8-13-2010

Harry F. Connick v. John Thompson

Anthony Barkow

Martin Siegel

No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney, *et al.*,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

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

AMICI CURIAE BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW; THE CRIMINAL JUSTICE INSTITUTE, UNIVERSITY OF HOUSTON LAW CENTER; THE JACOB BURNS CENTER FOR ETHICS IN THE PRACTICE OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW; THE LOUIS STEIN CENTER FOR LAW AND ETHICS, FORDHAM UNIVERSITY SCHOOL OF LAW; AND THE STANFORD CRIMINAL JUSTICE CENTER, STANFORD LAW SCHOOL IN SUPPORT OF RESPONDENT

ANTHONY S. BARKOW
DAVID B. EDWARDS
SARAH M. NISSEL
Center on the Administration of Criminal Law
139 MacDougal Street
Room 307
New York, NY 10012
(212) 998-6612

MARTIN J. SIEGEL
Counsel of Record
Law Offices of Martin J. Siegel
Bank of America Center
700 Louisiana Street
Suite 2300
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com

Attorneys for Amici Curiae

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

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INTEREST OF *AMICI CURIAE*[1]

Amici are several centers based at leading law schools committed to the study of criminal law and procedure, the institutional administration of criminal justice, and legal ethics. They share the mission of promoting best practices in the operation of prosecutors' offices and the criminal justice system more broadly through academic research, litigation, and participation in the formulation of public policy. Many of *amici's* directors and faculty advisors amassed significant experience as federal and state prosecutors before entering academia, while others served as defense attorneys or with private organizations involved in criminal cases. Several are now academic leaders in the scholarship and teaching of criminal law and procedure and legal ethics.

Petitioners contend that liability under 42 U.S.C. § 1983 cannot arise from the failure to train prosecutors because they are already sufficiently equipped to avoid constitutional violations by law school and passage of a bar exam, and are effectively policed by professional disciplinary authorities. *Amici* – who know firsthand the inevitably superficial level of understanding of the doctrine first enunciated in *Brady v. Maryland,* 373 U.S. 83 (1963), that is transmitted in law school – strongly disagree that

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[1] The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

these are adequate safeguards. They are concerned that acceptance of Petitioners' position could result in prosecutors cutting *Brady*-related training at a time when, ironically, wide consensus has developed as to its necessity. Accordingly, *amici* submit this brief in support of Respondents in order to promote ongoing and effective training of prosecutors as an invaluable mechanism for ensuring both effective law enforcement and the protection of constitutional rights.

SUMMARY OF ARGUMENT

This Court has held "that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability" under § 1983. *Bd. of County Comm'rs. of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

Petitioners argue that an office of prosecutors cannot be held liable under this theory unless there is a pattern of previous violations because prosecutors are already armed against error and wrongdoing by virtue of having graduated from law school, passed a bar exam, and taken up positions as licensed professionals. In light of these attributes, Petitioners assert, no one could foresee that prosecutors would be likely to violate constitutional rights, and without such predictability there can be no finding of deliberate indifference or liability under § 1983.

In fact, it is entirely predictable that *Brady* violations will occur if prosecutors are not given

effective training. The recurrence of mistakes and deliberate violations by prosecutors when they handle *Brady* material, documented repeatedly across decades, confirms that prosecutors need training. Complying with *Brady* often presents complex legal problems that can easily lead to error, and making the right decision is even harder in light of the institutional pressures prosecutors face to win their cases. Neither courses in criminal law and professional responsibility nor study for the bar exam imparts sufficient knowledge about *Brady*'s doctrinal complexities or ethical demands. Nor is the prospect of discipline from state bar authorities a serious deterrent in light of how rarely prosecutorial misconduct is investigated, much less sanctioned. Petitioners and their *amici* are therefore wrong to claim that chief prosecutors can reasonably rely on their subordinates' status as professionals to prevent constitutional violations. *See* Points I and II, *infra*.

Petitioners' view that training is unnecessary and cannot prevent *Brady* violations is equally misguided. There is wide acceptance of the essential need to conduct ongoing education of prosecutors in the law and ethics of subjects like *Brady* compliance, and the Department of Justice and most state offices now employ such training. Petitioners' argument contradicts this long-term trend and, if accepted, threatens to set government back in adopting the very practices needed to prevent more tragedies like the one that befell Thompson. *See* Point III, *infra*.

Justice Jackson, then Attorney General, famously observed that the prosecutor "has more control over life, liberty and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*,

24 J. AM. JUDICATURE SOC'Y 18, 18 (1940). In light of this tremendous power, it is wrong to simply assume that a law degree and a license and nothing more properly equip prosecutors to make the right decisions. Continuing, effective training is imperative to protect constitutional rights.

ARGUMENT

I. *Brady* Violations Are Predictable in the Absence of Ongoing, Effective Training

A. Prosecutors Have Consistently Struggled with *Brady's* Requirements

The clearest indication that there is an obvious need to train prosecutors in the law and ethics of *Brady* compliance is the substantial accumulated evidence that prosecutors fail at the task at a consistent and significant rate. Many violations are never uncovered, making it impossible to get more than a glimpse of the true scope of the problem. But enough instances of unlawful suppression have surfaced over the years to cast doubt on Petitioner's claim that any lawyer with a diploma and a passing grade on the bar exam is ready to fulfill a prosecutor's constitutional disclosure obligations.

Several studies of particular groups of cases have found recurring *Brady* violations. One review of all capital convictions in the United States from 1973-1995 found that illegal suppression of evidence accounted for 16% of all state post-conviction reversals – the second most common cause. *See* James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases,*

1973-1995, 78 TEX. L. REV. 1839, 1850 (2000). The *Chicago Tribune* reviewed records of cases involving prosecutorial misconduct throughout the country and found 381 homicide cases, 67 of them capital, in which convictions were reversed because the government concealed exculpatory evidence or used evidence known to be false. *See* Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1, *available at* www.chicagotribune .com/news/watchdog/chi-020103trial1,0,479347.story. The *Pittsburgh Post-Gazette* reviewed 1,500 allegations of prosecutorial misconduct in the preceding ten years and "found hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect." Bill Moushey, *Win at all Costs, Hiding the Facts*, PITT. POST-GAZETTE, Nov. 24, 1998 at A1.

