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IN THE SUPREME COURT OF THE UNITED STATES

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HARRY F. CONNICK, DISTRICT :
ATTORNEY, ET AL., :
Petitioners :

v. : No. 09-571

JOHN THOMPSON :

- - - - - x

Washington, D.C.

Wednesday, October 6, 2010

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:04 a.m.

APPEARANCES:

STUART K. DUNCAN, ESQ., Appellate Chief, Baton Rouge,
Louisiana; on behalf of Petitioners.

J. GORDON COONEY, JR., ESQ., Philadelphia, Pennsylvania;
on behalf of Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 09-571, Connick v. Thompson.

Mr. Duncan.

ORAL ARGUMENT OF STUART K. DUNCAN

ON BEHALF OF THE PETITIONERS

MR. DUNCAN: Mr. Chief Justice, and may it please the Court:

This case asks when a district attorney's office may be liable under section 1983 for inadequately training prosecutors. The Petitioner, Orleans Parish District Attorney's Office, was found liable for the terrible injuries caused to Mr. Thompson by a Brady violation on the theory the office was deliberately indifferent to Brady training, this despite the fact that there was proved no pattern of previous misconduct by office prosecutors.

The district court exempted this case from the ordinary pattern requirement by making a flawed analogy to a hypothetical in this Court's City of Canton opinion. There, the Court suggested that a city may be liable, absent a pattern, if it fails to inform police officers of the basic constitutional standard for deadly force.

1 Extending that hypothetical to this case was
2 error. It misunderstood Canton's distinction between
3 single-incident and pattern liability, nullifying
4 Canton's stringent standards of fault and causation.

5 JUSTICE GINSBURG: Isn't this something in
6 between? Because in Canton, the hypothetical was one
7 rookie police officer. Here, it wasn't one rogue
8 prosecutor. There were four prosecutors who knew of
9 this blood evidence, and there were multiple
10 opportunities for them to disclose it, but four of them
11 apparently thought it was okay under Brady to keep this
12 quiet.

13 Now, if we were just talking about -- what
14 was his name, Deegan? -- it would be a different case.
15 But we have the three other prosecutors. And so I think
16 it's questionable to characterize this as a single
17 incident.

18 MR. DUNCAN: I understand your question,
19 Justice Ginsburg. Our argument does not turn on whether
20 it was one or three or four prosecutors. What our
21 argument does turn on is that the theory from the Canton
22 hypothetical, which does not require a pattern, was
23 clearly at issue in this case. The district court
24 analogized to Canton in order to allow the jury to find
25 liability absent a pattern.

1 There is no question that, whether it was
2 one or four prosecutors, this is a single incident of a
3 Brady violation.

4 JUSTICE SOTOMAYOR: Counsel, this is a
5 single incident, and Canton said if you know that a tort
6 is likely to happen without training, then one incident
7 is enough.

8 Every prosecutor knows that there can be
9 Brady violations if people are not taught what Brady
10 means, because it's not self-evident in every situation,
11 correct?

12 MR. DUNCAN: That's -- that's true, Justice
13 Sotomayor. Yes.

14 JUSTICE SOTOMAYOR: All right. So if you
15 know that rookie prosecutors -- and most prosecutors'
16 offices are filled with young ADAs who have just come
17 out of law school. If you know that they are going to
18 meet some situations where the answer is not intuitively
19 known, like that if you get a lab report, you should
20 turn it over, don't you have an obligation, isn't that
21 what the jury said, to train them to turn over lab
22 reports?

23 Now, I know you claim you had that policy.

24 MR. DUNCAN: Correct.

25 JUSTICE SOTOMAYOR: We can talk later about

1 whether or not there was sufficient evidence for the
2 jury to disbelieve that you had that policy or not.
3 That's a sufficiency of the evidence question.

4 But if you know that lab reports have to be
5 turned over, you've conceded it's a Brady violation not
6 to do it, and there was sufficient -- and you had no
7 policy -- I know you are disputing that -- and you had
8 no policy of turning it over, why aren't you responsible
9 for a Canton-like violation?

10 MR. DUNCAN: The question is under the Brady
11 scenario, which side of the Canton line does it fall on?
12 Does it fall on the single-incident line or the pattern
13 line? We say it falls on the pattern line.

14 JUSTICE GINSBURG: Life doesn't always come
15 in just two categories, and my suggestion to you is this
16 doesn't fit into a single rookie.

17 You have -- if you have four prosecutors who
18 are not turning over this evidence, then it seems like
19 there's kind of a culture in the office that we don't
20 turn over -- either we don't understand Brady, because
21 one suggestion was -- well, having the blood sample will
22 show you -- you'd have to have the blood sample from
23 Thompson to have it mean anything.

24 So there was misunderstanding about that.
25 But what struck me was that the -- to shoehorn this into

1 a single incident, it doesn't fit. So we have a
2 situation maybe that hasn't -- that we haven't directly
3 confronted before.

4 MR. DUNCAN: I think the Court has in
5 Canton, Your Honor. Let me answer it this way: If we
6 pay close attention to the function of the
7 single-incident hypothetical in Canton, I think it
8 illuminates the kind of notice, the kind of fault, and
9 the kind of causation that needs to arise out of a
10 general situation.

11 So looking carefully, what Canton said is:
12 A policymaker who fails to give police officers the
13 basic constitutional standard for deadly force, which
14 they are not equipped to know in the beginning, and
15 without which they --

16 JUSTICE GINSBURG: Can you tell me -- I
17 think I have a copy.

18 MR. DUNCAN: I'm sorry, Your Honor. Yes.
19 This is -- this is -- I'm referring to the -- the basic
20 Canton standard is at 390, page 390 of the Canton
21 opinion. And specifically, the footnote is footnote 10,
22 that discusses the two possibilities, the no-pattern and
23 the pattern possibilities.

24 So -- and I'm reading from Canton at
25 footnote 10. City policymakers know -- "For example,"

1 the Court said, "city policymakers know to a moral
2 certainty that their police officers will be required to
3 arrest fleeing felons. The city has armed its officers
4 with firearms, in part to allow them to accomplish this
5 task. Thus, the need to train officers in the
6 constitutional limitations on the use of deadly force...
7 can be said to be 'so obvious' that the failure to do
8 so" is "deliberate indifference."

9 Now, what we have there, as Justice
10 O'Connor's concurrence in that case and then later the
11 Court's opinion in Bryan County explain, you have a
12 failure to inform city personnel of the basic standard
13 without which they have no hope of doing their job in a
14 constitutional manner. So you put your employees in a
15 situation of impossibility, and when a deadly force
16 violation occurs, what you have --

17 JUSTICE SCALIA: These are people who
18 haven't gone to law school, right?

19 MR. DUNCAN: That's correct.

20 JUSTICE SCALIA: And do not know that you
21 cannot apply deadly force in most circumstances?

22 MR. DUNCAN: They've got no background
23 equipment to know what the constitutional standard is.
24 And so that satisfies, in a general situation --

25 JUSTICE SCALIA: If you were giving guns to

1 lawyers, it might have been different.

2 (Laughter.)

3 MR. DUNCAN: It could be, Your Honor.

4 Here, you're giving --

5 JUSTICE SCALIA: Depending on the law school
6 they went to or what?

7 {Laughter.}

8 MR. DUNCAN: It could be.

9 However, what you are giving to lawyers here
10 is the task of analyzing legal judgments. Can lawyers'
11 judgments go astray, Justice Sotomayor? Absolutely.
12 Absolutely. But --

13 JUSTICE SOTOMAYOR: Now what you're
14 suggesting is that for certainty you know that a
15 lawyer's judgment is going to go astray because a
16 particular area of law is that complicated.

17 Your people disagreed -- some of your people
18 disagreed or didn't know whether turning over a lab
19 report was a -- failure to turn over a lab report when
20 you didn't know a defendant's blood type was a Brady
21 violation. That has been conceded in this case, so I
22 accept as a working proposition that they should have
23 known that.

24 What you're suggesting is you get a pass
25 because, even though you know that there's an area of

1 law that a young lawyer is not going to be able to
2 figure out on their own, you fail to train them and
3 you're okay.

4 MR. DUNCAN: Well, that --

5 JUSTICE SOTOMAYOR: That's not the Canton
6 example.

7 MR. DUNCAN: That is not -- that's the
8 Canton example, Your Honor. What we have here --

9 JUSTICE SOTOMAYOR: That's what you're
10 saying.

11 MR. DUNCAN: No, that's not what we're
12 saying. We're not saying that the policymaker
13 inevitably knows my prosecutors are going to make this
14 mistake, and so I need to train on it and I don't care
15 about training on it.

16 JUSTICE SOTOMAYOR: Well, then why don't we
17 just --

18 JUSTICE ALITO: Can we just -- can we clear
19 something up?

20 MR. DUNCAN: Yes, sir.

21 JUSTICE ALITO: Are you -- are you accepting
22 the proposition that Brady always requires that lab
23 reports be turned over?

