

No. 07-30443

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN THOMPSON,

Plaintiff-Appellee,

v.

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; EDDIE JORDAN, in his official capacity as Assistant District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Louisiana

**BRIEF FOR *AMICUS CURIAE* CENTER ON THE
ADMINISTRATION OF CRIMINAL LAW
IN SUPPORT OF APPELLEE**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in 5th Circuit Rule 28.2.1, have an interest in the outcome of this case. This representation, supplemental to those of the parties and *amici* who have already appeared, is made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law (“the Center”), respectfully submits this brief in support of Appellee John Thompson. The Center, based at New York University School of Law, is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. One best practice supported by the Center is ongoing training and continuing legal education for prosecutors on the important matters that regularly arise in the performance of their duties, such as the government’s disclosure obligations under the United States Constitution and applicable rules.

The Center’s litigation program, which consists of filing briefs in support of both the government and defendants, seeks to bring the Center’s empirical research and experience with criminal justice and prosecution practices to bear in important cases in state and federal courts throughout the United States. The Executive Director of the Center, Anthony S. Barkow, is a former federal prosecutor who worked for many years in two United States Attorneys’ Offices and in the United States Department of Justice in Washington, D.C.

In this brief, the Center has particularly sought to include published commentary from former prosecutors about the analytical and ethical challenges posed by compliance with *Brady* and the need for *Brady*-related training, since this appeal focuses in part on the claimed, objective obviousness of the disclosure obligation faced by Thompson's prosecutors. Specifically, the Court has directed to the parties to address "whether it would be obvious or self-evident to law-school educated, practicing criminal law attorneys that there was a *Brady* obligation to disclose the blood evidence to Thompson such that the district attorney could not be deliberately indifferent in failing to further train prosecutors on this application of *Brady*." Letter to Counsel from Charles R. Fulbruge III, dated March 18, 2009. The Center's brief focuses exclusively on this question and believes the correct answer is "no."

The Center believes that developments over the last several years confirm that prosecutors need more training about *Brady* and the government's disclosure duties, not less. See pp. 11-12, *infra*. Thus, the Center's appearance as *amicus curiae* in this case is prompted by its concern that an affirmative answer to the Court's question could be misconstrued as license to dispense with or deemphasize *Brady*-related training. The Center also believes that an affirmative answer may lead courts and prosecutors to

overvalue what little information students glean about *Brady* and disclosure duties in law school, or happen to absorb from colleagues while “on the job,” and come to see these as adequate substitutes for sustained and effective training. Thus, the Center believes that its basic mission to improve the performance of prosecutors through the promotion of effective training is at stake in this important appeal.

INTRODUCTION

In 1941, Justice Frankfurter wrote that the prosecutor “wields the most terrible instruments of government.”¹ One year earlier, then-Attorney General Robert Jackson addressed the nation’s United States Attorneys and made much the same point, noting that “[t]he prosecutor has more control over life, liberty and reputation than any other person in America.”²

In light of the considerable power bestowed on prosecutors – often young lawyers in the early stages of their careers – we should not simply assume they have picked up the necessary knowledge about and sensitivity to matters as important as the government’s disclosure duties while in a law school class, or somewhere in the course of handling other cases. Rather,

¹ *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir. 1976) (Lumbard, J., concurring) (quoting Felix Frankfurter, Letter to the Editor, N.Y. TIMES, Mar. 4, 1941).

² Robert H. Jackson, *The Federal Prosecutor*, 24 JRL OF AM. JUDICATURE SOC. 18 (June 1940).

this case illustrates the vital need to effectively and continually train prosecutors in the legal and ethical questions raised by *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent decisions.

The record in this case indicates that Thompson's prosecutors were confused about how to apply *Brady* to the blood evidence they ultimately suppressed prior to his trial for armed robbery. This uncertainty extended to other exculpatory information withheld by the government, revealing a global misunderstanding about *Brady*'s requirements. More generally, several facets of the decision to withhold or provide *Brady* evidence often trip up even experienced prosecutors. With effective and continuing training, however, *Brady* violations can be averted. In light of the necessity of *Brady*-related training, on the record in this case and in general, the claimed obviousness of the disclosure decision faced by Thompson's prosecutors is no reason to reverse the jury's verdict or the panel's decision.

