No. _____

In The
Supreme Court of the United States

COUNTY OF GAGE, ET AL.,

Petitioners,

v.

JAMES DEAN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After twice reversing district-court judgments for Petitioners, the Eighth Circuit affirmed judgments of approximately 30 million dollars against them, finding that liability was supported under two substantive-due-process theories of liability applied to a 1989 murder investigation. Petitioners ask the Court to review:

I. Whether in 1989 a law-enforcement officer violated a plaintiff's substantive-due-process rights merely by recklessly gathering "unreliable" evidence implicating the plaintiff in a crime (1) even if the prosecutor and defense counsel had access to all information needed to assess the reliability of the evidence gathered; and (2) even if the evidence gathered was never used at a plaintiff's criminal trial because the plaintiff voluntarily pleaded to charges.

II. Whether in 1989 a law-enforcement officer violated a plaintiff's clearly established substantive-due-process right prohibiting the "manufacture of false evidence" by conducting an interview or interrogation during which false statements incriminating the plaintiff were made, even if the plaintiff voluntarily pleaded to charges.

III. Whether a county can be liable for the decision of a sheriff, as final policymaker, to fail to stop a multi-suspect investigation when (1) the jury found that the sheriff

QUESTIONS PRESENTED – Continued

was not responsible for any constitutional violation or any conspiracy; (2) the plaintiffs identified no municipal policy; and (3) there was no evidence of a historical pattern of constitutional violations.

PARTIES TO THE PROCEEDING

Petitioners are the Defendants below, Burdette Searcey, Wayne Price, Ph.D, and County of Gage, Nebraska.

Respondents are the Plaintiffs below, James L. Dean, Lois P. White as Personal Representative of the Estate of Joseph White, deceased, Kathleen A. Gonzalez, Thomas W. Winslow, Ada Joann Taylor, and Debra Shelden.

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PETITION FOR A WRIT OF CERTIORARI

Burdette Searcey, Wayne Price, Ph.D, and County of Gage, Nebraska petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

Opinions of the Eighth Circuit are reported at *Winslow v. Smith*, 696 F.3d 716 (8th Cir. 2012); *White v. Smith*, 696 F.3d 740 (8th Cir. 2012); *Dean v. Cty. of Gage, Nebraska*, 807 F.3d 931 (8th Cir. 2015); and *Dean v. Searcey*, 893 F.3d 504 (8th Cir. 2018). Relevant orders of the district court can be found at *Dean v. Smith*, 805 F. Supp. 2d 750 (D. Neb. 2011) and *Dean v. Cty. of Gage, Nebraska*, No. 4:09CV3144, 2016 WL 4621070 (D. Neb. Sept. 6, 2016) (unpublished decision).

JURISDICTION

The Eighth Circuit had jurisdiction under 28 U.S.C. § 1291. The Eighth Circuit denied *en banc* review on July 24, 2018. App. 365. Petitioners applied for and received an extension of time to file their Petition. Thus, Petitioners timely filed this Petition on November 14, 2018. *See* Sup. Ct. R. 13(1), (3). The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

> Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section,

> any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Overview of the claims and the parties

This lawsuit arises from the 1989 investigation of the murder of Helen Wilson and resulting criminal prosecutions.

Respondents—the Plaintiffs below—are six individuals convicted of offenses related to Wilson's murder, five after pleas and one, Joseph White, after a jury trial. App. 3; 304. Respondents filed Section 1983 actions after 2008 DNA testing implicated another person. App. 3; 354. After a long procedural history, a 2016 trial of their consolidated actions led to a nearly 30-million-dollar verdict against two law-enforcement officers and a rural Nebraska county. App. 4-5.

Petitioners are the Defendants against whom judgments were entered.[1] The individual Petitioners are two Deputy Sheriffs, Burdette Searcey and Wayne Price, Ph.D (collectively "the Officers"). The municipal Petitioner is Gage County, a political subdivision of Nebraska ("the County"). The sole theory of municipal liability at the 2016 trial rested on the acts or

[1] Respondents also sued the County Attorney for Gage County, Richard Smith, ("Prosecutor Smith") and several deputies who were dismissed earlier in litigation.

omissions of Sheriff Jerry DeWitt who the Eighth Circuit held acted as the County final policymaker for investigations and arrests. App. 57. DeWitt was also a defendant at the time of the 2016 trial, but the jury found for him on all claims. App. 9.

The investigation

Wilson was raped and murdered in 1985. App. 135. The Beatrice Police Department ("BPD") conducted the initial investigation. App. 135-138. During that investigation, BPD suspected Bruce Allen Smith—the same man ultimately implicated by 2008 DNA tests. App. 136. But BPD ruled him out as a suspect in 1985 based on an erroneous report from the Oklahoma City Police Laboratory. App. 136-137. BPD could not solve the Wilson murder. App. 145.

In January 1989, the Gage County Sheriff's Office reopened the investigation. App. 145-146. Searcey was the lead investigator. Price, a psychologist by training, played a limited role. He participated in only a few interviews, mostly at the request of Respondents' criminal-defense counsel. App. 134; 162-167; 182-183; 213-214; 222-224; 257-262; 264. DeWitt's role primarily consisted of administrative tasks. App. 134.

Searcey started his formal investigation by following up on initial leads. App. 147. This led Searcey to focus on Respondents White and JoAnn Taylor. App. 147-149. One of Taylor's acquaintances told Searcey that Taylor had confessed to being in Wilson's apartment during Wilson's murder. App. 147-148. The

acquaintance also told Searcey that she had seen White, Taylor, and Respondent Thomas Winslow driving in the area on the night of Wilson's murder. App. 148-149.

Respondents and the Eighth Circuit focus on inconsistencies between the first statements Searcey collected and the crime-scene evidence as demonstrating that the Officers should have known the evidence was false. App. 65-66; 142-143. But these statements—like most of the statements Respondents rely on—were recorded and made part of the investigation file. This file was available to Prosecutor Smith and to Respondents' criminal-defense attorneys. App. 290; 354. So was the crime-scene evidence that Respondents allege was inconsistent with these statements.

Early in his investigation, Searcey also spoke to Winslow. App. 149. During this initial interview, Winslow corroborated some information that Searcey had received about White and Taylor but denied his own involvement in Wilson's murder. App. 149. Soon after this interview, Prosecutor Smith arranged with Winslow's attorney (representing him on unrelated felony charges) to interview Winslow again under a grant of use immunity. App. 151-152. During this second interview, Winslow changed his statement, admitting that he had been in Wilson's apartment with White and Taylor on the night of Wilson's murder. App. 153-159.

