Police Misconduct and Civil Rights
LAW REPORT

Volume 10 Number 4 July/August 2011

What Price Immunity: Prosecutorial Misconduct, Wrongful Convictions, and the United States Supreme Court

By G. Flint Taylor*

As its 2010-2011 term draws to a conclusion, the U.S. Supreme Court has once again rendered a decision that further restricts the already highly circumscribed liability of policy making and supervisory prosecutors who either encourage or participate in blatant prosecutorial misconduct. This decision, like a prior decision rendered during the Court's 2008-2009 term, extends these protections at a time when the systemic nature of state and county prosecutorial misconduct as a crucial component of wrongful convictions is becoming more and more undeniable. The Court has accomplished this troubling expansion by extending absolute prosecutorial immunity, and by further restricting the scope of *Monell* liability. In this article, we will examine the nature and extent of prosecutorial misconduct as a component of wrongful convictions, the leading Supreme Court prosecutorial immunity decisions, and the impact of these decisions on the pervasive problem of prosecutorial misconduct.

Mr. Taylor, a PMCRLR Editorial Board member, has represented wrongfully convicted prisoners in Chicago for over 20 years and successfully argued the Buckley v. Fitzsimmons prosecutorial immunity case before the U.S. Supreme Court.

The Interrelated Problems of Wrongful Convictions and Prosecutorial Misconduct

It has long been known by defense lawyers and civil rights litigators that prosecutorial misconduct has played a leading role in the wrongful conviction of an untold number of defendants, many of whom were actually innocent. This includes a significant number of persons who were sentenced to death row. According to the Center on Wrongful Convictions at Northwestern Law School (CWC) there have been 20 exonerations of death row prisoners in Illinois, with the ever increasing total number of wrongfully convicted Illinois exonerees now standing at a nationally leading 117. The Center's incomplete tally of the wrongfully convicted who have been exonerated nationally now stands at nearly 1000, with Texas, New York, California, and Florida ranking second through fifth, respectively, to Illinois. The CWC's listing of the exonerees can be found at http://www.law.northwestern.edu/wrongfulconvictions/exonerations/.

These cases are fraught with systemic suppression of evidence by police and prosecutors; coerced, tortured, and fabricated confessions taken by prosecutors who often are aware of, and sometimes play a role in, the coercion and fabrication; the subornation and presentation of false and perjured witness testimony by police and prosecutors; mistaken witness

Police Misconduct and Civil Rights Law Report is published by Thomson Reuters. 50 East Broad Street, Rochester NY 14694
ISSN 0738-0623

40930824

WEST®

identifications that are often occasioned by improper police and prosecutorial suggestion; the use of jailhouse "snitches" and other "incentivized" witnesses who are given rewards for their testimony by prosecutors; and questionable and sometimes fraudulent crime lab tests and reports that were manipulated, misrepresented, and sometimes suppressed by prosecutors.

On June 19, 2011, the Chicago based Better Government Association (BGA), in conjunction with the CWC, released an exhaustive study of 85 Illinois wrongfully convicted prisoners who have been exonerated since 1989. The BGA investigation found that in 81 of the 85 cases there was official misconduct or error by police, prosecutors, and/or forensic experts; that in over half of the cases (44), there was prosecutorial misconduct; in 33 cases there was a false confession; that the 85 individuals spent a combined 926 years in jail, averaging almost 11 years per person; that while the wrong people were serving time, the actual perpetrators committed at least 94 additional felonies, including 14 murders, 11 sexual assaults, and 10 kidnappings; and that the actual perpetrators who committed 35 of the murders, 11 of the rapes, and 2 of the murder/rapes for which the exonerees were wrongfully convicted have never been charged for these crimes. The BGA further found the financial costs to state and local governments to be $155.9 million in settlements and judgments, $31.6 million in attorney's fees paid to private attorneys defending the offending law enforcement officials and the official governmental bodies that employed them, $8.2 million paid in compensation through the Illinois Court of Claims, and $18.5 million in jail and incarceration costs. This totals to $214.2 million, a number that will surely substantially increase in the near future since there are at least 16 civil damages cases brought by exonerees that are still pending in court. The BGA Report can be found at http://www.bettergov.org/investigations/wrongful_convictions_1.aspx.

DNA testing has played a determinative role in many of these cases, exposing not only that the wrong person was convicted, but also validating allegations of coerced and fabricated confessions, false and perjured testimony, and misidentifications. It is impossible to know how many of the wrongfully convicted remain in prison or have been executed, but it seems clear that the numbers marshaled by the CWC represent the tip of the iceberg. One would hope that the prosecutors involved would be held responsible for their role in this epidemic of misconduct. Unfortunately, this is not the case, and the Supreme Court must shoulder primary responsibility for this gross miscarriage of justice.

Prosecutorial Immunity: Early Supreme Court Decisions

In 1976 The Supreme Court first addressed the issue of prosecutorial immunity under 42 U.S.C.A. § 1983 in the landmark case of *Imbler v. Pachtman*, 424 U.S. 409 (1976). Imbler was convicted of murder and sentenced to death in California in 1962 on the basis of the testimony of several identification witnesses. Subsequently, the trial prosecutor, Richard Pachtman, wrote to the Governor describing evidence he claimed, he and a prison investigator had discovered after trial. This evidence consisted of newly discovered corroborating witnesses for Imbler's alibi, as well as new revelations about a key witness' background which established that he was less trustworthy than he had represented originally to Pachtman and had repeated in his testimony. Pachtman stated that he wrote from a belief that "a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented." 424 U.S. at 413.

Police Misconduct and Civil Rights Law Report
is prepared under the auspices of the
National Police Accountability Project

Published bimonthly by Thomson Reuters
Editorial Offices: 50 Broad Street East, Rochester, NY 14694
Tel.: 585-546-5530 | Fax: 585-258-3708

Customer Service: P.O. Box 64833, St. Paul, MN 55164-0833
Tel.: 800-328-4880 | Fax: 612-687-6674

 ISSN 0738-0623

The California Supreme Court found that, contrary to Imbler's assertions, Pachtman had neither knowingly used false evidence nor suppressed material evidence, and, despite the subsequent recantation of the witness, denied Imbler's habeas corpus petition. However, in 1969, the Federal District Court for the Central District of California, finding "culpable use" of false testimony by the prosecution, granted Imbler's federal habeas corpus petition. 409 U.S. at 414-415. After an unsuccessful appeal, the State chose not to retry Imbler and he was released, after spending ten years behind bars.

