

**In The  
Supreme Court of the United States**

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EARL TRUVIA; GREGORY BRIGHT,

*Petitioners,*

v.

HARRY F. CONNICK, in his capacity as District  
Attorney for the Parish of Orleans;  
GEORGE HEATH, DETECTIVE, individually  
and in his official capacity as Officer of  
the City of New Orleans Police Department;  
JOSEPH MICELI, individually and in his  
official capacity as Officer of the  
City of New Orleans Police Department;  
CITY OF NEW ORLEANS; EDDIE JORDAN,

*Respondents.*

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

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

1. The Fifth Circuit properly affirmed the dismissal of Petitioners' § 1983 claims against the City of New Orleans and New Orleans Police Officers George Heath and Joseph Miceli (the "City Respondents"). Before the Court is a petition for writ of certiorari requesting review of two issues entirely unrelated to any potential liability on the part of either the City of New Orleans or NOPD Officers Heath and Miceli. The questions presented by Petitioners only involve the Orleans Parish District Attorney's Office, not the City Respondents. The City Respondents request that the writ be denied to the extent Petitioners are seeking any review as to the City Respondents.
2. Petitioners' brief includes repeated references to a policy or custom at the NOPD of withholding exculpatory evidence and failing to properly train its officers on *Brady* requirements, as well as continued references to the actions of Officers Heath and Miceli. With respect to these references, the question presented is whether Petitioners have presented compelling reasons to grant the Petition when the Fifth Circuit:
  - (a) correctly found that the Petitioners waived their argument concerning a general custom or policy at the NOPD;
  - (b) properly dismissed the Petitioners' failure to train claim against the City when the City did not make a deliberately indifferent decision to endanger Petitioners' constitutional rights; and

**QUESTIONS PRESENTED** – Continued

(c) appropriately held that Officers Heath and Miceli did not withhold any exculpatory evidence and that they are entitled to qualified immunity.

The Fifth Circuit correctly analyzed these issues and dismissed all of Petitioners' § 1983 claims against the City Respondents. Petitioners neither challenge the legal merits of the Fifth Circuit's decision, nor cite any appropriate reason for this Court to review those decisions. Thus, the City Respondents request that the writ be denied.

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## INTRODUCTION

Petitioners presented no compelling reason for the Petition to be granted because the Fifth Circuit's August 8, 2014 Opinion is not in conflict with any decision of this Court or another Court of Appeals, and the Fifth Circuit did not decide an important federal question that has not been settled by this Court. (*See* Sup. Ct. R. 10(a)-(c)).

The Fifth Circuit correctly applied *Connick v. Thompson*, 131 S. Ct. 1350 (2011) and dismissed all claims against the City Respondents. Petitioners are not challenging that dismissal in any way, but have erroneously alluded to actions of the City Respondents which requires this opposition.



## FACTS AND PROCEEDINGS BELOW

In 2002, life sentences for Petitioners, Earl Truvia and Gregory Bright, were vacated when a Louisiana state judge found that the State of Louisiana suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) in connection with Petitioners' criminal trial in 1976. C.A.R. pp. 2643-51. Importantly, the state judge did not find that the New Orleans Police Department committed any *Brady* violations. *Id.* The *Brady* evidence that was suppressed by the State included a supplemental police report, attached statements, and information about a key witness – all evidence that was in the possession of the State, not the NOPD. *Id.*

Petitioners filed suit against all Respondents, including the City Respondents, asserting various claims under 42 U.S.C. § 1983 and associated state statutes. C.A.R. pp. 44-59. Petitioners also asserted claims against the City of New Orleans under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978). *Id.* Specifically, Petitioners sought recovery under the following theories: (1) the District Attorney's Office maintained a policy, custom, or practice that caused Petitioners' injuries; (2) the District Attorney's Office failed to properly train its employees about proper *Brady* requirements; (3) the New Orleans Police Department had a policy, custom, or practice that caused Petitioners' injuries; (4) the New Orleans Police Department failed to properly train its employees about proper *Brady* requirements; and (5) NOPD Officers Heath and Miceli withheld exculpatory evidence.

The district court properly found that Petitioners were unable to support any of their allegations and granted summary judgment in favor of Respondents on all claims. C.A.R. p. 6696. As to the City Respondents, the district court held that Officers Heath and Miceli did not withhold exculpatory evidence. The district court also held that the officers are entitled to qualified immunity because there was no purposeful concealment by the officers of evidence favorable to Petitioners. C.A.R. pp. 6710-11. Further, the district court found no triable issue as to the existence of an official NOPD policy, custom, or practice that violated Petitioners' rights. C.A.R. p. 6714. Likewise, the

district court found no triable issue with respect to whether the NOPD's training of its officers reflected a policy of deliberate indifference towards Petitioners' constitutional rights. *Id.*

