presumed to follow the court's instructions. *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009). The jury here was specifically instructed that the failure of a single prosecutor to comply with *Brady* was *not* enough to find liability. Rather, liability could *not* be found unless the *office's* willful or deliberately indifferent failure to train, monitor, and supervise employees on their duties proximately and in fact caused the failure to produce the withheld *Brady* material. Additionally, the jury was instructed that "for a failure to train to be deliberately indifferent, there must be proof that the District Attorney knew that prosecutors would be confronted with difficult legal issues that had a substantial impact on Defendants' constitutional rights." *Thompson v. Connick*, 553 F.3d 836, 861 (5th Cir. 2008). The trial judge further clarified that deliberate indifference did not require a finding of intent, as this Court has observed in *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (fact-finder can infer deliberate indifference "from the fact that the risk of

harm is obvious”), and *Bryan County*, 520 U.S. at 419 (“Deliberate indifference is ... tantamount to intent.”), but that it required “a showing of more than negligence or even gross negligence.” (JA 828.)

Viewing the evidence in the light most favorable to the jury verdict, as federal appellate procedure requires, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996), it is clear that the evidence amply supported the findings specifically required by the jury instructions, that: (1) then-District-Attorney Connick’s decision not to provide training and adequate guidance and supervision to the attorneys employed by the office with respect to their *Brady* obligations was an act of deliberate indifference to defendants’ constitutional rights; (2) this failure was likely to lead to a denial of such rights; and (3) this indifference directly caused Mr. Thompson’s wrongful convictions and eighteen-years’ wrongful imprisonment.

Each of the four assistant district attorneys prosecuting Mr. Thompson’s case failed at various points in time, and in *two* trials of this defendant, to meet their *Brady* obligations and failed to produce multiple material pieces of evidence favorable to the defense. The civil-case jury heard testimony from most of those very attorneys, as well as from other members of that prosecutors’ office and their current and former supervisors, including testimony in which various attorneys from Connick’s office disagreed (even now) about whether they would have been compelled to disclose the lab and police reports to Mr. Thompson’s counsel. The jury also heard about the completely nonexistent training provided

with respect to prosecutors' *Brady* obligations. This indifference to a lack of training, combined with the policy of providing the minimum pre-trial discovery required by law, demonstrably posed grave risks to defendants' constitutional rights. Furthermore, the jury was certainly in the best position to assess the credibility and demeanor of the defense witnesses to determine whether Connick, as policymaker, had been deliberately indifferent to the need for training and supervision concerning *Brady* and criminal defendants' other constitutional rights.

There was plentiful evidence that Connick's failure to train and supervise his employees led directly to the constitutional violation that deprived Mr. Thompson of fair trials on both the armed robbery and murder charges, and placed this innocent man on death row for nearly eighteen years. The decision by a panel of the Fifth Circuit Court of Appeals, in affirming the District Court judgment, correctly respected the jury's fully supportable assessment of the evidence.

Second, if the Court were not to affirm, the writ of certiorari should be dismissed as improvidently granted because the question on which the Court granted certiorari is not presented by the record of this case. Petitioners' merits brief mischaracterizes both the facts of the case and the findings of the jury. But, more troublingly, in their merits brief, Petitioners re-frame the "question presented" in a way that not only differs substantially from that which was contained in their own petition for certiorari, but also presupposes a jury verdict that the district court's jury charge flatly

precluded. Specifically, Petitioners assert that the issue before this Court is “[w]hether failure-to-train liability may be imposed on a district attorney’s office for a prosecutor’s deliberate violation of *Brady v. Maryland*, 373 U.S. 83 (1963), despite no history of similar violations in the office.” Pet. Br. at i (emphasis added). However, the jury found that fault lay “in the training program itself, not in a particular prosecutor.” (JA 828.) Moreover, regardless of whether a single violation of *Brady* may justify liability under *Monell*, the facts of this case present no such issue. Rather, as the jury heard, multiple prosecutors, on more than one occasion, failed to produce a number of significant pieces of evidence from Mr. Thompson’s counsel, at two separate trials. Inasmuch as neither the question on which this Court granted review, nor the question reframed by Petitioners, is fairly presented by the record, this case is an inappropriate vehicle for deciding it.

Third, any narrowing of *Monell* liability in the context of what the jury—after assessing Connick’s own admissions and other prosecutors’ in-court testimony and demeanor toward constitutional protections for criminal defendants—found to be the office’s deliberate indifference to the need to train, monitor, and supervise its multiple prosecutors’ compliance with *Brady*, would be deeply destructive of defendants’ constitutional rights. The experience of the Innocence Project with the Orleans Parish District Attorney’s office and other similar offices demonstrates the necessity of preserving *Monell*

liability as a deterrent.⁵ This Court has provided individual prosecutors with a range of protections, including absolute immunity. *Monell*—however infrequently it is invoked, much less applied, against a prosecutors’ office—is the sole remaining bulwark, other than reversals, against prosecutors’ offices’ indifference to training as to constitutional obligations, and it is often the sole method of compensation for wrongfully convicted defendants like Mr. Thompson. Simply trusting to the professionalism of each of the individual prosecuting attorneys has unfortunately proved—and continues to prove—insufficient to preserve defendants’ constitutional rights. Incentives for prosecutors’ offices to train and supervise, regrettably, are essential.

