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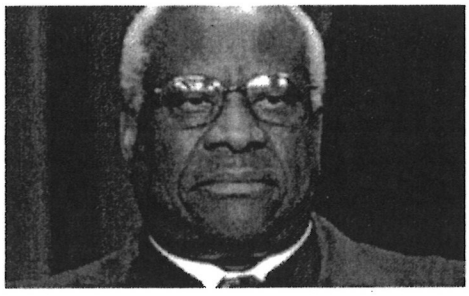
Cruel but Not Unusual

Clarence Thomas writes one of the meanest Supreme Court decisions ever.

By Dahlia Lithwick



Clarence Thomas

In 1985, John Thompson was **convicted of murder in Louisiana**. Having already been convicted in a separate armed robbery case, he opted not to testify on his own behalf in his murder trial. He was sentenced to death and spent 18 years in prison—14 of them isolated on death row—and watched as seven executions were planned for him. Several weeks before an execution scheduled for May 1999, Thompson's private investigators learned that **prosecutors had failed to turn over evidence** that would have cleared him at his robbery trial. This evidence included the fact that the main informant against him had received a reward from the victim's family, that the eyewitness identification done at the time described someone who looked nothing like him, and that a blood sample taken from the crime scene did not match Thompson's blood type.

In 1963, in *Brady v. Maryland,* the Supreme Court held that prosecutors must turn over to the defense any evidence that would tend to prove a defendant's innocence. Failure to do so is a violation of the defendant's constitutional rights. Yet the four prosecutors in Thompson's case managed to keep secret the fact that they had hidden exculpatory evidence for 20 years. Were it not for Thompson's investigators, he would have been executed for a murder he did not commit.

Both of Thompson's convictions were overturned. When he was retried on the murder charges, a jury acquitted him after 35 minutes. He sued the former Louisiana district attorney for Orleans Parish, Harry Connick Sr. (yes, his

dad) for failing to train his prosecutors about their legal obligation to turn over exculpatory evidence to the defense. A jury awarded Thompson $14 million for this civil rights violation, one for every year he spent wrongfully incarcerated. The district court judge added another $1 million in attorneys' fees. A panel of the 5th Circuit Court of Appeals upheld the verdict. An equally divided 5th Circuit, sitting en banc, affirmed again.

But this week, writing on behalf of the five conservatives on the Supreme Court and in his first majority opinion of the term, **Justice Clarence Thomas tossed out** the verdict, finding that the district attorney can't be responsible for the single act of a lone prosecutor. The Thomas opinion is an extraordinary piece of workmanship, matched only by Justice Antonin Scalia's concurring opinion, in which he takes a **few extra whacks at Justice Ruth Bader Ginsburg's dissent**. (Ginsburg was so bothered by the majority decision that she read her dissent from the bench for the first time this term.) Both Thomas and Scalia have produced what can only be described as a master class in human apathy. Their disregard for the facts of Thompson's thrashed life and near-death emerges as a moral flat line. Scalia opens his concurrence with a swipe at Ginsburg's "lengthy excavation of the trial record" and states that "the question presented for our review is whether a municipality is liable for a single *Brady* violation by one of its prosecutors." But only by willfully ignoring that entire trial record can he and Thomas reduce the entire constitutional question to a single misdeed by a single bad actor.

Both parties to this case have long agreed that an injustice had been done. Connick himself conceded that there had been a *Brady* violation, yetScalia finds none.Everyone else concedes that egregious mistakes were made. Scalia struggles to rehabilitate them all.

One of the reasons the truth came to light after 20 years is that Gerry Deegan, a junior assistant D.A. on the Thompson case, confessed as he lay dying of cancer that he had withheld the crime lab test results and removed a blood sample from the evidence room. The prosecutor to whom Deegan confessed said nothing about this for five

years. While Scalia pins the wrongdoing on a single "miscreant prosecutor," Ginsburg correctly notes that "no fewer than five prosecutors" were involved in railroading Thompson. She adds that they "did so despite multiple opportunities, spanning nearly two decades, to set the record straight." While Thomas states the question as having to do with a "single *Brady* violation," Ginsburg is quick to point out that there was far more than just a misplaced blood sample at issue: Thompson was turned in by someone seeking a reward, but prosecutors failed to turn over tapes of that conversation. The eyewitness identification of the killer didn't match Thompson, but was never shared with defense counsel. The blood evidence was enough to prove a Brady violation, but it was the tip of the iceberg.