24 MR. DUNCAN: No, Your Honor. What we would
25 concede in this case is --

1 JUSTICE ALITO: I know you concede that
2 there was a Brady violation here --

3 MR. DUNCAN: Yes.

4 JUSTICE ALITO: -- but in answer to some of
5 the questions, it seems to me you were possibly -- or at
6 least you did not express an opinion on the suggestion
7 that it is always a violation of Brady to fail to turn
8 over a lab report.

9 MR. DUNCAN: I'm not aware that it would
10 always be a violation of Brady. However, of course, we
11 have evidence in this case that the -- uncontradicted
12 evidence, that the office policy was to turn over all
13 scientific reports. But --

14 JUSTICE KAGAN: Mr. Duncan, could I give you
15 a hypothetical -- -

16 MR. DUNCAN: Sure.

17 JUSTICE KAGAN: -- just to test how strong
18 your position is here.

19 So let's say that there is a new DA comes to
20 town, and he says, there's going to be one attorney per
21 case from now on, and it will be a random assignment
22 system. So sometimes important cases will be tried by
23 experienced attorneys, but sometimes they'll be tried by
24 people right out of law school. And there will be no
25 Brady supervision at all, no Brady training. And there

1 is a closed file system, that we only turn over what
2 we're required to turn over and not anything else.

3 And in addition to that, if I, the DA, find
4 that you have turned over things that you're not
5 required to turn over, that will be taken into account
6 in your yearly review for promotion purposes, for salary
7 purposes, et cetera. That will be very severely frowned
8 upon.

9 So he, the new DA --

10 MR. DUNCAN: I'm sorry -- repeat the last
11 part again, the "severely frowned upon" part.

12 JUSTICE KAGAN: If you turn over anything
13 that you didn't have to. Okay?

14 MR. DUNCAN: Exactly. I understand.

15 JUSTICE KAGAN: If you give any material
16 that you're not required to do by law.

17 And so he puts into place this whole system
18 and -- and says, okay, go to it. And what happens is
19 that there are Brady violations. And there's a Brady
20 violation in a capital case and the person sits on death
21 row, or the person is executed, whichever, and there's a
22 claim brought.

23 Is that claim not a good claim?

24 MR. DUNCAN: If there is a pattern of
25 demonstrated --

1 JUSTICE KAGAN: There's not a pattern,
2 because he just came to town and he just, you know,
3 instituted all these policies, and this is the first
4 Brady violation.

5 MR. DUNCAN: Not for the first Brady
6 violation, Justice Kagan. But in your hypothetical, you
7 noted a policy of actually assigning inexperienced
8 prosecutors randomly to perhaps high-profile cases.

9 If that were the facts, the jury, as they
10 could have in this case, could have found that an
11 official policy actually caused the violation. But they
12 didn't find it in this case. So the hypo leaves open
13 that possibility.

14 JUSTICE KAGAN: But the failure to train or
15 supervise in any way and the setting up a structural
16 system that's pretty much guaranteed to produce Brady
17 violations, that would not be enough?

18 In other words, even if the jury said yes,
19 you are liable under that second theory -- not the
20 policy theory, but the failure to train and supervise
21 theory -- that -- that would have to be rejected?

22 MR. DUNCAN: No -- exactly, Your Honor. No
23 liability there, because it doesn't meet the stringent
24 fault and causation standards of Canton.

25 This goes back to --

1 JUSTICE SOTOMAYOR: But that's --

2 JUSTICE BREYER: Well, how is that so? The
3 -- I've read the instruction that the court gave, and it
4 seemed to me the instruction the Court gave was
5 word-for-word taken from Canton. And when I read the
6 question that you presented in your Petitioner's brief
7 -- in the petition for cert, I thought what this case
8 was about was an instance where there was only -- it was
9 conceded that there was only one such instance.

10 But then when I read your second reiteration
11 of the question, which is a little different, and read
12 the briefs, I thought no, there are four other ones.
13 And so what you're really asking us to do is to decide
14 in the case of perfect instructions whether the evidence
15 supports them. I didn't think I was getting into that,
16 and, frankly, as raised, the brief I think clearly
17 supports it, but others could disagree. But why are we
18 getting into that business in this Court?

19 MR. DUNCAN: We're not asking you to.

20 JUSTICE BREYER: All right. Then what is it
21 you're asking? Is there something in the instructions
22 that is wrong? What?

23 MR. DUNCAN: Yes, the instructions --

24 JUSTICE BREYER: What?

25 MR. DUNCAN: -- reflect that the single

1 incident theory --

2 JUSTICE BREYER: Sorry. Where -- I'm
3 reading the instruction. I have it here. What is it?
4 I'm not saying you're wrong. I'm just saying, what in
5 the words stated are wrong? And where is the request
6 that they be stated differently? That I should look at
7 that, and that they weren't. Okay.

8 MR. DUNCAN: Yes, Justice Breyer. Let me
9 help you with that. The -- the -- at the Joint Appendix
10 page 828, we have the instructions on deliberate
11 indifference.

12 CHIEF JUSTICE ROBERTS: I'm sorry. What's
13 the page number.

14 MR. DUNCAN: 828.

15 CHIEF JUSTICE ROBERTS: 828.

16 MR. DUNCAN: Joint Appendix 828.

17 There are the instructions on deliberate
18 indifference. Let me start here, Justice Breyer. These
19 instructions are taken from the Second Circuit's Walker
20 decision, which was the first court that I am aware of
21 to allow for the possibility of single-incident
22 liability in a Brady situation.

23 The second instruction there allows a
24 choice. It allows a choice for the jury to find that a
25 single-incident situation -- I'm sorry -- that a

1 situation involving a Brady decision could arise and be
2 a basis --

3 JUSTICE BREYER: What are the words -- I
4 mean, it looked to me like the words on page 828 are
5 pretty similar to my copy of what he actually said. So
6 what are the words on page 828 that you think he should
7 have said that he didn't say?

8 MR. DUNCAN: "The situation involved a
9 difficult choice or one that prosecutors had a history
10 of mishandling."

11 JUSTICE BREYER: All right. What he says
12 here is, "The situation involved a difficult choice or
13 one that the prosecutors had a history of mishandling,
14 such that additional training, supervision, or
15 monitoring was clearly needed."

16 So it looks to me like, unless I'm reading
17 the wrong page, which I've sometimes done out of my memo
18 here. It looks to me like he gave those words.

19 MR. DUNCAN: That is the -- I'm sorry. Then
20 I misunderstood your question. Those are the actual
21 instructions.

22 JUSTICE BREYER: I'm saying what is it that
23 you asked the judge to do that he didn't do or that you
24 asked him not to do that he did do? That's what
25 happens. That's the way you object to an instruction.

1 MR. DUNCAN: I understand, Your Honor.

2 JUSTICE BREYER: Okay. So what is that?

3 MR. DUNCAN: I misunderstood. I was reading
4 where I thought the single-incident theory was posed in
5 the jury instructions. What the Petitioners --

6 JUSTICE SCALIA: I thought he asked that.
7 So I was glad to see that. Thank you.

8 MR. DUNCAN: The Petitioners specifically
9 asked that an instruction be given that required a
10 pattern of similar violations --

11 JUSTICE BREYER: I want you to point out in
12 the record the words that were said to the district
13 court saying, Judge, I want you to say this, and then
14 the judge didn't do it.

15 MR. DUNCAN: It is instruction number 14.

16 JUSTICE BREYER: Which is where?

17 MR. DUNCAN: The proposed instruction. I
18 regret to say I don't believe that's in the Joint
19 Appendix, Your Honor. And it is also --

20 JUSTICE BREYER: Then I think we take it as
21 saying that you not objecting to what -- to instruction.

22 MR. DUNCAN: No, Your Honor.

23 JUSTICE BREYER: I mean, your whole brief is
24 objecting to the instruction, and you didn't include the
25 objection?

1 MR. DUNCAN: No, Your Honor. The argument
2 is not about the specific jury instruction. It's about
3 the legal theory. What it's about --

4 JUSTICE BREYER: Wait, wait. If you don't
5 object to the instruction, then we're back to what I'm
6 saying, that what you're objecting to is you don't think
7 the evidence was such that, given that instruction, the
8 jury could find guilt. And that's what I thought this
9 case wasn't about to begin with, and there are three
10 other instances. So I don't see why, given this
11 instruction, the jury couldn't find guilt.

12 MR. DUNCAN: What our main complaint is, is
13 about the failure of the district court to grant a
14 motion for summary judgment and a judgment as a matter
15 of law on the basis that a failure-to-train theory under
16 these circumstances does not permit the single -- the
17 single-incident --

18 JUSTICE SOTOMAYOR: I understood -- and
19 maybe I'm confused -- that you were arguing that there
20 was no set of circumstances in which a prosecutor could
21 be handled -- could be liable on a theory of failure to
22 train for one incident.