Charges were filed and arrest warrants were executed for White and Taylor. App. 159; 162. North Carolina law enforcement arrested Taylor on a fugitive

warrant. App. 160. Shortly after, she gave a voluntary statement to North Carolina law enforcement admitting she was present when White and another unidentified male raped and murdered Wilson. App. 160-162.

Before leaving North Carolina, Searcey and BPD Officer Sam Stevens took a recorded statement from Taylor during which she again admitted her involvement. App. 167-181. After she arrived in Nebraska, Taylor again provided a recorded statement. App. 181-183. During this third statement, Taylor viewed a photo lineup and named Winslow as the previously unidentified male in Wilson's apartment. App. 181. Taylor then admitted that she had known it was Winslow all along but that she had been afraid to identify him. App. 182. Prosecutor Smith filed a complaint against Winslow for first-degree murder. App. 187.

Respondents and the Eighth Circuit identify several problems with Taylor's statements, emphasizing internal inconsistencies and inconsistencies between these statements and the crime-scene evidence. App. 68. They fault Searcey, and non-party BPD Officer Stevens, for using suggestive techniques when Taylor claimed inability to remember some details. App. 69-70. Taylor's statements were recorded and available in the investigation file. App. 354. Both the inconsistencies that Respondents identify and the interview techniques used were evident from those transcripts. They also emphasize that Taylor had a known mental illness and that Price, a psychologist, met with her and could have influenced her before she gave her third statement incriminating Winslow. App. 18-19. Taylor's

meeting with Price was at her request and Price obtained no additional incriminating information during that meeting. App. 183-184.

After White, Taylor, and Winslow were arrested, their blood was typed. App. 71; 189; *White v. Smith*, 696 F.3d 740, 746 n. 7 (8th Cir. 2012). The 1985 BPD crime-scene investigation had found Type O and Type B blood. Wilson herself had Type O blood. App. 137. The initial bloodwork obtained in 1989 showed that White (like Wilson) had Type O blood matching some blood found on the crime scene. But neither Winslow nor Taylor had the Type B blood found at the crime scene. App. 357-358. Though they had not identified a source of Type B blood, the investigators continued finding evidence implicating White, Taylor, and Winslow in Wilson's murder. App. 71-77.

After he reviewed the blood-typing results and the other evidence, Prosecutor Smith provided law enforcement with a list of tasks to complete. App. 189; 197. As the Officers completed these tasks, the remaining Respondents—Deborah Shelden, James Dean, and Kathy Gonzalez—were arrested one-by-one between April and May 1989.

Shelden's arrest came after she acknowledged during an interview that she was in Wilson's apartment the night of the murder and had traveled in a car with Winslow, White, and Taylor that evening. App. 203-206. The next day, Shelden gave another interview stating that Respondent Dean had also been present. App. 206-210. Shortly after these statements, Shelden's counsel arranged a plea deal; Shelden would

plead to aiding and abetting Wilson's murder. App. 213; 215-216. Shelden then gave another statement implicating Gonzalez in Wilson's murder. App. 254-255.

Respondents and the Eighth Circuit identify several inconsistencies in Shelden's statements and between these statements and other evidence. App. 16-17. They also allege that Searcey used suggestive-interview techniques to get Shelden to implicate Dean and Gonzalez. App. 80; 89; 91. Shelden's statements were recorded and available, along with the crime-scene evidence, as part of the investigative file. App. 290.

After Shelden implicated him, a warrant was issued for Dean's arrest. App. 210. Dean first denied involvement and provided false alibis. App. 73; 76; 212. He was promptly appointed counsel who requested that Dean take a polygraph. App. 328. Dean failed. App. 220. Dean's attorney then requested that Price and Prosecutor Smith accompany him to talk to Dean about the polygraph results. App. 222; 328. During this conversation, Price suggested that Dean may be blocking his memory of the events. App. 223-224. In the days after this meeting, Dean made a series of statements, all with his counsel present, acknowledging his involvement in Wilson's murder and implicating White, Taylor, Winslow, and Shelden. App. 75-77; 226-229; 244; 328-329. Dean's attorney then reached a plea deal with Prosecutor Smith, agreeing Dean would plead guilty to aiding and abetting Wilson's murder. App. 77; 245-248. Shortly after, Dean gave a recorded statement implicating Gonzalez. App. 253-254.

The Eighth Circuit points to inconsistencies in Dean's statements and between his statements and crime-scene evidence. App. 75. It also emphasizes that Price could have unduly influenced Dean by encouraging him to dream when Dean first denied involvement. App. 18; 76; 87. Yet all the statements in which Dean gave incriminating information were either recorded or written, were made part of the investigative file, and were given in the presence of his attorney after charges were filed. App. 226; 311; 326.

Based on the statements of Shelden and Dean, Gonzalez was arrested and charged in late May 1989. App. 255. Gonzalez, on advice of counsel, took and failed a polygraph. App. 311. Blood tests showed Gonzalez had Type B blood. App. 257.

While Gonzalez's blood-*type* matched, in reality there was a mismatch between her specific alleles and the sample from the crime scene. App. 17. But at the time, the significance of this was unclear, at least to the Nebraska State Patrol's forensic analyst, Dr. Reena Roy. At her September 1989 deposition, Roy testified that she could not exclude Gonzalez as the source of crime-scene blood. App. 263; 331. In 2016, Roy was allowed to testify, through the lens of hindsight, that the bloodwork *did* rule Gonzalez out as a suspect. But that is *not* how Roy testified in 1989. App. 263.

After Roy's deposition, Gonzalez entered into a plea agreement. App. 263; 299. The results of Gonzalez's bloodwork, including the indication of mismatched

alleles, were available to Gonzalez, her counsel, and all Respondents in 1989. App. 354.

All Respondents were promptly appointed counsel after arrest. App. 312. Everything that Respondents rely on to show the falsity of the evidence against them was known by or available to Respondents in 1989. App. 354.

Ultimately, all the Respondents except for White pleaded to charges related to Wilson's murder. App. 292; 300-302. None of the Respondents asserted their innocence during the plea colloquy. App. 215-216; 245-249; 292-293; 300-302.