In the 10 years preceding Thompson's trial, Thomas acknowledges, "Louisiana courts had overturned four convictions because of Brady violations by prosecutors in Connick's office." Yet somehow this doesn't add up to a pattern of *Brady* violations in the office, because the evidence in those other cases wasn't blood or crime lab evidence. Huh? He then inexplicably asserts that young prosecutors needn't be trained on *Brady* violations because they learned everything in law school.

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Scalia and Thomas are at pains to say that Connick was not aware of or responsible for his subordinates' unconstitutional conduct, except—as Ginsburg points out—that Connick acknowledged that he misunderstood *Brady*,acknowledged that his prosecutors "were coming fresh out of law school," acknowledged he didn't know whether they had Brady training, and acknowledged that he himself had 'stopped reading law books ... and looking at opinions' when he was first elected District Attorney in 1974." And Connick also conceded that holding his underlings to the highest Brady standards would "make [his] job more difficult." As **Bennett Gershman and Joel Cohen** point out, the jury had "considerable evidence that both Connick and prosecutors in his office were ignorant of the constitutional rules regarding disclosure of exculpatory evidence; they were ignorant of the rules regarding disclosure of scientific evidence; there was no training, or continuing education, and no procedures to monitor compliance with evidentiary requirements; prosecutors did not review police files; and shockingly, Connick himself had been indicted by federal prosecutors for suppressing a lab report of the kind hidden from Thompson."

It's not just that a jury, a judge, and the 5th Circuit Court of Appeals found that Connick knew his staff was undertrained and he failed to fix it. It's that it's almost impossible, on reviewing all of the evidence, to conclude anything else. Nobody is suggesting that the legal issue here is simple or that there aren't **meaningful consequences** to creating liability for district attorneys who fail to train their subordinates in *Brady* compliance. But those aren't the opinions that Thomas and Scalia produced. Their effort instead was to sift and resift the facts until the injury done to Thompson can be pinned on a single bad actor, acting in bad faith. It's a long, sad, uphill trek.

> Beyond that, there is no suggestion in either opinion that this is a hard question or a close call or even a hint of regret at their conclusion. There is only certainty that the jury, the appeals court, and above all Ginsburg got it completely wrong in believing that someone should be held responsible for the outrages suffered by John Thompson. If there is empathy for anyone in evidence here, it's for the overworked and overzealous district attorneys.

It's left to Ginsburg to acknowledge that the costs of immunizing Connick from any wrongdoing is as high as the cost of opening him to it: "The prosecutorial concealment Thompson encountered ... is bound to be repeated unless municipal agencies bear responsibility—made tangible by §1983 liability—for adequately conveying what Brady requires and for monitoring staff compliance." As **Scott Lemieux points out**, by all-but-immunizing Connick for the conduct of his subordinates, the court has created a perfect Catch-22, since the courts already give prosecutors absolute immunity for their actions as prosecutors (though they may still be liable for their conduct as administrators or investigators). By immunizing their bosses as well, the court has guaranteed that nobody can be held responsible for even the most shocking civil rights violations.

I don't think that the failure at the court is one of empathy. I don't ask that Thomas or Scalia shed a tear for an innocent man who almost went to his death because of deceptive prosecutors. And, frankly, Ginsburg's dissent—while powerful—is no less Vulcan in tone than their opinions. But this case is of a piece with prior decisions in which Thomas and Scalia have staked out positions that revel in the hyper-technical and deliberately callous. It was, after all, Scalia who wrote in 2009 that "this court has *never* held that the Constitution forbids the execution of a convicted defendant who had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." It was Thomas who wrote that a prisoner who was slammed to a concrete floor and punched and kicked by a guard after asking for a grievance form had no constitutional claim.

The law awards no extra points for being pitiless and scornful. There is rarely a reason to be pitiless and scornful, certainly in a case of an innocent man who was nearly executed. It leads one to wonder whether Thomas and Scalia sometimes are just because they can be.