

In the
Supreme Court of the United States

BRAD JENNINGS,

Petitioner,

v.

DANIEL F. NASH ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the doctrine of “opening the door” require the traditional Federal Rules of Evidence Rule 403 balancing of probative value versus prejudicial effect?
2. Should District Courts be permitted to refuse a request for an instruction for the jury to disregard a prohibited murder accusation against a Plaintiff?
3. Does the Eighth Circuit persist in failing to credit Plaintiffs with favorable facts at the summary judgment phase?

PARTIES TO THE PROCEEDINGS

Petitioner

- Brad Jennings

Respondents

- Daniel F. Nash
- James Michael Rackley
- Dallas County, Missouri
- George Knowles

LIST OF PROCEEDINGS

United States Court of Appeals for the Eighth Circuit
No. 20-1894

Jennings v. Nash, et al.

Date of Final Opinion and Judgment: May 21, 2021

Date of Rehearing Denial: July 19, 2021

United States District Court
Western District of Missouri

No. 6:18-3261-CV-S-WJE

Jennings v. Nash, et al.

The Trial Judgment Issued: February 27, 2020

New Trial Judgment Issued: July 20, 2020

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PETITION FOR A WRIT OF CERTIORARI

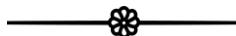
Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.



OPINIONS BELOW

The Eighth Circuit's decision (App.1a-5a) was not published, and is included in the appendix. *Jennings v. Nash*, 848 F. App'x 228 (8th Cir. 2021)

The district court's rulings are reported as follows: on summary judgment (sealed version: App.77a-149a) at (unsealed version) *Jennings v. Nash*, No. 6:18-CV-03261-NKL, 2020 WL 234678 (W.D. Mo. Jan. 15, 2020), aff'd, 848 F. App'x 228 (8th Cir. 2021), on motions in limine (App.33a-44a), included in appendix, unpublished; on new trial (App.10a-32a), included in appendix, unpublished.



JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Summary Judgment was granted on all counts but one against Sgt. Daniel F. Nash on January 15, 2020. Judgment was entered in favor of Sgt. Nash after a jury trial on February 27, 2020. A Motion for New Trial was timely filed on March 26, 2020. The Motion for New Trial was denied on April 23, 2020 and the clerk entered a judgment denying the

Motion on July 20, 2020. The case was timely filed in the Eighth Circuit Court of Appeals and they entered a judgment affirming the district court on May 21, 2021. A Motion for Extension of Time to file for Re-hearing was granted on June 1, 2021 and the Petition for Rehearing En Banc was denied on July 19, 2021. On October 8, 2021, this Court granted a timely requested extension of time to file the instant Petition for Writ of Certiorari until December 16, 2021.



STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 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

This Petition for Panel Rehearing and Rehearing En Banc arises from the Panel's decision to affirm the District Court Rulings on summary judgment and at trial in the underlying 42 U.S.C. 1983 suit brought by Petitioner.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 in that the case involved a federal question, having been brought pursuant to 42 U.S.C. § 1983. The Eighth Circuit Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner's suit was based upon his wrongful conviction for the death of his wife in 2006. His convictions were vacated in 2018 by the Missouri Courts based on a *Brady v. Maryland* 373 U.S. 83 (1963) violation, *i.e.* suppression of exculpatory gunshot residue results on the robe he was wearing when his wife died. (App.50a-74a) The Missouri Attorney General's Office declined to retry Petitioner.

The District Court granted summary judgment to:

- a) Defendants Former Sheriff Rackley and Nash on other alleged Brady violations and conspiracy and
- b) Defendant Knowles, Nash's supervisor, on a claim for failure to adequately supervise Sergeant Nash. (Sealed App.77a-149a)

Petitioner went to trial against Defendant Nash in February 2020 on one *Brady* count, the suppression of the exculpatory gunshot residue test Nash had

requested on Petitioner’s robe. A jury returned a verdict in favor of Nash.

Jennings appealed the grants of summary judgment and trial court rulings that clearly constitute reversible error. A three-judge panel of the Eighth Circuit affirmed the District Court’s summary judgment and evidentiary rulings in an unpublished per curiam opinion on May 21, 2021. The Eighth Circuit denied a timely filed Motion for Rehearing by the Panel and Rehearing En Banc.

A. Lisa Jennings Death Investigation, Conviction of Petitioner

Lisa Jennings (Lisa), wife of Petitioner Brad Jennings (Brad) died by gunshot in 2006. The death was ruled a suicide by local authorities, based on the fact that Lisa had a BAC of .152 and a positive gunshot residue (GSR) test on her dominant hand. A GSR test on Brad’s hands was negative. Deputy Scott Rice performed the GSR test and observed dried blood on Brad’s hands.

Lisa’s sister asked Defendant MSHP Sergeant Nash (Nash) to investigate. He contacted Defendant Former Dallas County Sheriff Rackley (Rackley). Rackley provided Nash with photographs and reports. Nash, who had not taken even the basic course in bloodstain pattern analysis (BPA), determined the death was a homicide based on one photograph of Lisa’s dominant hand. Nash and Rackley began a reopened joint investigation.

Rackley and Nash regularly met and discussed progress made and additional steps needed. Rackley helped make decisions and do interviews. He was present for anything “of substance” according to Nash.

Rackley was entitled to know all investigative steps including lab tests requested. He expected Nash to share test results with him.

Nash and Rackley executed a consent search at Jennings residence on March 26, 2007. Petitioner's black robe (worn the night Lisa died) was seized and they discussed sending it to the crime lab. Brad indicated he found Lisa's body and cradled her in his arms. Nash specifically requested that it be tested for bloodstains, DNA and gunshot residue. The robe had Lisa's blood on it and both were informed of this result which was provided to Petitioner pretrial and used as evidence against him.

