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Civil Rights Update

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Prosecutor's Office Not Subject to Section 1983 "Failure to Train" Liability in the Absence of a Demonstrated Pattern of Similar *Brady* Violations

Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194 (1963), and the cases that have followed and expanded it, established that a prosecutor's suppression of evidence favorable to a criminal defendant violates due process when that evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor. *See also Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936 (1999); *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985); *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976). Prosecutors who run afoul of *Brady*'s requirements are said to have committed a "*Brady* violation." *Strickler*, 527 U.S. at 281-82. In *Connick v. Thompson*, 131 S. Ct. 1350 (2011), the United States Supreme Court considered whether a single *Brady* violation can lead to § 1983 "failure to train" liability for a prosecutor's office. Ordinarily, a municipal entity's failure to adequately train its employees may only result in § 1983 liability when that failure stems from the "deliberate indifference" of decision-makers to the constitutional rights of the public. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197 (1989). Deliberate indifference is customarily demonstrated through a pattern of similar constitutional violations. *Bd. of Cty. Comm'rs of Bryan Cty. Okla. v. Brown*, 520 U.S. 397, 409, 117 S. Ct. 1382 (1997). The plaintiff in *Connick* took a different, albeit ultimately unsuccessful, approach. In the absence of a pattern of *Brady* violations, he argued that the Supreme Court's *City of Canton, Ohio v. Harris* decision established that, under the circumstances, the "obvious" nature of the single constitutional deprivation established failure to train liability. *See Canton*, 489 U.S. at 390 n. 10.

Facts and Procedural History

The relevant facts of this case involve conduct by prosecuting attorneys in the New Orleans Parish District Attorney's Office in the mid-1980s. The head of that office was the elected District Attorney, Harry Connick, Sr. Connick's office charged John Thompson with murder in early 1985. *Connick*, 131 S. Ct. at 1356. After the case was charged, victims of an unrelated armed robbery came forward and identified Thompson as their assailant. *Id.* As a result, the district attorney's office also charged Thompson with attempted armed robbery. This second case proceeded to trial first. *Id.*

Evidence recovered during the police investigation into the armed robbery included the pants of one of the victims, which were stained with blood attributed to the assailant. A swatch of the stained fabric was inventoried but not sent to the crime lab for testing until one week prior to trial. Two days before trial, an assistant district attorney received the crime lab's report, which concluded that the perpetrator had type B blood. *Id.* The trial prosecutors neither produced the lab report to defense counsel nor sought to determine Thompson's blood type. On the day of Thompson's trial, one of the two assigned assistant district attorneys

checked all of the physical evidence out of the police property room, including the blood-stained swatch of fabric. That same prosecutor then checked all of the evidence *except for the swatch* into the courthouse property room. The swatch and crime lab results were never mentioned at trial, and Thompson was convicted of attempted armed robbery. *Id.*

Thompson's murder trial commenced a few weeks later. As a result of his new felony conviction, Thompson made the tactical decision not to testify on his own behalf. The jury found him guilty of murder and sentenced him to death. After many years of state and federal court challenges, Thompson's execution was scheduled for May 20, 1999. One month before Thompson's execution date, a private investigator discovered the lab report. After a blood test confirmed that Thompson had type O blood, this evidence was brought to the attention of the District Attorney's office. A former assistant district attorney then revealed that one of the former trial prosecutors told him in 1994 that he had intentionally suppressed the blood evidence. This confession took place shortly after the trial prosecutor was diagnosed with terminal cancer. *Id.* at 1356 n. 1. In light of these revelations, the District Attorney's office moved to stay the execution and vacated Thompson's attempted armed robbery conviction. *Id.* at 1356. The appellate court then reversed the murder conviction and remanded it for a new trial. A jury found Thompson not guilty in 2003. *Id.* at 1357.