The New York State Bar Association's Task Force on Wrongful Convictions closely examined 53 cases of reversed convictions in that state and determined that violation of *Brady* was one of the factors potentially responsible for the erroneous results. *See* N.Y. STATE BAR ASS'N, FINAL REPORT OF THE N.Y. STATE BAR ASS'N'S TASK FORCE ON WRONGFUL CONVICTIONS 19 (2009), www.nysba.org/AM/Template.cfm?Section= Blogs1&Template=/CM/ContentDisplay.cfm&Conten tID=27188 (hereafter "N.Y. REPORT"). The task force also cited thirteen other published New York decisions featuring *Brady* violations. *See id*. at 26. In North Carolina, the easing of post-trial access to prosecutors' files in 1996 led to the reversal of ten death sentences for *Brady* violations. *See* Robert Mosteller, *Exculpatory Evidence, Ethics and the Road to the Disbarment of*

Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 GEO. MASON L. REV. 257, 261 (2008).

There have also been several individual, highly publicized cases of *Brady* violations in recent years. Perhaps most notable was the Department of Justice's admission that *Brady* violations so tainted the trial of Senator Ted Stevens that post-conviction dismissal was required. *See* Mike Scarcella, *Sen. Stevens Trial Suspended Over Possible* Brady *Violation*, LEGAL TIMES, Oct. 2, 2008 at 1. The government's prosecution of W.R. Grace executives for asbestos poisoning in Libby, Montana was derailed by *Brady* violations, leading the judge to harshly criticize prosecutors. *See* Kirk Johnson, *Judge Says Asbestos Case Can Proceed*, N.Y. TIMES, April 28, 2009 at A17. The prosecution of Duke University lacrosse players for sexual assault collapsed upon the revelation that the prosecutor withheld exculpatory DNA test results. *See* Shaila Dewan, *Duke Prosecutor Jailed: Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007 at A8. Widely reported convictions of two executives in New York for antitrust violations were later overturned due to the state Attorney General's failure to produce potentially exculpatory documents. *See* Noeleen G. Walder, *Former Executives' Convictions Upset Over AG's Failure to Turn Over Documents to Defense*, N.Y. L.J., July 9, 2010 at 1. A federal case against two men accused of forming a "terrorist sleeper cell" in Detroit was dismissed because the government withheld favorable evidence. *See* John Farmer, *Prosecutors Gone Wild*, N.Y. TIMES, April 3, 2009, at A29.

Last year, the Chief Judge of the District of Massachusetts noted the government's "long pattern of inadvertent failures to produce material exculpatory

information, and cases of intentional misconduct as well" in that district, observed that violations there continued despite repeated admonitions by the courts, and considered sanctioning the United States Attorney. *United States v. Jones*, 620 F. Supp. 2d 163, 168-85 (D. Mass. 2009). The court cited a 2007 report by the Advisory Committee on Criminal Rules noting the "significant number of cases in which the courts have found *Brady* violations, as well as many more cases in which the courts have found that exculpatory material was not disclosed" though no due process violation resulted. *Id*. at 172. The court also appended a non-exhaustive list of 68 reported federal cases featuring *Brady* violations and failures to disclose exculpatory or impeachment evidence. *See id.* at 185-93, Ex. A.

Overall, one former prosecutor and leading scholar of prosecutorial ethics concludes that "[t]housands of decisions by federal and state courts have reviewed instances of serious *Brady* violations, and hundreds of convictions have been reversed because of the prosecutor's suppression of exculpatory evidence." Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006); *accord* Andrew Smith, Note, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1938 (2008) ("disclosure violations continue to occur at high rates at both the federal and state levels").

While recent high profile cases of *Brady* error and misconduct like the Stevens trial post-date Thompson's prosecution, there is no reason to believe that *Brady* violations are more numerous now than they were in 1985. If anything, the additional quarter

century of judicial guidance about *Brady*'s requirements should have facilitated compliance. Many of the cases analyzed in the studies discussed above took place around the time of Thompson's prosecution, and commentary from that period notes the many cases featuring *Brady* error that had already come to light. *See, e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697-98 (1987) (noting "disturbingly large number of published opinions" documenting intentional *Brady* misconduct and additional cases where prosecutors inadvertently failed to disclose); Hugo Adam Bedau & Michael L. Redelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56 (1987) (identifying 35 cases of suppression of exculpatory evidence that led to wrongful convictions in capital cases).

Of course, whether now or in 1985, it is impossible to know the true scope of government error in applying *Brady*. As Justice White recognized in *Imbler v. Pachtman*, "unlike constitutional violations committed in the courtroom . . . the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence. The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface." 424 U.S. 409, 443-44 (1976) (White, J., concurring). "Once a trial is over most defendants no longer have counsel actively seeking exculpatory evidence, and most witnesses are effectively unavailable to the defense." Rosen, *supra*, at 702. For their part, prosecutors are either unaware of the nondisclosure if it stemmed from legal error, or

motivated to perpetuate if it stemmed from willful concealment.[2]

The persistent frequency of disclosure violations undermines Petitioners' argument that no district attorney would suppose his subordinates were in danger of wrongfully suppressing evidence. *Amici* strongly believe that the vast majority of prosecutors are ethical public servants committed to ensuring a fair trial, but the consistent occurrence of *Brady*-related error suggests Petitioners are wrong about the predictability of violations and calls for acknowledgment of the legal and ethical challenges that give rise to the problem.