Preserving *Monell* incentives will not result in opening the floodgates to a sea of baseless *Monell* claims. The hurdles even for filing, much less prevailing in, a suit such as the instant case are many and high. Before a civil suit for damages based upon wrongful conviction or imprisonment may even be filed, a plaintiff must prove that his conviction or sentence has been reversed, expunged, declared invalid, or called into question by the issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Indeed, in this case, Mr. Thompson had to go one substantial step further, by enduring a repeat of his murder trial, where he was, thankfully, promptly acquitted by the jury. Even then, a §1983 plaintiff like Mr.

⁵ *See supra* pp. 23-25.

Thompson must further surmount substantial hurdles to prove all of the elements of a constitutional violation as well as legal causation of injury. *See City of Canton v. Harris*, 489 U.S. 378, 389-91 (1989).

Unless Petitioners believe that wrongful convictions like Mr. Thompson's occur commonly, the number of §1983 suits allowed to proceed will be small. Moreover, insurance is available to prosecutors' offices (indeed, in Louisiana, it is required by statute) such that the actual dollar impact on an office will frequently be limited to the deductibles.⁶ But preserving the availability of *Monell* relief in proper cases would nevertheless provide an effective deterrent against deliberate indifference by a district attorneys' office to training and supervising prosecutors regarding their obligations concerning constitutional rights. In contrast, narrowing the scope of *Monell* liability to shield offices like Connick's puts the rights and liberty of any accused at risk.

Finally it must be emphasized that, given the demanding standards of culpability and causation,

⁶ *Brady* violations at trial, which are compounded by failures to disclose on appeal and during post-conviction proceedings, can trigger coverage for more than one policy period, which often involves more than one insurance company. Only a failure by the municipality to obtain any insurance creates a situation, such as this one, in which a relatively sizeable judgment will ultimately have to be paid by the government. We know of no instance where a municipality's financial stability has been in any way jeopardized because of a wrongful-conviction-based civil rights judgment.

and the many necessary preconditions for filing these suits, plaintiffs will prevail only under truly exceptional circumstances. But where such circumstances actually exist, recovery under *Monell* is not only appropriate but essential. After all, the award here can be no more than partial compensation for the grievous wrong inflicted upon Mr. Thompson, who spent eighteen years in prison with execution looming because of what a jury found to be the policymaker's deliberate indifference to the need to train, monitor, and supervise, and *not* because of an isolated act of wrongdoing of a single rogue prosecutor, as Petitioners misleadingly assert in their brief.

ARGUMENT

I. The Jury Verdict Below is Clearly Correct and Should Be Affirmed.

The jury's verdict finding liability under *Monell* should be upheld. It is axiomatic that a federal appellate court reviewing a jury verdict in a civil case must construe the record evidence in the light most favorable to the jury's verdict. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996). Accordingly, such review requires deference to the jurors' superior position to assess the evidence, especially where, as here, the individuals accused of participating in, or responsibility for, the wrongdoing took the stand. The jury's verdict here must be affirmed unless no reasonable juror could have found that the withholding of numerous pieces of evidence from defense counsel by four different prosecutors, in Mr. Thompson's two trials, and the

consequent wrongful convictions, were caused by the deliberate indifference of the policymaker (whose demeanor they observed on the stand) to the need to provide adequate training, monitoring, and supervision with respect to the prosecutors' *Brady* obligations. Fed. R. Civ. P. 50(a)(1); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Furthermore, juries are presumed to follow the Court's instructions. *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009). Here, the jury was correctly instructed (incidentally, without objection):

- That the issue to decide was “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.” (JA 825.)
- That the policy, practice, or custom requirement could be met if an official policymaker failed to act when the need was obvious and the failure likely to result in a *Brady* violation such as to demonstrate deliberate indifference.
- That deliberate indifference could be shown where the District Attorney’s office inadequately trained its prosecutors or failed to monitor them adequately in carrying out their duties, when that would obviously result in a constitutional violation, and that such indifference proximately caused the failure to disclose the *Brady* information.

- That, more specifically, if there was no official policy, practice, or custom that caused the non-production of *Brady* material, deliberate indifference could be found if “[t]he District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to an accused, [t]he situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed[, and that t]he wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused’s constitutional rights.” (JA 820.)
- That it was more likely than not that “the *Brady* material would have been produced if the prosecutors involved in [Mr. Thompson’s] cases had been properly trained, supervised, or monitored regarding the production of *Brady* evidence.” (JA 829.)
- That to support liability, fault must lie “in the training program itself, *not in a particular prosecutor.*” (JA 828 (emphasis added).)