Procedural history

White requested DNA testing under a Nebraska statute. The results of 2008 testing of specimens collected from the crime scene established that Wilson had been raped by Bruce Allen Smith, who had no known connection to Respondents. App. 108. White was granted a new trial, and the State of Nebraska decided to dismiss his charges. The other Respondents received pardons. App. 108.

Respondents then filed this lawsuit asserting several theories of liability. The district court dismissed Respondents' Fourth Amendment, Fifth Amendment, Sixth Amendment, and state-law claims. Respondents did not appeal. App. 86, n. 5. The district court granted summary judgment on Respondents' claims that their

pleas were not knowing and voluntary. The Eighth Circuit affirmed. App. 63.

This left only the substantive-due-process claims (for manufacture of false evidence and reckless investigation) and the conspiracy claim. App. 4. The Officers moved for summary-judgment on the substantive-due-process claims. App. 111. The district court granted this motion as to the Respondents who pleaded to charges. App. 111. Another district-court judge denied the motion as to White, who was proceeding separately. The Eighth Circuit reversed the grant of qualified immunity, finding that all Respondents could go forward on substantive-due-process theories of reckless investigation and manufacturing false evidence. App. 63.

The parties went to trial for the first time in 2014. This resulted in (1) judgment as a matter of law for the County and on the conspiracy claim; and (2) a mistrial. App. 42. A 2015 panel of the Eighth Circuit reversed the district court's grant of judgment as a matter of law to the County. App. 41. This panel determined that a Nebraska Sheriff is a county policymaker, and thus the County was responsible for constitutional violations that DeWitt affirmatively commanded occur. App. 54-59. This decision was based on the existence of a direct-liability claim against DeWitt and a conspiracy claim, both of which the 2016 jury rejected. App. 58-59.

On remand, the jury found for DeWitt on all claims and found no conspiracy existed. App. 5. Nonetheless, the jury found against the County. *Id.* The jury also returned verdicts against the Officers on some, but not

all, claims. *Id.* The Eighth Circuit affirmed the jury's verdicts and denied a timely filed petition for rehearing *en banc*. App. 365.

REASONS FOR GRANTING CERTIORARI

I. Review is warranted because the Eighth Circuit denied the Officers qualified immunity and affirmed a jury verdict based on a substantive-due-process theory of "reckless investigation" that other circuits have rejected and that was not clearly established in 1989.

In rejecting the Officers' qualified-immunity defense and affirming the nearly 30-million-dollar judgments against them based on a substantive-due-process theory of reckless investigation, the Eighth Circuit found that (1) reckless investigation is a viable theory of constitutional liability; *and* (2) the law on this theory was clearly established in 1989. App. 87. Both conclusions warrant this Court's review.

A. The Court should review the Eighth Circuit's conclusion that the law on "reckless investigation," as applied to the Officers' conduct, was clearly established in 1989.

The Eighth Circuit's holding that the law of "reckless investigation" was clearly established in 1989 departs from the precedent of lower courts around the

country and of this Court, both in methodology and in result. Methodologically, the Eighth Circuit strayed from this Court's oft repeated mandate that the qualified-immunity analysis must focus on what specific source of law put the defendant's conduct beyond debate at the time of the conduct. *See Reichle v. Howards*, 566 U.S. 658, 664 (2012). As to result, the Eighth Circuit split from several courts that have found no law clearly establishing a reckless-investigation cause of action.

The Eighth Circuit first recognized a constitutional cause of action for reckless investigation in *Wilson v. Lawrence County*, 260 F.3d 946, 956-57 (8th Cir. 2001), a case about a 1985 investigation The decision below relied heavily on *Wilson* in concluding that the law on reckless investigation was clearly established in 1989. App. 25; 86.[2]

The common methodological flaw running through both *Wilson* and the decision below is the Eighth Circuit's failure to identify any pre-1989 case law showing that the relevant principles of constitutional law were clearly established. The only cases that the Eighth Circuit has relied on to anchor a reckless-investigation claim in pre-1989 case law are *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Napue v. Illinois*, 360 U.S. 264

[2] While *Wilson* is the starting point for understanding the Eighth Circuit's approach to reckless investigation, notably the *Wilson* defendants made concessions relevant to the qualified-immunity analysis on reckless investigation. *Wilson*, 260 F.3d at 955. The decision below applied *Wilson* even though the Officers made no similar concessions. App. 25; 86.

(1959).[3] But these cases cannot provide clearly established law. This Court has repeatedly warned that "clearly established law should not be defined at a high level of generality . . . [but] must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548 (2017). Three considerations show why, under the *White* standard, *Brady* and *Napue* cannot provide the clearly established law.

First, both *Brady* and *Napue* were *prosecution* cases. The considerations relevant to claims against prosecutors are different than those relevant to claims against law enforcement. Courts confronting the issue have held that, even if an officer has *some* duty of pretrial disclosure, it is not the same duty applicable to prosecutors. The Fourth Circuit, sitting *en banc*, explained:

> The Brady duty is framed by the dictates of the adversary system and the prosecution's legal role therein. Legal terms of art define its bounds and limits. The prosecutor must ask such lawyer's questions as whether an item of evidence has "exculpatory" or "impeachment" value and whether such evidence is "material." It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it.

Jean v. Collins, 221 F.3d 656, 660 (4th Cir. 2000) (*en banc*). Thus, even if officers can be liable for *some*

[3] *See Wilson*, 260 F.3d 946.

conduct related to collection and preservation of evidence, the qualified-immunity analysis requires more than just assuming that law governing prosecutors also applies to officers. The contours of the law, as it applies to law enforcement, were not clearly established in 1989.

Second, both *Brady* and *Napue* involve *withholding* exculpatory evidence from a criminal defendant and his lawyer. There is no allegation that the Officers withheld *any* evidence. Instead, the theory is that the Officers recklessly *gathered* "unreliable" evidence. App. 32.

This difference (between gathering evidence and withholding evidence) matters. The heart of *Brady* and *Napue* is that withholding exculpatory evidence interferes with the effective function of the adversarial system. A cause of action for recklessly *gathering* unreliable evidence, absent accompanying allegations of withholding, does not serve the same purpose. Instead, this cause of action imposes an affirmative duty on law enforcement to evaluate the reliability of evidence before deciding whether to continue investigating. The result vastly expands law-enforcement liability. *See Grega v. Pettengill*, 123 F. Supp. 3d 517, 535 (D. Vt. 2015) (rejecting claim for reckless investigation as "essentially a malpractice standard based upon 'reckless' conduct" because it would be an "expansion of the range of government conduct that amounts to a violation of a criminal defendant's right to a fair trial in this circuit").