ARGUMENT

I. The *Brady* Question at Issue Confounds Some Prosecutors

Brady and its progeny required production of the blood evidence at issue in this case. Nonetheless, this sort of *Brady* question appears to confuse some prosecutors – including, most importantly, those who prosecuted Thompson.

Initially, in rejecting the District Attorney's obviousness argument, the panel was surely correct to focus on Thompson's own prosecutors' testimony that *Brady* did not require disclosure of the blood evidence. As the panel opinion notes, the trial witness offered by the District Attorney's Office under Fed. R. Civ. P. 30(b)(6) took issue with whether the blood evidence had to be disclosed. *See* Decision at 28. That witness, Val Solino, apparently believes that, since the prosecutors did not know Thompson's blood type, the evidence need not have been provided. *See id.* Williams, one of the assistants who handled the Thompson prosecutions, also testified that the blood evidence did not have to be disclosed under *Brady* "because I didn't know what the blood type of Mr. Thompson was, and I didn't know what the blood type of Mr. LaGarde was." TT 393.³ He also told LaGarde that the blood evidence was "inconclusive." Decision at 26. Thus, even facing civil liability and after state courts previously held suppression of the blood evidence to violate *Brady*, witnesses from the District Attorney's Office still voiced a contrary and erroneous view.

³ Although he testified that disclosure of the blood evidence was not required by *Brady*, Williams claimed at trial that he would have turned the lab report over anyway simply because it "was a written report that was generated in connection with this case." TT 393. Despite this testimony, however, Williams knew of the blood evidence but did nothing to ensure its production to Thompson.

It is equally telling that in 1999 – fourteen years after Thompson’s prosecution and twelve years after the office codified its policy toward *Brady* – the prosecutors pondering whether to seek indictment of the assistants involved in Thompson’s case still disagreed among themselves as to whether *Brady* compelled production:

First of all... when I said that we have proof that this went, I believe we can prove this was – that Jim Williams knew about this, Mr. Connick and Mr. McElroy started to argue with us as to whether or not you have a duty to turn over that report. And Mr. Connick’s point that he tried to make or persuade me about was that if you don’t intend to use that piece of paper and you don’t actually know what John Thompson’s blood type is, then you don’t have a duty to turn it over. And Mr. McElroy agreed. And I did not.

TT 986 (Glas testimony).

Similarly, Solino conceded at trial that the formal, written standard for *Brady* disclosures memorialized in the 1987 office manual would not have required production of the blood evidence. TT. 914-15. If defendants believed the blood evidence was obviously *Brady* material, surely the new office policy would have dictated its disclosure. In fact, as Thompson correctly points out, that policy was riddled with conceded legal error. *See* Appellees’ Brf. at 15, 27-28.

The prosecutors’ various other violations of and misunderstandings about *Brady* in this case also reinforce the overall conclusion that they found

proper construction of their constitutional disclosure obligation to be difficult. Additional evidence withheld from Thompson included eyewitness accounts not matching his appearance and information about a reward given to one government witness. *See* Appellees' Brf. at 11-12. The panel decision notes that "Defendants disputed among themselves" whether *Brady* applied to this evidence, Decision at 26 n. 15, and even now the District Attorney appears to argue that nondisclosure was appropriate. *See* Appellants' Brf. at 36-37. Actually, the evidence is classically the sort found to be covered by the *Brady* rule. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 443-44 (1995) (contrary or impeached eyewitness accounts covered by *Brady*); *U.S. v. Snell*, 899 F. Supp. 17, 22 (D. Mass. 1995) ("promises, rewards and inducements offered to government witnesses" is "classic *Brady* material"). At trial, Williams testified that information impeaching government witnesses is not covered by *Brady* and then, only moments later, changed his mind and agreed that it is. TT 381-82. Prosecutors' uncertainty could only have been magnified by the office's policy discouraging production of police reports and witness statements. TT 62-67. All this evidence of *Brady*-related confusion, internal disagreement and error supports the conclusion that the decision about whether to produce the blood evidence was not a simple one for Thompson's prosecutors.