On June 15, 2007 Gerhardt, lab technician, spoke with Nash on the phone and Nash again requested GSR testing on the robe. On June 21, 2007 Nash was at the crime lab for blood testing on the robe. Technician Wycoff noted "NWG (Gerhardt) had the items open and in the trace area for GSR exams, met with Nash who requested to watch stain ID to assist with his bloodstain pattern analysis." Blood/DNA results and GSR results were faxed on the same day, to the same number which Nash requested. The GSR result on the black robe was negative. Documents indicate that Gerhardt's fax successfully transmitted. Gerhart later indicated he gave Nash the results over the telephone. Nash admitted at one point that it is possible he discussed this with Gerhardt over the telephone, but he doesn't recall.

Nash did not provide these exculpatory GSR test results to the prosecutor.

Nash wrote a "Crime Scene Reconstruction Report." Rackley and Nash were aware that Lisa Jennings had a prior suicide attempt and a family history

of suicide. However, Nash's Report omitted any reference to Lisa's suicide history, a factor in determining suicide. Rackley was aware of that report and its contents. Rackley testified in habeas proceedings that a prior suicide attempt was pertinent. Nash's former supervisor Roger Renken testified would have expected Nash to document that in some way. Nash's other former supervisor, Defendant Knowles, testified that any prior suicide attempt was a risk factor when investigating suicides.

On July 26, 2007, Nash prepared a probable cause statement. It did not include Lisa's prior suicide attempt or the negative GSR results on Brad's robe. On July 27, 2007, a warrant was issued for Jennings' arrest. He was charged with murder and armed criminal action.

Brad's trial began in August, 2009. Nash was the key witness, testifying as to the bloodstain patterns. Nash misleadingly informed the jury that he was a "certified" BPA analyst. During closing, Petitioner's attorney questioned why the State had not tested the robe for GSR. Petitioner was found guilty of murder and armed criminal action and sentenced to twenty-five years in prison.

B. Habeas Proceedings and Release

The robe's exculpatory GSR was first discovered via sunshine act request by Petitioner's attorney in 2015. Based on these undisclosed GSR results, Petitioner filed a Petition for Writ of Habeas Corpus in Texas County, Missouri.

In February 2018, the Court granted the Writ. The Court found that the failure to disclose the GSR results was a material *Brady* violation. The Court reasoned

that the negative GSR result on the robe would have “substantially corroborated the inference of his innocence from the negative [GSR] on his hands.” The Court declared the evidence presented against Brad was “thin” and “circumstantial.” Non-disclosure of the GSR results was sufficient to undermine confidence in the verdict. The Court vacated Brad’s convictions. (App.50a-74a). The Missouri Attorney General declined to retry Petitioner for Lisa’s death.

C. Maddux and Rice Documents

Shortly before Petitioner’s habeas hearing he was, for the first time, provided Rackley’s documents regarding his investigator Scott Rice and witness Bridgette Maddux.

Nash interviewed Maddux, the teacher of Brad’s son, on May 3, 2007. Nash prepared a report containing his version of the Maddux interview which was turned over to the defense. Nash alleged statements from Maddux which disparaged Brad and suggested Rice was having an affair with Lisa. Maddux testified this statement is inaccurate, that Nash brought up the idea of an affair between Lisa and Scott Rice.

Nash indicated Maddux told him Brad was “rough”, “abusive”, “controlling” and that Lisa was going to leave him. Maddux testified she never made those statements about Petitioner.

In October 2007, Nash prepared a memo about an alleged conversation with Maddux two months earlier including an allegation that Maddux had complained to Nash that Rice was upset with her and had confronted her about the alleged rumor of an affair. (Sealed App.191a-192a). Maddux testified that this was false, that it was Rackley, not Rice who confronted her. She

testified that what she heard was “. . . that Rackley was trying to ruin Scott Rice’s life.”

Nash’s October 2007 memo to Rackley would form the basis for Rackley instituting disciplinary proceedings against Rice. It occurred during a time when Rackley was pressuring Rice to change his conclusion that Lisa committed suicide and accept Nash’s version. (Sealed App.173a-182a).

Maddux personally informed Rackley she had never filed a complaint against Rice, but testified later that she had complained about being harassed by Rackley.

In August 2007 Rackley requested MSHP investigate Rice over allegations that Scott Rice had an affair with Lisa. Rice was key in the initial determination of suicide. Defendant George Knowles, Nash’s supervisor, was copied on this request. (Sealed App.165a-166a). No evidence establishes an affair between Rice and Lisa.

In attempting to terminate Rice’s employment, Rackley told Rice that he had violated an order by confronting witness Maddux and had damaged relations with the Missouri State Highway Patrol by continuing to say that he would testify Lisa Jennings committed suicide. (Sealed App.174a-175a)

Rice responded to Rackley that based on his investigation he believed the death of Lisa Jennings was a suicide and that no evidence was ever shown to him that suggested anything different. He told Rackley he could not change his testimony. (Sealed App.180a).

Rice told both Nash and Rackley about Lisa’s suicide attempt, and her family history of suicide. Rice believed that Nash’s conclusion about the one-drop of

blood on Lisa's hand was not a valid reason to re-open the investigation and did not point to a murder.

D. Dallas County

As Sheriff of Dallas County, Rackley maintained written policies and procedures for the department. Rackley had the final say over policy Guidelines. Rackley's system for handling complaints about officers in his department would depend on who took the complaint, he said it would get to him eventually. Dallas County did not keep records reflecting the number of allegations against members of the Department over the past 15 years for constitutional violations.

E. Knowles

Defendant Knowles was Nash's supervisor during Nash's involvement in the Jennings case. He attended investigative meetings in the Jennings case. Knowles was aware Nash requested lab tests on clothing he seized.

Knowles and Nash have given conflicting testimony as to whether Knowles read all the reports in the Jennings case. Nash claims Knowles read all of the reports, while Knowles denies this.

Knowles admitted that he did nothing to make sure investigators were getting lab reports and were requesting all the right tests. There were no checks and balances to ensure lab reports get into the file and Knowles did nothing before 2016 to make sure this occurred. In 2007 Knowles did not require officers to prepare a report regarding lab results, although, Knowles admitted that regulations required a supplemental report be completed for each investigative activity.