On appeal to the Fifth Circuit Court of Appeals, Petitioners did not challenge the district court's finding regarding the NOPD's policies and customs. The Fifth Circuit correctly held that the argument was waived. *See* Pet. App., pp. 13-14. Instead, Petitioners continued to assert that the City Respondents are liable because the NOPD failed to properly train its officers on *Brady* rights. *See* Pet. App., pp. 14-15. Petitioners heavily relied on statements by Officers Heath and Miceli that they were unsure as to the meaning of exculpatory evidence. *Id.* Additionally, Petitioners cited the lack of a specific policy for handling exculpatory evidence. *Id.*

The Fifth Circuit held that Petitioners could not meet their burden to demonstrate that the City "knew its *Brady* training for police officers was insufficient yet still made a deliberate or conscious choice in the face of such information to endanger constitutional rights." *See* Pet. App., p. 14 (internal quotations omitted). Applying Supreme Court precedent, the Fifth Circuit held that, absent proof of deliberate indifference, Petitioners could not establish a genuine issue of material fact with respect to the City's alleged failure to train NOPD Officers on *Brady* rights. *Id.*



Finally, the Fifth Circuit agreed with the district court and the Louisiana state criminal court that Officers Heath and Miceli did not withhold any exculpatory evidence. *See* Pet. App., pp. 17. The Fifth Circuit noted that the district court carefully analyzed evidence presented by Petitioners. *Id.* The Fifth Circuit thus affirmed the district court's conclusion that there was not any evidence of the officers' participation in a *Brady* violation and that the officers are entitled to qualified immunity. *Id.*

Petitioners do not challenge the Fifth Circuit's ruling regarding the City Respondents in their petition. Petitioners only ask this Court to review issues regarding the District Attorney's Office. For that reason, the City Respondents urge that the rulings in their favor not be reviewed. Moreover, even to the extent review is appropriate under the circumstances, the Fifth Circuit was correct in finding (1) that Petitioners waived their custom and policy argument; (2) that Petitioners failed to raise an issue regarding whether the City acted with deliberate indifference towards Petitioners' constitutional rights; and (3) that the NOPD officers are entitled to qualified immunity.



## REASONS FOR DENYING THE WRIT

### **I. There are no compelling reasons to grant certiorari review.**

Review on a petition for writ of certiorari is not a matter of right. Sup. Ct. R. 10. Rather, certiorari

review is granted at this Honorable Court's discretion and only upon a showing of "compelling reasons." *Id.* Here, the petition fails to satisfy that requirement. The Fifth Circuit's decision:

- Does not conflict with any relevant decision of this Court;
- Does not conflict with the decision of any other federal court of appeals or with a state court of last resort; and
- Does not decide any important, unsettled question of federal law.

*See id.* The Petitioners' questions presented do not address the City Respondents in any way. *See* Pet. App., p. i. To the extent Petitioners are seeking any review as to the City Respondents, the Fifth Circuit properly dismissed all Petitioners' claims against the City Respondents. Thus, the Petition should be denied.

**A. The Fifth Circuit's holding that Petitioners waived their "policy or custom" claim is consistent with Fifth Circuit precedent.**

Petitioners waived their argument that the NOPD had a practice (or a policy, for that matter) of withholding *Brady* materials. *See* Pet. App., pp. 13-14. The Fifth Circuit has consistently held that the "failure to provide any legal or factual analysis of [the] issue on appeal waives that issue." *See Jason D.W. by Douglas W. v. Hous. Indep. Sch. Dist.*,

158, F.3d 205, 201 n. 4 (5th Cir. 1998). In this case, Petitioners did not attempt to demonstrate on appeal that the NOPD had a custom or policy of withholding *Brady* evidence. Thus, the Fifth Circuit correctly held that this argument was waived. Petitioners cite no case that conflicts with the Fifth Circuit's analysis under the *Jason D.W.* case. This Court should not review the matter.

**B. The evidentiary standard for a “policy or custom” claim under *Monell* is irrelevant because the Petitioners waived that claim against the City Respondents.**

Petitioners assert that proof of a policy or custom can be based, in part, on unconstitutional acts that occurred following the specific events at issue. Pet. App., p. i. However, it is well settled that for *Monell* liability to exist with regard to a municipality, there must be either evidence of an express policy of violating the Constitution, a widespread practice or custom, or a decision by an individual with express policy-making authority. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978). After the fact incidents do not satisfy this evidentiary burden. Throughout this entire case, Petitioners have not pointed to any express NOPD policy to withhold exculpatory evidence, as no such policy exists. Additionally, Petitioners did not allege a claim against a policymaker.

Petitioners assert that certiorari is warranted to review “whether the Fifth Circuit erred in refusing to find a triable issue as to whether there is a ‘policy’ or ‘custom’” of *Brady* violations by *the Orleans Parish District Attorney*. See Pet. App., p. i, (emphasis added). Petitioners do not now assert that such a “policy” or “custom” exists at the New Orleans Police Department. Petitioners waived this argument by failing to raise it before the Fifth Circuit. See Pet. App., pp. 13-14. Thus, there are no fact issues related to any policy or custom at the NOPD for this Court to address.

