

No. 25-1341

IN THE
Supreme Court of the United States

DONNA BIRKS,

Petitioner,

v.

CLEMENTE JAVIER AGUIRRE-JARQUIN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent restates the questions presented as follows:

1. Whether this Court should review the Eleventh Circuit's discretionary decision to decline pendent appellate jurisdiction over fact-bound causation and materiality issues in an interlocutory qualified immunity appeal, where those issues remain to be litigated on remand.

2. Whether the Eleventh Circuit correctly held, on the summary judgment record and drawing inferences in Respondent's favor, that a jury could find a forensic examiner fabricated evidence where she reported and testified to a positive identification after deliberately routing the required verification to an already-retired, medically infirm colleague she believed incapable of performing a genuine verification—a conclusion two independent reviews later determined was erroneous or of no value.

3. Whether the law was clearly established by 2004–2006 that a law enforcement forensic examiner violates due process by falsely presenting incriminating forensic evidence and falsely testifying to it at a criminal trial.

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STATEMENT OF THE CASE

Respondent Clemente Javier Aguirre-Jarquin spent fourteen years in prison—ten of them on Florida’s death row awaiting execution—for a double murder he did not commit. Petitioner Donna Birks, a latent print examiner for the Seminole County Sheriff’s Office (“SCSO”), supplied the forensic centerpiece of that wrongful conviction: her report and trial testimony that a latent print on the murder weapon was a “positive identification” of Respondent’s left palm. As the Eleventh Circuit recounted, while Respondent “languished on death row,” “the foundation of his convictions buckled”: “[a] 2007 investigation into the Seminole County Sheriff’s Office Latent Print Unit revealed a pattern of misconduct that substantially undermined the positive identification of Aguirre as the source of latent prints on the murder weapon.” *Aguirre-Jarquin v. Seminole County*, 158 F.4th 1276, 1283 (11th Cir. 2025). Although this petition is Birks’ alone, her fabricated identification did not occur in a vacuum. It supplied the decisive charging evidence in an investigation the district court described as one “about leads dropped, inconsistencies ignored, doubts glossed over—and a man who spent ten years waiting to be executed because the legal process went wrong.” *Aguirre-Jarquin v. Hemmert*, No. 6:20-cv-25, 2023 WL 2558479, at *1 (M.D. Fla. Feb. 22, 2023).

A. The Murders and the SCSO’s Investigation

On the morning of June 17, 2004, Cheryl Williams and her mother, Carol Bareis, were found stabbed to death in their home in Altamonte Springs, Florida. Cheryl had been stabbed 129 times and bore numerous

defensive wounds; Carol, a stroke victim who used a wheelchair, suffered two stab wounds. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 787–88 (Fla. 2016). Although SCSO deputies arrived within minutes of the 911 call, no officer checked the bodies to gauge rigor mortis, and the medical examiner—traveling from another county—did not arrive until “nearly twelve hours after Cheryl’s and Carol’s bodies were discovered.” 2023 WL 2558479, at *4; D. Ct. Doc. 193 at 111:10–114:20. “By that point, with rigor retreated, it was impossible to estimate the time of death, and Hemmert”—Robert Hemmert, the SCSO’s lead homicide investigator—“did not ask the medical examiner to attempt to do so.” 2023 WL 2558479, at *4. The investigation thus proceeded without the most basic anchoring fact: when the murders occurred.

From its first hours, the investigation surfaced red flags pointing to Cheryl’s daughter, Samantha Williams, who lived in the home. Samantha had fought with her mother the night of the murders—an argument corroborated by the victims’ neighbors, whom Cheryl visited that evening, upset, before returning home around 11:00 p.m. 2023 WL 2558479, at *2; D. Ct. Doc. 236-11. When Hemmert interviewed Samantha, she paused for more than 27 seconds before answering where she had spent the night, then gave an alibi she later admitted was false. D. Ct. Doc. 236-16 at 10; 2023 WL 2558479, at *3. Hemmert “picked up on her hesitation and called her out for lying,” *id.*, and agreed at his deposition that her untruthfulness was a “red flag,” D. Ct. Doc. 193 at 268:12–269:16. By the time of that interview Hemmert already knew that Samantha “had a history of anger and mental health problems,” had been “diagnosed with intermittent explosive disorder, an anger and aggression-