Knowles has questioned whether Nash always complied with general orders to be truthful. Nash's previous supervisor, Mike Cooper, wrote an evaluation indicating that Nash omits relevant facts for his own benefit leading Cooper to mistrust Nash's reports. (Sealed App.150a-164a). Knowles claimed unawareness of this evaluation, but Cooper indicated they had many discussions about Nash and whether they made mistakes in managing him. Knowles never discussed the Cooper evaluation with Nash.

Knowles testified he is now concerned about Nash's ability to do bloodstain analysis in 2007 and questioned whether Nash misrepresented his training and experience to secure a conviction. Knowles did not believe that there were improper forensic science procedures going on under his supervision in 2007 but recent revelations make him question that.

Knowles took no extra steps to supervise Nash's cases in 2007 despite knowledge of "tumultuous events" in Nash's personal life. He received a complaint from the Taney County Sheriff that Nash investigated an officer involved shooting. He didn't believe that all the evidence was gathered. Knowles did not follow up on this. Knowles further acknowledged concerns of other county law enforcement officials about Nash. (Sealed App.150a)

As a supervisor Knowles acknowledged he was responsible for ensuring that each crime is adequately investigated and that he had to conduct performance evaluations. Knowles testified supervisors are obligated to prevent filing of improper charges and must ensure that officers act with diligence in identifying *Brady* material.

F. Civil Rights Suit, Civil Trial

Jennings filed suit in August 2018 alleging constitutional violations by Nash, Rackley, Dallas County and Knowles. The District Court granted summary judgment on all claims except for one *Brady* count against Nash for the suppression of the GSR test. (Sealed App.77a-149a).

Jury trial began February 18, 2020. The Court ruled on motions in limine that if Petitioner produced evidence that probable cause didn't exist for his arrest or argued that little to no evidence suggested that Plaintiff killed his wife then Nash would be allowed to rebut those claims. (App.33a-44a).

Early in the trial defense counsel repeatedly asked Plaintiff's expert psychologist whether Petitioner's PTSD symptoms could have been caused by "overwhelming guilt" from killing his wife. (T Vol. I, P120-133). Defense counsel explicitly stated the rationale for the questions as "... I think we can explore whether or not some of the things (symptoms) she has described and attributed to him are feelings of guilt for actually doing the crime." (T Vol I P127-128).

Kevin Zoellner prosecuted Petitioner in his underlying criminal case. Before his testimony Petitioner's counsel expressed concerns that he would use inflammatory language like the term "murder." (T Vol IV P 614-615). Defense counsel asked for a recess to inform Mr. Zoellner not to use that term and yet almost immediately upon testifying Zoellner referred to Lisa's death as a murder. (T. Vol. IV P. 616 Lines 23-25, P. 621 Lines 12-21, P. 713 Lines 8-16). The Court refused to instruct the jury to disregard the statement and Zoellner then went on to describe Lisa as having been "killed" on at least three more occasions. (T. Vol. IV P.

720 Lines 18-25, P. 721 1-8, Vol. IV P. 747 Lines 3-16, P. 750 Lines 14-25, P. 751 Lines 1-2).

In his closing argument Defense counsel reemphasized Nash's debunked bloodstain conclusions, said Petitioner's account of the night of Lisa's death was not "believable," and told jurors they could weight in their mind whether or not Petitioner was guilty of murdering his wife. (T. Vol. V, p. 979-980, 981, 983, 985-987)

Petitioner presented evidence that Nash received exculpatory GSR results from the crime lab before he prepared his probable cause statement, including that the lab technician, Gerhardt, telephoned, mailed and faxed the results to Nash per Nash's specific request, (T. Vol. III p. 484-487, 545, 584). Gerhardt also testified as to MSHP documents that he was doing his GSR analysis on the robe about the same time that Nash was present for blood testing on that robe, that Nash had actually requested GSR testing on the robe a second time after his initial request and that he had faxed the results to Nash at the number Nash requested. (T. Vol. III P477-478, 482-483, 489-499).

There was substantial evidence that Nash was known by supervisors and prosecutors for omitting relevant information from his reports for his own benefit, he had a reputation for dishonesty and that he lied under oath to get what he wanted. (See testimony of Michael Cooper, Penny Speake and George Knowles-Nash failed to correct in two separate performance evaluations the falsehood that he possessed a masters degree in forensic psychology) (T. Vol. II, p. 358-364, p.176-178, 788-790, Vol. V p. 944, 946, 947-949).



REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S RULING AND REASONING DEPARTS FROM THE GENERAL "OPENING THE DOOR" PRINCIPLES, PREVIOUSLY ESPoused BY THE EIGHTH AND OTHER CIRCUITS.

As noted in the Statement of the Case, Petitioner was convicted in the Missouri Circuit Court of murdering his wife. The conviction was almost exclusively dependent on the pseudo-expert testimony of the investigating officer, Defendant Dan Nash. His testimony at Petitioner's criminal trial was that his analysis of blood stain patterns depicted in crime scene photographs established that Lisa's death was not a suicide, but a homicide. Without that opinion the State could not have established the *corpus delicti* of a homicide.¹

Years later, Petitioner discovered that, during his investigation, Nash had seized Petitioner's bathrobe he was wearing when he wife died and requested it be tested for gunshot residue. (GSR). That test indicated a lack of gunshot residue on the bathrobe. This result

¹ It has never been disputed at any level of the proceedings subsequent to the criminal trial that Nash did not possess the necessary qualifications to give such an opinion. Unfortunately, Petitioner's defense counsel inexplicably and negligently failed to challenge Nash's qualifications. At the time of Nash's determination of homicide, he had not even taken a basic course in Bloodstain Pattern Analysis.

would have corroborated the negative GSR result on Petitioner's hands the night of the death.²

The Missouri Courts resoundingly rejected Nash's conduct and reversed Jennings' Murder conviction. Upon remand for a new trial, the State dismissed all charges based on the findings of a newly hired expert who opined that the bloodstains depicted crime scene photographs could not prove that a homicide occurred. Jennings then filed this Sec. 1983 action.