Third, because *Brady* and *Napue* rest on a fair-*trial* right, how they apply when a plaintiff pleads to charges was not clearly established in 1989. *See United States v. Ruiz*, 536 U.S. 622, 629 (2002) (holding that there is no *Brady* claim for failure to disclose impeachment evidence when a plaintiff pleads guilty). The Eighth Circuit fails to do an adequate qualified-immunity analysis because it does not consider how Respondents' pleas affect the applicability of *Brady* and *Napue*. In doing so, the Eighth Circuit departs from a recent *en banc* decision of the Fifth Circuit, *Alvarez v. City of Brownsville*, 904 F.3d 382 (5th Cir. 2018), as well as the decisions of other circuits. For example, the Sixth Circuit has held that qualified-immunity defeated a claim challenging the adequacy of an investigation when the plaintiff had pleaded to the charges. *Tinney v. Richland Cty.*, 678 F. App'x 362, 367 (6th Cir. 2017) (unpublished).

As a result of this methodological error, the Eighth Circuit recognizes as clearly established in 1989 a cause of action that other jurisdictions say is not clearly established even today. The Third Circuit has questioned whether reckless investigation is a viable theory, while concluding it was not clearly established in 2006. *Geness v. Cox*, 902 F.3d 344, 354 n. 5 (3d Cir. 2018). The Fifth Circuit has held that there is no free-standing constitutional claim based on a reckless investigation. *Hernandez v. Terrones*, 397 F. App'x 954 (5th Cir. 2011). District courts, too, have found the law

not clearly established on this claim.[4] The Court should resolve this split of authority.

B. The Court should review the Eighth Circuit's conclusion that there is a substantive-due-process cause of action for "reckless investigation."

Not only should the Court review whether the law on "reckless investigation" was clearly established in 1989, it should also review whether, even today, this is a viable cause of action under Section 1983. Two considerations show why the Court should review the reckless-investigation cause of action adopted by the Eighth Circuit.

First, the Eighth Circuit has imported the amorphous substantive-due-process analysis into an area properly governed by procedural amendments.

The Eighth Circuit's reckless-investigation framework allowed Respondents to invoke this substantive-due-process theory as a basis for recovering damages resulting from their criminal convictions. The jury was instructed to decide whether Respondents had recklessly gathered "unreliable" evidence during the investigation and, if they found in the affirmative, asked to award damages for the time that Respondents spent in prison before and after their convictions. This was permitted even though Respondents' pleas were found

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[4] *Grega v. Pettengill*, 123 F. Supp. 3d 517 (D. Vt. 2015); *Newton v. City of New York*, 566 F. Supp. 2d 256, 278 (S.D.N.Y. 2008) ("[T]here is no constitutional right to an adequate investigation.").

knowing and voluntary and their other procedural claims were found time barred or deficient. In other words, Respondents were challenging their arrests, detentions, or convictions (through pleas or, in one case, trial). Yet rather than invoke the procedural protections that govern each of these stages, Respondents were allowed to rely on an amorphous substantive-due-process analysis. App. 96-97.

Using substantive-due-process in this way—to breathe new life into procedural claims that are either substantively deficient or time barred—violates this Court's instruction in *Albright v. Oliver* that "where a particular Amendment provides an explicit textual source of constitutional protections against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive-due-process, must be the guide for analyzing those claims." 510 U.S. 266, 270-71 n. 4 (1994) (plurality opinion). In *Albright*, this Court rejected the contention that the initiation of criminal proceedings without probable cause violates substantive-due-process. *Albright* held that petitioner must look to the explicit text of the Fourth Amendment as a source of protection for the "particular sort of government behavior" at issue. *Id.*

Here, too, the Eighth Circuit's recognition of a substantive-due-process action for reckless investigation duplicates the remedy available from a procedural claim but under more amorphous and ambiguous terms. A claim related to arrest or detention must be analyzed as a Fourth Amendment claim. *See Manuel v. City of Joliet, Illinois*, 137 S. Ct. 911, 919 (2017) A claim

related to criminal conviction must be analyzed as a fair trial claim, with the analysis focusing on whether the law-enforcement officer took steps that interfered with the plaintiff's right to a fair trial, not by relying on an unanchored substantive-due-process framework. *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001); *Burke v. McDonald*, 572 F.3d 51, 58 (1st Cir. 2009).

These concerns are particularly pronounced as they relate to the five Respondents who pleaded to charges. Even if there *may* be circumstances so extreme that investigatory conduct renders a guilty plea involuntary, the Eighth Circuit expressly found that this was not the case here. Any "taint" from the investigatory conduct had dissipated, leaving the guilty pleas voluntary. App. 98-101. By nonetheless recognizing a cause of action for reckless investigation grounded in substantive-due-process, the Eighth Circuit created a sweeping new right.

The Eighth Circuit's application of substantive-due-process splits from the Seventh Circuit, which has rejected attempts to use general claims of substantive-due-process to displace more specific procedural claims. For example, in *Brooks v. City of Chicago*, the Seventh Circuit rejected plaintiff's attempts to rely on substantive-due-process to circumvent a barred Fourth Amendment claim:

> A plaintiff cannot state a due process claim by combining what are essentially claims for false arrest under the Fourth Amendment

> and state law malicious prosecution into a sort of hybrid substantive due process claim under the Fourteenth Amendment.

564 F.3d 830 (7th Cir. 2009). Other courts, too, have recognized that claims against law-enforcement officers related to criminal convictions must be analyzed as *procedural* fair-trial claims rather than substantive-due-process claims. *See Hernandez*, 397 F. App'x at 966.

Second, the Eighth Circuit has imposed unwarranted obligations on law-enforcement officers who gather evidence, requiring them to judge the reliability of that evidence. Not only is substantive-due-process the wrong framework to consider claims of investigatory misconduct, but there are also questions about whether *gathering* unreliable evidence violates Respondents' constitutional rights at all.