based disorder,” was “prone to violence,” and had been involuntarily committed under the Baker Act. 2023 WL 2558479, at *2. A May 2001 psychiatric evaluation—which Hemmert never obtained—documented Samantha’s “explosive temper” and “episodes of rage,” recorded her screaming “I’m going to [expletive] kill you. I’ll kill all of you if I get out” while Cheryl stood at her bedside, and deemed her a “danger to others.” D. Ct. Doc. 234-2 at 4, 6, 8. Yet “Hemmert did not ask Williams about her mental health during her one and only interview. No one collected DNA swabs from Williams, photographed her, examined her for wounds, collected her shoes, or took her prints.” 2023 WL 2558479, at *4.

The physical-evidence investigation was no more searching. The SCSO’s lead crime scene analyst, Jacqueline Grossi, “collected 150 blood samples from the trailer, including blood that came from the outside of Williams’ open bedroom window. But Grossi, in consultation with Hemmert, did not test a single one of these blood samples. Only evidence from Aguirre’s residence, along with evidence from the murder weapon and victims, was sent for testing.” 2023 WL 2558479, at *5. The Eleventh Circuit would later catalogue twelve categories of information known to investigators yet omitted from the probable-cause affidavit—among them that Samantha “lied at first about her alibi,” “had anger and mental health issues,” “was diagnosed with intermittent explosive disorder,” “had been Baker Acted before,” “fought with her mother the night of the murders,” “had gotten into physical fights with her mother,” and that Samantha and her boyfriend “both had wounds on their bodies.” 158 F.4th at 1301–02.

Respondent, by contrast, cooperated. An undocumented immigrant from Honduras who spoke little English, Respondent volunteered to deputies, through a translating officer, that he had discovered Cheryl's body early that morning when he went next door looking for beer, and that he had not called police for fear of deportation. 2023 WL 2558479, at *4–5; D. Ct. Doc. 193-12 at 12. He willingly turned over his sneakers, submitted to swabs, photographing, and testing, and directed officers to the clothing he had been wearing. D. Ct. Doc. 236-12 at 3. And his account of his whereabouts was corroborated: a police report and multiple witnesses placed him at Pretzel's bar—where police responded to an unrelated altercation around 1:00 a.m.—until the bar closed, and then drinking at a friend's house until roughly 5:30 or 6:00 a.m. D. Ct. Docs. 236-12 at 2; 236-24; 236-25 at 4; 2023 WL 2558479, at *2.

Even the murder weapon's supposed link to Respondent was disputed. The knife recovered from the yard at Respondent's residence was a Sysco-brand chef's knife with a ten-inch *straight* blade. D. Ct. Doc. 236-12 at 2. But according to the executive chef at the restaurant where Respondent worked, the Sysco knives missing from the restaurant's inventory were a *serrated* chef's knife, a smaller boning knife, and possibly a bread knife—and the chef could not say when they had gone missing or what happened to them. D. Ct. Doc. 204-9 at 7–8; *see* 158 F.4th at 1303 (noting the parties' dispute over the chef's description and that “the Sysco knife found in Aguirre's yard was not serrated”). Meanwhile, a box marked “Sysco” sat in the victims' own trailer, “but no one ever opened it, nor did anyone check the restaurant where [Samantha] worked.” 2023 WL 2558479, at *4.

B. Birks' Unverified "Identification" and Respondent's Arrest

One week after the murders, on June 24, 2004, Birks "examined the photograph of the print on the murder weapon" and "quickly concluded that the print matched Aguirre's left palm." 2023 WL 2558479, at *5. Birks never inspected the knife itself; she worked entirely from a photograph of the handle. D. Ct. Doc. 185-2 at 2. She collected only Respondent's palm prints, not Samantha's or anyone else's connected to the scene. D. Ct. Doc. 185-6 at 209:18–212:8, 226:9–13.