The district court, in a pre-trial order, ruled that because Nash had not disclosed any experts pursuant to Rule 26 requirements, no expert could testify on his behalf and, specifically that Nash would not be permitted to give his "expert" opinions regarding bloodstain pattern analysis. Strangely, though, the court ruled that if Jennings "opened the door" by presenting evidence of lack of probable cause, Nash would be entitled to rebut that evidence. However, the trial court ruled that, because Jennings is presumed innocent, he could permissibly state to the jury that he was "innocent."

At the trial in February 2020, Petitioner presented evidence of materiality of the suppressed gunshot residue test, bad faith on the part of Defendant Nash and stated that he was innocent of murdering his wife. Although no evidence of "lack of probable cause" was introduced by Petitioner, the District Court and the Appellate Court have held that Petitioner "opened the door" to the following:

² Lisa Jennings' right (dominant) hand tested positive for GSR, suggesting suicide, a conclusion reached by local authorities, but subsequently rejected by Missouri Highway Patrol detective Nash after he became involved.

- 1) The criminal prosecutor's opinion that he had probable cause to charge Petitioner with murder.
- 2) Repeated and improper questioning of Petitioner's damages expert as to whether his post-traumatic stress disorder could have been caused by guilt from killing his wife

The District Court then proceeded to commit further error and compound the prejudice from the former errors by refusing to instruct the jury to disregard the criminal prosecutor's opinion that the death of Lisa Jennings was a murder.

Although it is rare for this Court to accept Certiorari on the basis of a Court's evidentiary rulings, this case presents a particularly egregious, comprehensive and flagrant disregard of evidentiary requirements, especially in regard to the unwarranted freedom given to the Defendant Nash in presenting highly improper expert testimony on an issue, probable cause to arrest, which was not properly before the court, was not an element of the claim to be tried and which never should have been presented to the jury.

The Eighth Circuit's evidentiary decisions regarding "opening the door" in the instant case signal an alarming departure from its own precedent and that of other circuits. Although the Court of Appeals cited to its own precedent, *Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 981 (8th Cir. 2014), it proposed and employed an entirely different standard and split itself from other Circuits. This is an evidentiary issue that could cause significant confusion going forward.

The "opening the door" principle of admissibility allows a party to introduce otherwise inadmissible

evidence “when the opposing party has introduced inadmissible evidence on the same issue.” *United States v. Kaiser*, 609 F.3d 556, 572 (2d Cir. 2010). This Court acknowledged the doctrine, saying, “The doctrine’s soundness depends on the specific situation in which it is used and calls for an exercise of judicial discretion.” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 177 (1988).

The extent to which otherwise inadmissible evidence is permitted must correspond to the unfair prejudice created. Further, the trial court must also weigh the need for and value of the rebuttal evidence against the potential for undue delay, confusion, and prejudice. Federal Rule of Evidence 403; *Manuel v. City of Chicago*, 335 F.3d 592, 597 (7th Cir. 2003). *Bearint ex rel. Bearint v. Dorell Juv. Grp., Inc.*, 389 F.3d 1339, 1349 (11th Cir. 2004) *See also: Tambourine Comercio Internacional SA v. Solowsky*, 312 F. App’x 263, 289 (11th Cir. 2009).

Door opening is an incredibly limited doctrine that must be carefully applied to each piece of evidence. *See: Tambourine, supra, United States v. Bursey*, 85 F.3d 293, 296 (7th Cir. 1996). The doctrine of opening the door cannot “be subverted into a rule for injection of prejudice.” *United States v. Brumfield*, 686 F.3d 960, 964 (8th Cir. 2012)

The Tenth and numerous other Circuits have held that the doctrine of curative admissibility is “dangerously prone to overuse” and found it is “is limited to the prevention of prejudice and used ‘only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . .’” *United States v. Morales-Quinones*, 812 F.2d 604, 610 (10th Cir. 1987) *See also: United States v. Brown*, 921

F.2d 1304, 1307 (D.C. Cir. 1990), *Manuel v. City of Chicago, supra, Bearint, supra, Elledge v. Bacharach Instrument Co.*, 974 F.2d 1338 (6th Cir. 1992)

The logic of the Eighth Circuit here is dangerous because the trial court nor the panel attempted to weigh the probative value versus the prejudicial effect of any of the inflammatory “rebuttal” evidence allowed in. The opinion is devoid of any indication that the Court engaged in this required analysis.

Instead, and contrary to the limited principle of “door opening,” the Eighth Circuit has espoused a new analysis in the instant case: requiring no analysis, a blanket “open the door” theory. By doing away with the requirement to weigh the evidence, the Court promulgates a new legal standard which is contrary to the above legal precedent and the specific requirements of the Rules 403 and 303, Federal Rules of Evidence.

This cannot be allowed to stand. The District Court and the Eighth Circuit’s decisions have opened the floodgates indiscriminately. District Court’s will no longer be required to fulfill their evidentiary duties. The real danger of the Appellate decision in the instant case, is the very real possibility that it is the beginning of the Eighth Circuit beginning to significantly broaden the doctrine of door opening, or, curative admissibility.

This decision could serve as precedent for allowing, blanket, across the board, “rebuttal” evidence without the necessity of weighing probative value against prejudice or requiring a direct link.

Here, the prejudice is acutely manifested in the trial court’s allowance of (and the Eighth Circuit’s

approval of the otherwise inadmissible and severely inflammatory propensity evidence that Jennings was guilty of a murder which Defendant Nash had no way to legitimately prove had even occurred. This was explicitly acknowledged by the State of Missouri when it *nolle prossed* murder charges against Petitioner because it had no way to prove that a homicide had occurred. Yet the jury in the case at hand was given free-reign to consider that Jennings was guilty of a murder which never occurred.

