

No. 25-1341

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IN THE  
**Supreme Court of the United States**

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DONNA BIRKS,

*Petitioner,*

*v.*

CLEMENTE JAVIER AGUIRRE-JARQUIN,

*Respondent.*

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

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**REPLY BRIEF IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

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**I. THE LAW WAS NOT CLEARLY ESTABLISHED TO GIVE NOTICE TO BIRKS THAT ASKING MCQUAY TO VERIFY HER LATENT PRINT ANALYSIS WAS A DUE PROCESS VIOLATION.**

Aguirre's Response to the Petition relies largely on a glaring and critical factual error, to wit: Aguirre's claim that Birks "shopped" the June 2004 palm print verification to fellow print examiner William McQuay *after* McQuay retired from the forensic latent print identification division of the Seminole County Sheriff's Office. That is simply not true.

Petitioner Birks concluded on June 24, 2004, that Aguirre's palm print was a match for a latent print left in blood on the knife used to kill the victims. On the same date – June 24, 2004 – McQuay verified Birks' conclusion. (Dist. Ct. Doc. 185-1). Aguirre represents in the "Questions Presented" portion of his Response to Birks' Petition that McQuay was retired when McQuay performed this June 24, 2004, verification. (Resp., p. i, referring to McQuay as "already-retired" when the verification was made).

But the record reflects that McQuay did not retire until May 2005, the year *after* the print verification in this case. (District Ct. Doc. 185-1, paragraphs 5-8, and 209-1, p. 29.) Aguirre also errs when he implies that Birks impermissibly "shop(ped) around" for a second opinion from a retired McQuay when other verifiers were unable to reach a result in Aguirre's case. (Resp., p. 6). First, McQuay was not retired when he performed the verification.<sup>1</sup> Second, there

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1. Birks' Petition for Writ of Certiorari also notes that the Eleventh Circuit erroneously adopted Aguirre's incorrect rendition of the timing of McQuay's retirement. Petition, p. 7, n. 1.

is no evidence that Birks asked anyone other than McQuay to review her finding in Aguirre's case. (Dist. Ct. Doc. 209, pp. 228-229; Doc. 185-1, pp. 3-4).

To support this unfounded "shopping" implication, Aguirre cites to a 2006 examination by Birks in the matter of Troy Bouey Jr., which he incorrectly describes as an "earlier" case. In that 2006 matter, Birks was criticized by another examiner for asking McQuay, having retired in 2005, to verify a print identification after two other examiners were unable to verify Birks' conclusion. (District Ct. Doc. 209-1, pp. 89-90, 4-5).

Aguirre cites no evidence that Birks sought out McQuay to verify her conclusion in Aguirre's case only after her analysis was rejected by one or more other examiners. The Eleventh Circuit in fact acknowledged that none of the criticisms of Birks in the Bouey matter or any other case "directly relates misconduct" to Birks in Aguirre's case. *Aguirre v. Seminole County*, 158 F.4th 1276, 1300 (11th Cir. 2025).

The Eleventh Circuit observed in this case that "constitutional due process is implicated when a state law enforcement official offers false inculpatory evidence that the State uses to incriminate a suspect," but all of the cases cited in support involved submission of evidence that the officials in those cases fabricated with malevolent intent and with *subjective knowledge* of its falsity. *Id.*, at 1298 (*planting cocaine* in a suspect's car, *fabricating a boot print* at a murder scene, *switching exculpatory evidence* with inculpatory evidence). None involved incorrect lab analysis of genuine physical evidence. In his Response, Aguirre concedes that numerous circuit court

cases stand for the proposition that for due process to be implicated by a State witness offering such evidence the witness must subjectively know that the evidence is false. (Resp., pp. 14-15).

Aguirre cannot carry his burden of proving Birks deliberately falsified the identification, so he seizes upon an alleged violation of industry standards, in the form of Scientific Working Group on Friction Ridge Analysis, Study and Technology (SWGFAST) guidelines, to infer a due process deprivation. But SWGFAST does not clearly establish constitutional law. Aguirre himself refers to a positive identification under SWGFAST guidelines as “a term of art.” (Resp., p. 18).

Moreover, SWGFAST does not clearly define the qualifications for a verifier, nor does it establish that McQuay was not qualified to verify Birks’ print match result in Aguirre’s case. “For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right” such that “in the light of pre-existing law the unlawfulness [is] apparent.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks and citations omitted). “[E]xisting law must have placed the constitutionality of [Birks’] conduct ‘beyond debate.’” *District of Columbia v. Wesby*, 583 U.S. 62, 63 (2018), quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Qualified immunity gives government employees like Birks the “breathing room” to make reasonable but mistaken judgments. *Ashcroft v. al-Kidd*, 563 U.S. at 743.