Birks' report declared the palm impression on the knife a "positive identification with the left palm of Clemente Aguirre." D. Ct. Doc. 185-4 at 13. The consequences were immediate: "On June 25, the morning after receiving Birks' identification, Hemmert arrested Aguirre for the murders." 2023 WL 2558479, at *5. Hemmert testified that "the recommendation to charge" Respondent was made "once the result of the print came back." D. Ct. Doc. 193 at 307:13–17; *see* 2023 WL 2558479, at *7 n.11 ("the match was a crucial factor in Hemmert's decision to arrest Aguirre for the murders").

Under the professional standards governing Birks' discipline, that identification should never have been reported. The Scientific Working Group on Friction Ridge Analysis, Study and Technology ("SWGFAST") establishes the standards that certified latent print examiners are required to follow—as Birks herself acknowledged. D. Ct. Doc. 185-6 at 21:23–22:9. As the Eleventh Circuit explained, "[p]ositively identifying a suspect as the source of latent prints involves two steps: (1) comparison by a

print examiner of a latent print of sufficient investigatory value to known prints to conclude a positive match; and (2) verification by an independent, competent examiner of the results of the comparison. Only after the second step can a positive identification be confirmed.” 158 F.4th at 1298. Under SWGFAST guidelines, every positive identification must be verified by a second qualified examiner who reaches an independent, unbiased conclusion; the method of verification must ensure the verifier is not influenced by the original examiner’s conclusion; if the verifying examiner cannot verify the print, the analysis must terminate—there can be no positive identification; and the original examiner may not shop the print to other examiners in search of a verification. D. Ct. Doc. 185-6 at 30:21–33:23, 164:11–18, 165:2–7.

Birks’ disregard of those safeguards long predated this case. She assumed the latent print examiner role before certification by the International Association for Identification, without sufficient training, and without a college degree—itsself a departure from SWGFAST guidelines. D. Ct. Doc. 185-6 at 17:8–24, 21:14–19. The routine technical and administrative case reviews SWGFAST requires never occurred during her tenure, and Birks admitted there was no technical supervision of her work at the SCSO at all. *Id.* at 183:13–184:15, 188:19–24. In an earlier case involving a criminal defendant named Troy Bouey, Jr., Birks reported a positive identification even though two examiners initially refused to verify the purported match—a disagreement Birks never documented—before sending the print to William McQuay, who “verified” it without further inquiry. D. Ct. Docs. 209-1 at 84–85; 185-6 at 161:24–162:12, 243:18–22. Birks admitted that reporting an identification after

two examiners would not verify it violates SWGFAST guidelines, conceded that no authority permits sending a print out for verification after the initial verifiers refuse, and acknowledged that doing so “was not appropriate to do.” D. Ct. Doc. 185-6 at 162:13–19, 166:14–167:11.

McQuay was Birks’ verifier of choice for a reason. In this capital case, Birks routed the only verification of her identification to him even though “McQuay had officially retired at this time and was in questionable health.” 158 F.4th at 1299. Although “Birks alleges she did not know his health status at the time,” in the 2007 investigation “she claimed that McQuay told her that he was sick and that she knew his health led to his retirement.” *Id.* Birks admitted she knew McQuay “had been on medication” and had been losing his competency; she recalled once being unable to verify one of his prints, speaking to her supervisor about “McQuay’s state of mind,” and that McQuay “hadn’t been feeling good for a while . . . and he was probably gonna retire.” D. Ct. Doc. 209-4 at 41. According to Tara Williamson, the unit’s trainee, “McQuay was noticeably sick and was taking medication when she joined the Latent Print Unit. He would fall asleep mid-conversation and err when performing verifications, which Birks knew.” 158 F.4th at 1299. The district court put it succinctly: Birks sent difficult verifications to “a soon-to-be-retired older analyst with medical issues whom Birks considered incompetent.” 2023 WL 2558479, at *7.

In short, in a capital case, Birks entrusted the sole safeguard against a false identification to a medically failing, already-retired examiner whose infirmities—which she knew had ended his career—made him incapable of genuinely checking her work.