Not surprisingly, Thompson filed a civil rights suit against the District Attorney's office, Connick, the trial prosecutors, and others. *Id.* The only claim to proceed to trial was Thompson's *Brady* claim against the District Attorney's office, predicated on theories that an unconstitutional office policy led to the *Brady* violation and that the office was deliberately indifferent to the likelihood of such a violation through its failure to adequately train its prosecutors. At trial, the jury rejected the office policy theory but ruled in Thompson's favor on his "failure to train" theory. Thompson was awarded over $15 million in damages, fees and costs. *Id.* at 1357.

At summary judgment and on the eve of the civil trial, Connick argued that the District Attorney's office could not have been deliberately indifferent to an obvious need for further *Brady*-related training because there was no evidence to suggest he was aware of a pattern of similar *Brady* violations. *Id.* The district court rejected Connick's argument, holding "that Thompson could demonstrate deliberate indifference by proving that the D.A.'s office knew to a moral certainty that assistan[t] [district attorneys] would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights." *Id.* at 1358 (internal quotations omitted).

A panel of the Fifth Circuit Court of Appeals agreed with the trial court, and held that Connick was "on notice of an obvious need for *Brady* training." *Id.* at 1358. On rehearing *en banc*, the full court was evenly divided as to "whether Thompson could establish municipal liability for failure to train the prosecutors based on the single *Brady* violation without proving a prior pattern of similar violations, and, if so, what evidence would make that showing." *Id.*

Municipal Liability and the *Canton* Hypothetical

Ordinarily, local government liability through § 1983 only exists when a constitutional violation is the direct result of an official municipal policy. *Id.* at 1359 (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692, 98 S. Ct. 2018 (1978)). A municipality's decision not to train its employees about the legal duty to avoid violating citizens' constitutional rights may, in certain circumstances, rise to the level of an official municipal policy. *Id.* at 1359. Since a municipality's § 1983 liability is "at its most tenuous" in failure to train cases, the failure must amount to a deliberate indifference to the rights of its citizens. *Id.* at 1359.

The deliberate indifference standard is a stringent one, and requires a showing that the municipality adopted a "policy of inaction" in the face of actual or constructive notice of ongoing constitutional deprivations. *Id.* at 1360. Ordinarily, § 1983 plaintiffs can only satisfy this showing by pointing to a pattern of similar constitutional violations by the municipality's inadequately trained personnel. *Id.* (citing *Bd. of Cty. Comm'rs of Bryan Cty. Okla. v. Brown*, 520 U.S. 397, 409, 117 S. Ct. 1382 (1997)).

In *Connick*, the district court and Fifth Circuit panel both accepted Thompson's argument that "single-incident" failure to train liability can exist in certain circumstances. They ruled, in effect, that "obviousness" can overrule the usual prerequisite of a pattern of similar violations. *Id.* at 1361. This theory was based on a hypothetical scenario presented in a footnote in *City of Canton, Ohio v. Harris*, 489 U.S. at 390, n. 10.

The *Canton* hypothetical opined that, if a city armed its police officers with firearms and deployed the officers to capture fleeing felons without first training them as to the constitutional limitations relating to the use of deadly force, the predictable result would be that the untrained officers would violate citizens' constitutional rights. The hypothetical theorized that the city's decision not to train its officers about the constitutional limits on the use of deadly force could potentially represent the city's deliberate indifference to the highly predictable consequence of constitutional deprivations. *Id.* at 1361 (quoting *Brown*, 520 U.S. at 409).

The Failure to Provide *Brady* Training
Does Not Result in Single-Incident Liability

Connick conceded that the confessed action of the trial prosecutor in suppressing the armed robbery blood evidence constituted a *Brady* violation. Consequently, the Supreme Court only considered whether that single violation could lead to "failure to train" liability as posited in the *Canton* hypothetical. In its 5-4 decision, the Court rejected the hypothetical's real-world applicability to prosecutors' offices generally and to the particular facts of this case.