Imbler then brought a § 1983 action alleging a conspiracy between Pachtman, a fingerprint expert, and several Los Angeles police officers to unconstitutionally charge and convict him in violation of his right to due process of law. The complaint alleged that Pachtman had

> "with intent, and on other occasions with negligence" allowed Costello [the witness] to give false testimony as found by the District Court, and that the fingerprint expert's suppression of evidence was "chargeable under federal law" to Pachtman. In addition Imbler claimed that Pachtman had prosecuted him with knowledge of a lie detector test that had "cleared" Imbler, and that Pachtman had used at trial a police artist's sketch of [the] killer made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused upon him.

409 U.S. at 416.

The Court, in a 5 to 3 decision written by Justice Powell, applied a functional analysis to the alleged actions of prosecutor Pachtman and found that he was entitled to absolute prosecutorial immunity. Citing to the strong public policy in assuring that prosecutors perform their duties "with courage," and in protecting the "independence" of the office, the majority further defined the protected actions as being "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 409 U.S. at 430. The majority highlighted some of the determinations and actions that define the prosecutorial function as "the prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument," and, "ultimately in every case," the question of whether "prosecutorial misconduct so infected a trial as to deny due process." 409 U.S. at 425. The majority expressly limited its application of absolute prosecutorial immunity to "initiating a prosecution and in presenting the State's case," stating that "we have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 409 U.S. at 430.

The majority also cited to what has proven to be the highly dubious alternative remedies of criminal prosecution and professional discipline, and echoed Judge Learned Hand in the oft cited prosecutorial immunity case of *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950):

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

409 U.S. at 427-428.

Justice White, joined by Justices Brennan and Marshall, "concurred in the judgment of the Court and in much of its reasoning." Specifically, Justice White wrote that he agreed with the majority that "the gravamen of the complaint in this case is that the prosecutor knowingly used perjured testimony; and that a prosecutor is absolutely immune from suit for money damages under 42 U.S.C.A. § 1983 for presentation of testimony later determined to have been false, where the presentation of such testimony is alleged to have been unconstitutional solely because the prosecutor did not believe it or should not have believed it to be true." 409 U.S. at 432 (White, J. concurring). However, he wrote separately to articulate the "most serious" disagreement that he and his fellow concurring Judges had with "any implication that absolute immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence" because "such a rule would threaten to injure the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history." 409 U.S. at 433.

Justice White went on to point out that suppression of evidence takes place outside of the judicial process and that the process had no way to "prevent or correct the constitutional violation of suppressing evidence." 409

U.S. at 443. Addressing the public policy question, Justice White continued:

> Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would discourage precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits. Denial of immunity for unconstitutional withholding of evidence would encourage such disclosure. A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process. Indeed, it will help it. Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. *Hilliard v. Williams*, 465 F. 2d 1212, 1218 (CA6), cert. denied, 409 U.S. 1029 (1972) (additional citations omitted)

409 U.S. at 442-443. In conclusion the concurring Justices "would simply not grant [a prosecutor] absolute immunity from suits for committing violations of pre-existing constitutional disclosure requirements, if he committed those violations in bad faith." 409 U.S. at 447.

Unfortunately for wrongfully convicted prisoners and § 1983 litigators, by the time of the *Imbler* decision, the more liberal Warren court had been fundamentally altered by former President Richard Nixon who had appointed Warren Burger as Chief Justice and William Rehnquist as an associate Justice. Additionally, Justice Stevens took no part in the determination of the *Imbler* case, and recently appointed Justice Harry Blackmun had yet to emerge as a liberal voice on the Court. Hence Justice White's view was in the minority, and any glimmer of hope that prosecutorial suppression of evidence at trial would survive the clutches of absolute immunity was unquestionably squelched when the Court, only weeks after deciding *Imbler*, reversed and remanded "for further consideration in light of Imbler v. Pachtman," the leading Court of Appeals case—*Hilliard v. Williams*—that had so excepted an egregious example of this common form of prosecutorial misconduct. See, *Williams v. Hilliard* 424 U.S. 961 (1976). Following the Supreme Court's lead, the Sixth Circuit, on remand, after again condemning the prosecutorial suppression of evidence that lead to a substantial jury verdict against the offending prosecutor, reluctantly concluded that "under the decision in Imbler, Williams as a prosecuting attorney is not liable in damages to appellant Hilliard in this action filed under 42 U.S.C. § 1983. Accordingly, the judgment of this court is vacated as to John L. Williams and the case is remanded to the District Court with directions to dismiss the action as to him." *Hillard v. Williams*, 540 F.2d 220 (6th Cir. 1976).

Burns v. Reed

It was not until 15 years after its *Imbler* decision that the Court, in *Burns v. Reed*, 500 U.S. 478 (1991) again directly addressed prosecutorial immunity. In the interim, the Court had substantially strengthened a public official's right to qualified immunity (see, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987)); denied absolute immunity to former U.S. Attorney General John Mitchell for authorizing, in an admittedly nonprosecutorial act—"national security" wiretaps—while granting him qualified immunity, and also granting all qualified immunity defendants whose claims had been rejected the right to interlocutory appeal, *Mitchell v. Forsyth*, 511 U.S. 472 (1985); and refused to afford a police officer who procured an arrest warrant absolute immunity under the theory that his actions were akin to a prosecutor's. *Malley v. Briggs*, 475 U.S. 335 (1986).

In *Burns v. Reed*, the Court dealt with several actions by the prosecutor—advising an investigating police officer to hypnotize a suspect before she was charged, approving a search warrant application, and illiciting testimony he knew to be false or misleading at a judicial hearing held to determine whether there was probable cause to issue the warrant. In an opinion written by Justice White, and joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, and Souter, the majority rejected Burns' assertion that the issue of approval of the search warrant was properly raised. With regard to prosecutor Reed's presentation of false testimony at the probable cause hearing, the majority applied common law immunity principles which provided that "[prosecutorial] immunity extended to 'any hearing before a tribunal which performed a judicial function'" and the *Imbler* Court's observation that the "duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution," to hold that Reed was entitled to absolute prosecutorial immunity. 500 U.S. at 490-491.