C. Trial and Conviction

At Respondent's 2006 capital trial, Birks "testified to her examination of the Sysco knife, stating that she concluded it had a print of sufficient quality to make a comparison and that the print positively matched Aguirre's left palmprint." 158 F.4th at 1288. That sworn identification was the only forensic evidence purporting to place Respondent's hand on the murder weapon, in a prosecution the Florida Supreme Court described as "based primarily on forensic evidence." 202 So. 3d at 794 (citing *Aguirre v. State*, 9 So. 3d 593, 609 (Fla. 2009)). The jury convicted Respondent of two counts of first-degree murder, and he was sentenced to death. 158 F.4th at 1288.

D. The 2007 Investigation: Birks' Identification Was False

A year after Respondent's conviction, Williamson (the examiner Birks had trained) wrote a memorandum to SCSO management identifying "multiple events that are in violation of the SWGFAST guidelines and the ethics set forth for Certified Latent Print Examiners by the [IAI]." D. Ct. Doc. 209-1 at 70. "[G]iven the fact that a latent print examiner's opinion has the ability to put people in jail," Williamson wrote, "it is only just that we as experts in the science are held to the highest of standards." *Id.* at 68. The violations she catalogued included "report[ing] numerous identifications without verification," "verbally report[ing] a print she had identified prior to verification," sending a print to McQuay—who had "medically retired early and had admittedly lost his eye for latent prints"—and having a "trainee with three-weeks of experience verify latent print identifications." *Id.* at 70. Williamson described

Birks' testimony at Respondent's trial as "a complete mockery." 158 F.4th at 1288; Pet. App. 14a.

That memorandum triggered the administrative investigation that unraveled Respondent's conviction. The Florida Department of Law Enforcement ("FDLE") "re-examined every single identification made by Birks that resulted in arrest" and concluded that she "had incorrectly identified at least half a dozen print matches—including Aguirre's. Birks was forced to resign, and the Sheriff publicly stated that she had no credibility as a print examiner." 2023 WL 2558479, at *5. FDLE print examiners Christina Barber and Jennie Ahern each reviewed the knife-handle print and determined there were "no latent prints of value," in other words, that the print was too poor in quality to support any analysis at all, let alone a positive identification. D. Ct. Doc. 185-3 at 30:15–18, 47:17–20; 158 F.4th at 1288; Pet. App. 14a. The FDLE consulted seven other qualified analysts, all of whom verified that conclusion. D. Ct. Doc. 185-3 at 33:3–10. The independent consultant retained to audit Birks' work, Ron Smith & Associates, likewise "found that the positive identification in Aguirre's case was erroneous" and found erroneous identifications in four other Birks cases as well. 158 F.4th at 1289; Pet. App. 16a; D. Ct. Docs. 209-1 at 57–60; 209-3 at 20–21. Even the print expert retained by the *defendants* in this litigation, Glenn Langenburg, agreed "that there was insufficient support for an identification of Aguirre and that Birks was incorrect to find a positive identification." D. Ct. Doc. 202 at 44:24–45:3, 47:14–21; *see* 2023 WL 2558479, at *7 ("Birks' own print expert does not even agree with her, opining that the print lacked sufficient reliable characteristics to make a positive identification."). Facing termination, Birks resigned. D. Ct. Doc. 185-6 at 235:13–24.

E. Exoneration

Respondent's conviction was ultimately vacated by the Florida Supreme Court based on newly discovered evidence. Post-conviction DNA testing of 150 previously untested bloodstains from the crime scene—the same categories of evidence the SCSO had declined to test in 2004—revealed eight bloodstains containing Samantha's DNA, "all located in areas close to the victims' blood, in high-traffic areas, or the bathroom where the State argued at trial that the killer would have cleaned up after the murders." 202 So. 3d at 791–92. Samantha also "confessed—on five different occasions to four different people—that she killed the victims." *Id.* at 792. Respondent's DNA was found nowhere at the scene. *Id.* at 791–92. The court held that this evidence "weakens the case against [Aguirre] so as to give rise to a reasonable doubt as to his culpability," vacated the convictions and death sentences, and ordered a new trial. *Id.* at 791, 794–95. The State elected not to retry Respondent and dropped all charges on November 5, 2018. 158 F.4th at 1289.