A. The Prosecutor's Probable Cause Opinion Testimony

The Eighth Circuit affirmed the District Court's decision to allow Prosecutor Zoellner's opinion testimony that he had probable cause to charge Jennings, arguing that Petitioner "opened the door" by making probable cause a "central issue." This logic is flawed and creates a dangerous new precedent.

Probable cause was not relevant. Probable cause was not an issue in the case nor was it an element of the single claim to be decided by the jury, *i.e.* bad faith suppression of exculpatory evidence. Jennings never argued the lack of probable cause to arrest nor did he elicit any testimony which could conceivably have opened the door to evidence that there was probable cause to charge him.

The door cannot be opened to inadmissible evidence by using admissible evidence. *See: Elledge v. Bacharach Instrument Co.*, 974 F.2d 1338 (6th Cir. 1992): . . . the "opening the door" doctrine did not apply . . . plaintiffs did not introduce evidence that was inadmissible or irrelevant . . . Therefore, there was no door opened through which defendant could enter to

introduce the evidence.” *See also: United States v. Kaiser, supra* at 572 (2d Cir. 2010).

Here the Appellate Court erroneously ruled that Petitioner opened the door to inadmissible evidence of guilt and alleged probable cause to arrest by presenting a) evidence of materiality and bad faith, which were requisite elements of his claim that Nash violated his due process rights under *Brady* and b) by suggesting that the death was a suicide.³

The logic of the Eighth Circuit here is dangerous because the district court nor the panel attempted to weigh the probative value versus the prejudicial effect of a prosecutor’s opinion testimony, as has been a prerequisite. *Bennett v. R & L Carriers Shared Servs., LLC*, 744 F. Supp. 2d 494, 540 (E.D. Va. 2010), aff’d, 492 F. App’x 315 (4th Cir. 2012), *Manuel v. City of Chicago*, (7th Cir. 2003), *supra*. The Court allowed this opinion testimony under a blanket “open the door” theory.

The prejudice resulting from allowing the trial court’s allowance of the criminal prosecutor to give his opinion as to probable cause to charge Petitioner was manifold and egregious. The probable cause testimony was improper even if only for the simple reason that Defendant Nash made no Rule 26 expert disclosures.

Prejudice is even greater where, as here, the witness is a prosecuting attorney. A prosecutor’s opinion has undue influence on a jury. *Newlon v. Armentrout* 885 F.2d 1328, 1336 (8th Cir. 1989). The prosecutor’s opinion, “carries with it the imprimatur of the Gov-

³ The trial court ruled before trial that Petitioner was entitled to inform the jury that he was innocent, referring to the death as a suicide is tantamount to that

ernment and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18–19, (1985).

In a malicious prosecution case in the Eastern District of Virginia, the Fourth Circuit affirmed the trial Court's decision to exclude the testimony of the prosecutor about her basis for prosecuting the Plaintiff. All parties in that case agreed that she would not be able to give an "opinion" as to probable cause, as Zoellner was permitted to do in the instant case. However, the District Court excluded her from testifying to the basis for charges because,

... the Defendants had not designated Melissa Hoy as an "expert," yet her expertise is making probable cause determinations and prosecuting crimes. The likelihood of juror confusion and prejudice far outweighed the probative value of the testimony, and it is within the Court's discretion to admit evidence following an appropriate Rule 403 balancing. This balancing favored the testimony's exclusion.

Bennett, supra at 479 (4th Cir. 2012)

The Fourth Circuit also affirmed that district courts are charged with "prevent[ing] jurors from giving undue weight to . . . lay [opinion] testimony." *Bennett, supra* at 539 (4th Cir. 2012) Citing: *United States v. Baptiste*, 596 F.3d 214, 225 (4th Cir. 2010).

Here, similarly, Mr. Zoellner was not designated as an expert, and yet was giving his lay opinion as to probable cause charges against Petitioner. The testimony should have been excluded as it was in *Bennett*.

Thus, even if the door had been opened, the prosecutor's opinion testimony was an inflammatory and disproportionate way to rebut it. *See: United States v. Brown, supra* at 1307 (D.C. Cir. 1990), citing: *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971), "Even if defense counsel had opened the door . . . it does not follow that all subsequent evidence is admissible. As this court has long recognized: Opening the door is one thing. But what comes through the door is another." (internal quotations omitted). *See also: Bursey*, (7th Cir. 1996) *supra*, "The Rules of Evidence do not simply evaporate when one party opens the door on an issue."

Here, a prosecutor's opinion does not rebut evidence of innocence. Mr. Zoellner's opinion on probable cause to charge Petitioner was just that, an opinion. The Missouri Attorney General's Office chose not to retry Petitioner because, without the discredited blood-stain opinions of Defendant Nash, they could not prove a homicide had taken place.⁴ Therefore, Mr. Zoellner's opinion had no basis and did not actually rebut any evidence of innocence offered. The opinion of Assistant Attorney General Zoellner did not make it any more likely that a homicide occurred.

The Court of Appeals and District court ignored the vitally important Federal Rule of Evidence 403 requirement previously employed by the Eighth and Other Circuits, seemingly creating a new standard for "opening the door" in the Eighth Circuit that requires no balancing or analysis of the evidence offered

⁴ Although it should have been prohibited, the District Court also allowed Defendant Nash to testify as to his discredited bloodstain conclusions, further adding to the prejudice experienced by Petitioner.

to rebut. If allowed to stand this would create a new standard by which analysis of individual evidence nor balancing is required in the Eighth Circuit. There is no direct link between what the trial court ruled opened the door and the opinion of a prosecutor that there was probable cause to charge Petitioner with a crime. The two are entirely disproportionate.

The Eighth Circuit previously found in *White v. McKinley*, 605 F.3d 525, 538 (8th Cir. 2010) that the prosecutor's belief that the Plaintiff was guilty was not relevant to whether an officer withheld evidence in bad faith. The Court of Appeals upheld the trial court's refusal to allow the criminal prosecutor to testify regarding the strength of the criminal investigation and the probable cause to arrest Mr. White.