Petitioners admit that the blood evidence was *Brady* material, and did not object to the judge's jury instruction to that effect at trial. The jury below found, consistent with these instructions, that the evidence presented on the record was more than ample to satisfy the requirements of the law as instructed. Accordingly, the jury concluded that the decision by Connick's office to provide *no* training as to prosecutors' *Brady* obligations caused Mr. Thompson to be wrongfully convicted of armed robbery and murder and to spend nearly two decades on death row. That verdict should be affirmed.

First, the jury's verdict was based on entirely appropriate instructions. Prior to deliberations, the jury was informed that a verdict for Mr. Thompson required finding that for a failure to train to be deliberately indifferent, there had to be proof that Connick knew that prosecutors would be confronted with difficult legal issues that would have a substantial impact on defendants' constitutional rights. (JA 828.)

The District Court also clearly distinguished between deliberate indifference and negligence, stating that deliberate indifference "requires more than negligence or even gross negligence," *id.*, but "does not necessarily mean intentional." (JA 832.) This is fully consistent with *Canton* and with *Hope v. Pelzer*, 536 U.S. 730, 738 (2002), in which this Court held that a fact-finder may infer deliberate indifference "from the fact that the risk of harm is obvious." This Court has also noted that deliberate indifference involves "conscious disregard for the known and obvious consequences of [one's] actions,"

and again, may be inferred when the risk of harm is obvious. *Bryan County*, 520 U.S. at 413. At trial, Mr. Thompson’s counsel did not argue that Connick’s policies were established with the specific intention of depriving defendants of *Brady* material, but rather that they evidenced deliberate indifference to the risk of *Brady* violations, just as discussed in *Brown*.

The jury was also expressly required to find that the *office’s* failure to train, monitor, and supervise its employees—*not* a single act by just one of them, as the Petitioners’ brief erroneously reframes the question presented—was the cause of the failure to produce *Brady* material. In fact, the jury was charged that it was precluded from finding the prosecutors’ office liable unless “[t]he fault [was] *in the training program itself, not in a particular district attorney.*” (JA 828 (emphasis added).) The instructions provided to the jury are in accord with precedent and provide the framework for appellate review, particularly since they were not objected to by Petitioners at trial.⁷

⁷ Although Judge Clement argued in her separate opinion below that the jury instruction on deliberate indifference was plainly erroneous, a finding of “plain error” requires that a plain error in the district court proceeding affected substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. Here, the jury instructions were absolutely correct—which doubtless explains the lack of any objection from Petitioners. *A fortiori*, it is clear that the standard for showing plain error has not been met.

There was ample basis in the evidence (including the jury's ability to assess Connick's testimony and demeanor) for the jury to conclude that Connick's office was deliberately indifferent to *Brady* and that this failure to train caused Mr. Thompson to be wrongfully convicted in two separate trials, for two different crimes—because *Brady* violations by multiple prosecutors occurred in *both* of Mr. Thompson's trials.

Mr. Thompson was tried separately for the murder of Ray Liuzza and for an unrelated armed robbery that occurred three weeks later. The Orleans Parish District Attorney's office elected to prosecute Mr. Thompson for the latter crime first, however, so that the State could gain the tactical advantage of a prior armed robbery conviction in the murder trial. Four different prosecutors worked on Mr. Thompson's trials. Though obligated by *Brady* to do so, none of them disclosed to Mr. Thompson or his attorney: (1) the crime lab report that revealed the armed robber's blood type (which in fact was not Mr. Thompson's blood type and was thus directly exculpatory), or even the fact that they possessed a piece of clothing with the armed robber's blood; (2) a police report describing an eyewitness account of the murderer as six feet tall and with closely cropped hair (a description at odds with Mr. Thompson's short stature and full, bushy "Afro"); (3) a variety of additional witness statements including substantial impeachment material; and (4) evidence relating to a reward to one of the witnesses testifying against Mr. Thompson, the unfairness of which was heightened by the prosecutor's having *asserted the absence of*

any incentive to lie by the witness in his closing argument to the murder trial jury. The effect of withholding all this evidence was devastating, as the unfairly obtained armed robbery conviction effectively precluded Mr. Thompson from testifying in his own defense at his murder trial, leading to his death sentence and his eighteen years of wrongful incarceration.