Petitioners attempt to include the actions of the NOPD in their analysis of the actions of the Orleans Parish District Attorney. Pet. App., pp. 4-5, 14-15. As both the district court and the Fifth Circuit correctly recognized, the NOPD and the District Attorney are entirely separate legal and juridical entities. See C.A.R. pp. 6696-6719; *see also* Pet. App., pp. 1-20 (analyzing claims against the DA’s office separately from claims against the City). Petitioners may not now resurrect their extinct legal claims against the City Respondents by blurring the distinction between the City Respondents and the District Attorney. Accordingly, denial of the writ is appropriate.

## **II. The Fifth Circuit’s decision is consistent with Supreme Court precedent.**

Petitioners’ writ for certiorari addresses a narrow issue relating only to their claims against the Orleans

Parish District Attorney. Nevertheless, the City Respondents are compelled to oppose the petition, because Petitioners' application includes incorrect statements about the City's policies and liability. To the extent Petitioners attempt to revive waived claims against the City in this Court, Petitioners' writ should be denied because the Fifth Circuit's decision was based on the clear guidelines this Court recently spelled out in *Connick v. Thompson*. In fact, the proceedings below were stayed by the district court until that case was decided. C.A.R. p. 5464.

The Fifth Circuit properly affirmed the district court's finding that no triable issue exists with respect to Petitioners' failure-to-train claim against the City. This Court recently addressed a failure to train claim in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). The Court plainly stated that, in order to prevail on a failure to train claim, the plaintiff must establish that a municipality's omissions amounted to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Thompson*, 131 S. Ct. at 1359 (2011) (quoting *Canton v. Harris*, 489 U.S. 378, 388 (1989)). Deliberate indifference requires proof that a municipal employee "disregarded a known or obvious consequence of his action." *Id.* (quoting *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)).

The Court also held that the existence of a single *Brady* violation is insufficient to support a government entity's liability under § 1983 for an unconstitutional policy or practice or for failure to train.

*Thompson*, 131 S. Ct. at 1356. A pattern of similar constitutional violations is “ordinarily necessary” to demonstrate deliberate indifference. *Id.* The plaintiff must also prove that the lack of training actually caused the *Brady* violation at issue. C.A.R. p. 6702 (citing *Thompson*, 131 S. Ct. at 1358 and n. 5).

The Fifth Circuit applied *Thompson* to the facts of this case and agreed with the district court that Petitioners cannot demonstrate that the City knew its *Brady* training for police officers was insufficient and made a deliberate or conscious choice in the face of such information to endanger the constitutional rights of individuals. *See* Pet. App., pp. 13-15. Petitioners’ writ does not raise any new important question of federal law that needs to be addressed. The *Thompson* case thoroughly described how to prove a failure to train theory, and the Fifth Circuit correctly applied that law to this case. Petitioners’ attempt to compare and contrast the factual determinations made by other courts is an effort to create a circuit split that just does not exist. For that reason, any claim of a circuit split is illusory.

### **III. The Fifth Circuit correctly held that Officers Heath and Miceli did not suppress *Brady* evidence and are entitled to qualified immunity.**

The claims against NOPD Officers Heath and Miceli were analyzed under clear, well-established precedent. Petitioners cite no reason for this Court to

review or alter that case law. Petitioners cite no conflicting precedent from any other circuit court. Qualified immunity shields a governmental official from § 1983 liability if the official's acts were objectively reasonable in light of clearly established law at the time of the official's conduct. *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005). Both the district court and the Fifth Circuit exhaustively reviewed the record and applied the proper standard. The result was a straightforward determination that Officers Heath and Miceli did not commit a *Brady* violation, or at the very least did not act objectively unreasonable. *See* Pet. App., pp. 15-17.

The City Respondents were properly cleared of all liability. In the event the Court chooses to review any of the issues presented by Petitioners, the Fifth Circuit's ruling on the issues related to City liability should not be disturbed. As discussed *supra*, the Fifth Circuit correctly dismissed all of Petitioners' claims against the City Respondents, and Petitioners have not cited a valid reason for this Court to review that decision.



## CONCLUSION

The Petition does not meet the standard required for a writ of certiorari to issue. Upon a thorough review of the record and well-established federal law, the Fifth Circuit properly dismissed all claims against the City Respondents. The Fifth Circuit was

correct in finding that: (1) Petitioners waived their “policy or custom” argument; (2) Petitioners failed to raise an issue regarding whether the City acted with deliberate indifference towards Petitioners’ constitutional rights; and (3) the NOPD officers did not withhold exculpatory evidence and are entitled to qualified immunity. Thus, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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