In *Holmes v. Slay*, 895 F.3d 993 (8th Cir. 2018) the Court of Appeals affirmed a 1983 judgment in favor of the plaintiff. Holmes had been convicted of drug conspiracy on the basis of the testimony of the defendant St. Louis narcotics officers. Those officers were later discredited to the point that a new trial was granted to Holmes at which he was acquitted. At the civil rights trial the trial court refused to allow the defendants to testify about their probable cause to arrest Holmes. In upholding the trial court's ruling the 8th Circuit, in an opinion particularly apposite to the case at hand, held that:

... (in a 1983 case) plaintiff is required to prove that a defendant's conduct violated his civil rights. Holmes (the Plaintiff) had the burden of proving the elements of each claim against each officer, which placed the focus squarely on Garrett's and Sharp's (the arresting officers), not Holmes' conduct. The officers'

strongest argument for admissibility is that Holmes' claims rested on the theory that he did not commit the crimes of which he was accused, and that the disputed evidence shows instead that he likely did. But that reasoning supports the admission of this evidence for just the type of propensity purpose that Rule 404(b) prohibits, *i.e.* to show that because Holmes sold drugs in the past, he had the propensity to do so again. And the officers offer no reason why the disputed evidence was relevant to their own conduct."

Holmes at 999, 1000.

Here, the thrust of Nash's repeated suggestions that Petitioner was guilty was prohibited propensity and character evidence under Federal Rule of Evidence Rule 404(b). Without any proof that a homicide had occurred, *i.e.* that his wife died as a result of the actions of another, the evidence was nothing more than improper bad character evidence. That it pervaded the trial and was, with few exceptions, condoned by the trial judge (and ultimately by the Eighth Circuit) made the prejudice even greater and the failure to properly weigh the evidence even more shocking.

B. The District Court's Decision to Allow Defendant Nash's Counsel to Ask Petitioner's Damages Experts 6 Times Whether or Not His PTSD Could Have Been Caused by Overwhelming Guilt for Having Killed His Wife.

The Court of Appeals sanctioned another incredibly disproportionate and dangerous line of questioning under its "blanket open the door doctrine". The opinion

did not even address the repeated and unacceptable questioning of Jennings damages expert as to whether his PTSD could have been caused by guilt for having killed his wife. Nash was allowed to ask Dr. Weaver this question, 6 times and over the repeated objections of Petitioner's counsel. The prejudicial nature of this questioning was displayed when Dr. Weaver was asked the same question a 7th time, by a juror. (T.126, 127, 131, 132, 133 (twice), 138. App.76a).

The Eighth Circuit's order simply and cavalierly addresses these serious concerns by holding that, "For the remaining challenges, we agree with the reasoning of the magistrate judge, who addressed them all in an order denying Jennings's motion for anew (sic) trial."

This line of questioning should have been prohibited based on the above stated principles of opening the door and the Federal Rules of Evidence Rules 403 and 404B because:

- a) The questioning was irrelevant. Dr. Weaver was assessing the psychological impact of Jennings incarceration. The Missouri Courts had already determined that his incarceration and convictions were wrongful. Her opinions had nothing to do with innocence or guilt but the psychological impact of his incarceration. Suggestions about "overwhelming guilt" did not rebut her opinions or the presumptions underlying them.
- b) The only testimony elicited on direct examination regarding the night Lisa Jennings died was background information given to Weaver during her psychological assessment of Jennings and did not factor into her analy-

sis. She made clear at several points that her analysis was focused on Jennings psychological functioning, not a fact-finding comparison. (T. 118, 121, 124). Therefore, under the principles of opening the door, there was no information elicited on direct that opened the door to rebuttal with accusations of murder.

- c) Even if there was confusion about the role this background information played in her analysis the issue was already cleared up by counsel for Nash at two different points where he pointed out that the narrative by an interviewer in the sentencing assessment of Jennings from 2009 differed from his account of the facts to her. She clarified both times that her focus was to look at the psychological impact of his incarceration.
- d) Even if Nash was allowed to rebut the background interview Petitioner gave to Weaver, the questions went too far, moving beyond remedying the implication on direct. The issue of the role the background played in her analysis, or that the State had disputed Jennings version of events was cleared up by counsel for Nash several times (T.118, T.121) before he began asking about overwhelming guilt. Counsel for Nash all but admitted that his questioning had gone beyond rebuttal, beyond gone any point to which the door may have been opened,

MR. JAMES: . . . I think I can explore whether or not some of the things that she's described and attributed to him are

feelings of guilt for actually doing the crime. (T.127)

- e) There was no analysis, as required by the principles of opening the door, of the probative value versus prejudicial effect of this line of questioning. There was no real probative value and certainly none that could outweigh the extreme prejudice of a murder accusation. Neither Defendant Nash nor the State of Missouri had any ability to prove that a homicide occurred.

C. The Lack of Foundation, *Corpus Delicti*

This raises a foundation issue. The State dismissed charges against Petitioner because they could not prove a homicide had occurred. Nash's unfounded bloodstain analysis, the sole basis upon which Petitioner was convicted of murder, was discredited by their own expert. The State admitted at trial they could not prove a homicide (T.622), contrary to the requirement that the state, in a murder case, must prove the death was neither self-inflicted nor by natural causes or accident.⁵ *State v. Priest*, 660 S.W.2d 300 (Mo.App. W.D. 1983)

Nash should not have been allowed to throw the grenade of a murder accusation into cross examination of a damages witness when he could not even prove a homicide took place. This abhorrent line of

⁵ In *United States v. Wilson, et al* 135 F.3d 291, 298 (4th Cir. 1998), the Court reversed drug convictions where the prosecutor, without any proof of the *corpus delicti* of murder, argued that the defendants were also guilty of murdering a driver. (“The *corpus delicti* is (1) a death (2) by unlawful conduct . . . only when there is a complete absence of probative facts to support the conclusion does a reversible error appear . . . ”). (*Id.*, footnote 4)

questioning shows the risks of the Eighth Circuit's new "non-analysis" approach to the door opening doctrine. This is so far the from the accepted and usual course of proceedings; this Court should exercise its supervisory power.