B. *Brady* Confronts Prosecutors with Complex Legal Questions

Applying *Brady* is not a simple or mechanistic task. This Court has repeatedly observed that there will inevitably be close calls. *See, e.g.*, *Cone v. Bell*, __ U.S. __, 129 S.Ct. 1769, 1783 n.15 (2009) (noting "doubtful

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[2] Since most *Brady* violations likely remain hidden from view, Petitioners' claim that Connick's office handled "thousands of cases" while "only" four convictions of innocent people emerged is specious. Pet. Br. 46-48. Moreover, many of these thousands of cases would not have presented the opportunity to commit disclosure error since they ended in guilty pleas or were so minor that significant quantities of evidence about the crime, exculpatory or otherwise, would not have fallen into prosecutors' hands. *See United States v. Ruiz*, 536 U.S. 622, 625 (2002) (no duty to disclose exculpatory impeachment evidence prior to entry of plea). In any case, the long-term record of Petitioners' office may be open to question, as Respondents point out. *See* Resp. Br. 13-14; Armstrong & Possley, *supra* (noting Connick's office was "condemned repeatedly for withholding evidence").

[*Brady*] questions"); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("judgment calls" inherent in *Brady* decisions); *United States v. Agurs*, 427 U.S. 97, 108 (1976) (prosecutors have to "deal[] with an inevitably imprecise standard"). Petitioners acknowledge this and even go as far as to admit, disturbingly, that some prosecutors may well be going about their work with "a defective understanding of Brady." Pet. Br. 38-39, 52-53; *see also* Br. of *Amicus* District Attorneys Ass'n of the State of N.Y. 15 (*Brady* decisions "different in every case, complex, and at times difficult").

Perhaps the most vexing aspect of the *Brady* analysis is its materiality component. If the evidence in question is not material, disclosure is not required, even though it might be useful to the defense. *See, e.g.*, *Agurs*, 427 U.S. at 108-13. Materiality, in turn, hinges on whether nondisclosure will result in deprivation of a fair trial considering all the proof adduced at trial. *See id*. at 112-13. This standard requires a prosecutor to determine *before trial* whether the trial would be deemed fair *afterward*, when the record is complete and the verdict rendered, if the evidence is not disclosed. *See id.; accord*, *United States v. Bagley*, 473 U.S. 667, 682 (1985)

Forcing prosecutors to estimate the fairness and outcome of the trial before it actually occurs poses quandaries, starting with the government's lack of information about how the trial will develop at the time materiality must be considered. One district court summarized the difficulty:

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such [materiality] judgment necessarily is

> speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).

United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005). In addition, prosecutors with no prior experience representing criminal defendants may simply fail to see how seasoned defense counsel would utilize certain evidence, and therefore fail to view it as material.

A second challenge is that, since the materiality standard requires weighing a single piece of potentially exculpatory evidence against all inculpating evidence, the totality of which may seem especially powerful in the investigative stage, prosecutors may wrongly conclude that "the guiltier a defendant seems before trial, the less disclosure he is legally owed." Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1784 (2007). Because prosecutors naturally believe in the guilt of those they charge and labor to convict, the materiality analysis can encourage under-disclosure. The prosecutor must "achieve a state of

cognitive separation where she can simultaneously recognize that a piece (or pieces) of evidence objectively can create a reasonable doubt for the jury while still believing the case warrants prosecution." Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 662 (2002).

Making this recognition can be further complicated by cognitive biases, well documented in social science research, which can creep into prosecutorial determinations no less than any other sort of decision-making. Confirmation bias, which leads one to recall and emphasize information confirming his existing hypothesis and discount contradictory data, may result in prosecutors undervaluing potentially exculpatory evidence. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594-96, 1609-12 (2006). Selective information processing, which causes one to home in on information consistent with prior beliefs and filter out seemingly inconsistent facts, can cause prosecutors to take inculpatory evidence at face value while overly questioning the utility of potentially exculpatory evidence to the defense. *See id.* at 1596-99, 1611-12. These basic cognitive biases can contribute to a form of tunnel vision that makes guilt appear stronger than it otherwise might and thereby skew judgments about materiality. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351-52 (2006).

Aside from navigating materiality, applying *Brady* raises myriad other complex issues requiring prosecutors' informed and experienced legal judgment.

Because "in many cases, the scope of the relevant law is contested or its application is unclear," and approaches "vary among the federal district courts," the legal terrain is often hazardous. Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes?,* 31 CARDOZO L. REV. 2161, 2164, 2179 (forthcoming 2010), *available at* www.cardozolawreview.com/content/31-6/green.31-6.pdf. Such issues include:

- whether inadmissible evidence can be material, *see, e.g.*, *United States v. Kennedy,* 890 F.2d 1056, 1059 (9th Cir. 1989) *cert. denied*, 494 U.S. 1008 (1990); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) at 5 (discussing distinction between admissible evidence and "favorable information" and applicable disclosure duties);

- whether the prosecutor's view of the veracity of the evidence matters, *see, e.g.*, *United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1997);

- whether *Brady* applies to all impeachment evidence, *compare Conley v. United States,* 415 F.3d 183, 189 (1st Cir. 2005) (impeachment evidence immaterial if "cumulative or impeaches on a collateral issue"), *with United States v. Wilson*, 481 F.3d 475, 480-81 (7th Cir. 2007) ("evidence that provides a new basis for impeachment is not cumulative and could well be material");

- whether implicit and unwritten understandings with government witnesses are subject to disclosure, *see, e.g.*, *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir.) (*en banc*), *cert. denied*, 129 S. Ct. 114 (2008);

- the degree of disclosure required prior to a guilty plea, *compare United States v. Ruiz*, 536 U.S. 622, 625 (2002) (no duty to disclose exculpatory impeachment evidence prior to plea), *with McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003) (production of evidence establishing innocence may be required prior to plea);

- the proper timing of disclosure, *compare United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (must only be in time for "effective use" of evidence), *with Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (disclosure "on the eve of trial, or when trial is under way" may be tardy);

- whether *Brady* applies to unrecorded information, *see United States v. Rodriguez*, 496 F.3d 221, 222 (2d Cir. 2007);