With regard to the legal advice issue, all nine Justices agreed that Reed was not entitled to absolute prosecutorial immunity. Emphasizing that since *Imbler* the Court had substantially broadened the protections afforded by

qualified immunity to public officials, that prior Supreme Court decisions counseled that absolute immunity should be sparingly bestowed, and that the Court did not have "a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy," the Court reasoned:

> We do not believe, however, that advising the police in the investigative phase of a criminal case is so "intimately associated with the judicial phase of the criminal process," Imbler, 424 U.S. at 430, that it qualifies for absolute immunity. Absent a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in Imbler, we have not been inclined to extend absolute immunity from liability under § 1983.

500 U.S. at 493.

Justice Scalia, joined by Justices Marshall and Blackmun, dissented from the majority's refusal to recognize or decide the issue of Reed's approval of the search warrant application. In these Justices' view, Burns had sufficiently litigated this issue below and raised it before the Court. Since, in Scalia's analysis, nothing beyond in court activities were protected by absolute immunity at common law and since the "procuring of a mere search warrant" was even more removed from the judicial process than the nonimmunized procurement of an arrest warrant, the dissent contended that Reed was not entitled to absolute prosecutorial immunity for his bad faith approval of the warrant application. 500 U.S. at 505.

Buckley v. Fitzsimmons

Two years later, the Court decided *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Steven Buckley was one of three innocent men who were wrongfully charged for the highly publicized 1983 murder of an 11-year-old girl, Jeanine Nicarico, in suburban Chicago. Buckley was tried, the jury hung, and his case was dismissed after he spent three years in jail. The other two, Rolando Cruz and Alejandro Hernandez, were convicted and sentenced to death, and both remained in prison, despite the fact that another man, Brian Dugan, later confessed to the crime, until they were exonerated more than a decade later.

After his release, Buckley brought suit under § 1983 against the police officers, prosecutors, and expert witnesses who were responsible for his wrongful prosecution. His claim against the prosecutors included that State's Attorney Fitzsimmons and two of his assistants fabricated crucial bootprint evidence, long before he was charged, that was later used against him at trial, and that Fitzsimmons made false and defamatory public statements at a postindictment press conference that violated his right to fair trial. The District Court granted the prosecutors absolute immunity on the fabrication claim, but not for the press conference. On appeal, the Seventh Circuit rendered a divided opinion written by Judge Easterbrook, in which the majority relied on the fact that the prosecutors' "out-of-court acts" only caused injury to Buckley in the judicial proceedings, to hold that the prosecutors were entitled to absolute immunity on both claims. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1242 (1990).

The Supreme Court vacated the Seventh Circuit's decision and remanded the case for further consideration in light of *Burns v. Reed*. *Buckley v Fitzsimmons*, 502 U.S. 801 (1991). However, on remand, the Seventh Circuit, again in a divided opinion, held that *Burns v. Reed* was inapposite and reaffirmed its original decision. *Buckley v Fitzsimmons* 952 F.2d 965 (7th Cir. 1992). The Supreme Court again took certiorari, and in an opinion written by Justice Stevens, reversed the Seventh Circuit. Calling "unprecedented" the Seventh Circuit's "theory" that the locus of the constitutional injury was determinative of whether prosecutorial immunity was mandated, (509 U.S. at 265), the Court unanimously held that the prosecutorial press conference was not covered by absolute prosecutorial immunity, while an unlikely majority of five—Justices Stevens, Blackmun, O'Connor, Scalia, and Thomas—held that the fabrication of evidence claim was likewise not so cloaked.

The majority first rejected the Seventh Circuit's location of injury theory:

> The location of the injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages (a question that this case does not present, see supra, at 261). It is irrelevant, however, to the question whether the conduct of a prosecutor is protected by absolute immunity. Accordingly, although the Court of Appeals' reasoning may be relevant to the proper resolution of issues that are not before us, it does not provide an acceptable basis for concluding that either the pre-indictment fabrication of evidence or the post-indictment press conference was a function protected by absolute immunity

509 U.S. at 272.

Stating that qualified immunity was the "norm," and emphasizing that it was the prosecutors' burden to establish their entitlement to absolute immunity, the majority, relying on a decision written by Justice Stevens when he was a Seventh Circuit Judge, delineated the difference between investigation and advocacy:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Hampton v. Chicago*, 484 F.2d 602, 608 (CA7 1973)

509 U.S. at 273.

Noting that the prosecutors did not have probable cause to arrest or prosecute Buckley at the time that they allegedly fabricated the bootprint evidence, and asserting that "a prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested," the majority held that the prosecutors' "mission at that time was entirely investigative in character." 509 U.S. at 274. The majority went on to underscore that this determination was further buttressed by the Court's prior decision in *Burns*:

> After Burns, it would be anomalous, to say the least, to grant prosecutors only qualified immunity when offering legal advice to police about an unarrested suspect, but then to endow them with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested.

509 U.S. at 276. The unanimous Court then further held that

> Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor. At the press conference, Fitzsimmons did not act in "his role as advocate for the State," *Burns v. Reed*, 500 U.S. at 491. The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions. . . . a prosecutor is in no different position than other executive officials who deal with the press, and, as noted, supra, at 268, 277, qualified immunity is the norm for them.

509 U.S. at 277-278.

Justice Scalia, re-emphasizing his strongly held position, which he previously articulated in *Burns*, that the narrow scope of absolute prosecutorial immunity in the common law required that it be similarly limited in its application under § 1983, concurred in both parts of the majority opinion, but reformulated the Seventh Circuit theory in a way that opened the door to the grant of qualified immunity:

> Many claims directed at prosecutors, of the sort that are based on acts not plainly covered by the conventional malicious-prosecution and defamation privileges, are probably not actionable under § 1983, and so may be dismissed at the pleading stage without regard to immunity—undermining the dissent's assertion that we have converted absolute prosecutorial immunity into "little more than a pleading rule," post, at 283. I think petitioner's false-evidence claims in the present case illustrate this point. Insofar as they are based on respondents' supposed knowing use of fabricated evidence before the grand jury and at trial, see ante, at 267, n. 3—acts which might state a claim for denial of due process, see, e.g., *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)(per curiam)—the traditional defamation immunity provides complete protection from suit under § 1983. If "reframed . . . to attack the preparation" of that evidence, post, at 283, the claims are unlikely to be cognizable under § 1983, since petitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution. See *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244 (CA7 1990), vacated and remanded, 502 U.S. 801 (1991).

