FEDERAL COURTS — SECTION 1983 LITIGATION — FIFTH CIRCUIT EQUALLY DIVIDES ON DECISION TO UPHOLD JUDGMENT AGAINST DISTRICT ATTORNEY'S OFFICE FOR WITHHOLDING EXCULPATORY EVIDENCE. — *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009) (en banc).

Prosecutors are immune from civil liability for their actions while representing the state in judicial proceedings.[1] But a district attorney's office may be liable under 42 U.S.C. § 1983[2] for violations of defendants' constitutional rights if a prosecutor's conduct is attributable to the municipality.[3] Recently, in *Thompson v. Connick*,[4] the en banc Fifth Circuit, by a vote of 8–8, automatically affirmed a $14 million § 1983 judgment against the Orleans Parish District Attorney's Office for withholding exculpatory evidence during the prosecution of plaintiff John Thompson, who spent eighteen years in prison following his murder conviction.[5] Under current § 1983 municipal liability doctrine, Thompson should not have prevailed because he did not demonstrate a pattern of similar constitutional violations by the District Attorney's Office. But because demonstrating such a pattern is exceptionally difficult for § 1983 withholding evidence claims, courts should change the inquiry for these specific claims to examine whether prosecutorial training shows deliberate indifference to defendants' constitutional rights.

On January 17, 1985, John Thompson and Kevin Freeman were arrested and charged with the murder of Raymond T. Liuzza, Jr., who was robbed and shot in New Orleans on December 6, 1984.[6] After viewing Thompson's picture in the newspaper, Jay, Marie, and Michael LaGarde, all victims of a December 28, 1984, robbery, identified Thompson as their assailant.[7] Assistant District Attorney Bruce Whittaker noted in office paperwork that the government might test blood belonging to the LaGardes' assailant that was recovered from Jay LaGarde's pants.[8] The government performed the test about one week before Thompson's trial for the LaGarde robbery began, and it

---

[1] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 269–70 (1993); *see also* Hartman v. Moore, 547 U.S. 250, 261–62 (2006); Kalina v. Fletcher, 522 U.S. 118, 125–26 (1997).

[2] 42 U.S.C. § 1983 (2006).

[3] *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

[4] 578 F.3d 293 (5th Cir. 2009) (en banc).

[5] Thompson v. Connick, 553 F.3d 836, 846 (5th Cir. 2008); *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that withholding evidence violates due process "where the evidence is material either to guilt or to punishment").

[6] *Thompson*, 553 F.3d at 843.

[7] *Id.*

[8] *Id.*

showed that the perpetrator had type B blood, but prosecutors never disclosed this report to Thompson and did not introduce it at his trial.[9] At his first trial, for the LaGarde robbery, a jury found Thompson guilty of attempted armed robbery and sentenced him to forty-nine and a half years in prison.[10] Because this conviction would have been admissible as impeachment evidence had he testified, Thompson chose not to take the stand in his defense at his subsequent trial for the Liuzza murder.[11] On May 8, 1985, a jury convicted Thompson of first-degree murder and sentenced him to death.[12]

Fourteen years later, an investigator discovered a copy of the LaGarde blood report.[13] Thompson was then tested and found to have type O blood, and a stay of execution was ordered.[14] Later investigation showed that Assistant District Attorney Gerry Deegan had deliberately withheld the blood report.[15] After the trial court granted Thompson a new trial for the armed robbery charge, the state elected not to prosecute,[16] and Thompson filed for postconviction relief from his murder conviction.[17] The trial court commuted Thompson's death sentence to life in prison,[18] and in 2002 the Louisiana Fourth Circuit Court of Appeals vacated his conviction for the Liuzza murder.[19] Following a new trial in which Thompson testified in his defense and presented thirteen pieces of evidence prosecutors had previously withheld, a jury found Thompson not guilty after deliberating for only thirty-five minutes.[20]

On July 16, 2003, Thompson sued the Orleans Parish District Attorney's Office, Harry Connick, the District Attorney at the time of Thompson's prosecution, Eddie Jordan, then-District Attorney, and others, all in their official capacities.[21] The district court granted summary judgment in favor of the state on Thompson's malicious prosecution and intentional or reckless infliction of emotional distress claims based on absolute prosecutorial immunity and dismissed Thompson's 42 U.S.C. § 1985(3) conspiracy claim.[22] Only Thompson's wrongful suppression of exculpatory evidence claim under 42 U.S.C.

