

No. 22-766

IN THE
Supreme Court of the United States

EDWARD PINKNEY,

Petitioner,

v.

BERRIEN COUNTY, MICHIGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

It is the province of the courts to declare “what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1983), *Charles Reinhart v. Winiemko*, 440 Mich. 579, 591-2, 513 N.W.2d 773, 778 (1994).

From the commencement of the criminal proceedings against him. Petitioner Edward Pinkney challenged his prosecution under Mich. Comp. Laws §168.937 by claiming the statute to be only a penalty provision, not a substantive, chargeable offense. The trial judge overseeing Pinkney’s criminal case rejected this argument and allowed the prosecution to proceed.

Moreover, on the very day that Pinkney’s criminal trial commenced, the Michigan Court of Appeals issued an opinion expressly declaring that “MCL 168.937 is not merely a penalty provision but rather creates a substantive offense of forgery.” *People v. Hall*, No. 321045, 2014 WL 5409079 (Mich. Ct. App. Oct. 23, 2014), *rev’d on other grounds* 884 N.W.2d 561 (Mich. 2016). On Pinkney’s own direct appeal, the Michigan Court of Appeals reiterated this conclusion that “MCL 168.937 does, in fact, create the substantive offense of election forgery.” *People v. Pinkney*, 316 Mich. App. 450, 463, 891 N.W.2d 891 (2016).

- I. Where the prosecution, trial, conviction and incarceration of Petitioner Pinkney were proper under the judicially declared law of Michigan at the time, should Pinkney’s petition be rejected for failure to present any constitutional violation whereby to address the due process clause question that Pinkney proposes?

- II. Where the Sixth Circuit left untouched the district court's dispositive rulings - - that the Berrien County prosecuting attorney has "sovereign immunity" against Pinkney's claims and that the prosecutor's actions were not "policy" of Berrien County for purposes of municipal liability - - should Pinkney's presentation of his "due process" issue be rejected as moot?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Edward Pinkney was the Plaintiff below and the Appellant in the United States Court of Appeals for the Sixth Circuit.

Respondents Berrien County, Michigan, and Berrien County Prosecutor were the Defendants below and the Appellees in the United States Court of Appeals for the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

None of the Respondents is a publicly owned corporation or a subsidiary or affiliate of such.

v

RELATED PROCEEDINGS

1. Pinkney v. Berrien County, et al., No. 1:21-cv-310, U.S. District Court for the Western District of Michigan. Judgment entered July 20, 2021.
2. Pinkney v. Berrien County, Michigan, et al., No. 21-2802, United States Court of Appeals for the Sixth Circuit. Judgment entered August 19, 2022.
3. Pinkney v. State of Michigan, et al., No. 356363, Court of Appeals of Michigan. Judgment entered May 26, 2020.
4. People v. Pinkney, No. 154374, Supreme Court of Michigan. Judgment entered May 1, 2018.
5. People v. Pinkney, No. 325856, Court of Appeals of Michigan. Judgment entered July 26, 2016.

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COUNTER-STATEMENT OF THE CASE

Introduction.

Petitioner Edward Pinkney was prosecuted and convicted for violation of a Michigan statute, Mich. Comp. Laws §168.937. At the time of Pinkney's prosecution, conviction and incarceration, the Michigan courts held this statute to establish a substantive criminal offense. Pinkney's conviction was affirmed on that basis. *People v. Pinkney*, 316 Mich. App. 450, 891 N.W.2d 891 (2016). It was not until review on Pinkney's own direct appeal that the Michigan Supreme Court held otherwise and vacated Pinkney's conviction. *People v. Pinkney*, 501 Mich. 259, 912 N.W.2d 535 (2018).

Following the decision vacating his conviction, Pinkney unsuccessfully sued the Berrien County Prosecutor's Office and the State of Michigan Department of Corrections in state court. He then filed the present federal case alleging that the prosecution, trial, conviction and incarceration constituted a violation of his Fourteenth Amendment "substantive due process" rights by Berrien County and the Berrien County Prosecutor. The United States District Court for the Western District of Michigan dismissed Pinkney's case. The United States Court of Appeals for the Sixth Circuit affirmed that dismissal.

Pinkney asserts that his case is a vehicle to decide at what point in criminal proceedings the protections of the Fourth Amendment give way to the protections of substantive due process under the Fourteenth Amendment. It is the position of Respondents Berrien County and Berrien County Prosecutor that Pinkney's

case affords no vehicle for such determination, because neither the Fourth Amendment nor the Fourteenth Amendment are violated by a prosecution conducted in accordance with the law as judicially declared at the time of the prosecution.

Pinkney's State Court Prosecution.