509 U.S. at 281-282.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Souter, dissented from the denial of absolute immunity on the fabrication claim, decrying what they characterized as the "bright line" probable cause standard, and opining, in strong terms, their conclusion that the prosecutors' actions in connection

with the bootprint evidence was evaluative in nature, and therefore prosecutorial rather than investigative because "almost all decisions to initiate prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction, just as almost every action in the courtroom requires some measure of out-of-court preparation." 509 U.S. at 283.

The Supreme Court decisions in *Burns* and *Buckley* unequivocally established an investigative exception to absolute prosecutorial immunity, an exception that the lower courts have consistently utilized both before and after those decisions were rendered, most often when prosecutors participated in interrogations and other witness contacts during the early stages of an investigation. See, e.g., *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992) (fabricating false witness statements during early stages of the case are investigative); *Rex v. Peoples*, 753 F.2d 840 (10th Cir. 1985) (prosecutor who participated in coercive and deceptive interrogation of suspect which resulted in suspect saying "what the police wanted him to say" acted as an investigator); *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995) ("intimidating and coercing witnesses into changing their testimony is not advocatory. It is a misuse of investigative techniques"); *Barbera v. Smith,* 836 F.2d 96, 99 (2d Cir. 1987) (distinguishing the investigative role in acquiring evidence and the advocacy role in evaluating that evidence); *Hill v. City of New York,* 45 F.3d 653 (2d Cir. 1995) (immunity does not protect efforts to manufacture evidence that occur during the investigatory phase); *Zahrey v. Coffey*, 221 F. 3d 342 (2d Cir. 2000) (coercing false testimony in early stages of case is investigative); *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993); *Prince v. Hicks*, 198 F.3d 607 (6th Cir. 1999) (a prosecutor who conducts an inadequate investigation into allegations of criminal misconduct is not immune); *Orange v. Burge*, 2008 U.S. Dist. LEXIS 75103 (N.D. Ill.) (prosecutor who is aware of torture and participates in fabricating confession is acting in an investigative manner).

However, the *Buckley* and *Burns* decisions have proven to be somewhat Pyrrhic victories, particularly to the plaintiffs in those cases, as the Seventh Circuit ultimately granted qualified immunity in both cases, and in *Buckley*, Judge Easterbrook seized upon Justice Scalia's concurrence to carve out a Catch-22 exception for prosecutors who both fabricate evidence, then compound their misconduct by knowingly introducing it at trial. *Buckley v. Fitzsimmons*, (*Buckley III*), 20 F.3d 789 (7th Cir. 1994); *Burns v. Reed,* 44 F.3d 524 (7th Cir. 1995); cf. *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001) (Judge Easterbrook distinguishing his decision in *Buckley*). In fact the *Buckley III* decision has subsequently caused a split in the Circuit Courts of Appeals, *See Zahrey v. Coffey*, 221 F.3d 342, 344, 349 (2d Cir. 2000) ("the right at issue is a constitutional right, provided that the deprivation of liberty . . . can be shown to be the result of [the prosecutor's] fabrication of evidence" where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial); *McGhee v. Pottawattamie County*, 547 F.3d 922, 932-933 (8th Cir. 2008) (egregious prosecutorial fabrication and suppression of evidence before charging of defendants in murder case not immunized by later introduction into evidence by same prosecutors); *Gregory v. City of Louisville*, 444 F.3d 735, 739 (6th Cir. 2006) ("Merely because a state actor compounds a constitutional wrong with another wrong which benefits from immunity is no reason to insulate the first constitutional wrong from actions for redress."); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997); contra: *Michaels v. McGrath*, 222 F.3d 118 (3d Cir. 2000). It has also engendered disapproval from a Supreme Court Justice, *Michaels v. McGrath*, 531 U.S. 1118 (2001) (Thomas J., dissenting from denial of certiorari), and conflicting decisions from District Court Judges in the Seventh Circuit. *See Steidl v. City of Paris*, 2006 U.S. Dist. LEXIS 15114, at *9-10 (C.D. Ill.) ("When the totality of the circumstances amounts to nothing more than evidence fabricated by the prosecutor, it is wrong to grant him absolute immunity for his role in presenting that evidence at trial."); *contra*, *Fields v. City of Chicago*, 2011 U.S. Dist. LEXIS 36410, **21-23. (reluctantly following *Buckley III*).

In 2009, in order to resolve the *Buckey III* conflict, the Supreme Court granted certiorari in the *Pottawattamie* case on the following question:

> Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation and then introduced that same testimony against the defendant at trial.

Pottawattamie County Iowa v. McGhee, 129 S. Ct. 2002 (2009). However, in January 2010, directly after oral argument before the Court, the defendant County, apparently anticipating a likely unfavorable decision from the tenor of the Court's questioning, settled the case against the prosecutor, paying McGhee and his criminal codefendant, who each spent 25 years in prison for a murder they did not commit, a total of $12 million.

Recent Decisions

It would be another 16 years after its *Buckley* decision before the Supreme Court would decide another major prosecutorial immunity case that would have a major impact on wrongfully convicted § 1983 plaintiffs. During that intervening period, the Court expressly restricted the right to bring such wrongful conviction claims to circumstances where the prisoner had been officially exonerated of the crime (see *Heck v. Humphrey*, 512 U.S. 477 (1994)), restricted the scope of the underlying Constitutional rights involved (see, e.g., *Albright v. Oliver* 510 U.S. 266 (1994) and *Wallace v. Kato* 510 U.S. 1215 (2007)), while further strengthening the qualified immunity defense (see, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001)). Additionally, with regard to prosecutorial immunity, the Court held that a prosecutor was immune both for her in-court and out-of-court actions in obtaining a search warrant, except for the act of certifying the factual summary that was presented to the Court in order to obtain issuance of the warrant. *Kalina v. Fletcher*, 522 U.S. 118 (1997).