- whether third parties who produced information to the government that might exculpate defendants can object to and prevent disclosure, *see United States v. Williams Cos.*, 562 F.3d 387, 390 (D.C. Cir. 2009); Mike Scarcella, *Arms Company Fights to Keep DOJ Docs Secret,* NAT'L L. J., June 28, 2010, at 17, 20; and

- whether *Brady* applies to files reflecting current leads and ongoing investigations, *compare*

> *Downs v. Hoyt,* 232 F.3d 1031, 1037 (9th Cir. 2000) (no disclosure of information reflecting leads and investigations required absent existence of exculpatory information), *cert. denied*, 532 U.S. 999 (2001), *with Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir.) (exculpatory material should have been produced in part because it could have been "used to uncover other leads and defense theories and to discredit the police investigation"), *cert. denied*, 479 U.S. 962 (1986).

Brady's tendency to confound prosecutors is illustrated by this case. The jury heard ample evidence that several prosecutors were involved in the non-production of evidence exculpating Thompson, and that they were confused about what *Brady* demanded of them. *See* Resp. Br. 17-20, 56-60. Petitioners strive to relitigate the strength and meaning of that evidence in this Court and argue that trial tactics like "skillful cross-examination" duped the jury into its verdict. Pet. Br. 57. But it seems far more plausible that, as Respondents showed at trial, some or all of the four prosecutors involved simply misanalyzed the relevant *Brady* questions than that all four joined in an illegal conspiracy to deliberately violate Thompson's constitutional rights.

C. Prosecutors Face Institutional Pressures That Compound the Difficulty Inherent in Correctly Applying *Brady*

The analytical difficulties prosecutors face when deciding what evidence to produce are magnified by a host of institutional pressures. One of these is simply

the nature of the adversary system, which places paramount emphasis on winning. Writing in 1957, Judge Jerome Frank noted the "peculiar dilemma" of the "reflective, conscientious prosecutor" assigned the task of safeguarding the defendant's rights while simultaneously fulfilling "another duty, that of convicting a criminal." Jerome Frank & Barbara Frank, NOT GUILTY, 233 (1957). Given this unique duality not faced by defense lawyers obligated to focus exclusively on zealously representing their accused clients, prosecutors could "scarcely [be] blame[d]" for falling back on standard adversarial "wiles and stratagems." *Id.*

In the same vein, Richard Uviller, an assistant district attorney and later a Columbia Law School Professor who admitted regarding his fellow prosecutors as "the flower of the bar," cautioned:

> Young assistants think of themselves primarily as advocates. The case they make, or (more likely) inherit from a law enforcement unit, is cast immediately as a trial scenario. It is refined and amplified – as it usually requires – in preparation for exposure to a jury. In this posture, of course the Assistant cares a good deal more for supplementary information that fortifies the case against the defendant than new data that calls his thesis into question. . . .
>
> [E]ven the best of the prosecutors – young, idealistic, energetic, dedicated to the interests of justice – are easily caught up in the hunt mentality of an aggressive office.

H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1699-1700, 1702 (2000). As the former Inspector General of the Justice Department responsible for investigating allegations of civil rights violations by prosecutors put it: "there is a tremendous amount of pressure to be aggressive and to push the limit." Symposium, *The Changing Role of the Federal Prosecutor*, 26 FORDHAM URB. L.J. 737, 744 (1999) (remarks of Michael R. Bromwich). Many prosecutors are young and, as Connick acknowledged was true of many of his assistants, "fresh out of law school," JA 442, and are therefore especially vulnerable to such pressure.

Winning defuses both internal office pressures and external public and political ones. Internally, prosecutors are often evaluated based on their wins and losses. One survey of 103 state prosecutors revealed that "a number of prosecutors view their primary function in terms of conviction and punishment," and that the "conviction rates of prosecutors are used as a measurement of success at prosecutorial work." George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 121-22 (1975). Offices have been reported to calculate and distribute win-loss "batting averages" and post convictions and acquittals on bulletin boards with color-coded stickers. *See* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 44 (2009). One of Thompson's prosecutors testified to "pressure on DAs to get convictions" in Connick's office. JA 190. While obtaining convictions should and usually does reflect a properly administered office that charges defendants

appropriately and competently handles cases, it can wrongly become the only thing that matters to some prosecutors.

Externally, state prosecutors like Connick are elected and so understandably prefer to win their cases in order to enhance the odds of continuing in office. A record of convictions also assists prosecutors' offices in their ongoing jockeying with legislatures over budgets. When a case is highly publicized, as was Thompson's, internal and external pressures on the assigned prosecutors only increase.

* * * * *

For all these reasons – longstanding empirical evidence that *Brady* violations are "a persisting problem" for prosecutors, Pet. Br. 24; the inherent analytical challenges posed by the doctrine; and the well-known institutional pressures brought to bear on prosecutors making disclosure decisions – it is plain to most prosecutors, and should have been obvious to Petitioners, that *Brady*-related training is essential. *See Bd. of County Comm'rs*, 520 U.S. at 407 (liability may stem from taking approach defendant should know will fail to prevent tortious conduct). There was in 1985 and is today "a glaring need for training [prosecutors] on constitutional standards" relating to disclosure, Pet. Br. 27, and no additional pattern of past violations by Connick's office was necessary before Petitioners should have reached that conclusion.

II. Law School, the Bar Exam and Professional Discipline Are Insufficient Guarantors of Defendants' Constitutional Right to Disclosure

The primary reason Petitioners and *amici* claim prosecutors' violations of *Brady* could never be predicted absent a history of earlier violations is the fact that, prior to their hiring, prosecutors have made it through law school, passed a bar exam, and assumed the status of licensed professionals personally responsible for "obeying the standards of their own profession." Pet. Br. 19, 25; *see also* Br. of District Attorneys Ass'n of the State of N.Y. 11. Petitioners also cite the "ethical regime" of professional discipline as a reason why it would never have occurred to Connick to train his subordinates. Pet. Br. 28-29. In fact, these are porous defenses against the violation of constitutional rights.