Merely gathering evidence—even if unreliable—has never been thought to independently violate the Constitution. The Eighth Circuit's recognition of the reckless-investigation cause of action changes that. By recognizing a right not to have law-enforcement officers ever *gather* unreliable evidence, the Eighth Circuit dramatically expands the scope of law-enforcement liability, departing from precedent in other lower courts, which have recognized that there is no right to be free from investigation or even prosecution. *See Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 814 (5th Cir. 2010) ("[T]here [is] no Fourteenth Amendment 'liberty interest' or substantive due process right to be free

from criminal prosecution unsupported by probable cause.")

There are good reasons not to regulate the *investigatory* process this way. Assessing reliability versus unreliability is not a matter within the province of law-enforcement, and collection of unreliable evidence does not itself violate the Constitution. *Yarris v. Cty. of Del.*, 465 F.3d 129, 143 (3d Cir. 2006). Indeed, even *use* of "unreliable" evidence usually does not violate the Constitution. *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012). Determination of whether evidence is reliable is, in most cases, a role for the jury. *Id.* In extreme cases, the Constitution requires that unreliable evidence be kept from the jury. But even then, the remedy is exclusion of the evidence, not liability for gathering it. "An improper investigation yielding unreliable evidence has its own remedy in the criminal justice system: suppression of the evidence at trial or reversal of a conviction based on the unreliable evidence." *Michaels v. New Jersey*, 50 F. Supp. 2d 353, 363 (D.N.J. 1999).

The Eighth Circuit's approach is also problematic because it holds officers responsible for determining the reliability of evidence given *all* information gathered, including that obtained well after the prosecution phase has started. While some courts have recognized—under a Fourth Amendment malicious-prosecution theory—that law-enforcement officers may have a duty to release detained inmates if information undermining probable cause becomes available *before*

prosecution starts,[5] the Eighth Circuit goes well beyond that, imposing a duty on law-enforcement officers to *stop* collecting information being used to prepare cases for criminal prosecution.

In evaluating claims that investigatory conduct caused a liberty deprivation, courts in other jurisdictions have not focused on the adequacy of the investigation or the reliability of evidence gathered. Instead, courts have focused on whether officers interfered with the function of the actors whose role it is to evaluate the evidence (jury, judge, defense counsel, prosecutors).[6] Without evidence that a law-enforcement officer interfered with the function of the adversarial system, deficiencies in the investigation are not constitutionally actionable. *See Alexander v. City of South Bend*, 433 F.3d 550, 555 (7th Cir. 2006) ("The Constitution does not require that police lineups, photo arrays, and witness interviews meet a particular standard of quality.")

The Eighth Circuit departs from this authority and, in doing so, expands the potential scope of law-enforcement liability for investigatory conduct. The Court should clarify the law on reckless investigation.

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[5] *See*, *e.g.*, *Nunez v. City of New York*, 735 F. App'x 756, 761 (2d Cir. 2018) (analyzing whether there was any evidence that officer "learned of any intervening facts between the arrest and initiation of prosecution").

[6] *See*, *e.g.*, *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018).

II. Review is warranted because the Eighth Circuit denied the Officers qualified immunity and affirmed a jury verdict based on generalizations about the "manufacture of false evidence" without identifying clearly established law in 1989 showing that the Officers' actions here amounted to manufacture of false evidence and without identifying actionable *use* of false evidence.

The Eighth Circuit also adopted a broad interpretation of a substantive-due-process cause of action for "manufacturing false evidence," applying it beyond what is supported by existing precedent.

In denying the Officers' qualified-immunity defenses, the Eighth Circuit rested on the premise that it is, of course, unconstitutional to "frame" a suspect. App. 26. But by invoking the "framing" label, the Eighth Circuit glossed over key legal issues. Even if "framing" were unconstitutional under clearly established law in 1989, the analysis cannot stop at this high level of generality. *See White*, 137 S. Ct. at 551 (collecting cases). Two questions remain: (1) what constituted "framing" or "manufacturing" evidence under clearly established law in 1989; and (2) did the Officers' specific conduct rise to that level?

Aside from misplaced focus on alleged inaccuracies in an arrest affidavit that cannot provide the basis for Respondents' substantive-due-process claims,[7] the

[7] The Eighth Circuit emphasizes that the arrest affidavit for White and Taylor contained some allegedly false statements. App.

only evidence allegedly "manufactured" here were statements given during investigatory interviews by Respondents implicating themselves and other Respondents in Wilson's murder. App. 20-22. To be clear, there is no allegation that the Officers fabricated the incriminating statements; Respondents *gave* these statements. Instead, the theory is that the Officers manufactured evidence because the Eighth Circuit concluded these statements were (in light of other evidence gathered during the investigation and the inconsistencies in the statements themselves) obviously false. App. 20-23.

Based on this, the Eighth Circuit concluded that it was appropriate for the jury to hold the Officers liable, under a substantive-due-process theory, for Respondents' criminal convictions and resulting imprisonment, even as to the five Respondents who entered voluntary pleas to charges related to Wilson's murder.

The Eighth Circuit's interpretation of this cause of action departs from relevant precedent in two ways:

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20. But this arrest affidavit cannot support the jury's verdict. The only *arguable* relevance of this affidavit would be to claims of White and Taylor under the *Fourth* Amendment. The district court found that those claims were time barred. App. 314. Moreover, the Eighth Circuit did not and could not find that, without the inaccurate statements, there would not have been probable cause for the arrests of White and Taylor. Existence of probable cause defeats a Fourth Amendment claim. *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *Hart v. O'Brien*, 127 F.3d 424, 442 (5th Cir. 1997).

1. It imposes novel substantive-due-process liability that limits the ability of a law-enforcement officer to conduct interviews or interrogations (even using constitutionally permissible techniques) because those interviews may produce false information;

2. It subjects a law-enforcement officer who obtained a false incriminating statement about a plaintiff to liability for all the consequences of the plaintiff's criminal conviction without requiring any showing that the officer interfered with the plaintiff's right to trial, and even when the plaintiff voluntarily pleaded to the charges.

Both departures expand the scope of law-enforcement liability in the Eighth Circuit. And they do so (1) under the guise of a nebulous substantive-due-process analysis; and (2) without proper consideration of qualified-immunity principles.

A. The Court should review whether, under clearly established law, an officer who obtains false statements through interviews or interrogations has "manufactured" those false statements.