Van de Kamp v. Goldstein

In 2009, a unanimous Supreme Court, in an opinion written by Justice Breyer, reversed the Ninth Circuit Court of Appeals, holding in a 42 U.S.C.A. § 1983 wrongful conviction case that the Los Angeles County District Attorney and his First Deputy were entitled to absolute prosecutorial immunity for allegedly failing to properly train their assistants about the requirements of producing potentially exculpatory informant evidence as required under *Giglio v. United States,* 405 U.S. 150 (1972), and for failing to establish an information sharing system within the District Attorneys' Office. *Van de Camp v. Goldstein*, 555 U.S. 335, 129 S. Ct. 855 (2009). Goldstein, a college student and Marine Corps veteran, was convicted of murder and sentenced to life in prison based on the testimony of an eyewitness, who later admitted that he was intimidated by the police to identify Goldstein, and the testimony of a jailhouse informant who claimed that Goldstein had made a jailhouse confession. The informant falsely testified at Goldstein's trial that he had not received any benefits in exchange for his testimony against Goldstein or for testimony in prior cases, when, in fact, the District Attorney's Office had promised him a reduced sentence on a pending charge in exchange for his testimony at Goldstein's trial, and he had also received similar benefits in a substantial number of prior cases. However, even though the District Attorney's Office knew of the informant's reduced-sentence deals, the Deputy District Attorney who personally prosecuted Goldstein's case did not, and this information consequently was not disclosed to Goldstein or his defense attorney at trial.

After 24 years in prison, Goldstein was released pursuant to a federal habeas corpus petition on the ground that he was wrongfully convicted because the informant had testified falsely and that the prosecution had violated *Giglio* when it did not supply the evidence of the favors to the defense. Goldstein then brought suit, *inter alia*, against District Attorney Van de Kamp, and his Chief Deputy, alleging that they intentionally decided not to create an office information system for trial prosecutors from which they could learn whether their witnesses were jailhouse informants who were receiving benefits, and that they did so in violation of their constitutional obligation to "insure communications of all relevant information on each case to every lawyer' in the office." *Giglio v. U.S.*, 405 U.S. at 154. Goldstein further alleged these high level prosecutors did not properly train or supervise their trial assistants concerning their *Giglio* obligations.

The prosecutors sought to cloak themselves with prosecutorial immunity under *Imbler* but the District Court denied their motion, finding that their alleged failures were administrative, rather than prosecutorial, in nature. On interlocutory appeal, the Ninth Circuit affirmed the District Court, holding that the alleged conduct was administrative because, although it "to some degree related to trial preparation," it bore a "close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases." *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1172, 1175-76 (9th Cir. 2007).

In its opinion, the unanimous Court powerfully reaffirmed *Imbler* and extended it to high ranking prosecutors acting as administrators. Noting the similarities between the procedural and substantive facts in *Imbler* and those alleged by Goldstein, and underscoring the *Imbler* Court's reliance on the fact that legislators, judges and jurors had, at common law, been afforded absolute immunity, the Court also embraced the public policy considerations relied upon in *Imbler*:

> Those considerations, the Court said, arise out of the general common-law "concern that harassment by unfounded litigation" could both "cause a deflection of the prosecutor's energies from his public duties" and also lead the prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust."

129 S. Ct. at 860.

Again quoting *Imbler*, the Court emphasized that the public trust in the prosecutor's office could be undermined "were the prosecutor to have in mind his own potential damages liability when making prosecutorial decisions—as he might well were he subject to § 1983 liability," which was of "no small concern given the frequency with which criminal defendants bring such suits." 129 S. Ct. at 860. Again quoting *Imbler*, the Court noted that a prosecutor "inevitably makes many decisions that could engender colorable claims of constitutional deprivation," and to defend against these claims many years later could "impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." 129 S. Ct. at 860. Therefore, again according to *Imbler*, an "honest prosecutor would face greater difficulty" than would other executive and administrative officials "in meeting the standards of qualified immunity." 129 S. Ct. at 860. Continuing with its exhaustive recitation of *Imbler*, the Court stated:

> The fact that one constitutional duty at issue was a positive duty (the duty to supply "information relevant to the defense") rather than a negative duty (the duty not to "use . . . perjured testimony") made no difference. After all, a plaintiff can often transform a positive into a negative duty simply by reframing the pleadings; in either case, a constitutional violation is at issue.

129 S. Ct. at 861.

Turning to the question left open in *Imbler*—whether "similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator . . . rather than that of advocate"—the Court agreed with Goldstein that his claim against the supervisory prosecutors "attacks the office's administrative procedures," but nonetheless held that:

> prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here. Those claims focus upon a certain kind of administrative obligation—a kind that itself is directly connected with the conduct of a trial. Here, unlike with other claims related to administrative decisions, an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim.The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, e.g., in determining what information should be included in the training or the supervision or the information-system management. And in that sense also Goldstein's claims are unlike claims of, say, unlawful discrimination in hiring employees. Given these features of the case before us, we believe absolute immunity must follow.

129 S. Ct. at 861-62.

The Court then utilized an illustrative hypothetical—where a plaintiff sought damages "not only from the trial prosecutor but also from a supervisory prosecutor or from the trial prosecutor's colleagues—all on the ground that they should have found and turned over the impeachment material about the [jailhouse informant]," and concluded that:

> The only difference we can find between *Imbler* and our hypothetical case lies in the fact that, in our hypothetical case, a prosecutorial supervisor or colleague might himself be liable for damages instead of the trial prosecutor. But we cannot find that difference (in the pattern of liability among prosecutors within a single office) to be critical. Decisions about indictment or trial prosecution will often involve more than one prosecutor within an office. We do not see how such differences in the pattern of liability among a group of prosecutors in a single office could alleviate *Imbler*'s basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks. . . Thus, we must assume that the prosecutors in our hypothetical suit would enjoy absolute immunity.

129 S. Ct. at 862.

The Court then concluded that "once we determine that supervisory prosecutors are immune in a suit directly attacking their actions related to an individual trial, we must find they are similarly immune in the case before us." 129 S. Ct. at 862. This is so because, while the Court "agree(s) with the Court of Appeals that the office's general methods of supervision and training are at issue here," it does "not agree that that difference is critical for present purposes. That difference does not preclude

an intimate connection between prosecutorial activity and the trial process." 129 S. Ct. at 862-63. These management tasks, which concern "how and when to make impeachment information available at a trial," are "thereby directly connected with the prosecutor's basic trial advocacy duties," and under *Imbler's* functional test, "a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately, on the other, would seem very much alike." 129 S. Ct. at 863.