The jury was nevertheless charged that it could only find for Mr. Thompson if, by indifferently failing to train or supervise its employees for *Brady* compliance, Connick's office created not a single bad-seed prosecutor, but a broader problem that inescapably led to *Brady* violations. The evidence at trial was more than sufficient to support the jury's finding, under the trial court's instructions, that these failures were indeed caused by the Orleans Parish District Attorney's office's deliberate indifference to the need for adequate training, monitoring, and supervision of the prosecutors' compliance with *Brady*. Prior to Mr. Thompson's 1985 trials, assistant district attorneys in Connick's office were provided literally no training on prosecutors' *Brady* obligations.⁸ Moreover, despite ample opportunity for the various defense witnesses to explain what had happened, no prosecutor said that he deliberately violated *Brady*; and the record reveals that there was also no supervisory effort to

⁸ Although various informal training sessions were described at trial, there was little or no evidence that any of them pertained to *Brady*.

ensure or monitor against unwitting non-compliance with *Brady* obligations.⁹

Numerous witnesses testified as to the deliberate indifference of Connick's office to *Brady*'s mandate and the ignorance and confusion that ensued. The jury also heard testimony from Connick and other attorneys from his office, including some of those who had prosecuted Mr. Thompson. Each assessed whether various items of withheld evidence were *Brady* material that should have been turned over to defense counsel. Despite the internal procedures much-vaunted by Petitioners in their brief—which, incidentally, were *not* in place at the time of Mr. Thompson's convictions—even at trial, attorneys from Connick's office, including Connick himself, displayed completely flawed and inconsistent knowledge of what constitutes *Brady* material. (Tr. 172-74 (testimony of Eddie Jordan); 86-87, 381 (testimony of James Williams); 179-81 (testimony of Harry Connick).) Indeed, Connick's successor testified that Connick's office had a terrible record of *Brady* noncompliance. (Tr. 159-60.)

⁹ Although the jury was free to reject Petitioners' claims that there was any *Brady* guidance prior to 1985, even if the jury credited Petitioners' testimony, such guidance was incorrect and inaccurate, as reflected in an office manual issued in 1987, which summarized the *Brady* policies in effect in 1985. As explained in Respondent's Brief at 14-15, the manual clearly mis-described what *Brady* requires in multiple ways, such that an attorney following the policies described would have unknowingly withheld substantial amounts of *Brady* material from defendants.

Although Petitioners attempt to place sole blame for the nondisclosure of the lab report on the deceased Mr. Deegan, the evidence presented to the jury was clearly sufficient to support its finding that it was Connick's indifference to training and supervision regarding constitutional obligations, as opposed to a single rogue prosecutor, that was to blame. Mr. Thompson's other prosecutors were also aware of the blood evidence. (Tr. 505-509.) And Petitioners do not even purport to contend that it was Mr. Deegan who concealed police reports documenting witness descriptions of Liuzza's murderer inconsistent with Mr. Thompson's appearance, which likewise were not turned over to Mr. Thompson's counsel. (Tr. 607, 1079.) Nor do Petitioners argue that it was Mr. Deegan who concealed the fact that one of the witnesses who testified against Mr. Thompson received a reward for doing so, but which was also not disclosed by prosecutors. (JA 628, 737-43, 753-56.) All of this evidence constituted *Brady* material, and yet not one of the four assistant district attorneys prosecuting Mr. Thompson produced any of it, at either trial.

The jury was amply justified in concluding from all of the evidence, that this innocent man spent nearly two decades on death row as a direct result of the deliberate indifference to training, monitoring, and supervision of the Orleans Parish District Attorney's office. Petitioners' challenge thus cannot prevail because, construing the evidence in the light most favorable to the jury verdict, the jury's finding that the inadequate training and supervision of employees in the Orleans Parish District

Attorney's office caused the conviction of innocent persons, including Mr. Thompson, met *Monell's* legal standard for liability. Accordingly, the verdict must be sustained on appeal.

II. The Writ Should Be Dismissed As Improvidently Granted Because the Question on Which This Court Granted Certiorari is Not Presented By the Facts of This Case.

Petitioners requested and were granted certiorari on the question whether “imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravenes the rigorous culpability and causation standards of *Canton* and *Bryan County*.” The writ of certiorari should be dismissed as improvidently granted, as the question on which certiorari was granted is not presented in this case at all,¹⁰ which may explain why Petitioners unilaterally chose to recast the question presented in their merits brief.

A. The Question On Which Certiorari Was Granted Is Not Presented By the Facts.

Although Petitioners attempt to portray this as a case in which Connick's purportedly well-

¹⁰ “After full argument and due consideration, [if it is] manifest that the course of litigation and the decisions of the [courts below] did not turn on the issue on the basis of which certiorari was granted,” the writ should be dismissed as improvidently granted. Eugene Gressman, et al., SUP. CT. PRACTICE 361 (9th Ed. 2007) (citing *Smith v. Butler*, 366 U.S. 161 (1961); *Cichlos v. Indiana*, 385 U.S. 76 (1966)).

trained and well-supervised office was found liable under §1983 due to a single *Brady* violation by a lone rogue prosecutor, the facts of this case as contained in the evidence presented to the jury and described above present a very different picture: one in which Connick himself demonstrated deliberate indifference and four different untrained employees of the Orleans Parish District Attorney's office repeatedly and tragically violated *Brady* in numerous ways in the process of prosecuting Mr. Thompson in two different trials. This is stark evidence of the deliberate indifference to the need to monitor and supervise these prosecutors' *Brady* compliance and the consequences to defendants. Attorneys prosecuting Mr. Thompson were obligated under *Brady* to turn over not just the crime lab report indicating the blood type of the armed robber (which was not Mr. Thompson's blood type), but also the facts regarding the bloody clothing, the police report providing a description of the murderer that was wholly inconsistent with Mr. Thompson's appearance, the other witness statements with material favorable to the defense and impeachment material, and, not least, information relating to a reward to be received by one of the witnesses testifying against Mr. Thompson. Not one of the four prosecutors did so.