Circuits are split on whether—under law clearly established in 1989—an officer who took a false statement during an interrogation thereby "manufactured" false evidence in violation of substantive-due-process

rights. According to the Eighth Circuit, the answer is yes, as long as a jury could conclude that, given all the other information gathered during the investigation, *som*e information given during the statement was obviously false. App. 20-25. But this is a broader definition of "manufacturing" than has been adopted in other circuits, and it is unsupported by any law clearly established in 1989.

Although other lower courts have recognized a manufacturing-false-evidence cause of action against officers and prosecutors, this cause of action has generally been limited to when a government-defendant has created evidence from whole cloth. *See*, *e.g.*, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129 (2d Cir. 1997).

Courts have split, however, on whether and when the cause of action can apply to an officer who has obtained information from a third party or whether, instead, claims related to interviews must be analyzed under separate legal frameworks.[8] The Eighth Circuit applied this cause of action to law-enforcement officers who obtained false testimony from independent parties during investigatory interviews. In doing so, it split from the Seventh Circuit, which has explicitly rejected any cause of action for manufacture of false evidence that would allow a 1983 plaintiff to transform either a coercion claim or a suggestiveness claim into a substantive-due-process claim for manufacture of

[8] *See*, *e.g.*, *Good v. Curtis*, 601 F.3d 393, 396 (5th Cir. 2010) (officer's conduct in intentionally using suggestive lineup to implicate a suspect falsely could sustain a manufacturing-false-evidence claim where the officer failed to disclose information).

false evidence. *See Petty v. City of Chicago*, 754 F.3d 416, 423 (7th Cir. 2014); *Stinson v. Gauger*, 799 F.3d 833, 843 (7th Cir. 2015) ("Sorting out reliable and unreliable evidence is an ordinary matter for trial, through the crucible of the adversary process, so the use of these suspect techniques doesn't violate due process unless the evidence is introduced at trial without adequate safeguards, such as disclosure of all material exculpatory evidence as required by Brady.")

The Court should resolve this split because the Eighth Circuit's approach distorts the existing legal framework that governs the use of statements obtained by law enforcement during an investigation. There is already law in place governing whether interview techniques are unduly suggestive or unduly coercive. But under the Eighth Circuit's approach, a plaintiff can evade these frameworks by invoking the label of "manufacturing" evidence.

Because it invoked the "manufacturing" label, the Eighth Circuit did not require a showing that any of the *techniques* used by the Officers were, themselves, unconstitutional—either under clearly established law in 1989 or even now. The Eighth Circuit made *general* comments that the Officers used suggestive techniques with some witnesses, but there was *no* analysis of whether the techniques used were *themselves unconstitutional*. Instead, the focus was on whether the statements obtained were inconsistent or in conflict with other evidence or otherwise unbelievable, even though *all* the statements and other evidence that created these alleged inconsistencies was equally

available to Prosecutor Smith, Respondents, and Respondents' attorneys.

By using the "manufacturing" framework, the Eighth Circuit has disclaimed any need to consider whether the particular interview or interrogation *techniques* that the Officers used were prohibited by clearly established law. Thus, by invoking the "manufacturing" label the Eighth Circuit sidestepped the qualified-immunity analysis that should have applied to the Officers' conduct. The Seventh Circuit has explicitly rejected such an approach, holding that even if there could be a substantive-due-process cause of action arising out of an interrogation, there would have to be a finding that the specific interrogations techniques were prohibited by clearly established law. *Phillips v. Allen*, 668 F.3d 912, 917 (7th Cir. 2012).

The closest that the Eighth Circuit gets to zeroing in on a specific *technique* was its repeated focus on evidence that Price, a psychologist by training, encouraged some Respondents to relax, telling them that blocked memories were most likely to resurface in a relaxed state. But there was no law in 1989 establishing that encouraging suspects to relax, or that involving a law-enforcement psychologist in custodial interviews, violated the Constitution. In other words, the unreliability of this type of evidence, and the impropriety of soliciting it, was not clearly established in 1989.[9]

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[9] *See*, *e.g.*, *People v. Hawkins*, 621 N.Y.S.2d 252, 210 A.D.2d 873 (1994) (identification through dream admissible).

As to Searcey, the Eighth Circuit relies only on *general* statements that he used suggestive or coercive techniques. But there simply is no showing that the *techniques* that Searcey used were anything but typical law-enforcement techniques. It is only by focusing on what it believes to be the *apparent* falsity of the statements taken that the Eighth Circuit concludes that Searcey violated the Constitution.

Applying the manufacturing-false-evidence cause of action in this way also violates the principle that substantive-due-process should apply to the conduct of executive officials only when this conduct shocks the conscience. Because the Eighth Circuit's manufacturing-of-false-evidence analysis focuses on the *results* of the criminal justice process, not the Officers' conduct, it improperly avoids analyzing whether the Officers' *conduct* shocked the conscience. Even assuming some egregious investigative interrogation techniques would shock the conscience, this does not justify imposing broad substantive-due-process liability on officers' use of common interview techniques. "For example, on the one hand, forcing an emetic down a person's throat to forcibly extract evidence from a suspect's stomach shocks the conscience, but on the other hand, lying to, threatening, or insulting a suspect does not." *See Fox v. Hayes*, 600 F.3d 819, 841 (7th Cir. 2010).

B. The Court should review whether a law-enforcement officer can be held responsible for the full consequences of a plaintiff's criminal conviction based on having obtained false incriminating information about that plaintiff during an investigation without a showing that the officer interfered with the plaintiff's right to a fair trial.

The Eighth Circuit's expansive interpretation of the manufacturing-false-evidence cause of action also conflicts with precedent—of other lower courts and of this Court—on when an officer's investigatory conduct can sustain a Section 1983 action.

Because it treated manufacturing of false evidence as a substantive-due-process cause of action, the Eighth Circuit allowed Respondents to recover *all* damages resulting from their criminal convictions based solely on a showing that the "manufacturing" occurred during the investigation. This creates a split of authority that warrants this Court's review.

Manufacturing false evidence does not, itself, violate the Constitution. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) ("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.") (Scalia, J., concurring). It is only some *uses* of false evidence that create a constitutional violation. *See*, *e.g.*, *Fields v. Wharrie*, 740 F.3d 1107, 1114 (7th Cir. 2014); *Wray v. City of New York*, 490 F.3d

189, 193 (2d Cir. 2007). The Eighth Circuit's focus on collection rather than use departs from precedent from other jurisdictions in two ways.