Underscoring the difficulty of drawing a line between "general office supervision or office training (say, related to *Giglio*) and specific supervision or training related to a particular case," the Court found that:

> To permit claims based upon the former is almost inevitably to permit the bringing of claims that include the latter. It is also true because one cannot easily distinguish, for immunity purposes, between claims based upon training or supervisory failures related to Giglio and similar claims related to other constitutional matters (obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), for example). And that being so, every consideration that *Imbler* mentions militates in favor of immunity.

129 S. Ct. at 863.

Elaborating on *Imbler's* application, the Court stated:

> If, as Imbler says, the threat of damages liability for such an error could lead a trial prosecutor to take account of that risk when making trial-related decisions, so, too, could the threat of more widespread liability throughout the office (ultimately traceable to that trial error) lead both that prosecutor and other office prosecutors as well to take account of such a risk. Indeed, members of a large prosecutorial office, when making prosecutorial decisions, could have in mind the "consequences in terms of" damages liability whether they are making general decisions about supervising or training or whether they are making individual trial-related decisions.

129 S. Ct. at 863.

The Court also emphasized that denying immunity would run afoul of *Imbler's* proscription against opening the floodgates for harassing suits by criminal defendants:

> Moreover, because better training or supervision might prevent most, if not all, prosecutorial errors at trial, permission to bring such a suit here would grant permission to criminal defendants to bring claims in other similar instances, in effect claiming damages for (trial-related) training or supervisory failings.

129 S. Ct. at 863.

The Court then rejected Goldstein's second claim—that "the creation of an information management system is a more purely administrative task, less closely related to the 'judicial phase of the criminal process,' than are supervisory or training tasks," and that "technically qualified individuals other than prosecutors could create such a system and that they could do so prior to the initiation of criminal proceedings":

> The critical element of any information system is the information it contains. Deciding what to include and what not to include in an information system is little different from making similar decisions in respect to training. Again, determining the criteria for inclusion or exclusion requires knowledge of the law. Moreover, the absence of an information system is relevant here if, and only if, a proper system would have included information about the informant Fink. Thus, were this claim allowed, a court would have to review the office's legal judgments, not simply about whether to have an information system but also about what kind of system is appropriate, and whether an appropriate system would have included *Giglio*-related information about one particular kind of trial informant. Such decisions—whether made prior to or during a particular trial—are "intimately associated with the judicial phase of the criminal process."

129 S. Ct. at 864.

In conclusion, the Court returned to *Imbler* one final time to re-emphasize the public interest that it considered at stake:

> Immunity does not exist to help prosecutors in the easy case; it exists because the easy cases bring difficult cases in their wake. And, as Imbler pointed out, the likely presence of too many difficult cases threatens, not prosecutors, but the public, for the reason that it threatens to undermine the necessary independence and integrity of the prosecutorial decision-making process. Such is

> true of the kinds of claims before us, to all of which Imbler's functional considerations apply. Consequently, where a § 1983 plaintiff claims that a prosecutor's management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself.

129 S. Ct. at 864.

Connick v. Thompson

In March of 2011 a sharply divided Supreme Court addressed a wrongful conviction case in which a jury had returned a $14 million verdict against the District Attorney of New Orleans Parrish, Harry Connick in his official capacity. In December of 1984, the son of a prominent New Orleans executive was robbed, shot, and killed. Approximately three weeks later, three siblings were the victims of an unrelated armed robbery during which some of the perpetrator's blood ended up on the cuff of one of the victim's pants. As part of the police investigation, crime scene technicians took a swatch of the pants with the perpetrator's blood on it.

Several weeks later, John Thompson and Kevin Freeman were arrested and charged with the murder. As a result, Thompson's picture was published in the newspaper, the victims saw the picture, contacted DA Connick's Office and identified Thompson as their assailant. The armed robbery case was then screened by an assistant district attorney who approved the case for prosecution and, after noting that a crime scene technician had taken a swatch of the pants with blood on it, wrote on a Screening Action Form that the state "[m]ay wish to do blood test."

The district attorneys' office successfully petitioned the court to switch the order of the trials so that Thompson would be tried for the armed robbery first in order to increase the likelihood he would be sentenced to death on the murder case. At the conclusion of the motion to suppress hearing in the robbery case, the prosecutor, noting the reference to a blood test on the Screening Action Form, stated in open court that it was the state's intention to file a motion to take a blood sample from the defendant, but the DA's Office never sent anyone to test Thompson's blood.

Approximately one week before the armed robbery trial, the bloody swatch was sent to be tested, and two days before the armed robbery trial, the DA received a crime lab report that stated that the armed robbery perpetrator's blood type was type B, but the report was never turned over to Thompson, and the DA, relying primarily on eyewitness testimony, never mentioned the blood evidence at trial. The jury found Thompson guilty of attempted armed robbery, and he was sentenced to 49 and one-half years in prison.

Shortly thereafter, Thompson was tried on the murder case. At the trial, codefendant Freeman testified that Thompson was the shooter, and an acquaintance testified that Thompson made incriminating statements about the murder and that he had sold Thompson's gun for him. Due to his attempted armed robbery conviction, Thompson decided not to testify on his own behalf, and the jury convicted Thompson of first-degree murder. During the sentencing phase, victim testimony about the armed robbery was admitted, and the prosecutor emphasized this testimony in his closing argument, asserting that there easily could have been three more murders and that a death sentence was necessary to punish Thompson because he was already sentenced to 49 and one-half years on the attempted armed robbery. The jury obliged, and sentenced Thompson to death.

In the 14 years after his murder conviction, Thompson exhausted all of his appeals, his execution date was imminent, and his attorneys informed him that there were no more options for appeal. Less than a month before his scheduled execution, Thompson's investigator came across a microfiche copy of the crime lab report containing the blood type of the armed robbery perpetrator. Thompson was tested and found to be blood type O, making it impossible for him to have been the armed robber. As a result, Thompson's execution was stayed. In the ensuing investigation, it was uncovered that, in 1994, one of the prosecuting DAs made a death bed confession to a former DA that he had intentionally withheld the blood evidence. The former DA kept the confession secret until the blood evidence was discovered in 1999.