As recounted by the Michigan Supreme Court opinion that vacated Pinkney's conviction, Pinkney had filed both a pretrial motion to quash and a post-trial motion for directed verdict arguing that Mich. Comp. Laws §168.937 is "a penalty provision, not a substantive, chargeable offense." *People v. Pinkney*, 501 Mich. at 264, 912 N.W.2d at 537. Pet. App. 44a. As Pinkney acknowledges, the state trial court denied both motions. *Id.*

But Pinkney ignores the substance of the two Court of Appeals opinions relevant to the criminal proceedings. First, on the day that Pinkney's criminal trial began, the Michigan Court of Appeals issued its opinion in *People v. Hall*, No. 321045, 2014 WL 5409079 (Mich. Ct. App. Oct. 23, 2014), *rev'd on other grounds* 884 N.W.2d 561 (Mich. 2016). In a unanimous opinion, three judges of the Michigan Court of Appeals came to the same conclusion as had the trial judge overseeing Pinkney's prosecution. As concluded by the *Hall* panel, "MCL 168.937 is not merely a penalty provision, but rather creates a substantive offense of forgery." *People v. Hall*, 2014 WL 5409079 at *6.

Second, in its subsequent published decision affirming Pinkney's conviction, the Michigan Court of Appeals reiterated this conclusion. Confronting Pinkney's contrary argument, the Michigan Court of Appeals again concluded

“that MCL 168.937 does, in fact, create the substantive offense of election forgery.” *People v. Pinkney*, 316 Mich. App. at 463, 891 N.W.2d at 899.

On Pinkney’s direct appeal the Michigan Supreme Court held the contrary and vacated Pinkney’s conviction, thus ending his incarceration. But until the issuance of the Michigan Supreme Court opinion, the declared law of the State of Michigan supported the prosecution, trial, conviction and incarceration that Pinkney now claims was unconstitutional.¹

Pinkney sued the Michigan Department of Corrections and the Berrien County Prosecutor’s Office in the Michigan Court of Claims alleging that they had violated his due process rights by prosecuting, convicting and incarcerating him for a “non-existent crime.” The Michigan Court of Claims granted summary disposition to the Defendants, and the Michigan Court of Appeals affirmed.

With regard to procedural due process, the Michigan Court of Appeals observed that Pinkney “had, in fact, obtained full due process” of notice and opportunity to be heard, which is “what led to the ultimate overturning of his convictions.” *Pinkney v. Dep’t of Corrections*, No. 356363, 2022 WL 1701944, *5 (Mich. Ct. App. May 26, 2022). The Court of Appeals then rejected Pinkney’s “substantive due process” claim, because that court’s own prior opinion in *Hall* had “concluded that MCL 168.937 set

1. Notably, the Michigan Supreme Court never questioned the jury finding that Pinkney was responsible for the alteration of dates of signatures affixed to election petitions.

forth a substantive defense” and, therefore, neither the prosecution nor the resulting conviction and imprisonment could be found “arbitrary in the constitutional sense” of shocking the conscience. *Pinkney v. Dep’t of Corrections*, 2022 WL 1701944 at *5, 6.

Pinkney has applied for further appeal of his state-court damages case to the Michigan Supreme Court, No. 164585. In the meantime, he has been focused on this parallel federal litigation.

Federal Proceedings.

Pinkney’s federal case alleges a violation of substantive due process. Although the district court discussed Pinkney’s due process claim and rejected it on Fourth Amendment grounds, this was a *secondary* analysis. The primary and dispositive analysis by the district court was two-fold. First, the district court held that the Berrien County Prosecutor was acting as an agent of the State of Michigan in prosecuting Pinkney and held sovereign immunity against Pinkney’s claims. Pet. App. 17a-21a. Second, the district court held that the actions of the Prosecutor as an agent of the State of Michigan could not be considered a policy of Berrien County for purposes of municipal liability. Pet. App. 21a-24a.

For its part, the Court of Appeals for the Sixth Circuit did not undertake any analysis of the sovereign immunity or municipal liability issues. Instead, the Sixth Circuit followed Pinkney’s own request to focus on his substantive due process argument. Pet. App. 5a-6a. Thus, the district court conclusions regarding the sovereign immunity of the Prosecutor and the absence of any basis for municipal

liability of the County stand. Because these rulings are dispositive against any continuance of Pinkney's due process claim, there is no basis for this Court to indulge that claim further.

But even if Pinkney's due process claim were to be considered, Pinkney's case affords no vehicle to address the question Pinkney proposes. Although the question of where in the "continuum" of the criminal process, the Fourth Amendment "gives way to the due process clause" may be an issue in other cases (Pet., pp. 1, 4, 11), it is not a material question in Pinkney's case. Whether analyzed under the Fourth Amendment or the Fourteenth Amendment, the Constitution is not violated by a criminal prosecution, trial, conviction or incarceration that occur in accordance with the judicially declared law in effect at the time of those actions, as was the case with the proceedings against Pinkney.

ARGUMENT FOR DENYING PETITION

I. The question presented by Petitioner Pinkney is immaterial to his own case.

It is a cornerstone of American law and governance that it is the role of the courts, not executive or administrative officials, to declare "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), *Charles Reinhart Co. v. Winiemko*, 440 Mich. 579, 591-2, 513 N.W.2d 773, 778 (1994).

In the course of the criminal proceedings against him, Pinkney repeatedly argued that Mich. Comp Law §168.937 did not create a substantive chargeable offense.

