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, Detective, Individually and in his official capacity as Officer of the City of New Orleans Police Department; CITY OF NEW ORLEANS; EDDIE JORDAN,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

Should this Court grant certiorari, where:

(1) The Fifth Circuit adhered directly to this Court's three-year-old decision in *Connick v. Thompson*;

(2) No circuit conflict is presented;

(3) No evidence of any similar unconstitutional acts was presented; and

(4) A Municipality cannot be on notice of events that take place in the future.

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INTRODUCTION

The petition should be denied because it does not present any conflict among the Circuits, rather Petitioners seek a review of alleged evidence which the District Court and Appellate Court have already carefully considered. Both the District Court and the Appellate Court carefully considered this Court's decision in *Thompson v. Connick*, 131 S. Ct. 1350 (2011) and applied it to this case. In an effort to avoid the *Thompson* decision, Petitioners claim this case is "quite different from *Thompson v. Connick* because Truvia and Bright do not rely on a single incident of misconduct." However, this Court, in *Thompson*, set forth the legal standard for imposing liability upon a municipality under 42 U.S.C. §1983 based on allegations of a failure to train or inadequate training of municipality employees. In this case, the parties and the District Court actually agreed to stay this case, because *Thompson* was pending before this court, and all wanted the benefit of this Court's reasoning.

This case is also a bad candidate for certiorari because Petitioners seek to expand the concept of the proof required to establish that a municipality is on notice that a particular omission in a training program causes constitutional violations. Petitioners seek to establish that Respondents were on notice based upon events occurring after the events involving these Petitioners.

COUNTERSTATEMENT OF THE CASE

Petitioners were convicted of second degree murder in 1976 based upon the eyewitness identification and testimony of Sheila Caston Robertson. In 2003, Judge Charles Elloie overturned their convictions. Judge Elloie accepted as fact the testimony of the Petitioners and their witnesses and thereafter concluded that the prosecutor could not have recalled the event of disclosing all exculpatory evidence to the defense because of the time lapse since the trial. Judge Elloie also questioned the credibility of Sheila Caston Robertson based upon events that occurred long after the 1976 trial. Prior to the murder trial in 1976, no adverse evidence existed which pertained to the credibility of Sheila Caston, and no such evidence was then known by prosecutors. Harry Connick respectfully disputes Judge Elloie's findings and ruling. Specifically, all then-existing exculpatory evidence which was within the knowledge and possession of prosecutors was disclosed prior to the murder trial and there exists no evidence to the contrary.

Subsequent to the overturning of the convictions, Petitioners filed suit against Respondent District Attorney Harry Connick alleging liability against the District Attorney's Office based upon 42 U.S.C. §1983.

REASONS FOR DENYING THE PETITION

This case presents no question of top priority. The 5th Circuit applied the criteria this court set

forth three years ago in *Thompson v. Connick* and issued a very concise and well-reasoned opinion. Petitioners suggest that *Thompson v. Connick* does not apply. *Thompson* does apply and is the latest expression of the law by this Court. The parties in this case requested that the trial court stay the proceedings and the trial court in fact stayed this case so that the parties and the court would have the benefit of *Thompson*. After the *Thompson* opinion was issued, the stay was lifted.

This Court rejected Thompson's arguments because they were based on a "single incident failure to train" theory, and thereafter in the *Thompson* opinion, this court set forth the applicable criteria to consider in cases alleging municipal liability based on a failure to adequately train employees.

In *Thompson*, this Court recognized the tenuous and nebulous nature of the Petitioners' cause of action. "In **limited** circumstances, a local government's decision not to train certain employees about their legal duties to avoid violating citizens rights **may** rise to the level of an official governmental policy for purposes of § 1983 . . . [A] Municipality's culpability for a deprivation of rights is at its **most tenuous** where a claim turns on a failure to train . . . [A] policy of 'inadequate training' is **far more nebulous**, and a good deal further removed from the constitutional violation, than was the policy in *Monell*." *Thompson,* 131 S. Ct. at 1359 **[emphasis added]**.

This Court, in *Thompson*, identified the elements of a §1983 action such as the one brought by these Petitioners as follows:

(a) the existence of a *Brady* violation;

(b) an action pursuant to official municipal policy, rising to the level of "deliberate indifference" (in this case a policy not to train Assistant District Attorneys); and

(c) such policy (created by deliberate indifference) actually caused Plaintiffs' injury.[1]

The District Court recognized in its Order of September 10, 2012, the principles governing Petitioners' claims under §1983 as recently addressed by this Court in the *Thompson* case and addressed each element as follows:

As to element (a) the existence of a *Brady v. Maryland*, 373 U.S. 83 (1963) violation: The District Court stated, "for purposes of the instant motion, the Court assumes, without deciding, that a Brady violation did occur in connection with Appellants' 1976 criminal trial." (R.6702,6703)

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[1] This Court reasoned as follows: "Because we conclude that *Thompson* failed to prove deliberate indifference, we need not reach causation. Thus, we do not address whether the alleged training deficiency, or some other cause, was the "'moving force,' that 'actually caused' the failure to disclose the crime lab report." *Thompson*, 131 S. Ct. at 1358 [citations omitted].

