

No. 18-648

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**

—◆—
REPLY BRIEF
—◆—

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ARGUMENT**I. By determining that the Officers violated Respondents' due-process rights under law that was clearly established in 1989, the Eighth Circuit split from authority in other jurisdictions in at least three ways.**

The Court should review the Eighth Circuit's decision that claims against Deputy Sheriffs Burdette Searcey and Wayne Price, PhD. (collectively "the Officers") for reckless investigation and manufacturing false evidence were (1) based on actual violations of Respondents' substantive-due-process rights; and (2) amounted to violations of constitutional law that was clearly established in 1989.

Respondents' arguments confirm that the decision below creates a split of authority warranting this Court's review. Echoing the Eighth Circuit, Respondents present the issue as the constitutionality of law-enforcement officers framing suspects in a murder investigation. They continue asserting that the Officers, along with other actors, engaged in a deliberate conspiracy to frame them. But qualified-immunity jurisprudence requires looking past labels. The jury rejected the conspiracy claim. Moreover, Respondents point to no *direct evidence* that the Officers believed Respondents were innocent or had bad-faith motives for targeting them. Instead, Respondents continue to rely on inconsistencies in the evidence and results of blood testing obtained late in the investigation. Based on this evidence, Respondents argue the Officers must

have, at some point, known they were innocent or were reckless in not knowing this.

Crucially, all these inconsistencies and the results of the blood testing were *equally available to the prosecutor, Respondents, and their attorneys*. Respondents point to *nothing* that the Officers hid or failed to disclose. Despite this, the Eighth Circuit held the Officers responsible for Respondents' criminal convictions, including the five resulting from pleas. This Court's review is critical because the Eighth Circuit's *reasoning*, and Respondents' attempts to defend it, confirm that the Eighth Circuit has split from its sister circuits on key questions about law-enforcement liability for investigatory conduct.

A. There is a split of authority on when, under the law as it was clearly established in 1989, investigatory conduct by law-enforcement officers causes a violation of a criminal defendant's conviction-related-due-process rights

The Eighth Circuit split from its sister circuits by holding that the Officers' investigatory conduct violated Respondents' conviction-related-due-process rights *without* requiring any evidence that the Officers interfered with independent actors in the criminal-justice system, either by misleading the prosecutor, withholding evidence, or exerting undue pressure.

In arguing that no split of authority exists on this issue, Respondents invoke the natural-and-probable-consequences doctrine. Respondents argue that, as long as evidence shows (under normal tort-causation principles) a link between the Officers' gathering evidence and the ultimate outcome, they have shown a due-process violation. There are two reasons this response is inadequate.

First, before analyzing causation of damages, there must be a finding that a defendant's conduct (actions with the requisite *mens rea*) violated the relevant constitutional provision under clearly established law.

The Eighth Circuit entrenched a split of authority by finding that a law-enforcement officer's investigatory conduct *itself* violates a criminal defendant's conviction-related-due-process rights. This is not a question of causation; it is a question of whether each Officer's actions were a violation of due-process rights under clearly established law. *See, e.g., Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007) (finding no constitutional violation where "Officer Weller's conduct, which later formed the basis of the constitutional deprivation, was not in itself a violation of Wray's constitutional rights" and there was no evidence that officer misled the prosecutor); *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012).

In support of its determination that the Officers' investigatory conduct did violate due-process rights, the Eighth Circuit relied on *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Napue v. Illinois*, 360 U.S. 264

(1959). But the Petition for Certiorari identifies three reasons why those cases cannot be used to show that the Officers' conduct was a violation of Respondents' conviction-related-due-process rights.¹

Respondents' attempt to identify other cases showing that the Officers' investigatory conduct violated conviction-related-due-process rights fails. Respondents' reliance on *Malley v. Briggs*, 475 U.S. 335, 345 (1986), an unlawful-arrest case, is misplaced. In *Malley*, there was no issue about what *conduct* implicated the Fourth Amendment; it was the officer's specific act of applying for an arrest warrant, allegedly without probable cause. Arresting is core activity governed by the Fourth Amendment's probable-cause standard. The same is true of Respondent's reliance on *Winfrey v. Rogers*, 901 F.3d 483, 491 (5th Cir. 2018), another Fourth Amendment case.