First, by focusing on collection, rather than use, the Eighth Circuit departs from precedent that requires accounting for the role of the criminal-justice system, and its procedural design and protections, when determining whether to hold a law-enforcement officer responsible for consequences resulting from the criminal-justice system.

A cause of action for manufacturing false evidence is, in essence, a challenge to the fairness at the procedural stage when the evidence was used. Because of the structural design of the criminal-justice system, courts have held that a law-enforcement officer only can be responsible for the results of a criminal conviction when the officer either (1) deceived the independent actors in the criminal-justice system; or (2) coerced those independent actors.[10] When the plaintiff seeks compensation for the plaintiff's conviction, this requires a showing that the officer interfered with the fair-trial rights of the plaintiff. Courts differ about whether this requirement is treated as part of the conduct that must be proven or whether it is part of the proximate-causation analysis. *Zahrey v. Coffey*, 221 F.3d 342, 350 (2d Cir. 2000) (collecting cases). The

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[10] *See*, *e.g.*, *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100 (1st Cir. 2013); *Alexander v. City of S. Bend*, 433 F.3d 550, 555 (7th Cir. 2006); *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989).

Eighth Circuit deepened the circuit split by treating such a showing as altogether unnecessary.

There is no evidence that the Officers deceived any justice-system actors about the truth or falsity of the statements obtained from Respondents, *or* about the techniques used to obtain those statements. Prosecutor Smith had access to all relevant evidence and decided whether to move forward with charges. App. 304. Nor is there evidence that Respondents or their counsel lacked any information necessary to impeach or discredit the statements in question. *See*, *e.g.*, App. 359. The Eighth Circuit's opinion rests on a novel premise that law-enforcement officers can be held liable for taking false statements, even if the facts showing that those statements are false are equally available to the prosecutor, the criminal defendant, and defense counsel.

Second, because it focused on obtaining, rather than using, false evidence, the Eighth Circuit split from other courts that have recognized that a Section 1983 plaintiff who has pleaded to charges cannot recover damages resulting from the plaintiff's criminal conviction without showing that the plea was not knowing and voluntary.

Although the Eighth Circuit found that Respondents' pleas were voluntary, it still allowed Respondents to recover all damages resulting from their criminal convictions based on their complaints about the investigatory conduct. App. 31.

This departs from the law in other jurisdictions, which recognizes that by entering a plea, a criminal defendant waives all rights connected to the criminal-trial process. *See*, *e.g.*, *Becker v. Kroll*, 494 F.3d 904, 924 (10th Cir. 2007). The Court should clarify whether a plaintiff who has freely and voluntarily pleaded to criminal charges but is later exonerated can bring a Section 1983 claim against law-enforcement officers arguing that, if the officers had never taken statements incriminating the subject, the subject would not have pleaded. App. 96.

III. Review is warranted because the Eighth Circuit affirmed, in departure from this Court's established precedent, jury verdicts against the County based on DeWitt's role as a final policymaker even though DeWitt had been exonerated by the jury of individual liability and conspiracy.

This case raises the important question of when municipal liability may be imposed based on the role of an exonerated final policymaker. The jury's verdicts were in favor of DeWitt, the only identified policymaker.[11] He was found to have no direct involvement in the claimed constitutional violations. The jury also

[11] The County has consistently maintained that a Nebraska sheriff is a policymaker for the state, not the County, under this Court's decision in *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997). The Eighth Circuit held to the contrary in its first 2015 decision, despite acknowledging that the County has no mechanism for exercising control over the sheriff. *Dean v. Cty. of Gage, Nebraska*, 800 F.3d 945, 955 (8th Cir. 2015).

found no conspiracy. Yet the jury found the County liability based on DeWitt's role.

In affirming the jury verdicts against the County under these circumstances, the Eighth Circuit eroded the prohibition of *respondeat superior* liability set forth in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) by expanding the narrow circumstances in which *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) allows for municipal liability based on an individual policymaker's decision. *First*, the culpability requirements set forth in 42 U.S.C. § 1983, and *County Comm'rs of Bryan County, Ok, v. Brown*, 520 U.S. 397 (1997) for municipal liability cannot be reconciled with the conspiracy verdicts. *Second*, there is no evidence of a causal link between DeWitt's actions and any constitutional violations. *Third*, after charges were filed, DeWitt did not have the final decision-making authority to stop the prosecution. *Pembaur*, 475 U.S. at 483 and *City of St. Louis v. Praprotnik*, 485 U.S.112, 123 (1988.) This Court's review is necessary to stop an impermissible expansion of municipal liability.

A. The verdicts bar a finding of culpability.

Because all the verdicts favored DeWitt, municipal liability cannot be based on DeWitt's direct involvement in any deprivation of rights. The path to municipal liability is severely restricted when the final policymaker is not directly involved with a deprivation of rights. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless

has *caused* an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the action of its employees." *Brown*, 520 U.S. at 405. Not only do the verdicts make direct-involvement liability unavailable, but the implications of the conspiracy verdict also limit the path toward finding sufficient culpability.

The verdict exonerating DeWitt of conspiracy means that he could not have knowingly agreed to or knowingly come to an understanding with the Officers to deprive Respondents of their rights. Given the boundary-less nature and ill-defined contours of the reckless investigation and manufacture of false evidence claims, there is no path available to find that DeWitt did not participate in a conspiracy to commit those violations, but that he still had the requisite culpability to impose municipal liability. The Eighth Circuit justified the verdicts by suggesting that the jury based County liability on DeWitt's policymaker/managerial role as opposed to his direct-investigative role. App. 10. Distinguishing between investigative and managerial functions may reconcile the County liability verdicts with the verdicts in favor of DeWitt on reckless investigation and manufacture of false evidence, but this distinction does not account for the conspiracy verdicts.

Because the conspiracy verdict means that DeWitt cannot have agreed to a constitutional violation, his managerial actions cannot have been made with sufficient culpability to support municipal liability. In

Praprotnik, this Court held that the failure to investigate decisions made by subordinates does not constitute policymaking. 485 U.S. at 130.

> Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy . . . But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where (as here) the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale.

Id. at 130.

The Eighth Circuit failed to reconcile the conspiracy verdicts with the municipal-liability requirement that there be deliberate indifference on the part of DeWitt to the known consequences of his actions. *Brown*, 520 U.S. at 405. If a *facially lawful* municipal action is alleged to have caused an employee to deprive a plaintiff of rights, then the plaintiff must prove that the municipal action was taken with deliberate indifference as to its known consequences. Given the verdicts in his favor, DeWitt's own actions must have been facially lawful. Thus, a showing of deliberate indifference is required for municipal liability. *Id.* at 407.

