No. 14-708

In The Supreme Court of the United States

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; THE CITY OF NEW ORLEANS; EDDIE JORDAN,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This case poses a question that is truly of national importance: When may a local government be held liable for a policy and custom of violating *Brady v. Maryland*, 373 U.S. 83 (1963)? The briefs in Opposition to the Petition for a Writ of Certiorari fail to dispute the fundamental reasons why this Court should grant review.

First, there is a significant national problem with prosecutors violating *Brady v. Maryland*, including in cases, like this one, where the defendants are ultimately exonerated. As Judge Alex Kozinski explained: "*Brady* violations have reached epidemic proportions in recent years." *United States v. Olson*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from the denial of en banc review). This serious national problem means that there is a great deal of litigation over when prosecutors, and the local governments of which they are a part, may be held liable. Civil liability is crucial as a way of compensating those who have been injured, including by wrongful convictions, and of deterring future misconduct by prosecutors and local governments. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) ("Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

Second, there long has been a serious problem with *Brady* violations by the Orleans Parish District Attorney's office. This Court has seen this in cases

such as *Smith v. Cain*, 132 S.Ct. 627 (2012), and *Connick v. Thompson*, 131 S.Ct. 1350 (2011). In fact, the Brief in Opposition to the Petition for Certiorari filed by Respondents Harry F. Connick and Eddie Jordan [hereafter "Connick and Jordan opposition"] admits that there have been at least twelve people who have been exonerated as a result of *Brady* violations by the Orleans Parish District Attorney's office. *Id.* at 8-9. The Connick and Jordan Opposition says that six took place before Earl Truvia's and Gregory Bright's convictions and two took place before Harry Connick was District Attorney. *Id.* at 9. But this admits that there has been a pattern of *Brady* violations by this local government resulting in wrongful convictions over a 33-year period. Petition for Writ of Certiorari at 10-11.

Third, Truvia and Bright spent 28 years in prison for a murder they did not commit and their convictions were reversed because the Louisiana courts found egregious *Brady* violations. The Connick and Jordan Opposition dispute the Louisiana courts' decision. *Id.* at 2. But the Louisiana courts' findings and conclusions that *Brady* was violated preclude any effort by the Respondents to dispute their misconduct; neither the district court nor the United States Court of Appeals for the Fifth Circuit questioned that *Brady* was violated and that Truvia and Bright were wrongly incarcerated.

Thus, this case presents the ideal vehicle for this Court to address issues that are of great national importance: What is enough to show a triable issue as

to whether there is a "policy" or "custom" when there was significant evidence of *Brady* violations by the Orleans Parish District Attorney in this and many other cases? Does proving municipal policy or custom require proving similar unconstitutional acts that occurred before the events giving rise to the lawsuit or whether proof of a policy or custom can be based, in part, on similar unconstitutional acts that occurred following the events involving these plaintiffs?

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AND A QUESTION OF NATIONAL IMPORTANCE AS TO WHAT IS SUFFICIENT EVIDENCE OF A POLICY OR CUSTOM OF VIOLATIONS OF *BRADY V. MARYLAND* TO CREATE LIABILITY UNDER 42 U.S.C. §1983.

A. Unlike in *Connick v. Thompson*, Plaintiffs in This Case Do Not Rely on a Single Incident of Misconduct to Establish a Municipal Policy, But Rather Show Many Instances of Unconstitutional Withholding of *Brady* Material By the Orleans Parish District Attorney's Office.

Respondents, like the Fifth Circuit, argue that this case is indistinguishable from *Connick v. Thompson*. Connick & Jordan Opposition at 2-3; Brief in Opposition of George Heath, Joseph Miceli and the City of New Orleans [hereafter "Heath Opposition"]

at 9. In *Connick v. Thompson* this Court recognized that "Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain." 131 S.Ct. at 1362. But this Court held that the single incident of prosecutorial misconduct in withholding exculpatory and impeachment evidence by the Orleans Parish District Attorney's office was not sufficient to establish a policy of inadequate training or supervision to create local government liability. The Court concluded by declaring that the plaintiff, Thompson, "did not prove a pattern of similar violations that would establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." *Id*. at 1366.

This case, though, is distinguishable from *Connick v. Thompson* because there is evidence of a pattern of violations and thus raises questions not resolved by it. First, this case poses the issue of when there is sufficient evidence of a widespread practice to constitute a policy or custom under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Respondents incorrectly characterize this case as being solely about a claim of failure to train so as to fit it neatly under *Connick v. Thompson*, which was entirely about proving a municipal policy based on deliberate indifference with regard to training.

Failure to train, though, is just one way of several ways of establishing municipal liability. As stated in the Heath Opposition: "[I]t is well settled 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 policy-making authority." Heath Opp. at 6 (emphasis added). Respondent Heath is correct that a widespread practice or custom is sufficient to establish municipal liability. Truvia and Bright contend that is exactly what the evidence shows in this case: a widespread practice and custom of the Orleans Parish District Attorney wrongly withholding *Brady* material. The question presented by this case is what is sufficient evidence to make this a triable issue as to whether there was a municipal policy or custom.