Indeed, *Malley* and *Winfrey* underscore why identification of *specific conduct* interfering with the criminal-justice system is necessary for a conviction-related-due-process claim against a law-enforcement officer. For a Fourth Amendment claim, the analysis is whether the officer had probable cause at the time the officer took some discrete step (search, seizure, arrest). By contrast, the Eighth Circuit's approach to the conviction-related-due-process claims against the Officers did not focus on each Officer's knowledge at the time when the Officer took a particular step that implicated a constitutional duty. Instead, the analysis

¹ Petition for Writ of Certiorari at 14-16.

focused on the overall investigation and the resulting convictions. But, unlike arrest, preparation of cases for trial after charges are filed is *not* a core law-enforcement function. The jury was presented with *all* of the inconsistencies in the evidence, including considerable evidence collected after most Respondents were arrested and charged. For example, the final results of the lab testing were a centerpiece of Respondents' case, but those results were not available until long after Respondents were arrested and charged and the prosecutor's office was preparing the cases for criminal prosecution. Applying a probable-cause-like analysis based on all evidence gathered in an investigation does not make sense when it is not tied to *specific* constitutionally regulated Officer conduct (e.g. arrest, search, seizure). How is the knowledge of each Officer at a particular point in time matched up with a step that the due-process clause required each Officer to take (or not to take), especially when considered in light of the role that the prosecutor and defense counsel play after charges are filed? Due process does not empower officers to substitute their judgment for the prosecutor's discretion to continue a prosecution.

Arguably, evidence that a law-enforcement officer misled a prosecutor, withheld material information from a prosecutor, or pressured a prosecutor is specific conduct that falls within the scope of the due-process clause. But the Eighth Circuit has created a circuit split by holding that due process allows for a wholesale evaluation of a law-enforcement investigation and prosecution even in the absence of such evidence. That

holding makes the investigatory activity *itself* the conduct that violates due process.

Second, even if Respondents *were* correct to treat this as a matter *only* of proximate cause (so that any investigatory conduct prior to a conviction could be analyzed under the due-process clause, even without an independent-conduct requirement), there would still be a split of authority for this Court to resolve regarding how the proximate-causation analysis works in a case like this.

None of the cases that Respondents cite support their argument that a straightforward natural-and-probable-consequence analysis applies to this case. Respondents rely on *Halsey v. Pfeiffer*, 750 F.3d 273, 289 (3d Cir. 2014), but in that case the Third Circuit specifically determined that the law-enforcement officers had actively lied to and misled the prosecutor, which is the hallmark feature absent in this case. *Id.* (“Their purported fabrication was double-edged: they told the prosecutor that Halsey had confessed even though he had not done so, and they included critical details in the confession to enhance its credibility in order to induce the prosecutor to proceed against Halsey.”) The same goes for *Jones v. City of Chicago*, where the Seventh Circuit specifically relied on evidence showing that the law-enforcement officers had deceived the prosecutor. 856 F.2d 985, 993 (7th Cir. 1988) (“But the jury could find that the defendants systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision whether to prosecute Jones

and whether (that decision having been made) to continue prosecuting him right up to and into the trial.”).

This Court, too, has recognized the unique features of the causation analysis when seeking to hold investigators responsible for criminal prosecutions. *See Hartman v. Moore*, 547 U.S. 250, 263 (2006) (“Moreover, to the factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor’s mind, there is an added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decision making.”).