B. The Question Presented in Petitioners' Brief is Substantively Different From That On Which Certiorari was Granted.

Perhaps sensitive to the difficulty of squaring the evidence with the way in which the question presented was first framed, Petitioners shockingly

chose to frame the question presented in a quite different manner in their merits brief: “Whether failure-to-train liability may be imposed on a district attorney’s office for a prosecutor’s *deliberate* violation of *Brady v. Maryland*, 373 U.S. 83 (1963), despite no history of similar violations in the office.” Petitioners’ Brief at i (emphasis added). But this is even further removed from the record evidence, construed as it must be in the light most favorable to the jury’s findings. Such a change is not permitted by Supreme Court Rule 24(1)(a), which provides that “[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents.”

A single *Brady* violation arising from a failure to train, monitor, and supervise (itself not the question presented by the record here), however, is substantively quite different from whether *Monell* liability may rest upon a deliberate flouting of the law by one individual employee in a single trial. And in this case, the jury was specifically precluded from finding in Mr. Thompson’s favor if the facts were as Petitioners’ new question presented assumes them to be. The jury was specifically charged that there could be no liability unless it found that Mr. Thompson’s wrongful conviction was caused by “the training program itself, not ... a particular prosecutor.” (JA 828.) Since this Court is obliged to construe the evidence in the light most favorable to the jury verdict, *Gasperini v. Ctr. for Humanities*,

Inc., 518 U.S. 415, 432 (1996), and the jury is presumed to follow the trial court’s instructions, *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009), this Court must assume that the fault here did *not* lie in the deliberate act of a single prosecutor. Otherwise, it would be construing the evidence in a manner that is *contrary* to the verdict and assuming that the jury did *not* follow the instructions, as would be plainly improper under *Gasperini* and *CSX*. Clearly, neither version of the question as framed by Petitioners (whether in their petition or their brief) is presented in this case, which did not involve just one *Brady* violation (deliberate or not) by a lone individual at a single trial.

Nor does this case present a *Brady* violation by an office with “no history of similar violations.” Petitioners’ Brief at i. Petitioners made no such record and indeed, they could not have done so. Connick admitted on the stand that as of the date of his testimony, there were at least four published opinions reversing convictions secured during his tenure based on *Brady* violations and he recognized that judges’ disagreements with his prosecutors’ *Brady* violations are not limited to published opinions.¹¹ Moreover, just from reported decisions,

¹¹ JA 452-55; *see also State v. Bright*, 875 So. 2d 37 (La. 2004); *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *State v. Thompson*, 825 So. 2d 552 (La. App. 4 Cir. 2002).

In *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988), no *Brady* violation was found but the prisoner’s sentence was commuted to life in prison due to substantial doubts about his guilt. Two other prisoners had their convictions reversed on other

during Connick's tenure as District Attorney, there were thirty-six capital convictions. Just over half of those convicted subsequently asserted that Connick's office withheld *Brady* material during their prosecutions.¹² Of the nineteen challenges, courts found that evidence had been improperly withheld in nine of the cases. *Id.* To date, five of the thirty-six people put on death row during Connick's tenure have been exonerated or pardoned.¹³ This is hardly an insubstantial figure; rather, it is shockingly high.

grounds. *State v. Smith*, 600 So. 2d 1319 (La. 1992), *Smith v. City of New Orleans*, 1996 WL 34136 (E.D. La., Jan. 29, 1996); *Louisiana v. Scire*, 1993 WL 192206 (E.D. La., May 28, 1993). In addition, several death row inmates have filed *Brady* challenges that have not yet been finally adjudicated but that still could be found meritorious. Thus, there is as yet no final determination of the percentage of capital convictions by Connick's office involving *Brady* violations.

¹² *State v. Anthony*, 776 So. 2d 376 (La. 2000); *State v. Bright*, 875 So. 2d 37 (La. 2004); *Brown v. Cain*, 104 F.3d 744 (5th Cir. 1997); *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *Deboue v. Cain*, No. 01-464 (E.D. La. Apr. 21, 2005), *see also State v. Deboue*, 552 So. 2d 355 (La. 1989); *State v. Deruise*, 802 So. 2d 1224 (La. 2001); *State v. Frank*, 803 So. 2d 1 (La. 2001); *State v. Harris*, 892 So. 2d 1238 (La. 2005); *James v. Whitley*, 926 F.2d 1433 (5th Cir. 1991); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *State v. Lacaze*, 824 So. 2d 1063 (La. 2002); *State v. Mattheson*, 407 So. 2d 1150 (La. 1981); *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988); *State v. Smith*, 600 So. 2d 1319 (La. 1992), *Smith v. City of New Orleans*, 1996 WL 34136 (E.D. La., Jan. 29, 1996); *Louisiana v. Scire*, 1993 WL 192206 (E.D. La., May 28, 1993); *State v. Sullivan*, 596 So. 2d 177 (La. 1992); *State v. Thompson*, 825 So. 2d 552 (La. App. 4th Cir. 2002); *Ward v. Whitley*, 21 F.3d 1355 (5th Cir. 1994).