F. Proceedings Below

In January 2020, Respondent sued under 42 U.S.C. §1983 and Florida law. His operative complaint asserted, as relevant here, a §1983 fabrication-of-evidence claim against Birks (Count I); a §1983 malicious prosecution claim against Birks and Hemmert (Count III); §1983 claims against Hemmert and Grossi for failure to disclose exculpatory evidence and inadequate investigation (Counts II (Hemmert only) and IV); *Monell* claims against the Sheriff (Counts V and VI); and a Florida-law claim for

intentional infliction of emotional distress against Birks, Hemmert, *and* Grossi (Count VII). 158 F.4th at 1289–90.

The district court denied Birks summary judgment and qualified immunity on the fabrication claim, explaining that “this issue boils down to the disputed question of Birks’ intent” and that “[b]ecause this question is one for the jury, summary judgment on Count I is inappropriate.” 2023 WL 2558479, at *8. It likewise denied Birks summary judgment on the IIED claim against her. *See* 158 F.4th at 1294–95. The Eleventh Circuit affirmed the denial of qualified immunity on the fabrication claim in a published opinion “[a]fter careful review, and with the benefit of oral argument.” *Id.* at 1283. From the summary judgment record, it concluded that “reasonable jurors could conclude that Birks, by intentionally selecting a person whom she considered incompetent or incapable as a verifier, fabricated an ultimate forensic result incongruent with what she could actually determine from her examination of the murder weapon,” and that “she intentionally selected McQuay as a verifier to avoid a competent examination that would impede her inculpation of Aguirre.” *Id.* at 1300; Pet. App. 40a–41a. “So the evidence creates a genuine factual dispute about Birks’s conduct as to the verification of Aguirre’s positive identification. A jury must resolve this question of fact, precluding qualified immunity.” 158 F.4th at 1300.

The panel also declined to exercise pendent appellate jurisdiction over Birks’ merits challenges—including her appeal of the denial of summary judgment on the IIED claim and her fact-bound materiality argument—leaving those issues for the district court on remand. *Id.* at 1293–

95. The court denied panel rehearing and rehearing *en banc* without any judge calling for a vote. Pet. App. 118a.

REASONS FOR DENYING THE PETITION

I. THE CAUSATION AND MATERIALITY QUESTIONS ARE INTERLOCUTORY, FACT-BOUND, AND PROPERLY LEFT FOR REMAND.

Petitioner’s lead argument is that the Eleventh Circuit erred by declining to exercise pendent appellate jurisdiction over her contention that the fabricated palm print evidence did not cause Respondent’s conviction. That argument does not warrant this Court’s review for three reasons.

A. The court of appeals’ exercise of its discretion over pendent appellate jurisdiction is not certworthy.

The Supreme Court has expressly reserved whether, or when, a court of appeals with jurisdiction over one interlocutory ruling may also review related rulings that are not themselves independently appealable, declining to “definitively or preemptively settle” the availability of pendent appellate jurisdiction; it observed only that the parties there did not contend the otherwise-nonappealable ruling was “inextricably intertwined” with the appealable one, or that its review was “necessary to ensure meaningful review” of the latter. *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 50-51 (1995). The Eleventh Circuit faithfully applied that framework. It recognized that “[t]he exercise of pendent jurisdiction is only proper in rare and

unique circumstances where a final appealable order is inextricably intertwined with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order,” 158 F.4th at 1293–94 (internal quotation marks omitted), and that “the Supreme Court has signaled that pendent appellate jurisdiction should be present only under rare circumstances,” *id.* at 1291–92 (quoting *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009) (per curiam), citing *Johnson v. Jones*, 515 U.S. 304, 318 (1995), and *Swint*, 514 U.S. at 49–50). Applying that settled standard, the panel explained: “Whether Birks’s conduct violated clearly established law does not necessarily entail a resolution of whether her conduct constituted IIED under Florida law, or whether her conduct was material to Aguirre’s arrest and conviction. We can resolve the qualified-immunity issue, for example, without having to consider” those distinct questions. 158 F.4th at 1294–95; Pet. App. 28a–29a.