23 MR. DUNCAN: Absent a pattern. Correct.

24 JUSTICE SOTOMAYOR: That was the petition as
25 it came --

1 MR. DUNCAN: Correct.

2 JUSTICE SOTOMAYOR: So it doesn't matter
3 what the facts are. The facts that Justice Kagan gave
4 you would never constitute an actionable claim against a
5 prosecutor; is that your position in this case?

6 MR. DUNCAN: That's -- under the Canton
7 hypothetical, yes. It would have to fall on the pattern
8 side because the general Brady situation is unlike the
9 single-incident --

10 JUSTICE SOTOMAYOR: So what you --

11 JUSTICE KAGAN: Could I add to my
12 hypothetical, then?

13 MR. DUNCAN: Yes, Your Honor.

14 JUSTICE KAGAN: Suppose that this new
15 district attorney said -- you know, every day he came
16 into the office and he said: I think Brady is just
17 crazy, and I think it's just the worst decision that the
18 Supreme Court has ever issued; and as long as you don't
19 get caught, anything you do is okay by me.

20 MR. DUNCAN: That sounds like a policy to
21 me, Your Honor. That sounds like a policy, an
22 actionable policy on the part of the policymaker.

23 JUSTICE KAGAN: It's not a policy. He's
24 just, you know, making his views known around the
25 office.

1 MR. DUNCAN: Well, this Court has defined
2 "policy" as a deliberate choice to embark on a course of
3 action in Pembaur, which this Court accepted. That
4 sounds like a policy to me. If it's not a policy --

5 JUSTICE KAGAN: Then the policy is just that
6 you -- you have to turn over what you have to turn over,
7 nothing else, and if you turn over anything else you'll
8 get penalized for doing so. That's the policy.

9 MR. DUNCAN: Well, then the policy is
10 constitutional. So what we would look to is, are
11 prosecutors failing to exercise their judgment properly
12 pursuant to that policy? And that falls very squarely
13 within the second part of the Canton choices, which
14 requires a pattern.

15 This case is about the alleged failure to
16 remedy, to guide, to reinforce, the pre-existing legal
17 judgment that a prosecutor has by virtue of being a
18 legal professional.

19 JUSTICE GINSBURG: Is that so? I mean, you
20 are assume that everyone who goes to law school takes a
21 course in criminal procedure, and I think there are many
22 law schools where they don't even have such a course and
23 others where most -- I don't know anywhere it's
24 compulsory to take a course in criminal procedure. So
25 you're assuming that. And, of course, the time is

1 running. There's something I wanted to ask you about
2 Brady, which seems to me unlike others and why you would
3 want special vigilance. And that is, Miranda warnings,
4 you know what was said; search and seizure, you know
5 what the police did. But the problem with Brady -- and
6 this case illustrates it so well -- is you don't know.
7 If the prosecutors don't do what they're supposed to do,
8 there's a very high risk, as there was in this case,
9 that it will never come to light.

10 So, recognizing the legal obligation of the
11 prosecutor and the temptation not to come out with Brady
12 evidence because it doesn't help the State's case,
13 shouldn't there be extra vigilance when we're talking
14 about a Brady claim?

15 MR. DUNCAN: Well, of course, there should
16 be vigilance, but the question you pose,
17 Justice Ginsburg, is whether the latency, the
18 hiddenness, that characterizes Brady violations should
19 change where we locate the Canton violation. Should it
20 be enough to put it into the single-incident, so-obvious
21 category, or still in the pattern category? But Canton
22 doesn't indicate that the latency of a particular
23 violation should -- should turn on which category it
24 goes into. Instead, it's the nature of the employee
25 duties and the employees themselves and how

1 that situation gives notice to a policymaker about when
2 there are obvious training risks. That's what we're
3 talking about.

4 So to go back to the hypothetical in Canton,
5 whether or not a deadly force situation is secret or
6 not -- of course, it's not. But the office has failed
7 not just to train, but to inform of the basic
8 constitutional duty without which those officers have no
9 chance of fulfilling their duties. And when they do a
10 deadly force violation under those circumstances, the
11 causal link will be very strong. It will be strong
12 enough to meet Canton.

13 And so there you have -- there you have a
14 situation where deliberate indifference and causation
15 are met without the pattern. But what -- you do not
16 have that in the situation of Brady compliance because,
17 as -- as everyone agrees Brady involves gray areas. It
18 is -- it is impossible to determine beforehand exactly
19 why a Brady violation will occur and what specific
20 training measures would prevent it from occurring.

21 And what that means is this falls plainly
22 within what Canton said about the pattern situation.
23 And here's what Canton said in the footnote 10 following
24 onto the hypothetical. "It could also be that the
25 police, in exercising their discretion, so often violate

1 constitutional rights that the need for further training
2 must have been plainly obvious...."

3 That's the situation we have posed by the
4 Brady situation in general.

5 JUSTICE BREYER: All right. But, look -- I
6 -- he read the instructions. They came right out of
7 Canton. Seems perfect.

8 Now you're saying, well, whether they did or
9 not, you cannot have an incident -- you can't have
10 liability if there's only one incident. And at that
11 point, I say, gee, I don't know. I mean, maybe it
12 depends on what the incident is. Maybe the incident
13 involved somebody saying, hey, Brady? What's Brady? Or
14 somebody saying, what's a criminal trial? I mean, that
15 person needs training.

16 And -- or -- but I don't even have to think
17 of that here, because there were four incidents here.
18 And, therefore, I don't have to try to make up weird
19 hypotheticals. So where we have four instances and we
20 have correct instructions, what's the problem?

21 MR. DUNCAN: Your Honor, there weren't four
22 instances. There was one Brady violation that possibly
23 could have involved one to four prosecutors. That's
24 one --

25 JUSTICE BREYER: Okay. Okay. We have -- we

1 have -- all this case? I thought that they had several
2 instances in other cases.

3 MR. DUNCAN: No. No, Your Honor.

4 JUSTICE BREYER: All involved -- in other
5 words, there has never in this office been an instance
6 of a Brady violation outside of this case.

7 MR. DUNCAN: No, Your Honor. That's not
8 true.

9 JUSTICE SCALIA: Not -- not before this
10 case. There was some --

11 JUSTICE BREYER: After, that's what it was.

12 JUSTICE SCALIA: -- later, as far as we
13 know.

14 MR. DUNCAN: There were some -- there were
15 four reported Brady violations before this case, in the
16 decade leading up, involving this office, that had
17 nothing to do with the circumstances involved here.

18 JUSTICE BREYER: Ah. There were four Brady
19 violations involving this office, okay?

20 MR. DUNCAN: Correct, out of tens of
21 thousands of prosecutions.

22 JUSTICE BREYER: All right. So now we're
23 talking about not one; we are talking about four --

24 MR. DUNCAN: We're -- but we're not --

25 JUSTICE BREYER: -- over many years, with

1 tens of thousands of violations, correct?

2 MR. DUNCAN: What was -- the Fifth Circuit
3 panel in this case affirmatively said Thompson did not
4 even try to prove a pattern, and he did not prove a
5 pattern of violations. The Fifth Circuit panel said
6 that.

7 JUSTICE BREYER: This is helpful. Thank
8 you.

9 JUSTICE KENNEDY: On your instruction in --

10 MR. DUNCAN: Yes, Your Honor.

11 JUSTICE KENNEDY: -- at J.A. 28 second,
12 would the instruction in your view have been proper, if
13 the "or" had been replaced by an "and." So: "The
14 situation involved a difficult choice and one that
15 prosecutors had a history of mishandling."

16 MR. DUNCAN: That's closer to what it should
17 be, Justice Kennedy, yes, because that begins to capture
18 the pattern requirement. It's not -- it's not the
19 pattern instruction that was specifically put forth by
20 the Petitioners in instruction number 15.

21 JUSTICE KENNEDY: Has there been -- has
22 there been any argument that you have waived your
23 objection to the instructions?

24 MR. DUNCAN: Not by Petitioners -- not by
25 the Respondent in this case. There's no -- there's no

1 -- question --

2 JUSTICE GINSBURG: Did you -- did you object
3 to it? To this charge?

4 MR. DUNCAN: The -- the charge?

5 JUSTICE GINSBURG: With the "or" --
6 difficult choice "or" one that prosecutors had a history
7 of mishandling.

8 MR. DUNCAN: No, the Petitioners did not
9 object to the -- the specific formulation of that
10 charge. Immediately after that charge, though, they --
11 they said, no, but we -- we have to have a pattern
12 instruction here. In other words --

13 JUSTICE KENNEDY: In other words, the
14 pattern instruction was -- it was -- was rejected?

15 MR. DUNCAN: It was rejected. It was
16 rejected twice, Your Honor, first in the formal jury
17 instructions and then at the charge colloquy.