As to element (b) an action pursuant to official municipal policy, rising to the level of "deliberate indifference" (in this case a policy not to train Assistant District Attorneys): The District Court stated, " . . . the court finds no triable issue has been demonstrated relative to the existence of a policy, custom or practice in Connick's office, in 1975 and 1976, of violating criminal defendants' constitutional rights, under *Brady* and its progeny, by purposefully withholding exculpatory evidence. The Court likewise rejects Plaintiff's contention that, in 1975 and 1976, Connick also failed to train and supervisor his prosecutors regarding the requirements of *Brady* such that his failure constitutes deliberate indifference actionable under § 1983." (R.6703)

As to element (c) such policy (created by deliberate indifference) actually caused Plaintiffs' injury: Just as this Court stated in *Thompson* that it did not address causation, the District Court did not have to address causation in this case. However, since the burden on proving causation lies with the Plaintiffs, their failure to present any evidence of causation alone, justified the entry of summary judgment against them.

I. There is no conflict among the Circuits

Thompson v. Connick is the law of the land and Petitioners do not cite any cases wherein any Circuit failed or refused to follow that case. Petitioners frame the issue as "what is sufficient evidence to create a triable issue of fact whether there is a policy or custom." However, Petitioners point to *Owens v.*

Baltimore City State's Attorney's Office, 767 F.3d ___ (4th Cir. 2014) and *Haley v. City of Boston*, 657 F.3d 39 (1st Cir. 2011) to argue that different Circuits address the extent of "evidence" necessary to create a triable issue of fact. *Owens* and *Haley* were decided on motions to dismiss, and both the 4th Circuit and 1st Circuit held that for purposes of a motion to dismiss the allegations must be accepted as true. In Petitioners' case, the District Court ruled on a Summary Judgment and dismissed the case. The 5th Circuit conducted a *de novo* review and affirmed the decision. The 5th Circuit noted that in summary judgment, as opposed to motions to dismiss, "the nonmovant must go beyond the pleadings and present specific facts indicating a genuine issue for trial in order to avoid summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2584, 2533 (1986). Petitioners do not and cannot identify any Circuit that does not recognize *Thompson*. There is no conflict among the Circuits.

II. Petitioners presented no evidence of actual *Brady* violations

In their effort to prove that Connick's DA office had a policy or persistent and widespread practice of violating criminal defendant's *Brady* rights in the 1970's, they claim the DA failed to turn over material exculpatory or impeachment evidence in their own case about the State's witness, Shelia Caston Robertson. As the 5th Circuit correctly noted, "appellants must go beyond their specific case and demonstrate

that a pattern or policy of purposefully withholding exculpatory evidence from criminal defendants existed within the DA office **during the relevant time period**." *Truvia v. Connick*, 577 Fed. Appx. 317, 322 (5th Cir. 2014) **[emphasis added]**.

In an effort to present specific facts, Petitioners pointed to discovery requests made by other counsel in other, unrelated cases wherein the State responded "no possession or no entitlement."

The District Court found:

> [T]he numerous discovery requests and responses provided by Plaintiff from other, unrelated matters to be problematic and of little value. . . . [T]he Court is provided with no explanation of the facts of those cases, no indication of any court resolution of the discovery requests, no proof that Brady material existed and was actually withheld, and no proof that a Brady violation occurred. Indeed, certain of the responses indicate that the State either had no such material, or had none in addition to that which had already been provided.

(R.6705)

Further, the District Court found:

> Connick's evidentiary submissions support the existence of an official policy, during the pendency of the criminal proceedings at issue here, directed toward compliance with applicable law, including *Brady* and its progeny

> . . . Connick's official policy recognized prosecutors' legal and ethical obligations to comply with applicable law concerning evidence disclosure including *Brady* and *Giglio*, and the Louisiana Code of Professional Responsibility.

(R.6703)

The 5th Circuit addressed the unrelated discovery requests and noted: "They [Petitioners] have not, however pointed to case law preceding their convictions that held the DA's office responsible for committing *Brady* violations or that upheld other criminal defendants' claims of *Brady* violations." *Truvia*, 577 Fed. Appx. at 322.