Truvia and Bright introduced a great deal of evidence of a pattern of *Brady* violations by the Orleans Parish District Attorney's office to demonstrate a policy or custom.[1] For example, Truvia and Bright presented other criminal discovery responses by Connick's Office showing that 44 of Connick's prosecutors committed over 90 *Brady* violations in just a two-year period from 1974 to 1976 by refusing to produce exculpatory written or oral statements

[1] Respondent Heath repeatedly contends that "Petitioners waived their argument that the NOPD had a practice (or a policy, for that matter) of withholding *Brady* materials." Heath Opp. at 5. This simply ignores all of the evidence that Truvia and Bright presented, and that is summarized in the Petition for a Writ of Certiorari, as to violations of *Brady* by the Orleans Parish District Attorney's office. In light of all this evidence this clearly is not a situation of "failure to provide any legal or factual analysis of an issue." *Id.* (citation omitted).

and/or material impeachment evidence of state's witnesses. (DE1160-1175, 1010-1011; R.2345-47, R.5807-5909, R.5911-6012, R.5807). The actual writing on these criminal discovery responses included "not entitled" to direct requests for *Brady*, exculpatory or material impeachment evidence. The prosecutors in these cases did not say that this was not *Brady* material, but rather that the defendants were "not entitled" to the *Brady* material.

That is *exactly* what occurred in this case. Bright requested the FBI "rap sheet" of any witnesses the State planned to call at trial (which would have shown a key witness's arrest record), and the DA responded "Defense is not entitled to this information." (DE100-4, DE100-5, DE100-6). Bright unquestionably was entitled to this, as the Louisiana courts later found in overturning his and Truvia's convictions.

This is powerful evidence that this case was part of a pattern of defendant's *Brady* violations.[2] It makes this case far different from *Connick v. Thompson* where the Court said that the basis for municipal

[2] Respondent's Connick and Jordan quote the district court that these denials of discovery requests are of "little value." Opp. at 7. But they are of significant value in that they involved precisely what happened in this case: the District Attorney's office denying a *Brady* request by saying "not entitled," when the defendants clearly were constitutionally entitled to the material.

liability was solely founded on a claim of deliberate indifference in training.

Additionally, Respondents do not deny that at least a dozen people have been exonerated as a result of the *Brady* violations by this office. Instead, they contend that some of these *Brady* violations were before and some were after Connick was District Attorney. Connick and Jordan Opp. at 9 ("Six of the convictions took place years after Truvia and Bright's conviction. Two took place years before Harry Connick was District Attorney."). But all of these *Brady* violations are evidence of misconduct by the Orleans Parish District Attorney's Office. The question is whether taken together all of this evidence was sufficient to create a triable issue of fact as to whether there was a "widespread practice or custom" by this office. The answer to this question seems obvious, but at the very least it poses the issue which this Court needs to resolve: What is enough evidence to create a triable issue of fact as to whether there was a widespread practice or custom of violations of *Brady*?

Second and independently, Truvia and Bright contend that there was a policy of inadequate training with regard to Respondents' obligations under *Brady*. Respondents rely on *Connick v. Thompson*, but that case involved a single incident of misconduct. Truvia and Bright, however, introduced a great deal more evidence than a single incident to establish deliberate indifference with regard to training. For example, Respondent Connick stipulated in *Thompson*

v. Connick, Case No. 2:03-cv-02045, U.S.D.C., E.D.La., that "none of the district attorney witnesses recalled any specific training concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." (DE100-9, ¶¶ UU). Respondent Connick stipulated in *Thompson* (and conceded here) that his office did not have any written policy on *Brady* prior to 1987. (DE100-9, ¶¶ TT; R.1110). Furthermore, Respondent Connick also acknowledged it was foreseeable that defendants' rights would be violated if ADAs were not properly trained on *Brady* issues, (R.1107-08).

Henry Julien, the prosecutor in this case, had been an Assistant District Attorney for only about one year when he tried this murder case after doing predominantly civil work. (R.6533). Julien conceded that he could not recall any specific training on *Brady* and was not trained on the specific requirements under *Brady*, such as assessing whether a witness statement would be considered exculpatory evidence. (R.6538, 6541). He was not trained to obtain the most fundamental potential *Brady* information: witness statements. (R.6542, 6563). Julien was trained that as long as he did not possess the statements, he did not have a duty to contact the police or produce those statements. (R.6302-03). In effect, he thought he was "safe" in not having to produce such statements. (R.6303-04).

Respondents Connick and Jordan respond to this by stating: "However, the affidavits submitted of [numerous individuals] unanimously establish that it

was Harry Connick's policy to obey the law." Connick and Jordan Opp. at 11. This entirely misses the point because it does not respond to the evidence Truvia and Bright introduced as to the failure to train prosecutors and police regarding their *Brady* obligations. Respondent Connick's self-serving statement that he followed the law does not address the inadequacies in training while he was district attorney, nor for that matter the reality that his office was notorious for not following the law with regard to its *Brady* obligations.