18 JUSTICE SOTOMAYOR: But that wasn't the
19 question presented to us. You didn't present to us an
20 issue of whether the jury instruction --

21 MR. DUNCAN: No, Your Honor.

22 JUSTICE SOTOMAYOR: -- was wrong or not.

23 MR. DUNCAN: What we present is the legal
24 theory on which this case was submitted -- what got to
25 the jury in the first place never should have got to

1 that legal theory at all.

2 JUSTICE SOTOMAYOR: You see, what I'm trying
3 to figure out is whether your position is that under no
4 circumstance, even the hypothetical that Justice Kagan
5 set forth, could you be charged with a single-incident
6 Canton violation. That is your -- your theory?

7 MR. DUNCAN: With respect to the Brady
8 situation, Your Honor.

9 JUSTICE SOTOMAYOR: The Brady situation.

10 MR. DUNCAN: Let me answer it this way:
11 What -- what the Canton single-incident hypo is talking
12 about is failing to provide employees with basic tools,
13 without which they absolutely have no chance of
14 fulfilling their constitutional obligations. If we --
15 it's difficult to imagine that situation for
16 prosecutors.

17 It is -- it's conceivable that a district
18 attorney's office set up -- sets up a structure where
19 prosecutors have no chance of even knowing whether
20 there's Brady evidence in the file. If you have that
21 situation, then it's closer to the Canton
22 single-incident hypothetical, but not involving the
23 exercise of legal judgment in particular cases. We say
24 no.

25 JUSTICE SOTOMAYOR: Well, how do you

1 exercise legal judgment if you don't even know what
2 you're supposed to turn over? That was Justice
3 Ginsburg's question.

4 MR. DUNCAN: That's exactly -- that's my
5 point. That's my point. If you don't -- if you don't
6 even -- in other words, if you don't even have a police
7 file, for instance, you can't exercise your legal
8 judgment if you don't even know what -- what the
9 subject of your legal -- the object of your legal
10 judgment is.

11 But that's not this case. What we're
12 talking about here is a failure to remedy, reinforce,
13 refine existing legal judgment that prosecutors have.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. DUNCAN: If there are no further
16 questions, thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Cooney.

18 ORAL ARGUMENT OF J. GORDON COONEY, JR.

19 ON BEHALF OF THE RESPONDENT

20 MR. COONEY: Mr. Chief Justice, and may it
21 please the Court:

22 Although the Petitioners' brief attempts to
23 relitigate factual issues that were resolved against
24 them by the jury, they have raised today only one
25 question of law, and that is whether this Court should

1 write into section 1983 a per se rule that the only way,
2 the only way, a civil rights victim can ever establish
3 the deliberate indifference of a district attorney is if
4 he can prove a prior significant history of assistant
5 prosecutors violating other citizens' constitutional
6 rights.

7 JUSTICE SCALIA: For -- for Brady
8 violations. They limit the principle to Brady
9 violations.

10 MR. COONEY: Yes, Your Honor. And I would
11 submit that --

12 JUSTICE SCALIA: Well, that's a significant
13 limitation, don't you think?

14 MR. COONEY: But I would submit, Your Honor,
15 that this Court's -- that their requirement for proving
16 deliberate indifference is, first, contrary to the
17 teaching of this Court in Canton and subsequent cases.
18 It finds no place in the language of section 1983 --

19 JUSTICE KENNEDY: But at the -- but at the
20 outset it seemed to me -- and correct me if I'm wrong --
21 that you misstate the theory on which you seek to -- to
22 have a reversal, and that this is a failure-to-train
23 case. You didn't mention that.

24 MR. COONEY: Your Honor --

25 JUSTICE KENNEDY: This is a failure-to-train

1 case; is it not?

2 MR. COONEY: It is absolutely a deliberate
3 indifference to the need to train and provide other
4 protections to the office.

5 JUSTICE KENNEDY: Well, I think that's very
6 important.

7 JUSTICE ALITO: Yes, if you could -- could
8 you just say as succinctly as possible what you would
9 tell assistant district attorneys if you were the
10 district attorney for this jurisdiction, and you, with
11 the benefit of hindsight, having seen this case, what
12 kind of -- what would you tell them they should do with
13 respect to Brady?

14 MR. COONEY: Yes, Your Honor. First of all
15 I think Canton says you have to look at the specific
16 circumstances. And so I don't think there's a
17 one-size-fits-all way or message that has to be
18 provided.

19 JUSTICE ALITO: No, but you are training
20 them, so: Now I want to tell you what you have to do
21 under Brady.

22 MR. COONEY: Well, first --

23 JUSTICE ALITO: What do you tell them?

24 MR. COONEY: In this office, Your Honor, I
25 think the first thing one has to confront is Mr.

1 Connick's testimony and, in fact, the concession that
2 the Petitioners made on pages 6 and 7 of their merits
3 brief that the office started with what the brief
4 described as "Connick's disclosure policies were no
5 mystery" -- turn over what the law required and nothing
6 more. I mean, that would be --

7 CHIEF JUSTICE ROBERTS: Well,
8 Justice Alito's question was, what you would tell the
9 assistant DAs? What's your answer?

10 MR. COONEY: And Mr. Chief Justice, with --
11 if -- first of all, I wouldn't start with that rule.
12 But if I started with that rule it would be incumbent
13 upon me --

14 JUSTICE SCALIA: Why wouldn't you start with
15 that rule? The rule is perfectly lawful, my goodness.

16 MR. COONEY: Your Honor, I'm not saying it's
17 an unlawful rule. However, it requires a countervailing
18 message. And if you're going to adopt --

19 JUSTICE ALITO: I really would appreciate it
20 if you'd get to my question. Brady requires that
21 exculpatory evidence be turned over. Now, do you -- do
22 you think the assistant prosecutors didn't even know
23 that?

24 MR. COONEY: Your Honor, I don't know that.
25 It seems from the record in this case they thought that

1 only something that screamed "exculpatory evidence" on
2 its face needed to be turned over.

3 JUSTICE ALITO: Okay. Now, you phrase --
4 you are the instructor. You phrase the lesson that you
5 think is required by Brady that has to be given to them.

6 MR. COONEY: I think at a minimum it has two
7 pieces, Your Honor. It has basic instruction about how
8 to go about fulfilling the Brady obligation, and how do
9 you go about looking through the file to make sure you
10 know what's there, making sure you have documents that
11 are in the possession of the police.

12 Thinking in advance, as this Court talked
13 about in the Agurs case, about what the evidence is
14 going to be at trial and looking thoughtfully at that
15 evidence to determine whether or not the evidence was
16 favorable to the accused and needs to be produced.

17 CHIEF JUSTICE ROBERTS: Okay. That's your
18 instruction on Brady. Now, you're basing liability on
19 -- on this incident of failing to comply with Brady. So
20 you say they should have instructed on Brady.

21 What else should they have instructed on?

22 MR. COONEY: Well --

23 CHIEF JUSTICE ROBERTS: You're the -- you're
24 the new DA, and you're setting up -- I need to instruct
25 my people. What -- what do they instruct on? I know

1 they instruct on Brady under your view. What else?

2 MR. COONEY: I think the second thing that
3 the -- that the office really should do is to -- to talk
4 about the importance of safeguarding the innocent here,
5 that our job is not just to secure convictions.

6 JUSTICE SOTOMAYOR: Counsel, I'm --

7 CHIEF JUSTICE ROBERTS: Well, we're looking
8 at -- we're looking at specifics where they're going to
9 violate the Constitution. I think that's a good thing,
10 to tell them they have an obligation as well to protect
11 the innocent.

12 But we're worried about violations of our
13 constitutional requirements. We know Brady is one.
14 What's the next one? What's day 2 in the course?

15 MR. COONEY: Well, Your Honor, I -- I do
16 think that there are other constitutional requirements
17 involved. Most of the hypotheticals, however, that have
18 been brought before the Court as a parade of horrors
19 aren't actions by the district attorney.

20 JUSTICE ALITO: I mean, with respect, I
21 really don't think, as a young district -- assistant
22 district attorney, that you have told me anything that's
23 going to be really helpful to me other than, you know,
24 follow the law, which you certainly should do, in
25 dealing with my obligation to turn over physical

1 evidence, which is what's involved here.

2 MR. COONEY: Your Honor --

3 JUSTICE ALITO: Or a lab report regarding
4 physical evidence.

5 Now, suppose I have -- I have several cases.
6 I have this case, where I have got blood -- I have
7 physical evidence, I have a blood test. I have another
8 case where all I have was physical evidence, but there
9 has been no testing of it.

10 Now, do I have to turn over that physical
11 evidence?

12 MR. COONEY: In this case, there has been a
13 stipulation by the district attorney's office that you
14 do. And I think if you think about the evidence in this
15 case --

16 JUSTICE ALITO: I have to turn over all
17 physical evidence that's in my possession?

18 MR. COONEY: No, Your Honor.

19 JUSTICE ALITO: Okay.

20 MR. COONEY: But here, the specific --

21 JUSTICE ALITO: Now, what's the instruction
22 that you're going to give me to tell me where I'm going
23 to draw that line?