A. Law School and the Bar Exam Do Not Adequately Equip Prosecutors

Petitioners' broad faith in law school and the bar exam to ensure accurate and ethical *Brady* decision-making is at odds with the facts. First, though Connick believed his assistants "follow[ed] the rules in 99.9 percent of the cases," he fully appreciated the inherent limitations of any large staff of prosecutors in a major jurisdiction like New Orleans:

> Connick . . . said his prosecutors labor under difficult circumstances where mistakes can happen. Many are inexperienced. Turnover is rampant. He has 80 prosecutors, and this year, 30 are new. Next year, 30 more will be new. His

> prosecutors average 30 jury trials year – a daunting caseload – and they can find it difficult to keep track of what evidence has been disclosed in every case they handle, Connick said.

Armstrong & Possley, *supra*; *see also* Resp. Br. 15. Perhaps in recognition of these "difficult circumstances," Petitioners claim Connick took various informal steps intended to help and monitor subordinates, though they concede none "comfortably equate[d] to a 'training program' under *Canton*." Pet. Br. 42. But if Connick truly believed prosecutors were adequately prepared by law school and the bar to handle all aspects of their jobs, he presumably would not have bothered instituting such procedures. While it was up the jury to decide whether the informal practices Petitioners now extol were sufficient to prevent constitutional violations – a question the jury fairly resolved against Petitioners – their claimed existence belies Petitioners' current litigation position that, actually, nothing more than a diploma and law license were needed.

In reality, it is unlikely that the head of an office of young, overworked lawyers practicing almost any sort of law would place the kind of absolute trust in law school and licensing Petitioners claim Connick did when authorizing subordinates to make the most crucial decisions of life and liberty. As for law school, Petitioners point to no evidence in the record indicating what the prosecutors who handled Thompson's case actually learned there about *Brady*, the extent and quality of their instruction, and what if anything they might have retained after graduating. Courses like criminal law and criminal procedure may

last no more than one or two semesters and necessarily cover the waterfront of related subjects. Criminal procedure is not a required course at many law schools. Discussion of *Brady* may consume no more than a class or two, if that, and it is extremely unlikely that anything more than the most superficial understanding of the subject can possibly be imparted. *Amici* are on the front lines of legal education and firmly believe that serious comprehension of *Brady*'s legal complexities is not typically achieved in law school. Pretending that newly minted law graduates are "extensively educated" on *Brady*, Pet. Br. 27, simply ignores reality.

Nor do professional responsibility courses prepare graduates for the ethical pitfalls that sometimes accompany tough *Brady* decisions. Particularly in the late 1970s and early 1980s, when the prosecutors who staffed Petitioners' office in 1985 were in law school, professional responsibility courses were not uniformly mandatory and usually consisted of a single one-hour, pass-fail course dedicated largely to memorizing the ABA canons. *See* Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 45 (2009). Then and now, such classes also concentrate primarily on private civil practice and may, paradoxically, only reinforce adversarial tendencies that can be counterproductive when it comes to meeting the government's criminal disclosure obligations. As one ex-prosecutor commented a few years after Thompson's trial: "Law school training in professional responsibility tends, quite understandably, to focus upon the private practitioner, whose obligation, in significant part, is to zealous advocacy on behalf of the particular client. . . . It is with this indoctrination that many individuals enter into service as prosecutors."

Kenneth J. Melilli, *Prosecutorial Discretion in an Adversarial System*, 1992 B.Y.U. L. REV. 669, 686 (1992).

Placing faith in bar exams puts supervising prosecutors on even shakier ground. Such exams may or may not include *Brady*-related questions, and those who pass may or may not have managed to study for that part of the test or gotten such questions right. It is the rare lawyer who, having frenetically crammed in the weeks before the test, will retain much of anything so tenuously absorbed. Rarer still is the lawyer who would stake any serious outcome once in practice on what she recalls from studying for the bar exam, or the law firm that would be so cavalier with potential malpractice liability.

Chief Justice Burger recognized the fallacy of Petitioners' argument long ago when he urged the bar to "[f]ace up to and reject the notion that every law graduate and every lawyer is qualified, simply by virtue of admission to the bar, to be an advocate in trial courts in matters of serious consequence." Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM. L. REV. 227, 240 (1973). He continued:

> Our traditional assumption that every lawyer, like the legendary Renaissance man, is equipped to deal effectively with every legal problem probably had some validity in the day of Jefferson, Hamilton, John Adams and John Marshall, but that assumption has been diluted by the vast changes in the complexity of our social, economic and political structure.

Id. at 239. The Chief Justice likened the view espoused by Petitioners to the questionable notion that any doctor who graduates from medical school and is licensed by the state is "competent to perform surgery on the infinite range of ailments that afflict the human animal." *Id.* at 231. No more so is any newly licensed lawyer automatically prepared to perform any legal task, however specialized and complex, as Petitioners assert. *See, e.g.*, *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (noting "trend toward specialization" in legal practice).

B. The Possibility of Professional Discipline is Too Remote to Deter Prosecutorial Misconduct

The "ethical regime designed to reinforce the profession's standards" invoked by Petitioners is equally ineffective as a tool to protect constitutional rights. Pet. Br. 28. The fact is, almost no prosecutor who commits misconduct actually faces the "severe consequences" Petitioners cite: suspension or disbarment. *Id*.

One study found that, while charges were dismissed, convictions reversed or sentences reduced in 2,000 cases due to prosecutorial wrongdoing since 1970, only 44 of these resulted in discipline of prosecutors, and none led to criminal prosecution. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 60 (2005). In reviewing 53 cases of wrongful convictions in New York, the State Bar Association's Task Force concluded: "Research has not revealed public disciplinary steps against prosecutors. . . . There is little or no risk to the specific official involved resulting from a failure to follow the rule." N.Y.