To the extent that Respondents argue that the evidence in this case would satisfy this requirement—whether it is treated as one of conduct or causation—this argument fails. Respondents argue that it is enough that the Officers passed evidence along to Prosecutor Richard Smith *expecting* he would use it to secure a criminal conviction, despite its obvious falsity. But there are at least three reasons that Respondents cannot rely on that theory to argue that there is no circuit split. *First*, this is based on a theory of conspiracy the jury rejected. *Second*, it ignores the presumption of regularity afforded to prosecutors and improperly shifts the burden to law-enforcement officers to evaluate evidence and decide whether to move forward with a criminal conviction; the point of the case law outlined in the Petition for Certiorari is that merely passing along evidence is not enough. *Third*, this argument ignores the role of defense attorneys and the criminal-justice system; there is no evidence that either the

Officers or Prosecutor Smith hid or failed to disclose any material evidence.

B. There is a split of authority on whether a Section 1983 plaintiff whose criminal conviction resulted from a *voluntary* plea can bring a substantive-due-process challenge to investigatory conduct

As to five of the Respondents, the Eighth Circuit's opinion also entrenches a circuit split about how a *voluntary plea* to charges affects the ability of a Section 1983 plaintiff to bring a due-process claim arising out of investigatory conduct. Respondents again treat this as an issue of causation, invoking the natural-and-probable-consequences doctrine. This mischaracterizes the issue, which is whether the Officers violated the relevant constitutional right in the first place. Specifically, it is about whether the fair-trial rights discussed in *Brady* and *Napue*, which were the sources of law the Eighth Circuit relied on, apply when a Section 1983 plaintiff pleaded to the relevant charges.

Accordingly, Respondents' reliance on *Haring v. Prose*, 462 U.S. 306 (1983) is misplaced. The question in *Haring* was whether the plaintiff's plea in a criminal trial precluded the plaintiff from bringing a Fourth Amendment claim under Section 1983 for an unlawful search. *Haring* is distinguishable because the plaintiff's Fourth Amendment claim did not depend on a fair-trial right and plaintiff did not challenge the relationship between the search and the criminal

conviction. 462 U.S. at 322 (“The defendant’s rights under the Fourth Amendment are not among the trial rights that he necessarily waives when he knowingly and voluntarily pleads guilty.”).

Respondents do not address the relevant authority from this Court, *United States v. Ruiz* 536 U.S. 622, 629 (2002), where this Court held that *Brady* claims implicate trial rights and, therefore, are not viable when a plaintiff has pleaded to charges. The Eighth Circuit decision splits from other circuits that have interpreted *Ruiz* to stand for the proposition that Section 1983 conviction-related-due-process claims against law enforcement are not viable when the plaintiff pleaded to criminal charges. *See Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018) (en banc) (collecting cases). In denying qualified immunity to the Officers, it also split from authority in other jurisdictions that have held there is no clearly established law about how *Brady* obligations apply to law-enforcement conduct when a plaintiff pleads to criminal charges. *See, e.g., Robertson v. Lucas*, 753 F.3d 606, 621 (6th Cir. 2014).

C. There is a split of authority on whether conduct governed by procedural amendments can be repackaged as the basis for a substantive-due-process claim

The Eighth Circuit’s decision also entrenches a split of authority about whether conduct governed by procedural amendments can be repackaged as the

basis for a substantive-due-process claim. Respondents do not directly address this issue. Instead, in defense of the Eighth Circuit's decision below, they (1) continue invoking case law dealing with specific procedural amendments, *see, e.g., Haring*, 462 U.S. 306; and (2) continue citing case law from other jurisdictions specifically holding that substantive-due process is not the appropriate remedy. *See, e.g., Halsey*, 750 F.3d at 289.

To the extent that Respondents continue to challenge their arrests or post-arrest detentions, those are Fourth Amendment claims. The district court dismissed those claims, and Respondents did not appeal their dismissal. App. 314. To the extent that Respondents advance arguments about the voluntariness of their pleas and how the Officers' conduct influenced the voluntariness of their pleas, those are Fifth Amendment claims. The district court granted summary judgment on those claims, and the Eighth Circuit affirmed. App. 98-101.