24 MR. COONEY: If you have physical evidence
25 that, if tested, can establish the innocence of the

1 person who is charged, you have to turn it over.

2 JUSTICE ALITO: Well, how do I know that
3 before the --

4 JUSTICE SOTOMAYOR: Well, didn't they here?
5 Didn't they make it available?

6 JUSTICE ALITO: How do I know that before
7 the physical evidence is tested?

8 Suppose I've got all sorts of items that
9 were found at the -- at the scene, and they might have
10 DNA on them. They might have epithelial samples on
11 them -- you know, all this fancy forensic testing that's
12 done these days. Do I have to turn over all of that?

13 MR. COONEY: No, Your Honor. In this case,
14 what we're talking about is a piece of evidence, a
15 specific piece, several specific pieces of physical
16 evidence, that it has been stipulated the prosecutors
17 knew contained the blood of the perpetrator.

18 It -- the rule and the training that should
19 have been provided in this instance, particularly since
20 the DA argues that it was perfectly clear that that
21 should have been produced --

22 JUSTICE ALITO: Now, you see what I'm
23 getting at is that you're dealing with a very specific
24 situation. So the instruction would be: If you have
25 physical evidence and you have tested it for blood and

1 you have a -- you have the result of the blood test, but
2 you don't know whether -- you don't know the blood type
3 of the accused, that -- that's Brady evidence, and that
4 has to be turned over.

5 And you're saying that the failure to
6 provide training to every assistant district attorney on
7 a question of that specificity gives rise to a -- a
8 potential claim, gives rise to a claim?

9 MR. COONEY: Your Honor, what I'm saying is
10 I think there are at least three layers to the training
11 that were missing here. One was the clear message about
12 the importance of Brady compliance. The second was the
13 basic ground rules about how you go about your Brady
14 obligation. And, third, if you have evidence that can
15 conclusively establish to a scientific certainty the
16 innocence of the person being charged, you have to turn
17 it over or get it -- get it tested. You can't just put
18 it in your hip pocket and say, I know --

19 JUSTICE SOTOMAYOR: Wait a minute. Wait a
20 minute. What evidence is there that they put this in
21 their hip pocket?

22 There was a disclosure that the evidence
23 existed. Where is the evidence that the defense counsel
24 didn't have access to asking for it?

25 MR. COONEY: Yes, Your Honor --

1 JUSTICE SOTOMAYOR: Or asking for it to be
2 tested? Where was that suppressed?

3 MR. COONEY: The -- the only information --
4 there was a discovery response that was filed very
5 shortly before trial, long after Mr. Thompson was
6 charged with the crime, where in response to one of the
7 questions, the response was: "Inspection to be
8 permitted." If you look at the chronology --

9 JUSTICE SOTOMAYOR: And what -- where's the
10 Brady violation for telling a defense attorney there was
11 a blood sample there, you can test it?

12 MR. COONEY: Your Honor, there was no
13 information provided. It was -- the simple response was
14 that the request was for all scientific evidence, and it
15 simply -- and physical evidence from the scene of the
16 crime. The answer was: "Inspection to be permitted."

17 Then the blood evidence, the very next day,
18 after the response was provided, was removed from the
19 crime lab by the prosecutors, never to be found again.
20 And defense counsel testified without impeachment at
21 trial that he went to the evidence locker, looked in the
22 evidence locker, found certain pieces of physical
23 evidence consistent with the discovery response, but not
24 the blood evidence, neither the blood report nor the
25 physical specimens that were involved in this case, Your

1 Honor.

2 JUSTICE SOTOMAYOR: So that you are claiming
3 there was suppression of that evidence?

4 MR. COONEY: Absolutely, Your Honor.

5 CHIEF JUSTICE ROBERTS: So if it is --
6 prosecutors can violate a defendant's constitutional
7 rights by making improper statements in their closing
8 arguments.

9 Do you have to instruct new -- I suspect new
10 prosecutors coming out of law school don't know what
11 those rules are. Do you have to give instruction on
12 what they can say in closing arguments?

13 MR. COONEY: Your Honor, I think, first of
14 all, the issue has to rise to a constitutional level in
15 order to be talking about this for section 1983
16 purposes.

17 CHIEF JUSTICE ROBERTS: Yes. My
18 understanding is -- I don't -- I'm not an expert in
19 criminal law. I need training in that. But my
20 understanding is that comments in a closing argument can
21 give rise to a constitutional violation.

22 So you should -- you should train those
23 people. You know that. You know that that can happen,
24 just as you know there can be Brady violations. So they
25 need training in exactly what they can say and can't say

1 in closing argument.

2 JUSTICE KENNEDY: And Miranda and proper
3 supervision of affidavits in support of search warrants,
4 and proper instructions that tell the police not to
5 exceed the scope of the warrant. So this is -- our
6 course is expanding.

7 MR. COONEY: Justice Kennedy --

8 JUSTICE KENNEDY: The -- the point of
9 concern here is that we're going to have to go through a
10 list, case by case, of everything there has to be
11 training on.

12 MR. COONEY: I think -- I think there are
13 some important distinctions here. And, first of all,
14 when you're talking about search and seizure, when
15 you're talking about Miranda, you're talking about those
16 things, the actor that is committing the constitutional
17 tort there is not the district attorney. It's the
18 police. What we're talking about here, the
19 constitutional tort --

20 CHIEF JUSTICE ROBERTS: When you're talking
21 about improper comments in closing argument, it is the
22 prosecuting attorney.

23 MR. COONEY: But the second important
24 distinction, Your Honor -- and I do believe training
25 should be given there. But I think there's a

1 fundamental distinction between a Brady violation, which
2 happens in private and may never be revealed and, if
3 revealed, often happens long after trial and long after
4 incarceration, and a situation where a prosecutor makes
5 an improper comment during a closing jury, which is made
6 in public. Defense counsel has the opportunity right
7 there to stand up and say, Your Honor, I object, and the
8 court has the ability to address that issue then and
9 there.

10 With a Brady violation, you don't have any
11 of that. It's made in secret. It's --

12 CHIEF JUSTICE ROBERTS: So you don't -- you
13 don't have to train with respect to closing arguments?

14 MR. COONEY: Your Honor, I think they do.
15 But I think there's -- there's a particular issue.
16 There's particular force in this context because of the
17 unique nature of Brady, because it's made in private,
18 because it is -- by definition, if the information has
19 been concealed, it has not been revealed prior to the
20 time the defendant suffers constitutional harm. He's --
21 he's found guilty, he's sentenced to death, et cetera.

22 The Brady violation, unlike your situation,
23 Mr. Chief Justice, doesn't come to light, perhaps ever.
24 But in Mr. Thompson's case --

25 JUSTICE GINSBURG: So we have --

1 MR. COONEY: -- more than a decade after he
2 was convicted.

3 JUSTICE GINSBURG: And it's something like I
4 was trying to get at before when I said Miranda is out
5 there, you know what was said, you know what was seized,
6 talking about -- but Brady is, if the prosecutor doesn't
7 come out with it, high risk it will never come out.

8 So we have use of force, plus -- that can
9 kill people if you're not properly trained. Brady,
10 because if they don't come up with the information, it
11 could have what almost happened in this case.

12 Anything else on this special list?

13 MR. COONEY: Your Honor, I --

14 JUSTICE GINSBURG: The concern was that you
15 don't want to have to give the prosecutors a clinical
16 law school course before you let them do their job.

17 MR. COONEY: I agree with that concern, Your
18 Honor. And -- and I think it's important to remember
19 that in this case, this was a no-training case. The
20 evidence in the light most favorable to Mr. Thompson was
21 there was zero Brady training in the office.

22 JUSTICE KAGAN: So what would have been
23 enough? I mean, is an hour a year enough? Is an hour a
24 month enough?

25 MR. COONEY: I think that would have been

1 dependent on what its content was, Your Honor, and the
2 other circumstances of the office.

3 If you look at Canton, what Canton does is
4 it asks the question: Is there an obvious need for
5 training based on the circumstances of this
6 particular --

7 JUSTICE SCALIA: Wait. As I understand it,
8 you -- you really have a need to train them, when you
9 know defense counsel is coming over to look at the
10 physical evidence, don't remove from the locker some of
11 the physical evidence.

12 (Laughter.)

13 JUSTICE SCALIA: You want to give a course
14 in that?

15 MR. COONEY: Your Honor, what -- what
16 happened is the physical evidence very conveniently was
17 being sent to the crime lab when it was removed. And so
18 we don't know what the motivation was as to why that
19 physical evidence was removed at that time. What we
20 know is for many, many months --

21 JUSTICE SCALIA: Well, then, you shouldn't
22 have -- you shouldn't have mentioned it. I thought you
23 were -- you were asserting that it was intentionally
24 removed in order to prevent defense counsel from seeing
25 it.