¹³ *See n.13 supra.*

And this is just the tip of the iceberg.¹⁴ Since the problem inherent in a *Brady* violation is concealment, many such violations, even in prosecutions for serious crimes, are never uncovered, much less become the subject of published court decisions. In Mr. Thompson's case, for example, the lab report withheld by prosecutors was not discovered until years after he was convicted, and even then only by chance. The true rate of *Brady* violations during Connick's tenure can never be known. But given what is known, Petitioners' assertion that this case involves a prosecutors' office with "no history" of *Brady* violations similar to those which led to Mr. Thompson's wrongful convictions is utterly without basis.

In sum, Petitioners mischaracterize the *Brady* violation record of the Orleans Parish District Attorney's office, Connick's own indifference to *Brady* and the need to train, the multifaceted misconduct of the four prosecutors in Mr.

¹⁴ For example, the Innocence Project, in the ordinary course of its work, came across a similar violation during the Connick administration. In the 1987 trial of Booker Diggins for rape and robbery, Connick's prosecutors did not reveal the existence of biological evidence left behind by the perpetrator and serological results identifying the perpetrator's blood type—just as occurred in Mr. Thompson's case. Equally revealing, the Diggins case, like Mr. Thompson's, was tried by multiple (three) prosecutors. Mr. Diggins spent the last twenty-two years in prison. A 2010 blood test excluded Mr. Diggins as the perpetrator. His attorneys recently filed a *Brady* challenge. Application for Post-Conviction Relief (August 6, 2010) http://www.innocenceproject.org/docs/Booker_Diggins_Motion_to_Vacate_with_Exhibits.pdf.

Thompson's two separate criminal cases, and the question actually presented by the evidentiary record. Accordingly, the writ of certiorari should be dismissed as improvidently granted.

III. This Court Should Preserve the Role That *Monell* Liability Plays in Ensuring *Brady* Compliance and Preventing Wrongful Convictions.

This Court has consistently acknowledged that *Monell* liability is appropriate if “a plaintiff [can] show that the municipal action was taken with the requisite degree of culpability and [can] demonstrate a direct causal link between the municipal action and the deprivation of federal rights.” *Bryan County*, 520 U.S. 397 (1997). Often, a deprivation of constitutional rights is a life-and-death situation, as it was for Mr. Thompson. Here, the municipal action was the decision not to train, monitor, or supervise assistant district attorneys in their *Brady* obligations; and the causal link was established between the many confused and incorrect judgment calls as to what constituted *Brady* material in 1985 (and through the present day) by attorneys employed by Connick's office and the constitutional deprivations that took eighteen years of Mr. Thompson's life, and came close to taking the rest. A reasonable jury could find, and did find—including after assessing Connick's and the other prosecutors' testimony and demeanor on the stand—that Connick's deliberate indifference to the need to train, monitor, and supervise had caused the violation of Mr. Thompson's constitutional rights. and thereby made the office subject to *Monell*

liability. See *Owen v. City of Independence*, 445 U.S. 622 (1980).

In *Canton v. Harris*, 489 US 378, 390 (1989), this Court noted that when the need for training is “so obvious, and the [training] inadequacy so likely to result in the violation of constitutional rights,” a municipality may be said to be deliberately indifferent and thus liable under *Monell*—precisely as the jury was charged (and found) here. The Court hypothesized that if a city issued firearms to police while requiring them to arrest fleeing felons, the need for training on the appropriate use of force was sufficiently obvious that *Monell* liability could lie if there were a failure to train.

To allow assistant district attorneys to prosecute capital cases without providing them any training regarding their constitutional obligations under *Brady* is no different. The threat to a capital defendant’s life from the deprivation of constitutional rights is just as clear as in the case of the suspected felon fleeing from a police officer who has received no training in when and how to use a firearm in such situations. To shield the rare prosecutor’s office that provides no *Brady* training to assistant district attorneys prosecuting capital cases from *Monell* liability would sanction a collective indifference to gross injustice. Because individual prosecutors and, now chief prosecutors, are protected from individual liability by absolute immunity,¹⁵ the

¹⁵ *Van de Kamp v. Goldstein*, No. 07-854, 555 U.S. ___ (January 26, 2009).

only recourse the federal courts provide to wrongfully convicted individuals like Mr. Thompson is to meet the very heavy burden of *Monell* liability. And liability in such instances (should the jury find it) is deserved and its deterrent value important, since a prosecutors' office that is deliberately indifferent to its obligations under *Brady* in a capital case is no less dangerous than an untrained police officer who is given a gun and told to make arrests. In fact, Connick's admission regarding the reversal rate for his office's capital convictions on *Brady* grounds and the Innocence Network's research demonstrate that a substantial number of persons have been put in danger of death due to his deliberate indifference to *Brady*.