Writing for the majority, Justice Clarence Thomas held that the failure to train prosecutors as to their *Brady* responsibilities does not fall within the narrow *Canton* hypothetical. Unlike untrained police officers who must make "split-second decisions with life-or-death consequences" without familiarity with the constitutional constraints on the use of deadly force, prosecutors are subject to professional education and standards that differentiate them from other public employees. As stated by the Court, prosecutors "are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." *Id.* at 1361. This training begins in law school, is vigorously tested by the bar exam, and continues afterwards through continuing education requirements and on-the-job training. In addition, reasoned the Court, attorneys are uniquely subject to specific character and fitness standards and state ethical rules. *Id.* at 1361-62. These ethical rules, in Louisiana and elsewhere, place the added duty on prosecutors "to seek justice, not merely convict" and to follow the tenants of *Brady* and its progeny. *Id.* at 1362 (quoting La. State Bar Ass'n, Articles of Incorporation, Art. 16, EC 7-13 (1971); ABA Standards for Criminal Justice 3-1.1(c) (2d ed. 1980)).

This "regime of legal training and professional responsibility," according to the Court, means that a prosecutor's office's failure to provide specific *Brady* training is far less of a constitutional concern than in the scenario hypothesized in *Canton*. Even if not subjected to a formal office-sponsored training program, prosecutors are professionally "equipped with the tools to find, interpret, and apply legal principles." *Id.* at 1364. An elected prosecutor is thus entitled to rely on his assistants' professional training and ethical obligations in the absence of a specific reason not to so rely, such as the emergence of a pattern of constitutional violations. *Id.* at 1363. When compared to the untrained officers envisioned in *Canton*'s footnote, a licensed prosecuting attorney making use of his legal judgment about *Brady* material "simply does not present the same 'highly predictable' constitutional danger." *Id.* Although mistakes by prosecutors will inevitably occur, "[i]t does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to 'a decision by the [district attorney's office] itself to violate the Constitution.'" *Id.* at 1365 (quoting *Canton*, 489 U.S. at 395).

The Court also discussed another significant difference between the Orleans Parish District Attorney's Office and the *Canton* hypothetical. While the armed police officers in *Canton* were assumed to be completely ignorant of the constitutional constraints on the use of deadly force, it was undisputed that the assistant district

attorneys in Connick's office were all familiar with their general *Brady* obligations. *Id.* As a practical matter, reasoned the Court, this means that the plaintiff must be asserting a failure to train as to *Brady*'s requirements for the specific scenario that unfolded in this case. This nuance goes far beyond what the constitution requires, since proving that an injury could have been avoided if "better or more training, sufficient to equip him to avoid the particular injury-causing conduct" is not sufficient to demonstrate deliberate indifference.

The court was bitterly divided in this case. A lengthy dissent by Justice Ruth Bader Ginsburg took issue with the majority's contention that the conduct exhibited by one or more of Connick's assistant district attorneys during Thompson's prosecution and in the years that followed represented a single *Brady* violation. *Id.* at 1370-87. The dissent further contended that, given the complexities of *Brady*, the jury could reasonably conclude that Connick knew or should have known a lack of training would lead to frequent deprivations of criminal defendants' constitutional rights. *Id.* at 1370, 1383-84. Justice Antonin Scalia joined the majority in full but authored a vigorous concurrence in rebuttal of the dissent. *Id.* at 1366-70.

In light of *Connick*, prosecutor's offices need not worry about § 1983 liability for failing to train their attorneys through the single-incident theory hypothesized in *Canton*, no matter how obvious the likelihood of a constitutional deprivation. Nevertheless, this opinion does not significantly alter the landscape for defending § 1983 claims. It is important to remember that the existence of multiple similar *Brady* violations still leaves open the path for plaintiffs to attack in the more traditional way, through a supposed "pattern" indicative of deliberate indifference. As for the Connick-led Orleans Parish District Attorney's office, arguments were heard by the Supreme Court on November 8, 2011 in *Smith v. Cain*, No. 10-8145, another *Brady* action. Could a pattern be emerging?

About the Author

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