1 MR. COONEY: What we assert, Your Honor --

2 JUSTICE SCALIA: You don't know that.

3 MR. COONEY: It was certainly not -- it was
4 intentionally not placed back in into evidence after it
5 came back from the crime lab, and there was actual
6 testimony from the grand jury that was handling this and
7 looking into this situation for some period of time --

8 JUSTICE KENNEDY: Well, of course, there's a
9 --

10 MR. COONEY: -- of not just that.

11 JUSTICE KENNEDY: There is a causation
12 problem here. Even assuming training, if Deegan was
13 going to destroy the evidence or remove it anyway, as he
14 admitted later to Riehlmann, then the training or lack
15 of training is just irrelevant.

16 MR. COONEY: Your Honor, I think there
17 are --

18 JUSTICE KENNEDY: But I'm very concerned
19 about that causation aspect.

20 MR. COONEY: First of all -- let me address
21 that directly. First of all, the causation question was
22 put to the jury; the jury instruction very clearly said
23 in order for there to be liability here, the fault must
24 be in the training program, not in the individual
25 prosecutor. And the defense argued vehemently that

1 there was a lack of causation. What's interesting here
2 is --

3 JUSTICE ALITO: But the judge actually,
4 though, instructed the jury -- this is back on J.A.
5 828 -- in order to find that the district attorney's
6 failure to adequately train, monitor, or supervise
7 amounted to -- deliberate indifference, et cetera.

8 So liability could have been predicated not
9 on the lack of adequate training, but the absence of a
10 process by which superiors in the district attorney's
11 office reviewed all of the Brady decisions that were
12 made by more junior prosecutors; isn't that correct?

13 MR. COONEY: Your Honor, the concept of
14 monitoring or supervision was actually a concept that
15 defendants injected into the case. And so, to the
16 extent that there is any concern that there's an
17 expansion from training, it's been error that's invited.
18 And I don't believe it's error, Your Honor, but it's not
19 something that -- that was put into the case by the
20 defense or the court.

21 JUSTICE ALITO: Why wouldn't -- why wouldn't
22 that be error? That the -- the head of a very large
23 office is personally liable under Canton for violations
24 that are -- that are produced by actions taken by
25 subordinates, unless there is an elaborate process to

1 review all of the decisions that are made by those
2 subordinates? Doesn't that go well beyond anything
3 Canton permits?

4 MR. COONEY: Your Honor, again, the clear
5 thrust of this case was a failure-to-train case. The
6 concept of monitoring and supervision was introduced by
7 the defense, not by the -- by the plaintiffs. But to
8 get back to Justice Kennedy's case --

9 JUSTICE SOTOMAYOR: Could you please state
10 in simple terms to me what exactly they failed to train
11 these prosecutors to do, that the prosecutors didn't do?
12 What training -- Justice Alito asked it generally; I'm
13 asking specifically -- what is the exact training that
14 was required in this situation that caused the violation
15 in this case?

16 MR. COONEY: Number one, there was
17 absolutely no Brady training at all.

18 JUSTICE SOTOMAYOR: Forget about no Brady
19 training. What -- I think Justice Alito asked this
20 question. What specifically would the training have
21 said or done that would have avoided this Brady
22 violation?

23 MR. COONEY: First of all, I think a broad
24 statement in training about the importance of
25 safeguarding the rights of the accused --

1 JUSTICE SOTOMAYOR: Now, that seems to
2 suggest that you're claiming that if there was an
3 intentional violation by the prosecutors, that that
4 statement would have avoided the prosecutor from doing
5 something he or she knew was illegal. Is that what
6 you're intending?

7 MR. COONEY: No, it isn't, Your Honor.

8 JUSTICE SOTOMAYOR: Okay. So tell me.

9 MR. COONEY: The -- the second aspect of --
10 of it, though, is what I said to Justice Alito, and that
11 is that if you have physical evidence which, if tested,
12 would establish either the guilt or the innocence of the
13 -- of the defendant, it needs to be produced. Or at
14 least tested.

15 JUSTICE SOTOMAYOR: That goes to the
16 sufficiency --

17 MR. COONEY: Right.

18 JUSTICE SOTOMAYOR: -- whether they had a
19 policy to turn over or -- because it was tested, so
20 there was no Brady violation from the failure to test
21 here.

22 MR. COONEY: The Brady violation was for
23 failure to produce; you're right.

24 JUSTICE BREYER: Isn't -- am I right -- am I
25 right on this? Here -- I read on page 4 of your brief

1 that it seemed what happened -- and I might not be
2 right. Correct me if I'm not. What happened is a piece
3 of paper called the lab report came to the -- one of the
4 prosecutors' attention 2 days before the trial, and what
5 it said was the blood that was the perpetrator's was
6 type B. And the person on trial has blood of type O.
7 Is that what happened?

8 MR. COONEY: Your Honor, certainly what the
9 crime lab report said was that the blood that was tested
10 of the perpetrator was type B.

11 JUSTICE BREYER: And the -- and the
12 prosecutor knew that the person on trial had type O?

13 MR. COONEY: We don't know that, Your Honor.

14 JUSTICE BREYER: Ah, that's something --

15 MR. COONEY: That's the unresolved factual
16 question.

17 JUSTICE BREYER: I see.

18 MR. COONEY: And I think that's where
19 causation comes in, Your Honor, because I think there
20 are two possibilities.

21 JUSTICE BREYER: Did it turn out at the
22 trial that eventually the prosecutor knew it was type O?

23 MR. COONEY: It turned out that Mr. Thompson
24 was in fact type O. But the evidence is --

25 JUSTICE BREYER: When the did they learn

1 that?

2 MR. COONEY: The evidence is unclear as to
3 whether or not the assistants knew at the time that John
4 Thompson had type O blood.

5 CHIEF JUSTICE ROBERTS: Could I ask you what
6 -- most law offices with which I'm familiar, the
7 training is mentoring. In other words, the young
8 attorneys learn from the older attorneys, often by
9 following them along -- around.

10 Would it have been an adequate training
11 program for this office simply to say, new prosecutors,
12 you don't get to be first chair prosecutors until after
13 a year, and you're going to follow one of the
14 prosecutors around and learn from them? Is that an
15 adequate training program?

16 MR. COONEY: If, in fact, the senior
17 prosecutors, Your Honor, have a good familiarity with
18 the constitutional requirements --

19 CHIEF JUSTICE ROBERTS: Yes.

20 MR. COONEY: -- absolutely.

21 CHIEF JUSTICE ROBERTS: Even -- even if the
22 violation that becomes the basis for the claim later on
23 is one that, you know, didn't come up in that year? We
24 -- they didn't have a Brady issue in that first year.
25 They went around; they sat in on a lot of trials; but

1 there wasn't a Brady issue and so they didn't learn
2 about this type of question. And --

3 MR. COONEY: I think --

4 CHIEF JUSTICE ROBERTS: Does that give rise
5 to a claim of the sort you're bringing here?

6 MR. COONEY: I think the failure here -- and
7 I think we have to come back to the deliberate
8 indifference piece because what would happen there in
9 that instance, Your Honor, even if the training was not
10 provided, I think as experience has shown under Canton,
11 that claim would fail for failure to show the deliberate
12 indifference of the policymaker.

13 But here you had substantial evidence about
14 Mr. Connick's indifference.

15 JUSTICE ALITO: Mr. Cooney, when you -- when
16 you gave the specific instruction that you think should
17 be provided to assistant district attorneys, what you
18 stated was a questionable understanding of Brady, I
19 think. You -- did I understand you correctly?

20 You said that Brady means that if the
21 prosecutor has physical evidence which, if tested, might
22 establish the defendant's innocence, that is exculpatory
23 evidence that must be turned over.

24 MR. COONEY: Your Honor, that certainly has
25 been the position taken by the district attorney's

1 office in this case --

2 JUSTICE ALITO: Is that consistent with
3 Arizona v. Youngblood?

4 MR. COONEY: Your Honor, I believe it -- it
5 is consistent with Brady that if -- if one has a piece
6 of evidence that can conclusively establish that the
7 defendant is innocent, that it can't be the law that the
8 prosecutor can just put it in his hip pocket, not get it
9 tested, and not turn it over to the defense, and not
10 worry about whether they're prosecuting an innocent man.

11 JUSTICE SOTOMAYOR: But, you see, it was
12 tested. And it was made available to the defense.
13 Turning over -- using the word "turning over" is
14 ridiculous, because they're not going to physically give
15 it to the defense attorney to go off and do what he
16 wants. They're going to give it to a lab that will
17 establish a chain of custody, et cetera, et cetera.