If *Monell* liability is curtailed, a significant incentive to comply with *Brady* would be eliminated. Discipline from the state bar is unlikely for chief prosecutors like Connick who are deliberately indifferent to constitutional rights.¹⁶ Though most

¹⁶ Powerful proof that bar discipline is not an adequate or effective tool to deter prosecutors from engaging in misconduct, including the suppression of *Brady* material, comes from studies recently completed by the California Commission on the Fair Administration of Justice (C.C.F.A.J.).

Examining judicial decisions over the last ten years, the Commission's Prosecutorial Misconduct Report found that there had been 444 reported decisions where the courts themselves cited prosecutors for misconduct. In 54 of the cases, convictions were vacated; the remaining cases were generally affirmed, notwithstanding the prosecutorial misconduct, on the grounds of "harmless error." Moreover, a comparison of the misconduct in the harmless error cases and the reversal cases showed no significant difference in the nature or egregiousness

district attorneys' offices are run professionally and ethically, the Innocence Project would have far fewer cases if certain of these offices or certain of these prosecutors paid attention to this Court's decisions and their duties as members of the Bar in overzealous pursuit of convictions. What makes office-wide indifference to *Brady* violations particularly troubling is that, given the very nature

of the prosecutors' behavior. Finally, a review of those cases in which the names of prosecutors were identified (347 of the 444 cases) showed that 30 of the prosecutors were found by courts to have repeated the same misconduct in at least one other case, without any bar disciplinary review being commenced.

In broader study covering the thirteen year period of 1997-2009, a commissioner who served on the California Commission on the Fair Administration of Justice, Professor Kathleen Ridolfi, who authored the C.C.F.A.J study on prosecutorial misconduct and Maurice Possley (Pulitzer-Prize-winning journalist and co-author of a 1999 Chicago Tribune study of prosecutorial misconduct nationally and in Illinois) uncovered nearly 700 cases, on average about one case a week – where courts found prosecutors committed misconduct. In 143 of the cases, the actions of prosecutors were so egregious that courts set aside convictions, declared mistrials, or barred evidence. In 548 additional cases, courts declared misconduct occurred, but declined to set aside the convictions because, despite the misconduct, courts found the defendant's trial was valid. Of 5,232 disciplinary actions published in the California State Bar Journal for that same 13-year period, only 5 prosecutors were disciplined for their misconduct arising in the handling of a criminal case, and all since 2005. Of the 566 cases in which prosecutors have been identified, 59 committed misconduct more than once and some as many as four times.

See Northern California Innocence Project, available at www.ncip.scu.edu (last visited Aug. 9, 2010).

of the violation, it is very difficult to discover the true extent to which *Brady* material is being hidden; and, unfortunately, individuals who violate *Brady* (not just young prosecutors who make errors) are rarely sanctioned by the Bar or the courts.

Fear of public censure will also fail to prevent such abuse. *Brady* violations are uncovered, if ever, only months or years after a defendant is convicted, and allegations and proof of *Brady* violations are unlikely to muster public interest after so much time has passed—much less trigger a wave of public sympathy for a prisoner convicted of a heinous capital crime. Most errors are not front-page news. Nor are most lawsuits. The weakness of public censure as a corrective lies not only with the mercurial nature of the press and what may, from day to day, interest its readers but the inability of factually innocent but wrongfully convicted parties to get the facts. Unanswerable to any suits at law, and shielded from discovery, an office may proclaim with impunity that it did nothing wrong. Prosecutors who are deliberately indifferent to this Court's mandates and the laws of the country that they are sworn to uphold will not even flinch at the prospect of a beat reporter showing up at their door. Shielding prosecutors' offices from liability will only make it less likely that the press will be able to uncover flawed policies that lead to the most egregious cases like the one at issue here.

Mr. Thompson's conviction arose from a widespread misconception caused by the indifference of the Orleans Parish District Attorney's office to both the constitutional obligation under *Brady* itself

and the need to train, monitor, and supervise prosecutors in fulfilling their *Brady* obligations. Proper training and guidance can mean not only the difference between liberty or incarceration, but as in Mr. Thompson's case (and those of at least three others convicted during Connick's tenure)¹⁷, between life and death.

Like a police officer with a gun and no knowledge of when or how to use it properly, a prosecutor who does not understand the scope of his obligation to turn over *Brady* material jeopardizes the lives and wellbeing of citizens. In a case such as this, just one of the pieces of wrongfully withheld evidence, the results of a blood test, could have prevented the defendant from being convicted of one crime he did not commit and consequently being deprived of his right to testify in his own defense when accused of another. But the ability to withhold constitutionally required evidence with impunity does not endanger only the potential defendant; the public at large is endangered as well, when the innocent is wrongfully imprisoned or even executed while the true perpetrator walks free.