Petitioner identifies no conflict among the circuits about the scope of pendent appellate jurisdiction in this context, and this Court does not sit to review a court of appeals’ discretionary, record-bound decision to leave a fact-laden issue for remand. Nor can the panel be accused of stacking the deck: exercising the jurisdiction it did have, it *reversed* the denial of qualified immunity on two of the three claims before it—including a claim against Birks herself. 158 F.4th at 1300–10, 1312. Accordingly, there is no basis to disturb the Eleventh Circuit’s reasoned and case-specific application of *Swint* in this instance.

B. The causation question remains open as this case is interlocutory.

Because the Eleventh Circuit declined to reach causation and materiality, those issues remain live in the district court. Petitioner remains free to press her cumulative-evidence theory at trial, and on appeal from any final judgment. The interlocutory posture makes this a singularly poor vehicle: this Court would be reviewing an issue no lower court has finally resolved, on a record still in development. This Court's "usual practice" is to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari).

That practice is not merely prudential. This Court has long held that the non-final, interlocutory character of the decision below "of itself alone" furnishes sufficient ground to deny certiorari, and that "except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). And where, as here, the court of appeals has remanded for further proceedings, the case "is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Both grounds independently counsel denial here, where the very causation and materiality questions Petitioner presses remain to be litigated on remand.

C. There is no circuit split warranting review.

Petitioner's own account of the caselaw defeats any argument about a purported circuit split. She

acknowledges that every circuit treats causation as an element of a fabrication-of-evidence claim, and that the circuits differ only in articulating the quantum of causation—“reasonable likelihood” the evidence “would have” affected the jury, “reasonable likelihood” it “could have,” or similar formulations. Pet. 20. She then concedes that “[r]egardless of whether a plaintiff must plead and prove that the fabricated evidence definitively affected the criminal court jury, ‘likely’ affected the jury, or merely ‘could have’ affected the jury, the result in this particular case is the same.” Pet. 21. By petitioner’s own account, the disagreement she identifies had no bearing on the outcome of this case. That leaves nothing for this Court to decide but whether the courts below correctly resolved a fact-bound causation question—the paradigm this Court declines to review, as certiorari is “rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

Petitioner’s causation theory is also meritless. Her argument rests entirely on the Florida Supreme Court’s 2009 statement that the print match was “cumulative” of Respondent’s trial testimony that he handled the knife. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 603 (Fla. 2009). But that ruling addressed a different question (whether newly discovered evidence warranted a new trial under Florida’s post-conviction standard), on a different record (one that did not yet include Samantha Williams’ five confessions or the DNA results placing her blood, and not Respondent’s, at the scene), and it was superseded by the Florida Supreme Court’s 2016 decision vacating the conviction outright. 202 So. 3d at 794–95. The district court, surveying the summary judgment record, found that “the match was a crucial factor in Hemmert’s

decision to arrest Aguirre for the murders,” and that “[a] reasonable jury could logically conclude from this and other evidence that the match was a crucial factor in Aguirre’s arrest and later conviction.” 2023 WL 2558479, at *7 n.11; Pet. App. 90a.

Nor does the Eleventh Circuit’s separate holding that a cured probable-cause affidavit established *arguable* probable cause for Respondent’s arrest, 158 F.4th at 1307–08, say anything about causation of the *conviction*. Arguable probable cause is an arrest-stage standard requiring “less than evidence which would justify condemnation” and is “not a high bar.” *Id.* at 1307 (internal quotation marks omitted). Whether a reasonable officer could have believed there were grounds to arrest is a different question, answered under a different standard by a different decisionmaker, than whether sworn expert testimony placing Respondent’s palm on the murder weapon had a reasonable likelihood of affecting a jury asked to convict beyond a reasonable doubt—and to recommend a death sentence. A civil jury could reasonably find that the State’s forensic centerpiece was a substantial cause of Respondent’s conviction, of his death sentence, and indeed of his decision to testify at all. Nothing in that fact-bound determination merits this Court’s intervention.