REPORT at 29. In California, a commission created by the legislature in 2004 analyzed 54 cases where misconduct led to the reversal of convictions and determined that none had resulted in a report to the state bar, though state law requires California judges to give such notice. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (2008), www.ccfaj.org/documents/CCFAJFinalReport.pdf (hereafter "CAL. REPORT").

In 1987, law professor Richard Rosen examined several compilations of ethics decisions and other published sources and surveyed each state's bar counsel in an effort to determine how frequently prosecutors who violated *Brady* faced professional discipline. *See* Rosen, *supra*, at 718. He uncovered only nine instances where discipline was even considered, and 35 states reported that no complaints had ever been filed. *Id.* at 719-31. When contrasted with the "numerous reported cases" of *Brady* violations contained in judicial decisions, Rosen's scant findings indicated that "reliance on the Disciplinary Rules as a deterrent for *Brady*-type misconduct is misplaced." *Id.* at 731. A later study confirmed that few additional cases had been brought in the ensuing decade. *See* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 881-82 (1997); *see also Jones*, 620 F. Supp. 2d at 177 ("Neither referral to OPR, other disciplinary bodies, or public criticism has sufficiently deterred prosecutorial misconduct.").

Petitioners note that a prosecutor in Connick's office who learned of the suppression of the blood evidence in Thompson's case in 1994 and did not

report it was later sanctioned. *See* Pet. Br. 28. Such discipline is exceedingly rare, however, and even this prosecutor was merely reprimanded. *See In re Riehlmann*, 891 So.2d 1239, 1248-49 (La. 2005). The Louisiana Supreme Court actually rejected a disciplinary board's recommendation of a six-month suspension. *See id.* More importantly, the three prosecutors who bore responsibility for failing to produce *Brady* material to Thompson aside from the junior-most assistant who died in 1994 (Deegan) received no sanction at all.

Finally, some *amici* who support Petitioners stress that "tradition and experience justify" the belief that most prosecutors will fulfill their duties, and that chief prosecutors can therefore simply presume that they will do so. *See* Br. of *Amici* Nat'l League of Cities, *et al*. 9 (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987)). The same could be said of police officers, however, most of whom are also surely well intentioned public servants bound by their departmental rules as well as federal and state law proscribing the violation of suspects' rights. Nevertheless, this Court has recognized that failure to train law enforcement agents when the need is obvious can give rise to liability. *See Canton*, 489 U.S. at 390. The question is not whether most prosecutors or police officers are presumptively good people who mean to meet their obligations – *amici* agree that they are – but whether it is clear that training is vital to enable them to do so.

III. *Brady*-Related Training Is Essential to Ensure Proper Disclosure

Petitioners may "strain[] to imagine . . . when it should *ever* be 'obvious' to a district attorney that he needs to train prosecutors to know and obey the law," Pet. Br. 31 (emphasis in original), but there is actually wide agreement among prosecutors and experts that effective and ongoing *Brady*-related training is a fundamental component of administering a prosecutor's office. In fact, today "most prosecutors' offices have extensive training programs on *Brady*." Gail Donaghue, *Section 1983 Cases Arising from Criminal Convictions*, 18 TOURO L. REV. 725, 731 (2002); *accord* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1989 (Stephanos Bibas, reporter) (forthcoming 2010), *available at* www.cardozolawreview.com /content/31-6/group_reports.31-6.pdf ("Prosecutors' offices in large metropolitan areas typically provide in-house training on various aspects of criminal practice, including disclosure and ethical obligations").

At the federal level, the Stevens case and others prompted "a thorough review" of the Department of Justice's discovery policies and training, leading to the announcement that federal prosecutors will participate in annual *Brady* training to be provided by a discovery coordinator assigned to each United States Attorney's Office and litigating component. *See* U.S. DEP'T. OF JUSTICE, DEP. ATT'Y GEN. MEM., ISSUANCE OF GUIDANCE AND SUMMARY OF ACTIONS TAKEN IN RESPONSE TO THE REPORT OF THE DEPARTMENT OF JUSTICE CRIMINAL DISCOVERY AND CASE MANAGEMENT WORKING GROUP 3 (Jan. 4, 2010), http://www.justice

.gov/dag/dag-memo.pdf. Even before the recent spate of cases featuring *Brady* error, the United States Attorney's Manual "recogniz[ed] that it is sometimes difficult to assess the materiality of evidence before trial" and therefore "encourage[d] prosecutors to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation." DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, §§ 9.5001(B)(1), (E) (1997).

The Department of Justice's confidence in training to avert legal violations can also be seen in how it enforces criminal laws binding corporations. The Department will defer prosecution or recommend lesser sanction for entities that adopt employee training programs as part of a compliance regime designed to deter the commission of future violations, and penalties under the sentencing guidelines are lower for companies that create such programs. *See id.* §§ 9-28.300, 9-28.800 (2008); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2009). Petitioners' view that prosecutors need no *Brady* compliance training conflicts, ironically, with the position prosecutors themselves take toward legal compliance in the private sector.

States and municipalities have also established disclosure training programs. In New York, nearly a dozen prosecutors' offices in larger counties have full-time training directors who conduct monthly sessions on prosecutors' disclosure duties, among other subjects, including the ethical component of making decisions on production to the defense. *See* Symposium*, New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups,*

supra at 1989 n.32. In addition to training programs in individual counties, the New York Prosecutor's Training Institute "makes sure that assistants in offices large and small, in every area of the State, have access to free, quality programs." *Hearings before N.Y. State Bar Ass'n Task Force on Wrongful Convictions* (Feb. 13, 2009) (statement of Richard A. Brown, Queens County District Attorney), http://www.daasny.org/DABrownWrongfulTestimony.html. California's District Attorneys Association similarly "provide[s] intensive training to thousands of prosecutors, peace officers and allied professionals each year" in subjects including disclosure, *see* Cal. District Attorneys Ass'n, Training Dept., www.cdaa.org/training/index.asp (last visited August 9, 2010), and that state's Commission on the Fair Administration of Justice recommended such training for prosecutors because "compliance with *Brady* obligations should not be left up to each individual deputy's own interpretation of statutory and case law." CAL. REPORT at 87, 90-91. While state offices undoubtedly train in different ways depending on their particular needs and caseloads, and *amici* agree that one size hardly fits all in this area, offices are increasingly unlikely to take Petitioners' extreme view that training is completely unnecessary.