---

[9] *Id.* at 844.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 844–45.
[13] *Id.* at 845.
[14] *Id.*
[15] *Id.*
[16] State v. Thompson, 825 So. 2d 552, 553 (La. Ct. App. 2002).
[17] *Thompson*, 553 F.3d at 845.
[18] *Id.*
[19] *Thompson*, 825 So. 2d at 557–58.
[20] *Thompson*, 553 F.3d at 846.
[21] *Id.*
[22] 42 U.S.C. § 1985(3) (2006); *Thompson*, 553 F.3d at 846.

§ 1983 went to trial.[23] Because the defendants were named in their official capacities, Thompson, to establish municipal liability under *Monell v. Department of Social Services of New York*,[24] bore the burden of showing that a "policy or custom" of the District Attorney's Office substantially caused prosecutors to withhold exculpatory evidence in violation of his constitutional rights.[25] The jury found that the violation was not due to an unconstitutional *Brady*[26] policy but that "the District Attorney[] fail[ed], through deliberate indifference, to establish policies and procedures to protect one accused of a crime" from *Brady* violations.[27] The jury awarded Thompson $14 million in damages.[28]

The Fifth Circuit Court of Appeals affirmed.[29] Writing for the panel, Judge Prado[30] noted the "especially deferential" standard of review for jury verdicts[31] and concluded that a reasonable jury could have found that the District Attorney's Office was "deliberately indifferent to the need to train" on *Brady* issues.[32] The court rejected the state's argument that a pattern of *Brady* violations, which Thompson had not demonstrated, was necessary to evince "deliberate indifference"[33] and cited Supreme Court and Fifth Circuit cases showing that a single incident could support such a finding.[34] Judge Prado wrote that there was evidence that the need to train prosecutors on *Brady* issues was obvious, that prosecutors were inadequately trained,[35] and that Connick knew that failure to train would result in *Brady* violations.[36] Because such violations were a "highly predictable consequence" of failure to train,[37] "[n]o pattern of similar violations was necessary to put Connick on notice" that *Brady* training was needed.[38]

---

[23] *Thompson*, 553 F.3d at 846; *Thompson*, 578 F.3d at 296 (Clement, J., writing to reverse).

[24] 436 U.S. 658 (1978). "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

[25] *Thompson*, 553 F.3d at 851.

[26] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[27] *Thompson*, 553 F.3d at 847.

[28] *Id.*

[29] *Id.* at 842–43. The court also reversed the inclusion of nonliable defendants in the judgment and remanded to the district court with instructions to remove them. *Id.* at 843.

[30] Judge Prado was joined by Judges King and Stewart.

[31] *Thompson*, 553 F.3d at 851.

[32] *Id. City of Canton v. Harris*, 489 U.S. 378 (1989), held that "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* at 388–89.

[33] *Thompson*, 553 F.3d at 852.

[34] *Id.*

[35] *See id.* at 858.

[36] *See id.* at 853.

[37] *Id.* at 854.

[38] *Id.*

The court found that Deegan's intentional suppression of the blood report did not destroy Thompson's deliberate indifference theory because "the *Brady* violation was not solely the result of Deegan's actions."[39]

On rehearing en banc, the Fifth Circuit, by a vote of 8–8,[40] affirmed by reason of an equally divided en banc court.[41] Judge Clement, writing to express her wish that the court had reversed the judgment,[42] argued that the evidence was insufficient to hold the District Attorney's Office liable and that the trial judge's jury instructions regarding deliberate indifference were plainly erroneous.[43] The Supreme Court's decision in *Monell*, she wrote, required heightened standards of culpability and causation for § 1983 municipal liability.[44] The deliberate indifference standard usually required "at least a pattern" of deprivations of constitutional rights,[45] and "implies a sense of callousness . . . tantamount to intent" absent in the instant case.[46] Judge Clement believed that the trial judge erroneously instructed the jury that deliberate indifference was "something less than intent but more than negligence."[47] Judge Clement disagreed that Thompson's *Brady* violation was a highly predictable consequence of failure to train prosecutors on *Brady* because of the absence of similar violations[48] and emphasized the exceptional nature of single-violation *Monell* liability.[49] Moreover, Judge Clement argued that Thompson had not established that failure to train was the moving force behind the *Brady* violation[50] as required by *City of Canton v. Harris*[51] and that this standard was essential to prevent *Monell* liability from collapsing into respondeat superior,[52] which is not cognizable under § 1983.[53]

---

[39] *Id.* at 856.