Similarly, Respondents Connick and Jordan state that "Henry Julien, the prosecutor in the criminal case, maintained that Connick's official policy recognized prosecutor's legal and ethical obligations to comply with applicable law concerning evidence disclosure." *Id.* at 12. But again, this does not refute Julien's statements that he did not receive training as to his obligations under *Brady*.

Thus, the key question is what is sufficient evidence to show a triable issue of fact with regard to deliberate indifference as to training. Truvia and Bright introduced much more evidence of this than in *Connick v. Thompson*. This Court should grant certiorari to clarify what is enough evidence to establish a local government's liability under *Monell* for a local government's policy of not complying with its obligations under *Brady v. Maryland*.

B. This Court Should Grant Certiorari to Resolve a Conflict Among the Circuits and an Issue of National Importance as to What Is Sufficient Evidence to Create a Triable Issue of Fact as to Whether There is a Policy or Custom with Regard to the Unconstitutional Failure to Disclose Exculpatory and Impeachment Material to Criminal Defendants.

Truvia and Bright maintain that there is confusion and a split in the lower courts as to what is sufficient evidence to create a triable issue of fact regarding whether there is a municipal policy or custom of *Brady* violations. Respondents Connick and Jordan respond to this by declaring: "*Thompson v. Connick* is the law of the land and Petitioners do not cite any cases wherein any Circuit failed or refused to follow the case." Connick and Jordan Opp. at 5. Similarly, they state: "Petitioners do not and cannot identify any Circuit that does not recognize *Thompson.* There is no conflict among the Circuits." *Id.* at 6.

Respondents Connick and Jordan completely misstate Truvia's and Bright's position. Petitioners, of course, are not contending that Circuits are failing to "follow" or "recognize" *Connick v. Thompson.* Obviously the decision of this Court is the law of the land and is recognized and followed in every Circuit. Petitioners are not seeking certiorari on the ground that lower courts are failing to follow or recognize *Connick v. Thompson*. But that does not deny that there is

confusion and a split in the lower courts as to what evidence is sufficient to show a policy with regard to *Brady* violations.

Truvia and Bright point to cases with facts virtually identical to theirs where lower courts found these same types of evidence of violations would be sufficient to show a municipal policy or custom. *See* Petition for a Writ of Certiorari, at 16-17, citing *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379, 403 (4th Cir. 2014); *Haley v. City of Boston*, 657 F.3d 39, 43 (1st Cir. 2011); *Bertuglia v. City of New York*, 839 F.Supp.2d 703, 737-39 (S.D.N.Y. 2012).

Respondents Connick and Jordan attempt to distinguish these cases on the ground that they were decided on a motion to dismiss. Connick and Jordan Opp. at 6. But this misses the point. In these cases, the courts said that the allegations stated a claim and thus if proven would establish municipal liability. Truvia and Bright introduced evidence establishing exactly these allegations. In other Circuits this evidence thus would have been sufficient to go to trial and ultimately to prevail. It is very likely that under their precedents, the First and Fourth Circuits would have found that Truvia and Bright put forth sufficient evidence to show a triable issue as to whether there was a municipal policy or custom sufficient to meet *Monell*. But the Fifth Circuit said that there was insufficient evidence to go to trial. It is exactly this confusion in the lower courts that warrants the grant of certiorari in this case.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AND A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER PROOF OF MUNICIPAL POLICY OR CUSTOM REQUIRES ACTUAL PROOF OF PRIOR VIOLATIONS OR WHETHER PROOF OF DELIBERATE INDIFFERENCE AS TO TRAINING WHICH CAUSED A CONSTITUTIONAL VIOLATION IS SUFFICIENT.

As explained above, Respondents Connick and Jordan do not dispute that there were *Brady* violations by the Orleans Parish District Attorney's office. Instead, they focus on the timing of when the violations occurred. They state: "Six of the convictions took place after Truvia and Bright's conviction. Two took place years before Harry Connick was District Attorney." Connick and Jordan Opp. at 9.

Respondents' argument begs the question which this Court needs to resolve: Is proof of *prior* violations necessary in order to establish a municipal policy, and if so what is sufficient, or can a municipal policy be shown by all of the evidence of widespread violations of *Brady* and inadequacy of training? Respondents assume that the only relevant evidence is from proven *Brady* violations that occurred prior to Truvia's and Bright's convictions. This assumption is far too narrow. A jury should be able to look at all evidence of the Orleans Parish District Attorney's office's conduct with regard to *Brady* in deciding if there is a policy or

custom. At the very least, this Court needs to decide what evidence is relevant in determining whether there is triable issue of fact as to the existence of a policy or custom by the local government.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted in this case.

Respectfully submitted,

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