Professional groups concur. The ABA's Project on Standards for Criminal Justice promulgated a standard *in 1971*, long before Thompson's case, providing: "Training programs should be established within the prosecutor's office for new personnel and for continuing education of his staff." ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Standard 2.6 (Approved draft 1971); *see also* ABA Formal Op. 09-454, *supra*, at 8 (supervisory lawyers "must ensure that subordinate

prosecutors are adequately trained regarding [their] obligation" to disclose evidence to defendants). Likewise, the National District Attorneys Association's National Prosecution Standards provide: "The prosecutor and his staff should participate in formal continuing legal education." NAT'L DISTRICT ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 9.5 (2d ed. 1991).

In 2009, several *amici* joined the ABA's Criminal Justice Section, the National District Attorneys Association and the National Association of Criminal Defense Lawyers to sponsor a symposium to examine *Brady* in operation and develop best practices for compliance. *See* Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?,* 31 CARDOZO L. REV. 1943, 1946 (forthcoming 2010), *available at* www.cardozolawreview.com/content/31-6/yaroshefsky.31-6.pdf. One working group consisting of prosecutors, defense attorneys, judges and academics focused on prosecutor training and "agreed on the need for both formal programs and informal training on *Brady* and disclosure." Symposium*, New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups, supra* at 1989. The group specifically considered Thompson's case and "rejected the notion, advanced by at least one district attorney [Connick], that district attorneys may rely exclusively on law school training and prosecutors' own sense of ethics as sufficient discovery training." *Id*. In addition to training newly hired prosecutors, the group concluded that training "should also remain periodic, perhaps annual or semiannual, throughout a prosecutor's career." *Id*. at 1991.

Importantly, training in disclosure consists of more than simply imparting information about applicable substantive law; it also entails education in prosecutorial ethics. Writing almost two decades ago, Judge Kozinski emphasized the essential nature of such training in a case where the Ninth Circuit vacated a conviction following the government's suppression of a cooperation agreement with a witness:

> The overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it. But the temptation is always there: It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win.
>
> One of the most important responsibilities of the United States Attorney and his senior deputies is ensuring that line attorneys are aware of the special ethical responsibilities of prosecutors, and that they resist the temptation to overreach. Training to impart awareness of constitutional rights is an essential function of an office whose administration of justice the public relies on.

United States v Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993) (citations, quotations and punctuation omitted). The 1971 ABA standards also stressed that "[t]raining within the prosecutor's office should give special emphasis to ethics." ABA STANDARDS, *supra*, Standard 2.6.

More recently, exonerations brought about by DNA testing have increased recognition of the need for systematic training of the sort described by Judge Kozinski. For example, Dallas' District Attorney Craig Watkins, who established a specific unit to investigate allegations of wrongful convictions in light of Dallas's particularly high number of exonerations, noted that the unit is also responsible for training newer assistants "on the ethical side of a prosecutor's job – things like the importance of properly dealing with exculpatory evidence." Radley Balko, *Is This America's Best Prosecutor?*, REASON, Apr. 7, 2008, http://reason.com/archives/2008/04/07/is-this-americas-best-prosecut. Prosecutors must be taught "to think about their jobs in a different way," Watkins avers; "[w]e shouldn't be judging young prosecutors by how many convictions they win, or by how many people they put in jail." *Id*. Watkins also stresses the importance of complying with *Brady* in hiring interviews. *See* Yaroshefsky, *Foreword*, *supra,* at 1952. The New York State Bar Association's task force similarly recommended that prosecutors receive regular training "to make sure that the relevant due process principles are fully internalized and become the starting point for all cases." N.Y. REPORT at 37.

Perhaps most importantly, mandatory training helps foster an office environment necessary to overcome the pressures that can lead to misconduct. It is widely accepted that office culture plays a critical role in determining prosecutors' behavior. *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 346-47 (2003) (discussing former culture of Dallas District Attorney's Office to encourage racial discrimination in jury selection and give incoming prosecutors "formal training in excluding minorities from juries"). "Conscientious

commitment to an office policy or tradition goes a long way toward the ideal of quasi-judicial performance" by prosecutors. Uviller, *supra*, at 1718. Ongoing training about and emphasis on the importance of matters like *Brady* compliance promotes the proper internal culture. It sends a message to junior prosecutors and thereby deters violations – not simply because assistants have a greater knowledge about *Brady* law, but because they sense its clear importance to supervisors and the office as a whole. The Queens County District Attorney testified to the New York task force "that he takes every opportunity to send the clearest message to his assistants that their paramount responsibility is 'to do justice.' *Training is the most important way of sending the unequivocal message.*" N.Y. REPORT at 37 (emphasis added).

Communicating the importance of protecting fundamental rights is especially crucial if office policy is to "turn over what [is] required by state and federal law, but no more," as Petitioners describe Connick's. Pet. Br. 6-7. In contrast to Connick's view, this Court has repeatedly urged prosecutors to "err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone*, 129 S. Ct. at 1783 n.15 (and authority cited therein). Ethics rules, like Model Rule 3.8(d) and state analogs, similarly call for broader disclosure than is strictly mandated under *Brady*. See ABA Formal Op. 09-454, *supra*, at 4-5. If office policy cuts in the opposite direction, as Connick's apparently did, training to at least make sure required production actually occurs is all the more vital.