Additionally Thompson discovered that other exculpatory evidence had not been turned over to the defense—several police reports containing eyewitness descriptions of the murderer that did not match Thompson's description—despite the defense's request for all police reports containing descriptions inconsistent with Thompson's general appearance, and evidence that the acquaintance who testified against Thompson received a monetary award from the murder victim's family for identifying him as the murderer.

After an evidentiary hearing, Thompson's robbery conviction was vacated and Connick's Office chose not to

retry him. Connick convened a grand jury to investigate the concealment of the blood evidence, but quickly dismissed it. The assistant district attorney who was prosecuting the concealment charges resigned in protest and later testified that the evidence supported the charges.

Thompson filed for postconviction relief on the murder conviction and, in 2001, his death sentence was reduced to life, on the basis that the attempted armed robbery conviction had been used as evidence against him during the sentencing phase. The Louisiana Court of Appeals reversed Thompson's murder conviction in 2002, finding that the prior conviction unconstitutionally deprived Thompson of his right to testify in his own defense. The DA's Office retried Thompson, and, free of the attempted armed robbery conviction, Thompson testified in his own defense. In addition, Thompson was able to use 13 pieces of evidence that the prosecutors did not turn over during the first murder trial. This evidence included the police and incident reports, photographs, statements by the state's two key witnesses, and information regarding the monetary award. Three eyewitnesses who the police had not previously disclosed to Thompson, also testified. The jury returned a verdict of not guilty in 35 minutes. Thompson was then released from prison, 18 years after he was initially arrested.

Prevented by *Imbler* from suing the individual assistant district attorneys for their egregious *Brady* violations, Thompson instead sued, *inter alia*, the Orleans Parish District Attorney's Office, as well as Connick and some of the prosecuting ADAs in their official capacities under § 1983 for wrongful suppression of exculpatory evidence. At trial, the District Court found that the prosecuting ADAs were not "policymakers" and thus, their actions could not create liability under *Monell* on behalf of the DA's Office. It also ruled, and stated in the jury instructions, that the nondisclosure of the blood evidence and the resulting infringement of Thompson's right to testify in the murder trial violated his constitutional rights. Hence, the only liability issues that went to the jury were whether Connick's Office had an unconstitutional policy regarding production of *Brady* evidence and whether it adequately trained, monitored, and supervised its attorneys regarding their *Brady* obligations. The jury ultimately decided that Connick's Office did not have an official policy concerning *Brady* materials, but did fail to adequately train and supervise its Assistants, and brought back a $14,000,000 verdict against Connick in his official capacity. The Judge subsequently added more than $1 million in attorney's fees under 42 U.S.C.A. § 1988.

A unanimous panel of the Fifth Circuit affirmed the verdict. *Thompson v. Connick*, 553 F.3d 836 (5th Cir.2008). The Court rejected Connick's argument that Thompson was required to show a pattern of *Brady* violations to establish deliberate indifference, finding that the case fell into the narrow exception created by *City of Canton v. Harris,* 489 U.S. 378(1989) and *Board of the County Commissioners v. Brown,* 520 U.S. 397 (1997) and that "Thompson has met his burden of demonstrating that it was obvious that training about *Brady* was necessary and that a highly predictable consequence of failing to train attorneys about *Brady* was the infringement of the constitutional rights of those accused of crimes, such as Thompson." *Thompson v. Connick*, 553 F.3d at 854.The panel also rejected the argument that the prosecutor who admitted suppressing the blood report broke the chain of causation, and that the obvious exculpatory nature of the blood evidence made additional training irrelevant.

An evenly split Fifth Circuit, sitting en banc, affirmed. *Thompson v. Connick*, 578 F. 3d 293 (5th Cir. 2009) (en banc). The majority *per curiam* decision, in the main, adopted the panel decision. Chief Judge Jones and Judge Clements wrote dissenting opinions. Chief Judge Jones, citing 13 separate points from the Supreme Court's recent decision in *Van de Kamp,* argued that the same absolute prosecutorial immunity that individual prosecutors are afforded under *Imbler v. Pactman*, 424 U.S. 409 (1976) should be extended to municipalities such as the DA's Office. Judge Clement more specifically addressed the *Monell* failure to train claim. Arguing heightened *Monell* standards for proving deliberate indifference and causation, Judge Clement went on to discuss her view that the evidence did not meet these standards. Unlike the panel, Judge Clement further opined that a pattern of similar *Brady* violations was necessary to meet this highly specific standard, and that Thompson had failed to do so.

The Supreme Court granted certiorari on the *Monell* failure to train issue only. Justice Thomas wrote the opinion for the majority, in which he spent little time discussing the remarkable facts that underpinned Thompson's wrongful conviction, the specifics of the evidence that was suppressed at trial, the conduct of the team of prosecutors who suppressed it, or the body of evidence which the jury, the District Court, and the Court of Appeals each separately determined was sufficient to meet the rigorous standards set forth by the Supreme Court in *Canton v. Harris* and *Board of County Commissioners v. Brown* for proving municipal failure to train cases. Instead, the majority focused on whether Thompson had met his

burden on the determinative question of deliberate indifference.

In deciding that Thompson had not, the majority drew on language from the *Brown* decision to assert that "a pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference." *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011). Noting that Thompson did not show such a pattern, but rather relied on the "single incident liability that this Court hypothesized in *Canton*," the majority concluded that this principle could not be so ultilized by Thompson because the failure to train to prevent *Brady* violations did not fit the "narrow range of circumstances" contemplated in *Canton* for obviating the need to prove a pattern. 131 S. Ct. at 1361. In the majority's view, the specific hypothetical posed in *Canton*—the failure to train police officers about the constitutional limits on the use of deadly force—was in "stark contrast" to the specific failure to train prosecutors because "attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles." 131 S. Ct. at 1361, 1364. Hence, the majority, in reversing the jury's verdict, coldly concluded:

> The role of a prosecutor is to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Ibid. By their own admission, the prosecutors who tried Thompson's armed robbery case failed to carry out that responsibility. But the only issue before us is whether Connick, as the policymaker for the district attorney's office, was deliberately indifferent to the need to train the attorneys under his authority. We conclude that this case does not fall within the narrow range of "single-incident" liability hypothesized in Canton as a possible exception to the pattern of violations necessary to prove deliberate indifference in § 1983 actions alleging failure to train.