[40] Judge Dennis recused himself and did not participate. The opinions were delivered in the following order: Jones, Jolly, Clement, Prado.

[41] *Thompson*, 578 F.3d at 293. When an appellate court is equally divided, the judgment of the lower court stands. Sch. Bd. of Richmond v. State Bd. of Educ., 412 U.S. 92, 93 (1973); United States v. Seale, 570 F.3d 650, 651 (5th Cir. 2009) (en banc) (DeMoss, J., dissenting).

[42] Judge Clement was joined by Chief Judge Jones and Judges Jolly, Smith, Garza, and Owen.

[43] *Thompson*, 578 F.3d at 296 (Clement, J., writing to reverse).

[44] *Id.* at 297.

[45] *Id.* at 298 (quoting Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. 2003)) (internal quotation marks omitted).

[46] *Id.* (citation omitted) (quoting Bd. of County Comm'rs v. Brown, 520 U.S. 397, 419 (1997) (Souter, J., dissenting) (footnote omitted)).

[47] *Id.* at 309–10.

[48] *Id.* at 305.

[49] *Id.* at 299.

[50] *Id.* at 309.

[51] 489 U.S. 378 (1989); *id.* at 391.

[52] *Thompson*, 578 F.3d at 300, 301 (Clement, J., writing to reverse).

[53] *See id.* at 311 & n.78.

Judge Prado, writing to affirm,[54] began by emphasizing the fundamental right to a jury trial in civil cases and adopted the reasoning in his panel opinion.[55] He criticized Judge Clement for second-guessing the jury's findings of fact[56] and departing from the "especially deferential" standard of review.[57] Judge Prado argued that Judge Clement had conflated intent with deliberate indifference in arguing that the trial judge erroneously instructed the jury.[58] Though deliberate indifference may encompass intentional action, he wrote, it "does not *require* a finding of intent."[59] Moreover, Judge Prado disagreed that the judgment would subject municipalities to excessive liability because it is rare that the need for training will be "so obvious" and lack of training "so likely" to cause constitutional violations.[60]

Judge Jolly, specially concurring, wrote that he would prefer that the en banc court affirm the district court judgment without opinion, as is ordinarily the case for a tied vote.[61] But he joined Judge Clement's opinion because "it show[ed] the intellectual fortitude of meeting head-on . . . the truly difficult legal issues presented by this case."[62]

Chief Judge Jones wrote to express her support for reversal on different grounds. Urging the Supreme Court to address the tension between governmental entity liability under § 1983 and the doctrine of absolute prosecutorial immunity, Chief Judge Jones cited policy considerations outlined in *Van de Kamp v. Goldstein*,[63] which granted chief prosecutors absolute immunity from § 1983 suits for failing to train or supervise staff.[64] These policy considerations, Chief Judge Jones wrote, counseled against expanding municipal liability because it would damage the "public trust" in prosecutors, who might compromise their vigorous prosecution of defendants due to fear of lawsuits,[65] and require a "virtual retrial of the criminal offense in a new forum,"[66] among other reasons.[67]

---

[54] Judge Prado was joined by Judges King, Wiener, Stewart, and Elrod.

[55] *Thompson*, 578 F.3d at 311 (Prado, J., writing to affirm).

[56] *Id.* at 312–13.

[57] *Id.* at 312 (quoting Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 235 (5th Cir. 2001) (internal quotation marks omitted)).

[58] *See id.* at 313–14.

[59] *Id.* at 313.

[60] *Id.* at 314 (internal quotation marks omitted).

[61] *Id.* at 295 (Jolly, J., specially concurring).