III. The cases Petitioners cite were 14 years or more after Petitioners' convictions

Petitioners claim that "[s]ince 1990 at least twelve people have been exonerated as a result of the *Brady* violations committed by Connick's office." They count within that number themselves and John Thompson. As for the remaining nine, their trials and convictions took place in the following time frames:

Dan Bright, 875 So.2d 37 (La. 2004)
.....convicted in **1996**

Shareef Cousins, 710 So.2d 1065
.....convicted in **1995**

Roland Gibson, No. 203-904, Orleans Crim. Dist. Ct. .....convicted in **1968**
(5 years before Harry Connick became DA)

Isaac Knapper, 579 So.2d 956 (La. 1991) .....convicted in **1979**

Curtis Lee Kyles, 514 U.S. 419 (1995) .....convicted in **1994**

Dwight LaBran, No. 388-287, Orleans Crim. Dist. Ct. .....convicted in **1997**

Hayes Williams, No. 199-523, Orleans Crim. Dist. Ct. .....convicted in **1960**

Calvin Williams, 984 So.2d 789 (La. App. 1st Cir. 2008).....convicted in **1977**

Juan Smith, 132 S. Ct. 627 (2012) .....convicted in **1995**

Six of the convictions took place years after Truvia and Bright's conviction. Two took place years before Harry Connick was District Attorney. Petitioners' use of statistics is evidence of nothing. Justices Scalia and Alito addressed this statistical approach in the *Thompson* case stating, "[t]hat theory of deliberate indifference would repeal the law of *Monell* in favor of the Law of Large Numbers." *Thompson*, 131 S. Ct. at 1367.

In this case, Petitioners have identified one single conviction in the 1970's that was overturned, for unexplained reasons. Petitioners cite *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128 (9th Cir. 2012) and *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) for the proposition that subsequent instances of misconduct can establish prior knowledge. However, those cases do not stand for such a proposition and such illogical reasoning was not used by those courts.

Petitioners claim that in oral argument in the case of *Smith v. Cain*, 132 S. Ct. 627 (2012), "Connick's office admitted to this Court the existence of its two-decade unconstitutional *Brady* Policy." However, as the 5th Circuit stated in its review of Petitioners' case, "there was no 'admission' that the DA office had a policy of refusing to turn over Brady evidence." *Truvia*, 577 Fed. Appx. at 323.

IV. Assistant District Attorney Henry Julien did not admit to any *Brady* violation

Assistant District Attorney Henry Julien did not make any admission that he withheld any *Brady* information, and Petitioners don't point to any part of the record where such an admission was made. ADA Julien testified that he gave Petitioners' Criminal Counsel open file discovery. That testimony remains uncontradicted. As the District Court found, Julien "routinely allowed defense counsel to review the prosecution's file prior to trial, and did so in Plaintiffs' criminal case. Significantly, Plaintiffs have put forth no evidence including deposition or affidavit testimony of Plaintiffs' criminal defense counsel, to the contrary." (R.6704)

V. The Campbell affidavit was correctly excluded

Mr. Campbell's affidavit was not based upon personal knowledge as required by F.R.C.P. 56(e), but rather upon what his understanding of office policy

was, before Mr. Campbell was even in the office. The 5th Circuit found "the district Court correctly excluded Campbell's affidavit from evidence based on his lack of personal knowledge and hearsay." *Truvia*, 577 Fed. Appx. at 323.

VI. Respondents' evidence demonstrated the existence of an official policy of compliance with applicable law, including *Brady*

As recognized in the District Court's Order, the District Attorneys' evidentiary submissions established the existence of an official policy directed toward compliance with applicable law, including *Brady* and its progeny. (R.6702)

Respondents contend Harry Connick had a policy to violate criminal defendants' constitutional rights. However, the affidavits submitted of Harry Connick (R.539), Henry Julien (R.542), Robert Early (R.524), John Baker (R.512), Ralph Capitelli (R.515), Lawrence Centola (R.517), Joseph Tosterud (R.534), Joseph McMahon (R.531), Robert Livingston (R.529), and Patrick Fanning (R.526) unanimously establish that it was Harry Connick's policy to obey the law. Respondents submitted no evidence to contradict the affidavits. Respondents point to the affidavit of Bill Campbell, however that Affidavit was stricken as it was not based upon personal knowledge. That issue is addressed in Section V. above.

The District Court specifically pointed to the Affidavit Exhibits of Connick's Memorandum in Support

(Connick's Original Mem. (R.491-549), including affidavit of Henry Julien (R.542-544); Transcript of Harry Connick's deposition testimony (R.1053-1159, at 1111, 1113); and Transcript of Henry Julien Deposition (R.895-1041, at 915-924, 944, 967 and 1006). The Code of Professional Responsibility required disclosure of exculpatory evidence in 1976. DR 7-103 (B) of the Louisiana Code of Professional Responsibility.

Henry Julien, the prosecutor in the criminal case, maintained that Connick's official policy recognized prosecutors' legal and ethical obligations to comply with applicable law concerning evidence disclosure, including *Brady* and *Giglio* and the Louisiana Code of Professional Responsibility. Affidavit Exhibits of Connick's Memorandum in Support (Connick's Original Mem. (R.491-549), including affidavit of Henry Julien (R.542-544); Transcript of Harry Connick's deposition testimony (R.1053-1159); and Transcript of Henry Julien Deposition (R.895-1041, at 915-924, 944, 967 and 1006). As found by the District Court, the evidentiary submissions established the existence of an official policy directed toward compliance with applicable law, including *Brady* and its progeny. (R.6702)

CONCLUSION

For the foregoing reasons, District Attorney Harry Connick opposes the Petition for Writ of Certiorari.

Respectfully submitted this 12th day of February 2015.

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