Yet, the Eighth Circuit decision below allowed Respondents to take the same law-enforcement conduct governed by these amendments and repackage it collectively as a substantive-due-process claim. Respondents were allowed to do so even though they identified *no* deprivation of life, liberty, or property that was *not* the product of a portion of the criminal-justice process protected by a more specific procedural amendment. By allowing Respondents to repackage deficient or time-barred procedural claims into one claim under the guise of substantive due process, the Eighth Circuit

split from authority holding that substantive due process cannot provide an alternative avenue for challenging conduct governed by procedural amendments. *See, e.g., Brooks v. City of Chicago*, 564 F.3d 830 (7th Cir. 2009)

To the extent Respondents suggest that the Officers' investigatory conduct was *itself* so shocking to the conscience that it is an *independent* constitutional violation, the result is the same: a split of authority. Courts have held that there is no independent substantive-due-process claim arising out of investigatory conduct unless that conduct is, separate and apart from any result, shocking to the conscience and akin to the "rack and the screw." *See, e.g., Fox v. Hayes*, 600 F.3d 819, 841 (7th Cir. 2010) ("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."). Further, courts have recognized that *even* if a Section 1983 plaintiff could ground a substantive-due-process claim in investigatory conduct by a law-enforcement officer for some constitutional deprivation *not* governed by a more specific procedural amendment, the plaintiff would have to show that the *tactics* at issue themselves violated clearly established law. *Phillips v. Allen*, 668 F.3d 912, 917 (7th Cir. 2012). As explained in the Petition for Certiorari,² the Eighth Circuit did not require Respondents to

² Petition for Writ of Certiorari at 28-29.

show that any of the specific tactics used by the Officers violated clearly established law.

II. Review is warranted on the important issue of whether municipal liability can be based on a final-policymaker-decision when that final policymaker has been fully exonerated of individual liability and conspiracy.

The only theory of municipal liability tried was based upon policymaking by Sheriff DeWitt. The verdict in favor of DeWitt on conspiracy means that DeWitt did not knowingly agree to or knowingly come to an understanding with the Officers to deprive Respondents of constitutional rights. Respondents allege that the conspiracy verdict is irrelevant to DeWitt's supervisory role. DeWitt's knowledge about whether the investigation violated rights does not magically change between his individual capacity and supervisory role. The implication of such a difference in knowledge would be the same as applying *respondeat superior* to impose municipal liability. If DeWitt did not have knowledge in his individual capacity, the only way to find he had knowledge in his supervisory role would be to improperly impute employee knowledge to him.

Contrary to Respondents' argument that municipal liability is not based on DeWitt stopping the investigation, the Eighth Circuit specifically found that the investigation could have fizzled out without DeWitt's continued approval of arrests. App. 11. But even under this scenario DeWitt would have to know a constitutional

violation had taken place to justify municipal liability. No such finding can coexist with the verdict in favor of DeWitt on conspiracy.

Respondents continue to conflate prosecutorial and investigatory functions in assessing DeWitt's conduct as final policymaker. It was not until May 11, 1989, that the lab results were known, after five Respondents had already been charged and one Respondent had pleaded guilty. While DeWitt may have been aware that problems with the prosecution existed after May 11, 1989, it was not his decision to stop the prosecution. Nor was there evidence that DeWitt directed his Officers to go out and gather more evidence after May 11, 1989. It was Prosecutor Smith who requested further statements be taken from Sheldon and Dean in late May 1989. By then the prosecutor had met with the defense attorneys and their clients.

Respondents again rely upon *Malley* stating that municipal liability can be imposed based upon the natural consequences of DeWitt's actions. *Malley* does not set forth the causation basis for imposing municipal liability. Rigorous standards of culpability and causation are required to impose municipal liability. *County Comm'rs of Bryan County, OK v. Brown*, 520 U.S. 397, 405 (1997). The causation required to impose municipal liability is that DeWitt's actions were the moving force behind the deprivation of Respondents' rights. In light of the conspiracy verdict, none of DeWitt's actions meet the causation requirements.



CONCLUSION

Based on the foregoing arguments as well as those stated in the Petition for Writ of Certiorari, Petitioners respectfully request the Court grant the Writ.

Respectfully submitted,

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