131 S. Ct. at 1365-66.

Justice Scalia, joined by Justice Alito, filed a concurring opinion admittedly devoted to attacking Justice Ginsburg's dissent. Justice Scalia agreed with the majority that the question presented for review was, "whether a municipality is liable for a single Brady violation by one of its prosecutors, even though no pattern or practice of prior violations put the municipality on notice of a need for specific training that would have prevented it." 131 S. Ct. at 1366. That question was a legal one, Justice Scalia continued, "whether a Brady violation presents one of those rare circumstances we hypothesized in Canton's footnote 10, in which the need for training in constitutional requirements is so obvious ex ante that the municipality's failure to provide that training amounts to deliberate indifference to constitutional violations." 131 S. Ct. at 1366. Deeming Justice Ginsburg's lengthy "evacuation" of the evidence amassed against Connick and his prosecutors as irrelevant, he dismissed all but one of the numerous serious *Brady* violations proven by Thompson, opined that "Brady mistakes are inevitable," and further concluded that the withholding of the blood evidence "was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson." 131 S. Ct. at 1368. Justice Scalia condemned the dissent's approach as an attempt to inject forbidden *respondeat superior* liability into § 1983 litigation, a result that the *Canton* and *Brown* pattern requirement was designed to avoid:

> These restrictions are indispensable because without them, "failure to train" would become a talismanic incantation producing municipal liability "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee"—which is what Monell rejects. . . . Worse, it would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs," thereby diminishing the autonomy of state and local governments.

131 S. Ct. at 1367.

Justice Ginsburg was joined by Justices Breyer, Sotomayor, and Kagan in a lengthy dissent which she read from the bench. Her sense of outrage and injustice was palpable:

> In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated on death row, before the truth came to light: He was innocent

> of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair. The Court holds that the Orleans Parish District Attorney's Office cannot be held liable, in a civil rights action under 42 U.S.C. § 1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant Brady violation, not a routine practice of giving short shrift to Brady's requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

131 S. Ct. at 1370.

The dissent then characterized the *Brady* violations in Thompson's case in a far different way than did Justices Thomas and Scalia:

> From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived Brady's compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to Brady was standard operating procedure at the District Attorney's Office.
>
> What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of Brady's disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.

131 S. Ct. at 1370.

The dissent also underscored the importance of there being a § 1983 remedy against municipalities for egregious, concealed *Brady* violations:

> But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, 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. Failure to train, this Court has said, can give rise to municipal liability under § 1983 "where the failure . . . amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). That standard is well met in this case.

131 S. Ct. at 1370-1371.

The dissent then proceeded to chronicle the history of suppression of evidence by no fewer than five prosecutors, including the third in command of Connick's office, over a 15-year period, that was discovered by a "serendipitous series of events," leading to Thompson's release five years later "having served more than 18 years in prison for crimes he did not commit." 131 S. Ct. at 1374, 1376. She then documented the wealth of evidence that demonstrated an abject failure to train by Connick and his office, including admissions by Connick and numerous of the prosecutors under his command, expert witness testimony by a former prosecutor, Connick's and his underlings' cavalier attitude toward *Brady* compliance, the fact that there was "slim to no" training, monitoring or supervisory guidance in *Brady* compliance, that Connick had once been indicted for failing to comply with *Brady*, that the Supreme Court case of *Kyles v.Whitley,* 514 U.S. 419 (1995), arose from a pattern of egregious *Brady* violations in New Orleans Parrish under Connick's leadership, as well as the pattern of suppression reflected in Thompson's case itself. In the dissent's view:

> In both quantity and quality, then, the evidence canvassed here was more than sufficient to warrant a jury determination that Connick and the prosecutors who served under him were not merely negligent regarding Brady. Rather, they

> were deliberately indifferent to what the law requires.

131 S. Ct. at 1381.

In conclusion, the dissent also took strong exception to the minimizing of evidence suppression by the majority, and its conclusion that it did not merit consideration under the *Canton* single incident exception:

> Brady, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant's fair trial right. (citations omitted) Vigilance in superintending prosecutors' attention to Brady's requirement is all the more important for this reason: A Brady violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out. Because the absence of the withheld evidence may result in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light.

131 S. Ct. at 1385.

Conclusion

For the past 35 years, the Supreme Court has consistently protected prosecutors by affording them absolute immunity except when they act like police officers during the earliest stages of an investigation. Most recently, the Roberts Court has expanded the breadth of this protection by rejecting attempts to hold supervisors and policymaking prosecutors liable for egregious prosecutorial misconduct that has lead to patently wrongful convictions, decades in prison, and a death sentence. This unwarranted protection has been afforded at a time when DNA testing and police and prosecutorial scandals definitively establish that there is, and has been, an epidemic of wrongful conviction cases that are fueled by undeterred prosecutorial misconduct.

In Illinois, which leads the country in exonerations for wrongful convictions, including of death row prisoners, and also is home to a longstanding police torture scandal that lead to scores of false confessions, former Cook County State's Attorneys Richard Daley and Richard Devine, who have been implicated in the torture scandal, and have been ultimately responsible for most of these wrongful convictions, have not been prosecuted or subjected to attorney discipline, have been cleared by a friendly Special Prosecutor, and have been dismissed from several § 1983 suits that named them as defendants. Likewise, none of the nearly 50 prosecutors who participated in taking the tortured confessions have been prosecuted or disciplined, and only one has been held to trial in a § 1983 case. In fact, there is only one known case in Illinois of prosecutors being criminally charged for prosecutorial misconduct in connection with a wrongful conviction, and they were ultimately acquitted.

It is therefore obvious that the major alternative protections against prosecutorial misconduct that have been offered by the Supreme Court as a rationale for granting prosecutors absolute immunity from § 1983 liability are entirely illusory. Given the proliferation of wrongful conviction cases across the country, and their undeniable connection to prosecutorial misconduct, the U.S. Supreme Court, both past and present, must shoulder a significant portion of blame for this systemic miscarriage of justice.