The consensus that has developed in support of the need to provide training in *Brady*'s legal and ethical mandates undermines Petitioners' repeated assertions

that "no amount of training could have prevented" an intentional *Brady* violation. Pet. Br. 21; *see also id.* 39-40 56, 61; Br. of Nat'l District Attorneys Ass'n, *et al.* 6. Initially, Respondents convincingly demonstrate that the jury had ample grounds to reject Petitioners' "single rogue prosecutor" theory. *See* Resp. Br. 57-63. More generally, it is shortsighted to see intentional violations only as the products of the innate character defects of incurably immoral prosecutors. Violations also stem from the institutional pressures on prosecutors discussed in Point I, *supra* – a point the United States Attorney for the Northern District of Illinois, Patrick Fitzgerald, illustrated in a recent address:

> If you give a person the MPRE and ask, "You find *Brady* material on a Saturday afternoon. What do you do? A: turn it over. B: shred it," everyone will get the answer (option A) right. But the answer might not be clear to the person who is sitting alone in his office on a Saturday afternoon – particularly if it is an important case, particularly if it is a heated case, particularly if it involves defense counsel that he really does not get along with, particularly if it is a close case. He might start to doubt himself and think, "It's really not *Brady* material. I'm not really worried about it. It's not that big of a deal."

Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 16-17 (2009). The scenario Fitzgerald describes – surely a more common one than the prosecutor who sets out to ruin defendants' lives by wrongfully imprisoning them because he is incorrigibly evil – is the basic sort of

quandary systematic and repeated *Brady* training exists to address by helping prosecutors build the fortitude to make close calls under pressure and by sending the crucial message that the office values ethical behavior above burnishing its conviction record.

If Petitioners are correct that training is powerless to deter intentional wrongdoing, it is hard to see the point of the entire field of legal ethics. Stanford Law Professor Deborah Rhode, a leading expert in professional responsibility, writes that, while not a panacea certain to prevent any and all lapses, ethics instruction can shape conduct:

> More than a hundred studies evaluating moral education courses find that well-designed curricula can significantly improve capacities of moral reasoning and that individuals in their twenties and thirties gain more than younger students. . . .
>
> If, as most evidence suggests, some individuals will be helped to some extent in some contexts when they confront difficult moral questions, that is a sufficient justification for ethics coverage.

Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 46-48 (1992); *see also* Derek Bok, *Can Ethics Be Taught?*, CHANGE, Oct. 1976 at 26, 30 ("Although the point is still unproved, it does seem plausible to suppose that the students in these courses will become more alert in perceiving ethical issues, more aware of the reasons underlying moral

principles, and more equipped to reason carefully in applying these principles to concrete cases").

The widespread adoption of training by prosecutors' offices diminishes the likelihood of future cases like Thompson's based on deliberate indifference arising from the failure to train. Some *amici* supporting Petitioners claim that potential § 1983 liability will force prosecutors to establish continuing education programs when they otherwise might have steered resources elsewhere, *see* Br. of *Amici* Nat'l District Attorneys Ass'n, *et al*. 12, but the prevalence of such programs already in place and the wide consensus supporting their necessity largely obviates these concerns.

Similarly, Petitioners' and their *amici*'s many warnings that affirming Thompson's award will lead to runaway "vicarious liability" for every sort of mistake are vastly overstated. Pet. Br. 35-36. As Petitioners note, the standards for failure-to-train liability that guided the district court in this case were largely derived from *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993). *See* Pet. Br. 33-34. Yet there has been no flood of §1983 liability bankrupting prosecutors' offices in the districts comprising the Second Circuit in the 18 years since that decision. In fact, research reveals no reported decision affirming or reporting a finding or judgment of liability on the part of prosecutors for failure to train on *Brady* in the Second Circuit following *Walker* – something one would expect if there was merit to the dire predictions voiced by Petitioners and supporting *amici*. Nor is there any indication there that frivolous claims have notably increased or

that prosecutors have shrunk from aggressively pursuing cases when appropriate.

Moreover, other prosecutorial transgressions mentioned by the dissent below and cited by Petitioners and their *amici* as fertile ground for future lawsuits – wrongful searches and seizures, failure to give *Miranda* warnings, or errors relating to experts and sentencing, *see* Pet. Br. 35, 53 – are less likely to generate civil proceedings because, unlike the secret suppression of exculpatory evidence, they typically become known to the defendant or his counsel during the criminal case and can be addressed and remedied in that proceeding before prejudice results, diminishing the likelihood of a later civil suit.

Precisely because training is now so widely understood to be a critical ingredient in any well-administered prosecutor's office, it would be unfortunate if the Court's decision in this case validates Petitioners' notion that it is actually unnecessary. As *amici* stress, prosecutors' offices habitually face budget constraints and understandably look for areas to cut. *See* Br. of *Amicus* Nat'l District Attorneys Ass'n, *et al*. 8-9. Indeed, in advertising its training services to local prosecutors' offices, the National College of District Attorneys cited *this very case* as a warning against forgoing training and urged "reexamination of the old attitude that 'Training is the first thing to go.'" Mary M. Galvin, *Warning: Training Cuts Can Be Hazardous to Your Financial Health*, 42 PROSECUTOR 32, 32 (Oct./Nov./Dec. 2008). It would be ironic if a jury's factual finding that Petitioner's inadequate training caused Thompson's horrific ordeal led not to compensation for Thompson, but to license to scale back the very training most prosecutors now

agree can help prevent such tragedies in the first place.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully Submitted,

MARTIN J. SIEGEL
Counsel of Record
Law Offices of Martin J. Siegel, P.C.
Bank of America Building
700 Louisiana Street, Suite 2300
Houston, Texas 77002
Telephone: (713) 226-8566
martin@siegelfirm.com

ANTHONY S. BARKOW
DAVID B. EDWARDS
SARAH M. NISSEL
CENTER ON THE
ADMINISTRATION OF CRIMINAL LAW
New York University School of Law
139 MacDougal Street, Room 307
New York, New York 10012
Telephone: (212) 998-6612

Attorneys for Amici Curiae

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