II. THE EIGHTH CIRCUIT SANCTIONED A GRAVE DEPARTURE FROM THE ACCEPTABLE COURSE OF JUDICIAL PROCEEDINGS WHEN IT IGNORED AND DID NOT ADDRESS THE ISSUE OF THE PROSECUTOR REFERRING TO THE DEATH OF LISA JENNINGS AS A MURDER AND THE DISTRICT COURT'S REFUSAL TO INSTRUCT THE JURY TO DISREGARD.

The Court of Appeals completely ignored the trial court's refusal to instruct the jury to disregard the blurred-out testimony of the criminal prosecutor that the death was a murder. Prior to the prosecutor's testimony, the Court and the parties agreed that Zoellner would not be permitted to refer to the death a murder. A recess was taken so that Nash's counsel could inform the prosecutor not to refer to the death as a murder. Within minutes of taking the stand, he did just that. However, when Jennings requested the jury be instructed to disregard the opinion, the District Court refused to enforce its own order and stated that the jury had been previously instructed Jennings was presumed innocent.

No party in this case has argued, nor could they in good faith, that the prosecutor's opinion that the death was a murder was relevant or proper.

The Court had a duty, not only to sustain the objection, but to intervene when the witness ignored the court's instructions. A trial judge "... has an obligation in the interests of fairness and justice to

stop the prosecutor from delivering a greatly prejudicial argument *sua sponte*.” *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) citing: *Viereck v. United States*, 318 U.S. 236 (1943).

This was a highly prejudicial accusation from a prosecutor, and when combined with his statement on probable cause, had an even higher likelihood of influencing the jury against Petitioner.

Courts have recognized that prosecutors’ opinions have undue influence on a jury. *Garza, supra* (5th Ct. 1979). The Eighth circuit previously adhered to this principle in *Newlon supra* at 1336 (8th Cir. 1989), however, by sanctioning the District Court’s refusal to instruct the jury to disregard this extreme statement the Eighth Circuit has departed significantly from the acceptable course of judicial proceedings. This Court should exercise its supervisory power.

III. THE EIGHTH DECISION REGARDING SUMMARY JUDGMENT AGAINST DEFENDANTS NASH, RACKLEY, DALLAS COUNTY AND KNOWLES CONFLICTS WITH THIS COURT’S PRECEDENT IN THAT IT DID NOT DRAW ALL REASONABLE INFERENCES IN PETITIONER’S FAVOR IN VIOLATION OF THIS COURT’S RULING IN *LOMBARDO V. CITY OF ST. LOUIS*.

On June 28, 2021, this Court issued an opinion in *Lombardo v. City of St. Louis* 141 S.Ct. 2239, 2241 (2021). This Court reversed the Eighth Circuit on a grant of summary judgment regarding an excessive force claim, finding that the Court of Appeals failed to analyze or characterized as insignificant facts that

were favorable to the Plaintiff.⁶ *Id.* The Court reversed and remanded with instructions to employ “an inquiry that clearly attends to the facts and circumstances.” *Id.* This Court should do the same here. The Eighth Circuit has persisted, post *Lombardo*, in its refusal to credit favorable facts to Plaintiffs in a summary judgment context.

Here, The Eighth Circuit did not undertake an inquiry that clearly attends to the facts and circumstances as described by this Court in *Lombardo*, *supra* by ignoring and not analyzing facts favorable to Petitioner that could matter when deciding whether to grant summary judgment.

A. Facts Favorable to Petitioner Against Defendants Nash, Rackley and Dallas County, Ignored by the Court of Appeals.

The evidence showed that Defendants Nash and Rackley conspired to violate the clearly established law of *Brady* (*supra*) by suppressing evidence which was impeaching of their methods and bad faith in their investigation under *Kyles v. Whitley*, 514 U.S. 419 (1995) and witness tampering in violation of Missouri Statute MO Rev Stat § 575.270.

Suppressed communications in Rice’s personnel file showed: Defendants Nash and Rackley falsely accused investigator Rice, who wouldn’t go along with their theory of the case, of having an affair with the deceased, Lisa Jennings, and then made identical

⁶ This rationale may also apply to the refusal of the panel to analyze and acknowledge facts regarding erroneous and prejudicial trial rulings at Petitioner’s trial against Defendant Nash in February 2020.

and knowingly false allegations that he had harassed witness Maddux over the false rumor of an affair.

Even though witness Maddux told both Defendant Rackley and Defendant Nash that Rice never confronted her, Rackley continued to accuse Rice of this false allegation. Rackley used these allegations, based on a memo written by Nash, to institute disciplinary proceedings against Rice and to prevent him from testifying as a defense witness. Rackley wrote in a letter to Rice that he was “damaging relations” with the MSHP by continuing to say he would testify Lisa Jennings committed suicide.

Defendant Rackley continued to accuse Rice of this exact allegation he was informed was false. Defendant Nash knowingly fabricated a memo with this identical allegation, which he also knew to be false.

According to witness Maddux, Defendant Rackley tried to convince her that Rice was harassing her but she assured him otherwise. In fact, Defendant Rackley went on to harass Maddux himself and was instructed to stop by the Dallas County Prosecutor’s Office. (Sealed App.172a).

All of the above documents, if they had been disclosed would have impeached Nash, Rackley and their entire investigation therefore undermining confidence in the verdict. (*Brady and Kyles, supra*)

The materials undermined confidence in the outcome of the trial: Defendant Rackley helped make decisions, conducted witness interviews and was present for anything of substance in the Jennings case. There is a clear and reasonable inference that had the jury known Rackley was harassing one witness in the

Jennings case to bring false complaints against another, they likely would have questioned the testimony of the other witnesses he interviewed.