Eliminating *Monell* liability for prosecutors' offices also would remove a limited but necessary forum for public scrutiny of constitutional violations. The many preconditions to the filing of such suits already limit such claims to all but the most egregious violations. But where there are egregious violations, there *should* be liability, to provide both a

¹⁷ See n.12, *infra*.

measure of justice to the wrongfully convicted and a modicum of deterrence to the responsible municipal body. Even some prosecutors appear to think that *Monell* liability in these situations is a valuable tool. *See Van de Kamp v. Goldstein*, No. 07-854, 555 U.S. ___ (January 26, 2009), Amicus Curiae Brief of the States at 21. Protecting prosecutors' offices from potential *Monell* liability will only jeopardize the efficacy and credibility of the justice system and the wellbeing of innocent citizens unfairly caught within it.¹⁸

No floodgates would be opened by permitting these suits. Section 1983 claims founded upon wrongful conviction, or derivatives of such suits, may ordinarily be filed only after one establishes the invalidity of the underlying conviction. *Heck*, 512 U.S., at 487. In fact, Mr. Thompson's path in this litigation is quite unusual and not easily replicated. He was not only wrongly accused, but wrongly convicted. His appeals failed and he remained on death row for nearly eighteen years. He was eventually able to prove through extraordinary effort, and some good luck, that he was wrongly

¹⁸ Petitioners make much of the magnitude of the jury's damages award. But given the magnitude of the harm to Mr. Thompson, an innocent man, who spent eighteen years on death row, waiting to be executed, precisely because of Petitioners' disregard of his constitutional rights, the award is hardly disproportionate. And in any event, district attorneys' offices are generally not only able, but often required by law, as this one was, to purchase general liability insurance. *See, e.g.*, La. Stat. 42:1441.2(b). Accordingly, in most circumstances, the actual dollar impact on a prosecutors' office would be limited to the deductible.

convicted. But only after the ordeal of a second trial of the murder case, in which Mr. Thompson was quickly found not guilty by a jury, was he finally released from prison.

Yet even in this extraordinary case, only the most basic prerequisite for filing a claim had thereby been fulfilled. Vindication of trial-based rights through vacatur and dismissal of the original conviction is only the beginning of what must be satisfied in order to prevail. The mere assertion of a constitutional violation is not enough. A wrongfully convicted individual then must plead and ultimately prove the deliberate indifference to or intentional violations of established constitutional rights. And even that is not sufficient, because he must then prove that such intent or deliberate indifference came not from the line prosecutor who convicted him or even from an immediate supervisor with whom the line prosecutor consulted. Rather, as here, it must be related to an *administrative* decision that evinced deliberate indifference to—or intentionally attacked—a clearly established constitutional right, that *caused* a violation of that right. These many preconditions for a successful claim ensure that such suits would be uncommon unless the indifference of prosecutors' offices to their *Brady* obligations were even more common than it is.

The Innocence Project's experience highlights an additional obstacle as well: only a small fraction of cases can be researched to see whether a *Brady* violation occurred. For those who were convicted but nevertheless were factually innocent, attempting to prove that the *Brady* violation was material and

then obtaining vacatur and dismissal is incredibly difficult to achieve. Mr. Thompson's case provides an unusual example in which all of these requirements for suit are met. The link between his wrongful convictions and the prosecutors' office's deliberate indifference to training and supervising its employees as to their *Brady* obligations is rarely this clearly proven. By preserving *Monell's* sanctions against such egregious and flagrant disregard of citizens' constitutional rights, this Court would reaffirm its confidence in the vast majority of prosecutors' offices and the importance of encouraging all such offices to respect its earlier decision in *Brady*.

This case is a perfect example of why *Monell* liability for *Brady* violations must be preserved. The Orleans Parish District Attorney's office was deliberately indifferent to *Brady* itself and to the need for *Brady* training and supervision. This indifference was likely to and did result in violations of the constitutional rights of the people it prosecuted, with potentially deadly results. It would have been straightforward to decide, as other offices have, to train assistant district attorneys on the weighty obligations they carried as prosecutors under *Brady*, especially in capital cases. What a jury that assessed Connick's trial testimony found to be his deliberate indifference to doing so brought John Thompson within a month of execution. Yet Connick and the individual prosecutors are immune from suit as individuals. Accordingly, as this Court recognized in *Monell*, it is only right and just that a person wronged in the way Mr. Thompson was

wronged be allowed compensation from the government institution that failed him so miserably, and that an office that turned its back on its constitutional obligations be held accountable for the damage that a jury found that it had caused.

CONCLUSION

For the foregoing reasons, and those presented by the Respondent, the District Court's judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence

Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), and the Wisconsin Innocence Project.