II. THE ELEVENTH CIRCUIT’S FABRICATION HOLDING IS A FACT-BOUND APPLICATION OF SETTLED LAW.

Petitioner contends the lower courts created a “novel species” of due process liability for examiners who harbor “negative personal opinions” about a verifying colleague. The court of appeals considered and rejected precisely

that characterization. Birks argued below that her conduct was, at most, “being overly confident or wrong in expressing [her] opinion” that Respondent was the source of the print. 158 F.4th at 1298. The panel explained that this “mischaracterizes Aguirre’s allegations and the forensic process required to confirm inculpatory evidence that a suspect is the source of latent prints”: a positive identification requires both a comparison *and* “verification by an independent, competent examiner,” and “[o]nly after the second step can a positive identification be confirmed.” *Id.*

The premise of Petitioner’s “novel species” label is also mistaken. This Court has itself recognized the constitutional interest at stake here, assuming a “due process right not to be deprived of liberty as a result of a government official’s fabrication of evidence.” *McDonough v. Smith*, 588 U.S. 109, 113–14 (2019). A claim resting on that recognized right—and on decades of circuit precedent condemning the false creation of inculpatory evidence—is not an invention of the courts below.

The Eleventh Circuit did not hold that an honest mistake, or a poor choice of verifier standing alone, violates due process. It held that “[t]he purposeful failure to properly verify the results of a positive comparison is not mere error or overconfidence in expressing a forensic conclusion; it is the absence of a step required to report incriminating forensic evidence. Any intentional transmittal to investigators of a positive identification without this step would thus be a fabrication of a forensic result, akin to reporting that a drug test confirms the identity of a substance even though the testing did not result in a confirmation.” 158 F.4th at 1298–99 (citing

Manuel v. City of Joliet, 580 U.S. 357, 368 (2017)); Pet. App. 38a.

That analogy answers Petitioner’s repeated insistence that she never “knew” her comparison of the ridge detail was wrong. The fabrication does not lie in an erroneous comparison; it lies in attesting to a confirmed identification when no genuine confirmation ever occurred. A “positive identification” is a term of art that, by the professional standards Birks acknowledged, presupposes independent verification by a competent examiner. An analyst who reports a “positive identification” while deliberately routing the required verification to someone she believes cannot perform it has represented as established a result she knows was never established—whatever she subjectively believed about the underlying ridge detail. That is knowing falsity in the only sense the claim requires.

Viewed in the light most favorable to Respondent, as it must be at summary judgment, the record here supplies ample basis for a jury to find exactly that. Birks sent this capital-case verification to an examiner who “had officially retired at this time and was in questionable health,” who was “noticeably sick,” “taking medication,” and “would fall asleep mid-conversation and err when performing verifications, which Birks knew.” 158 F.4th at 1299. The evidence showed a pattern: Birks used McQuay as her verifier of choice when other examiners disagreed with her; she sent one identification to McQuay after two separate examiners declined to verify it; she sometimes skipped verification entirely, relied on unqualified examiners, or pressured colleagues to verify her results; and she admitted she “had exceptions” to the

verification process—all while professing that “she did not consider it proper to have a verification performed by an analyst in poor health or who was not able to properly verify identifications.” *Id.* at 1299–1300; Pet. App. 40a. From that pattern, “reasonable jurors could conclude that Birks, by intentionally selecting a person whom she considered incompetent or incapable as a verifier, fabricated an ultimate forensic result incongruent with what she could actually determine from her examination of the murder weapon,” and that she did so “to avoid a competent examination that would impede her inculcation of Aguirre.” 158 F.4th at 1300. That is not a mistaken quality-control choice. It is a knowing sham, the functional equivalent of reporting a confirmed result when no confirmation occurred.

Petitioner’s claimed circuit consensus that fabrication requires “knowing” falsity is therefore beside the point. The inference the Eleventh Circuit identified *is* an inference of knowledge: that Birks knew her result would not withstand competent verification and structured the process to avoid one. The district court drew the same inference, concluding that a jury could find Birks “intentionally sent the print in Aguirre’s case to McQuay for an unquestioned verification—indicating Birks knew the match was false or harbored serious doubts about the veracity of her findings.” 2023 WL 2558479, at *7. Whether the evidence ultimately supports that inference is a question for the jury—“[a] jury must resolve this question of fact, precluding qualified immunity,” 158 F.4th at 1300—not for summary judgment, and not for this Court on certiorari. Petitioner’s quarrel is with two courts’ reading of a summary judgment record, which is the paradigm of a fact-bound dispute on which this Court

does not grant review. Sup. Ct. R. 10 (certiorari “rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law”).