[62] *Id.*

[63] 129 S. Ct. 855 (2009).

[64] *Thompson*, 578 F.3d at 293–95 (Jones, C.J., writing to reverse) (citing *Van de Kamp*, 129 S. Ct. at 860–64).

[65] *Id.* at 294.

[66] *Id.* (quoting *Van de Kamp*, 129 S. Ct. at 860).

[67] *See id.* at 295.

Fifth Circuit precedent with respect to *Monell* liability suggests that the court should not have ultimately held the Orleans Parish District Attorney's Office liable for violating Thompson's constitutional rights. But Judge Clement's opinion went too far by insisting that Thompson's failure to demonstrate a pattern of *Brady* violations showed that his was not the product of a policy or custom of the District Attorney's Office. Because *Brady* violations are difficult to discover and often go unreported,[68] *Thompson* effectively demonstrates that the § 1983 municipal liability doctrine is ill-suited to claims resulting from *Brady* violations.

Thompson did not meet the exceptional criteria for single-violation *Monell* liability.[69] The Fifth Circuit has found *Monell* liability for a single constitutional violation in only one case.[70] In *Brown v. Bryan County*,[71] a sheriff hired a twenty-one-year-old man with no experience or education in law enforcement as a new deputy.[72] After the sheriff's office did not provide training on the constitutional limits of the use of force, the deputy used excessive force during an arrest and severely injured Brown.[73] Distinguishing *Brown*, Judge Clement noted that prosecutors in *Thompson* had "three years of legal schooling, prosecutorial experience, and no history of past misconduct."[74] Hence, Thompson's constitutional violation was not as highly predictable a consequence of failure to train as Brown's. Moreover, meeting the causation standard for *Monell* liability — that the municipal policy or custom be the moving force behind the violation — was far more speculative in *Thompson* than it was in *Brown*. The sheriff's failure to train could easily be called the moving force behind the deputy's unconstitutional arrest precisely because the new deputy had no law enforcement experience or training. In contrast, the value of Orleans Parish prosecutors' education and experience must be severely discounted to find that failure to train — rather than malice or desire to convict a suspected killer — was the moving force behind Gerry Deegan's deliberately withholding Thompson's blood report. Indeed, in *Burge v. St. Tammany Parish*,[75] which concerned a § 1983 claim based on a *Brady* violation, the Fifth Circuit rejected a single-violation theory.[76]

---

[68] *Id.* at 313 n.1 (Prado, J., writing to affirm).

[69] *See* Snyder v. Trepagnier, 142 F.3d 791, 798 (5th Cir. 1998) ("[A] single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training.").

[70] *Thompson*, 578 F.3d at 299 (Clement, J., writing to reverse).

[71] 219 F.3d 450 (5th Cir. 2000).

[72] *Id.* at 454; *Thompson*, 578 F.3d at 299 n.25 (Clement, J., writing to reverse).

[73] *Brown*, 219 F.3d at 454–55.

[74] *Thompson*, 578 F.3d at 299 n.25 (Clement, J., writing to reverse).

[75] 336 F.3d 363 (5th Cir. 2003).

[76] *Id.* at 373.

Though Judge Clement correctly identified *Thompson* as a case that fell short of the single-violation exception, her opinion ignored the practical realities of *Brady* claims. Judge Clement argued as a matter of statistics that Thompson's *Brady* violations were not a highly predictable consequence of failure to train prosecutors. If *Brady* violations were highly predictable, she wrote, then failure to train, "[a]s a matter of probability," would have produced a demonstrable pattern of violations.[77] This reasoning would require plaintiffs to show a pattern of constitutional violations in virtually all failure-to-train cases. But just because a plaintiff cannot demonstrate a pattern at trial does not mean that one does not exist.