The Eighth Circuit found the materials suppressed were not exculpatory or impeaching, including a letter that indicates the lead detective for Dallas County, one of the first people on the scene at the death of Lisa Jennings, disagreed with the conclusion of homicide and would testify that from his investigation he believed the death of Lisa Jennings to be a suicide. This clearly violates the summary judgment standard that all reasonable inferences were to be made in Petitioner's favor and violates *Lombardo, supra*.

Defendants Rackley and Nash's conduct amounts to improper tampering with witnesses and is outrageous and "shocking to the conscience". In *Ty, Inc. v. Softbelly's, Inc.*, 353 F.3d 528, 537 (7th Cir. 2003) the Court imposed sanctions for witness tampering and held that:

An attempt by a litigant to persuade a witness not to testify is properly admissible against him as an indication of his own belief that his claim is weak or unfounded or false . . . (W)itness tampering is extremely serious misconduct."

Id. (emphasis added)

Sheriff Rackley maintained the written policies and procedures for Dallas County Sheriff's Department and had the final say over policy in the Department. Department guidelines set by Rackley for processing complaints about officers in 2007 "would depend on who took it" and they would come to him eventually. He put complaints about officers in an officer's per-

sonnel file and doesn't remember having any other file for complaints about the department.

Dallas County did not keep records reflecting the total volume/number of allegations levied against members of the Dallas County Sheriff's Department over the past 15 years for false reporting, mishandling of evidence, constitutional violations and/or wrongful arrest and any disciplinary action taken.

Defendant Rackley was the final policy making authority for Dallas County's Sheriff Department. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). His policies show a disregard for safeguards against officer misconduct.

However, Defendant's Rackley's series of conscience shocking activities in investigating the Jennings case are enough to make Dallas County liable under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). ". . . it is plain that municipal liability may be imposed for a single decision by municipal policymakers." *Pembaur* *supra*. At 480.

B. Facts Favorable to Petitioner Against Defendant Knowles, Ignored by the Court of Appeals.

The panel decision regarding summary judgment against Defendant Knowles conflicts with precedent in that the Eighth Circuit overlooked and completely ignored facts favorable to Petitioner.

Defendant Knowles was Defendant Nash's supervisor and did nothing, despite his knowledge of deficiencies in the dissemination of lab reports into their proper file and his knowledge of Nash's suppression of relevant evidence, to remedy the problem. The

District Court called summary judgment on Knowles a “close question,” and yet decided in Knowles favor, as did the Court of Appeals, going against the established standard of summary judgment where the facts should be viewed in the “light most favorable” to the non-movant. The following facts were ignored:

a) Knowles had knowledge of Nash’s propensity for dishonesty and Nash’s suppression of relevant evidence. When viewed in the light most favorable to Jennings, Knowles was aware of the evaluations and reviews from Nash’s previous supervisor Cooper indicating that Nash “omits relevant facts for his own benefit leading him to mistrust some of Nash’s verbal and written reports”—they had conversations about the mistakes they made in handling Nash. Knowles failed to address the issue or take any corrective action.

Knowles knew the Taney County Sheriff indicated that Nash hadn’t gathered all the evidence that needed to be in a case and never followed up on it.

Knowles expressed concern that Nash had misrepresented his qualifications in order to secure a conviction.

b) Knowles knew MSHP Troop D lacked sufficient checks and balances to prevent officers like Nash from hiding exculpatory evidence and protect against Brady violations. Knowles knew there were no checks and balances to ensure lab reports got into the file yet did not require officers to prepare reports on lab results. This despite MSHP regulations requiring reports on every investigative activity. Knowles did nothing to ensure investigators, including Nash, were getting lab results and requesting all the right tests. He did nothing before 2016 to ensure lab reports got into the

file despite his knowledge there were no checks and balances. He acknowledged MSHP Supervisors are obligated to prevent filing of improper charges and must ensure officers are diligent in identifying Brady material.

Knowles had notice of the serious risk for constitutional violations by Nash by the suppression of relevant evidence. He was aware in this case that Nash requested lab testing on the clothing he seized in the Jennings case. He read all reports according to Nash and attended about half of the investigative sessions. Despite this, and his knowledge of Nash's pattern of omitting relevant facts from his reports, Knowles did nothing to follow up with Nash and ensure that every lab test, including the exculpatory gunshot residue test was placed in the file and given to the prosecutor. Knowles was deliberately indifferent despite having the power and the knowledge to prevent the *Brady* violations.

Knowles had more than enough knowledge to meet the standards set forth in *Kahle v. Leonard* 477 F.3d 544, 551 (8th Cir 2007) (a supervisor is liable for deliberate indifference if he is aware of a "substantial risk of serious harm" even if he is not aware the harm has in fact occurred. A supervisor can act with deliberate, reckless indifference even when he does not act knowingly.) In fact, in *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) the Eighth Court found that two complaints against an officer created a question of fact whether the supervisor was aware of a pattern of problems. There, the problem the supervisor was aware of did not exactly match the allegation of rape, but inappropriate conduct towards women more generally.

To affirm summary judgment was inconsistent with *Kahle* and *Andrews*. This signals that the Eighth Circuit is continuing down its newer *Lombardo* path, not crediting Plaintiff's with facts favorable to them at summary judgment. This Court should exercise its supervisory authority.



CONCLUSION

The instant case contains issues of national importance. Petitioner respectfully prays that this court exercise its supervisory authority and reverse the Eighth Circuit's new "non-analysis" analysis for the door opening doctrine that will continue to open the floodgates to prejudice. Further, this Court should uphold summary judgment standards, emphasized in *Lombardo*, (*supra*) by crediting Petitioner with those facts which support his claims.

Petitioner has not only suffered an unconstitutional and wrongful incarceration, he has now suffered from grave injustices in the lawsuit wherein he attempted to hold those responsible, accountable. This Court should use its supervisory authority to right these wrongs and prevent future harms of a similar nature.

Respectfully submitted,

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