18 So it was made available. He went to look
19 at it, but the looking at it wouldn't have told the
20 defense attorney anything. They had to make it
21 available for testing. He never asked for testing.
22 They did the lab reports. So now we come down to the
23 only failure is in the turning over of this report.
24 Correct?

25 MR. COONEY: No, Your Honor. First of all,

1 there is -- there is a stipulation, stipulation L at
2 J.A. 14: Prior to the armed robbery trial, Mr.
3 Thompson and his attorneys were not advised of the
4 existence of the blood evidence, that the evidence had
5 been tested, that a blood type was determined
6 definitively --

7 JUSTICE SOTOMAYOR: Now, what did I just
8 say? The failure to turn over the report, correct?

9 MR. COONEY: But -- but -- yes, Your Honor.
10 But what also is present here is the defense never had
11 the chance to -- never saw the physical blood evidence
12 itself.

13 JUSTICE SOTOMAYOR: Never knew it existed?

14 MR. COONEY: Never knew it existed, Your
15 Honor.

16 JUSTICE SOTOMAYOR: That's --

17 MR. COONEY: There is testimony,
18 clear testimony to that effect. If you look at Mr.
19 Williams's testimony in this case, there is a section of
20 the cross-examination where John Thompson's defense
21 counsel at the original criminal trial said just that.
22 He didn't know it existed.

23 JUSTICE SCALIA: But it isn't -- it isn't
24 clear from what -- according to what you said earlier,
25 it isn't clear that it was intentionally withheld from

1 the defense. It might have just been -- you said it was
2 sent to the lab when -- when he came to look for it.

3 MR. COONEY: But --

4 JUSTICE SCALIA: So would training have --
5 have gone into that detail? Don't send something to the
6 lab when defense counsel is coming over to look for it.
7 I mean, you know, that -- that's pretty detailed.

8 MR. COONEY: Yes, Justice Scalia, but here
9 there's a stipulation that the crime lab report with the
10 conclusive evidence about the perpetrator's blood
11 type was never --

12 JUSTICE SCALIA: Okay, but -- but that --

13 MR. COONEY: -- ever provided.

14 JUSTICE SCALIA: That's the lab report.
15 That -- that's what Justice --

16 MR. COONEY: And the physical evidence was
17 never seen, Your Honor, by defense counsel.

18 JUSTICE SCALIA: For all we know, by
19 accident, right? And the training would -- would
20 probably not have remedied that -- that difficulty.

21 MR. COONEY: Your Honor, four prosecutors --
22 it is clear that four prosecutors knew about the
23 existence of blood evidence for months, and it was never
24 produced to the defense. And that blood evidence would
25 have conclusively established John Thompson's innocence.

1 JUSTICE SCALIA: The defense was told to
2 come over and look for it -- to look at it. And when he
3 came over to look at it -- for all we know, by
4 accident -- it was -- it had been sent to the lab.

5 MR. COONEY: But -- but Your Honor, the "it"
6 was not come over and see the blood evidence. It was --
7 there was a broad request for -- for --

8 JUSTICE SCALIA: Yes, I understand, but --
9 yes. Okay.

10 MR. COONEY: -- physical evidence at the
11 crime scene, including things that had nothing to do
12 with the blood. So there's nothing that the defense
13 lawyer would have known by going to the evidence room to
14 say: I know there is nothing here.

15 CHIEF JUSTICE ROBERTS: But isn't that --
16 isn't that best practice? In other words, I thought
17 that was the good thing, when what the prosecutor does
18 is say look at everything we've got. And as my brother
19 has suggested, what is important may not be there for
20 either deliberate misconduct or by happenstance.

21 MR. COONEY: But the point here, Your
22 Honor -- and I think this goes to the causation point,
23 that -- that it would appear -- it would appear from
24 looking at Mr. Williams's testimony that there was a
25 deliberate effort to stay away from blood evidence in

1 the carjacking case. And Mr. Williams conceded that.
2 So this idea that this was an innocent error on the part
3 of the prosecutors does not find support in the record.

4 The question is --

5 JUSTICE ALITO: Well, if it was willful --

6 JUSTICE SOTOMAYOR: But that dooms your
7 case. If it wasn't an innocent error, if it was an
8 intentional violation of Brady, there is no training
9 that was going to stop him from doing that.

10 MR. COONEY: No, Your Honor, I think there
11 is a difference between a tactical choice to do
12 something sharp, on the one hand, and a knowing Brady
13 violation, on the other hand.

14 And the jury could clearly conclude --
15 particularly because the 30(b)(6) witness in this office
16 testified that, in his view, it wasn't Brady material
17 unless the -- unless the prosecutors knew John
18 Thompson's blood type -- the jury could clearly conclude
19 that what happened here was these four prosecutors
20 didn't understand and never got a clear message about --
21 about what Brady required, and they -- they did not
22 produce this evidence.

23 There is nothing that clearly showed that
24 they committed knowing Brady violations in this case.

25 JUSTICE KAGAN: Mr. Cooney, I'm still

1 confused as to sort of how much is enough by way of
2 training and how you would ask a court or a jury to
3 decide that.

4 You suggested to the Chief Justice formal
5 training wasn't -- isn't necessary if there's some
6 supervision, if there's some mentoring. But, you know,
7 this seems to give cities no sense of what they have to
8 do. No safe harbors. Is that your position?

9 MR. COONEY: Your Honor, I think that Canton
10 articulates a very flexible test. And I don't think
11 Canton says there is one size that fits all. And I
12 think the protection that district attorney's offices
13 get from Canton is from the standard of deliberate
14 indifference.

15 And if one looks at the 21 years of
16 experience under Canton, there have been between 6 and 8
17 cases against prosecutors' offices under this kind of
18 theory, in total, where there was some payout from the
19 prosecutors' offices to the defense. Total. In the 21
20 years.

21 So -- and the Court said -- this Court said
22 in Canton, judge and jury doing their job are adequate
23 to the test. I think we have been spending a lot of
24 time focusing on how much training. The fact is, this
25 is a no-training case, where evidence that the -- that

1 the defendants now concede should have been produced
2 wasn't produced, and four people knew about it and
3 failed to produce it.

4 In addition, there were multiple additional
5 pieces of Brady material in the murder case that weren't
6 produced. And this --

7 CHIEF JUSTICE ROBERTS: Would this have been
8 -- would this be a no-training case if the rule was you
9 have to be in the office for 3 years as a second chair
10 prosecutor before we let you have a case, and, in fact,
11 you have to be here 10 years before we let you have a
12 capital case? That's all it says. Is that sufficient
13 training?

14 MR. COONEY: I think, again, you would have
15 to look at the circumstances of the office. I think
16 with this -- this presumption against disclosure that
17 was present in Connick's office, that takes this case
18 out of the realm of the typical prosecutor's case,
19 because it is a bare minimum disclosure rule.

20 I think there needs to be -- if you're going
21 to have that bare minimum disclosure rule, there needs
22 to be something to counterbalance it. If you look at
23 what the assistants testified to in this case, they all
24 knew what not to produce. What they didn't know was
25 what to produce.

1 JUSTICE GINSBURG: But what do you do with
2 the Dubelier testimony? Didn't he testify that it was
3 standard operating procedure to turn over all lab
4 reports?

5 MR. COONEY: Your Honor, I think there are
6 two very quick answers to that. If one looks at J.A.
7 550 to 551, which was Mr. Glas, the grand jury
8 prosecutor's, testimony.

9 What he clearly said was, during the grand
10 jury, when Mr. Connick decided to terminate the grand
11 jury, Mr. Connick and his first assistant were actually
12 arguing with Glas that if the prosecutors didn't know
13 John Thompson's blood type, they didn't need to turn
14 over the blood report.

15 So that's number one. I think there is an
16 issue of fact that has to be resolved in our favor
17 solely from J.A. 550 and 551.

18 And the second is, Your Honor, the -- the
19 rule, the bare minimum discovery rule. Louisiana law
20 did not require the production of crime lab reports in
21 1985.

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Mr. Duncan, have you 3 minutes remaining.

24 REBUTTAL ARGUMENT OF STUART K. DUNCAN

25 ON BEHALF OF THE PETITIONERS

1 MR. DUNCAN: Justice Alito and Justice
2 Kagan, you asked repeatedly questions designed to elicit
3 a response from my colleague: What would you tell a
4 ADAs with respect to training -- and I believe Justice
5 Sotomayor as well -- that would have prevented such a
6 thing? And I didn't hear a clear answer.

7 The legal issue in this case turns on the
8 fact that, in the deadly force scenario that Canton
9 marks out as the paradigm single-incident case, it is
10 very clear what a police officer needs to tell a police
11 officer. Here's the deadly force standard under
12 Tennessee v. Garner: Don't shoot people unless there's
13 a reasonable probability of physical danger to yourself
14 or to others. You've got to tell them that.