The state trial court rejected that argument in the context of both a pretrial motion to quash and a post-trial motion for directed verdict. *People v. Pinkney*, 501 Mich. 259, 264, 912 N.W.2d 535, 537 (2018). Pet. App. 44a. On the day Pinkney’s criminal trial began, the Michigan Court of Appeals expressly declared that “Mich. Comp Law §168.937 is not merely a penalty provision, but rather creates a substantive offense of forgery.” *People v. Hall*, No. 321045, 2014 WL 5409079, *6 (Mich. Ct. App. Oct. 23, 2014), *rev’d on other grounds* 884 N.W.2d 561 (Mich. 2016). The Michigan Court of Appeals held likewise on Pinkney’s own direct appeal, concluding again that “M.C.L. §168.937 does, in fact, create the substantive offense of election forgery.” *People v. Pinkney*, 316 Mich. App. 450, 463, 891 N.W.2d 891, 899 (2016).

Whether the United States Court of Appeals for the Sixth Circuit erred by analyzing Pinkney’s claim under the Fourth Amendment, rather than Fourteenth Amendment substantive due process, is immaterial to Pinkney’s case. Under either the Fourth Amendment or the Fourteenth Amendment, there can be no constitutional violation by a government official acting in accordance with the law as declared by the courts at the time of the official’s actions. To hold otherwise would require government officials to second-guess judicial decisions, which would undermine both the efficacy and legitimacy of the legal system.

Even assuming that the “circuit split” perceived by Pinkney exists, Pinkney’s own case affords no vehicle for such split to be addressed by this Court. Neither the Berrien County Prosecutor, nor Berrien County, Michigan, violated the Constitution by acting in accordance with the law of Michigan as declared by the State’s courts at the time.

II. Even indulging Petitioner Pinkney’s “substantive due process” argument on its merits, the claim fails.

Pinkney’s proposition (i.e., that prosecution for a “non-existent offense” falls outside the scope of the Fourth Amendment) is dubious. This Court has expressly recognized that the Fourth Amendment safeguards citizens against “unfounded charges of crime.” *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975).

But even if a prosecutor’s involvement in the prosecution, trial, conviction or incarceration of a criminal defendant were properly to be reviewed by reference to Fourteenth Amendment substantive due process, there could be no constitutional violation found in the present case.

Pinkney does not challenge the statute under which he was prosecuted. Rather, he challenges the action of the prosecutor, as an individual government official, prosecuting Pinkney for an offense that the statute did not create.

The core of substantive due process is protection against arbitrary action. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). But the “criteria to identify what is fatally arbitrary differ depending upon whether it is legislation or a specific act of a governmental officer that is at issue.” *Id.*, at 846. This case falls within the latter category. In such context, the Due Process Clause is violated only when a government official’s actions are “arbitrary” in the sense that the officer’s actions shock the conscience and violate the decencies of civilized conduct. *Id.*, at 846-7.

As described above, the actions of the Berrien County Prosecutor toward Pinkney were actions taken in accordance with the law of the State of Michigan as judicially declared by the State courts at the time of the prosecutor's actions. There is nothing arbitrary, conscience shocking or violative of civilized conduct when a government official acts in accordance with judicial declaration of "what the law is." Neither an official, nor the governmental unit that official serves, can be held liable for not speculatively anticipating a subsequent reversal of existing law by the courts. See *Wilson v. Layne*, 526 U.S. 603, 617-8 (1999).

III. There is no reason for this Court to reach Pinkney's due process claim, because the district court's rulings regarding sovereign immunity and municipal liability render Pinkney's due process claim moot.

"No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer indebted in an actual controversy about the plaintiff's particular legal rights." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Because federal courts cannot give opinions upon "moot questions or abstract propositions," appellate proceedings are rendered moot, when the appellate court cannot grant "any effectual relief" in favor of the appellant. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). Such is the situation in the present case.

As described above, the district court addressed the merits of Pinkney's claims only as an afterthought. Pet. App. 25a-29a. The primary dispositive holdings by the

district court were that the Berrien County Prosecutor had sovereign immunity against Pinkney's claims and that the prosecutor's actions had no connection to any "policy" of Berrien County by which municipal liability could arise. Pet. App. 17a-24a.

The Sixth Circuit never addressed these dispositive conclusions, so those conclusions still stand and are dispositive against Pinkney's claims. Although Pinkney continues vehemently to dispute the lawfulness of his prosecution in the state court, the primary rulings of the district court regarding sovereign immunity and municipal liability leave Pinkney with no basis to assert any claim against either the Berrien County Prosecutor or Berrien County, Michigan, upon which any effectual relief can be granted.

CONCLUSION

Petitioner Pinkney urges this Court to answer a question that is immaterial to his own case - - and that would fail on its merits, even if indulged. Moreover, the question presented by Pinkney is mooted by the alternative grounds that the district court found dispositive against his claim. Therefore, Pinkney's petition is unjustified and should be denied.

Respectfully submitted,

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