This evidentiary problem is acute for § 1983 claims based on *Brady* violations.[78] Judge Prado's en banc opinion recognized that many cases of *Brady* violations are not published and that many, like Thompson's, go undiscovered for years.[79] Moreover, the incidences of *Brady* violations are probably far greater than the number of known violations.[80] In 1998, the *Pittsburgh Post-Gazette* concluded a two-year investigation into 1500 allegations of prosecutorial misconduct that found "hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence."[81] Similarly, a *Chicago Tribune* study counted 381 homicide convictions vacated due to *Brady* violations from 11,000 criminal cases surveyed between 1963 and 1999, but concluded that these findings reflected only "a fraction" of the true number of *Brady* violations, in part because violations are "by design hidden and can take extraordinary efforts to uncover."[82] Indeed, though such prosecutorial misconduct appears to be extensive, defense attorneys generally do not have the resources to amass *Brady* violation data with respect to a particular municipality.[83] Notably, the Fifth

---

[77] *Thompson*, 578 F.3d at 305 (Clement, J., writing to reverse).

[78] *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 432 (2001) ("Yet *Brady* violations, like most other forms of illegal prosecution behavior, are difficult to discover and remedy.").

[79] *Thompson*, 578 F.3d at 313 n.1 (Prado, J., writing to affirm).

[80] Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 536 (2007) ("[I]t is commonly believed that most *Brady* evidence never gets disclosed . . . ."); 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, 869 (1997) ("For every one of these [*Brady*] cases, we have every reason to suspect that there are many more in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney.").

[81] Bill Moushey, *Hiding the Facts: Discovery Violations Have Made Evidence-Gathering a Shell Game*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998, at A-1, *available at* http://www.post-gazette.com/win/day3_1a.asp.

[82] Kenneth Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1, *available at* http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story.

[83] Davis, *supra* note 78, at 432 ("Few defense attorneys have the time, resources, or expertise to conduct massive investigations of prosecution offices.").

Circuit rejected this notion in *Burge v. St. Tammany Parish*, stating that the frequency of *Brady* claims shows that *Brady* violations are not difficult to discover.[84] But even though *Brady* claims are common,[85] most are brought by prisoners convicted after a trial.[86] The vast majority of convicted criminals, however, waive their right to trial via plea bargain.[87] These nontrial convicts rarely raise *Brady* claims,[88] and because their *Brady* violations are rarely litigated, the frequency of *Brady* litigation probably far undercounts the true number of violations. The absence of a pattern or the plaintiff's inability to show a pattern is thus not dispositive as to whether a *Brady* violation was due to a municipal policy or custom.

These practical limitations show that the current § 1983 failure-to-train doctrine is not working for *Brady* violations. A better approach would focus on the training itself. Rather than require nearly all plaintiffs to demonstrate a pattern of violations, courts should examine whether the inadequacy of municipal *Brady* training reflects deliberate indifference to defendants' constitutional rights. This suggestion is consistent with *City of Canton*. Though the Court there cautioned against "second-guessing municipal employee-training programs,"[89] it held that the inadequacy of a municipal training program could serve as the basis for § 1983 liability and that the "identified deficiency in a city's training program must be closely related to the ultimate injury."[90] This language seems to authorize an inquiry into the quality of municipal prosecutorial training. Such a change would compensate deserving § 1983 plaintiffs and encourage municipalities to train prosecutors to avoid *Brady* violations.

---

[84] 336 F.3d 363, 373 (5th Cir. 2003) ("The frequency with which defendants' [sic] assert *Brady* violations belies [plaintiff's] claim that [they] are inordinately difficult to discover." (citing Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 738 (1987))).

[85] Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys To Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1076 (2009).

[86] Gershman, *supra* note 80, at 536–37.

[87] *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE. L.J. 1909, 1912 (1992) ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

[88] Gershman, *supra* note 80, at 536–37. It is still an open question whether any *Brady* obligations apply prior to a plea bargain. In *United States v. Ruiz*, 536 U.S. 622 (2002), the Court held that the Constitution does not require disclosure of impeachment or affirmative defense information prior to a guilty plea. *Id.* at 629. However, in his concurrence with the judgment, Justice Thomas felt the need to refute the majority's analysis, which relied on the "degree of help," *id.* at 634 (internal quotation marks omitted), of the information. *Id.* at 633–34. This fact suggests that Justice Thomas felt that there were certain situations in which the majority's rule would not apply. *See id.* at 633–34 (Thomas, J., concurring in the judgment).

[89] City of Canton v. Harris, 489 U.S. 378, 392 (1989).

[90] *Id.* at 391.