15 With respect to the Brady scenario, it's not
16 clear at all. Yes, of course, training is useful. Yes,
17 of course, training is important. But how do you
18 connect up a lack of specific training with a particular
19 violation that occurs?

20 And having heard the argument, I'm -- I'm no
21 longer clear as to what the theory of the case of my
22 colleague's is about what caused the violation.
23 Whatever caused the violation, I haven't heard about a
24 specific training measure that would have actually
25 prevented what happened in this case.

1 CHIEF JUSTICE ROBERTS: How do you train
2 your new hires? First day, somebody right out of law
3 school shows up and says, I want to be an assistant
4 district attorney. How do you train them?

5 MR. COONEY: I think the first thing you do
6 is you have a hiring process that emphasizes the
7 importance of -- the importance of Brady, as this office
8 did. Brady was important. One witness said --
9 McElroy -- from the moment you walked in the door, you
10 had to write an essay on Brady. Brady was emphasized as
11 being very important. And then --

12 JUSTICE KAGAN: Mr. Duncan, that I think you
13 can't say, because that's just overturning what the jury
14 found.

15 MR. DUNCAN: I -- I don't think -- the jury
16 couldn't have found that that didn't occur, Your Honor.
17 The jury found that that was inadequate.

18 JUSTICE KAGAN: The jury found that there
19 was inadequate training.

20 MR. DUNCAN: Correct, Your Honor.

21 JUSTICE KAGAN: In fact, the jury found -- I
22 think, if you look at the record -- the jury could have
23 found, a reasonable jury could have found, that there
24 was no training here.

25 MR. DUNCAN: A reasonable jury could have

1 found -- well, Your Honor, we don't contest the finding
2 of inadequate training. What we contest is the
3 ingredients that lead -- that can lead to a deliberate
4 indifference finding on the basis of inadequate
5 training.

6 And what we say is that this case, that is a
7 general case about you failed to train on Brady, it
8 doesn't fit within the single-incident hypothetical.
9 And what I was trying to get at with -- with response to
10 your questions and Justice Alito's question was that, if
11 you can't say with any specificity, well, what training
12 do you give?

13 You asked repeatedly, Your Honor, how much
14 training is enough? So is an hour a year? I thought I
15 heard my colleague say that an hour a year may make this
16 not a no-training case, and so what you have there is a
17 pattern --

18 JUSTICE BREYER: So we have to overturn the
19 jury finding?

20 MR. DUNCAN: No, Your Honor. Absolutely
21 not.

22 JUSTICE BREYER: We don't?

23 MR. DUNCAN: No, you do not.

24 JUSTICE BREYER: Because they found that the
25 failure to adequately train amounted to deliberate

1 indifference to the fact that inaction would obviously
2 result in a constitutional violation. That's what they
3 found.

4 Now, how can we -- assuming that's true and
5 accepting it and not overturning it -- find that there
6 was something unlawful? Because you're arguing --
7 you're all arguing about whether the training program
8 really was adequate or not. They found it was not.
9 What do we do?

10 CHIEF JUSTICE ROBERTS: You can answer.

11 MR. DUNCAN: Thank you, Your Honor, Mr.
12 Chief Justice.

13 The correct resolution is the lower court
14 should dismiss the failure-to-train claim as a matter of
15 law because there was no demonstration of a pattern of
16 violations, and this situation does not fall within the
17 narrow range of circumstances that Canton foresees for
18 single-incident liability.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 12:05 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

<p style="text-align: center;">A</p> <p>ability 40:8 able 10:1 above-entitled 1:12 61:22 absence 44:9 absent 3:23 4:25 18:23 absolutely 9:11,12 27:13 30:2 38:4 45:17 48:20 60:20 accept 9:22 accepted 20:3 accepting 10:21 61:5 access 36:24 accident 52:19 53:4 accomplish 8:4 account 12:5 accused 32:16 36:3 45:25 action 20:3 actionable 19:4,22 actions 33:19 44:24 actor 39:16 actual 16:20 43:5 ADAs 5:16 58:4 add 19:11 addition 12:3 56:4 additional 16:14 56:4 address 40:8 43:20 adequate 44:9 48:10,15 55:22 61:8 adequately 44:6 60:25 admitted 43:14 adopt 31:18 advance 32:12 advised 51:3 affidavits 39:3 affirmatively 25:3 agree 41:17 agrees 22:17 Agurs 32:13</p>	<p>Ah 24:18 47:14 AL 1:4 Alito 10:18,21 11:1 11:4 30:7,19,23 31:19 32:3 33:20 34:3,16,19,21 35:2,6,22 44:3,21 45:12,19 46:10 49:15 50:2 54:5 58:1 Alito's 31:8 60:10 alleged 20:15 allow 4:24 8:4 15:21 allows 15:23,24 amounted 44:7 60:25 analogized 4:24 analogy 3:21 analyzing 9:10 answer 5:18 7:5 11:4 27:10 31:9 37:16 58:6 61:10 answers 57:6 anyway 43:13 apparently 4:11 appear 53:23,23 APPEARANCES 1:15 Appellate 1:16 Appendix 15:9,16 17:19 apply 8:21 appreciate 31:19 area 9:16,25 areas 22:17 argued 43:25 argues 35:20 arguing 18:19 57:12 61:6,7 argument 1:13 2:2 2:5,8 3:3,6 4:19 4:21 18:1 25:22 28:18 38:20 39:1 39:21 57:24 58:20 arguments 38:8,12</p>	<p>40:13 Arizona 50:3 armed 8:3 51:2 arrest 8:3 articulates 55:10 asked 16:23,24 17:6,9 45:12,19 50:21 58:2 60:13 asking 14:13,19,21 36:24 37:1 45:13 asks 3:10 42:4 aspect 43:19 46:9 assert 43:1 asserting 42:23 assigning 13:7 assignment 11:21 assistant 29:4 30:9 31:9,22 33:21 36:6 49:17 57:11 59:3 assistants 48:3 56:23 assume 20:20 assuming 20:25 43:12 61:4 astray 9:11,15 attempts 28:22 attention 7:6 47:4 attorney 1:4 11:20 19:15 29:3 30:10 33:19,22 36:6 37:10 39:17,22 50:15,20 59:4 attorneys 11:23 30:9 48:8,8 49:17 51:3 attorney's 3:10,13 27:18 34:13 44:5 44:10 49:25 55:12 available 35:5 50:12,18,21 avoided 45:21 46:4 aware 11:9 15:20 a.m 1:14 3:2</p> <p style="text-align: center;">B</p>	<p>B 47:6,10 back 13:25 18:5 22:4 43:4,5 44:4 45:8 49:7 background 8:22 bare 56:19,21 57:19 based 42:5 basic 3:24 7:13,19 8:12 22:7 27:12 32:7 36:13 basing 32:18 basis 16:2 18:15 48:22 60:4 Baton 1:16 beginning 7:14 begins 25:17 behalf 1:17,19 2:4 2:7,10 3:7 28:19 57:25 believe 17:18 39:24 44:18 50:4 58:4 benefit 30:11 best 53:16 beyond 45:2 blood 4:9 6:21,22 9:20 34:6,7 35:17 35:25 36:1,2 37:11,17,24,24 47:5,6,9 48:4 51:4 51:5,11 52:10,23 52:24 53:6,12,25 54:18 57:13,14 Brady 3:14,16 4:11 5:3,9,9 6:5,10,20 9:20 10:22 11:2,7 11:10,25,25 12:19 12:19 13:4,5,16 15:22 16:1 19:8 19:16 21:2,5,11 21:14,18 22:16,17 22:19 23:4,13,13 23:22 24:6,15,18 27:7,9,20 29:7,8 30:13,21 31:20 32:5,8,18,19,20</p>	<p>33:1,13 36:3,12 36:13 37:10 38:24 40:1,10,17,22 41:6,9,21 44:11 45:17,18,21 46:20 46:22 48:24 49:1 49:18,20 50:5 54:8,12,16,21,24 56:5 58:15 59:7,8 59:10,10 60:7 Breyer 14:2,20,24 15:2,8,18 16:3,11 16:22 17:2,11,16 17:20,23 18:4 23:5,25 24:4,11 24:18,22,25 25:7 46:24 47:11,14,17 47:21,25 60:18,22 60:24 brief 14:6,16 17:23 28:22 31:3,3 46:25 briefs 14:12 bringing 49:5 broad 45:23 53:7 brother 53:18 brought 12:22 33:18 Bryan 8:11 business 14:18</p> <p style="text-align: center;">C</p> <p>C 2:1 3:1 called 47:3 Canton 3:21 4:6,21 4:24 5:5 6:11 7:5 7:7,11,20,20,24 10:5,8 13:24 14:5 19:6 20:13 21:19 21:21 22:4,12,22 22:23 23:7 27:6 27:11,21 29:17 30:15 42:3,3 44:23 45:3 49:10 55:9,11,13,16,22 58:8 61:17</p>
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