Because this is a single-incident case, not a pattern case, evidence that DeWitt should have known that the investigation was resulting in constitutional violations and thus should have intervened is not enough to show deliberate indifference. The reason a

sufficient pattern of past violations may create an exception to the general rule that inaction is not policymaking is that failure to respond to known violations can rise to the level of a deliberate decision. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) (plurality). But a single multi-suspect investigation cannot establish that DeWitt had enough knowledge that his failure to intervene constituted deliberate indifference, especially when the jury absolved DeWitt of a conspiracy.

The Eighth Circuit's failure to account for the conspiracy verdicts brings it out-of-step with the culpability requirements of *Monell*, *Praprotnik*, and *Brown*.

B. The Eighth Circuit failed to identify "managerial" conduct that satisfies applicable causation requirements.

Because the jury found DeWitt had no direct involvement in the deprivation of rights, the causation requirements are high. *Brown*, 520 U.S. at 411. The causal link between the "managerial" decision and the specific violation must be strong. It is not enough to identify conduct that can be attributable to the County, it must be proven that "through its *deliberate conduct*, the municipality was the 'moving force' behind the injury alleged." *Id.*, 520 U.S. at 404.

The Eighth Circuit suggested that the jury could have found DeWitt made policymaking decisions "by giving oxygen" to a stalled investigation or by allowing

interrogations to continue in spite of statements that contradicted crime scene evidence that could serve as causal links to Respondents' deprivation of rights. App. 11. These decisions do not establish a causal link because they were not the moving force behind the deprivation of rights. DeWitt's actions must have been the catalyst for the deprivation. It is insufficient for DeWitt's actions to be a "but for" or only a contributing factor. *Pembaur*, 475 U.S. at 482, n. 11; *Brown*, 520 U.S. at 410.

There is no evidence that DeWitt instructed the Officers to interview witnesses in a way that violated constitutional rights. Municipal liability cannot be based on DeWitt's knowledge about the interrogations if there is nothing unconstitutional about how those interrogations were conducted. There is no constitutional requirement that an interrogation must stop when a suspect's account does not match crime scene evidence. Nor is it a constitutional violation to advise suspects to relax or dream. Without a causal link between DeWitt's policymaking and a specific constitutional violation there can be no *Monell* liability. *Brown*, 520 U.S. at 404. And DeWitt cannot exhibit deliberate indifference to a constitutional right that has not been clearly established. *Brown*, 520 U.S. at 410-411; *Alvarez*, 904 F.3d at 391-392.

C. The decisions relied on by the Eighth Circuit were not in DeWitt's power, as final policymaker, to make at the time they were made.

The Eighth Circuit did not take into account at what point in the criminal process DeWitt was no longer the final policymaker. While *Pembaur* permits municipal liability based on a decision made by an individual policymaker, it limits such liability to circumstances in which the decision-maker has final authority. *Pembaur*, 475 U.S. at 481-483. After Prosecutor Smith filed criminal complaints against Respondents, DeWitt had no authority to dismiss charges against any Respondent or call a halt to the judicial process. Neb. Rev. Stat. §§ 29-1602, 23-1201(2) and 23-1710.

In its 2015 opinion, the Eighth Circuit held that County liability could not hinge on decisions made by Prosecutor Smith, as a final policymaker, because Prosecutor Smith took no action that violated the Constitution. App. 52-53; 103-104. Despite this, the period the jury considered went well beyond the investigative phase, when DeWitt had final policymaking authority. But in evaluating the County's liability, the Eighth Circuit failed to distinguish between investigative decisions for which DeWitt was the final policymaker and decisions only Prosecutor Smith could make, for example dismissal of charges.

The Eighth Circuit said the jury could have found municipal liability based on DeWitt's knowledge that

the blood evidence did not match the crime scene evidence when he approved arrests. App. 11. However, it is undisputed that Respondents' blood was not typed until after they were arrested and charges were filed. App. 16-17; 152-153; 159; 183; 189; 206; 210-211; 255-257. At the time Respondents' blood type became known, Prosecutor Smith was the final decision-maker on whether to continue with the prosecution.

The Eighth Circuit also held that the County could be liable because DeWitt "insulated and protected" the investigation from criticism by BPD Officer Stevens. App. 12. However, the events the Eighth Circuit points to regarding Stevens occurred at a meeting in the presence of Prosecutor Smith and after White, Taylor, and Winslow had all been charged. App. 195-197. DeWitt, as Sheriff, had no authority to remove Stevens, who was not a County employee, from the investigation. Only Prosecutor Smith could decide whether he would continue with the prosecution despite Stevens' criticism. And only Prosecutor Smith could decide whether he would continue to use the BPD for any additional investigation necessary for the prosecution.

The Eighth Circuit also ignored the difference between DeWitt's involvement in pre-charge interviews, when he acted as final policymaker, and post-charge interviews, when the prosecutor had final policymaking authority. Neb. Rev. Stat. §§ 23-1201(2), 23-1710; *Buckley*, 509 U.S. at 273-275. DeWitt sat in, along with Prosecutor Smith, on pretrial meetings with the Respondents and their attorneys, and other witnesses for purposes of trial preparation. App. 222-224; 226-228;

244-245; 262; 293. But municipal liability cannot be based on those meetings because DeWitt lacked the final authority to dismiss charges. *Pembaur*, 475 U.S. at 483.

In conclusion, because the jury exonerated DeWitt of direct involvement in any deprivation of Respondents' rights and of conspiracy, the path to municipal liability is extremely narrow. The Eighth Circuit erred in affirming the jury verdicts against the County on the basis that they were supported by DeWitt's actions in starting the investigation, allowing the investigation to continue, approving arrests, or allowing interrogation tactics. None of these actions invited or directed the officers to engage in unconstitutional action. Nor do they show that DeWitt had the specific knowledge that the Officers' conduct was unconstitutional. The verdicts against the County contravene *Monell*, *Pembaur*, *Praprotnik*, and *Brown*. The Court should review the Eighth Circuit decision, which impermissibly expands municipal liability.

CONCLUSION

Petitioners respectfully request that the Court grant certiorari.

Respectfully submitted,

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