III. THE QUALIFIED IMMUNITY HOLDING FAITHFULLY APPLIES THIS COURT’S PRECEDENTS.

Petitioner’s final argument that no case clearly established the unconstitutionality of her conduct is fatally flawed because it relies on recharacterizing the conduct at a level of granularity this Court has never required. The right at issue is not a right against “verification by a colleague the examiner privately doubts.” It is the right not to be convicted on evidence a state actor falsely creates or falsely attests to—a right this Court recognized nearly a half-century before Birks testified. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (“[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.”).

The Eleventh Circuit’s survey of its own precedent confirms the point. Since 1977, binding circuit law has “determined that constitutional due process is implicated when a state law enforcement officer offers false inculpatory evidence that the State uses to incriminate a suspect.” *Aguirre*, 158 F.4th at 1298 (citing *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977)).¹ The court had

1. The Eleventh Circuit “adopted as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981.” *Aguirre*, 158 F.4th at 1291 n.8 (quoting *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)).

“reiterated *Schneider*’s holding multiple times in varying circumstances”: an officer “planting cocaine in a suspect’s car,” *Riley v. City of Montgomery*, 104 F.3d 1247, 1253 (11th Cir. 1997); an officer “fabricating a boot print at a murder scene,” *Jones v. Cannon*, 174 F.3d 1271, 1289–90 (11th Cir. 1999); and officers “switching exculpatory evidence with inculpatory evidence during a search,” *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1281 (11th Cir. 2002). 158 F.4th at 1298.

As the Eleventh Circuit summarized, these cases “at least set forth a principle that it is unlawful for a law enforcement officer to falsely create or falsely attest to the existence of incriminating evidence,” and “[e]ven assuming our case law is not ‘directly on point,’ the ‘principles’ evinced by and the ‘reasoning’ in these cases would have fairly apprised reasonable officers in Birks’s position that falsely presenting evidence confirming a suspect as the source of a latent print on a murder weapon—and then falsely testifying to the inculpatory nature of that evidence at trial—is unlawful.” *Id.* A forensic examiner who read *Jones*—fabricated impression evidence in a murder case, decided five years before she examined the knife—could not have doubted that fabricating a palm print identification on a murder weapon violates due process.

The Eleventh Circuit’s analysis conforms to this Court’s specificity requirement. The panel began from *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), and *United States v. Lanier*, 520 U.S. 259, 271 (1997), acknowledging that “sometimes a very high degree of prior factual particularity may be necessary,” but that “general statements of the law are not inherently incapable of giving fair and clear warning.” 158 F.4th at 1297 (internal

quotation marks omitted). The specificity cases Petitioner invokes—*Kisela*, *Escondido*, *Sheehan*, and this Court’s recent decision in *Zorn v. Linton*—arise from the Fourth Amendment excessive force context, where this Court has explained that specificity is “especially important” because reasonableness turns on split-second judgments in rapidly evolving circumstances. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). In contrast, nothing about a forensic examiner’s deliberate misreporting of laboratory results in the months before a capital trial involves split-second judgment. No reasonable examiner in 2004 could have believed it was lawful to report and then testify to a positive identification she knew would not survive genuine verification. Where, as here, the conduct “so obviously” violates the Constitution, this Court has confirmed that a materially identical precedent is unnecessary. *Taylor v. Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam); *Hope*, 536 U.S. at 741.

Finally, the posture confirms that review is unwarranted. Whether Birks in fact harbored knowledge of the falsity of her identification is precisely the disputed factual question the courts below held a jury must resolve. On interlocutory review of a qualified immunity denial, the courts were required to take the facts in the light most favorable to Respondent. If Petitioner prevails on the facts at trial, she will need no immunity; if the jury credits Respondent’s evidence, her conduct falls squarely within the long-established prohibition on fabricating evidence. Either way, there is nothing here for this Court to decide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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