Birks had McQuay, a credentialed fellow employee, verify her identification conclusion in Aguirre’s case.

Aguirre has not cited, the Eleventh Circuit has not cited, and Birks cannot find, any case which has ever held that asking a certified and credentialed coworker to verify a forensic result is unconstitutional because one forensic examiner harbors subjective doubts as to the other examiner's capabilities. Birks does not pick and choose the hiring of fellow examiners at the Sheriff's Office and even if other examiners were employed in the latent print unit, which was not the case in June 2004, it was not established as clearly unconstitutional to have chosen McQuay, even if Birks subjectively believed that others would be better suited to the task.

Aguirre cites this Court's holding in *McDonough v. Smith*, 588 U.S. 109, 113-14 (2019), as standing for the proposition that the Court has recognized the "constitutional right at stake here" which Aguirre then contends includes the purposeful use of an unqualified person to verify a result. (Resp., p. 17). This Court in *McDonough* reached no such result. To the contrary, in *McDonough* the Court expressly did not decide the issue of what the right exactly is, accepting the Second Circuit's formulation of a fabrication of evidence claim as deprivation of liberty caused by a due process violation. Even if *McDonough* could be read for the proposition that use of one credentialed colleague over another is a due process violation, that opinion came 15 years after the print match verification in this case, which therefore could not clearly establish the law for Birks in 2004.

Aguirre argues at several points that the issues raised here are too unique to the facts of this case to merit this Court's review. But "where, as here, the Court of Appeals erred on both the merits of the constitutional claim and

the question of qualified immunity, ‘we have discretion to correct its errors at each step.’” *Wesby*, 583 U.S. at 62, quoting *al-Kidd*, 563 U.S. at 735. Where the circuit court’s analysis, “if followed elsewhere” would “undermine the values qualified immunity seeks to promote” this Court should review the case and correct the faulty analysis. *Id.*

It is the Eleventh Circuit’s creation of a novel, unique form of due process liability arising from a government employee’s personal view of a similarly credentialed colleagues’ competencies within the sphere of his job duties that calls for a finding of qualified immunity as to Birks. Because the Eleventh Circuit erred in its qualified immunity analysis on this issue, this Court should grant the Petition for Writ of Certiorari and hold that Birks is entitled to qualified immunity on Aguirre’s Fourteenth Amendment claim.

**II. THE CLAIM AT ISSUE IN THE PETITION IS AGUIRRE’S FOURTEENTH AMENDMENT CLAIM ARISING SOLELY FROM BIRKS’ SELECTION OF MCQUAY TO VERIFY HER FINDING AS IT RELATES TO HIS 2006 CONVICTION, NOT HIS FOURTH AMENDMENT CLAIM BASED ON THE ADEQUACY OF THE 2004 MURDER INVESTIGATION.**

The prosecutor’s case included fact-witness testimony which established the murder weapon had “a potential provenance that tightly linked it to Aguirre’s workplace and home,” *Aguirre*, 158 F.4th at 1305, expert testimony concerning a latent print found on the murder weapon in the victim’s blood, DNA evidence, footprint analysis, and blood-spatter analysis. Aguirre then testified, offering an innocent explanation for the inculpatory evidence.

Aguirre testified that he went to the victims' home early in the morning looking for beer. Instead, he found Cheryl Williams' body at the threshold of the front door. He entered the home and knelt down to lift Cheryl's lifeless and bloody body to his lap, returning her body as she lay. He attested he discovered a bloodied knife and picked it up because he feared the killer was still nearby, then walked further into the home with bloodied shoes. He left the victims' home with the knife in hand, then tossed it to the ground outside his own residence. He told no one about the gruesome discovery, showered, placed his blood-soaked clothing in a bag, placed the bag on the roof of his shed, and went to sleep.

Birks urges the Court to obtain and review the video of Aguirre's testimony at the 2006 criminal trial, which was filed in the district court in this action. (Dist. Ct. Docs. 180, 221, 229). Aguirre cannot avoid the logical consequences of his own sworn testimony at trial and in his deposition in this action that he handled the knife, establishing the very fact that Birks' testimony permitted the jury to infer. (Dist. Ct. Doc. 187, pp. 88-89).

The Florida Supreme Court rejected Aguirre's first appeal for a new trial, holding that even if Birks' palm print match was in error, the error was of no causal consequence to Aguirre's conviction and sentence because Aguirre admitted he held the knife. *Aguirre-Jarquin v. State*, 9 So.3d 593, 598 (Fla. 2009) ("*Aguirre v. State, I*"). Aguirre notes that this was based on a different standard of proof than would be the case in this civil matter and that in a second appeal the Florida Supreme Court vacated the murder convictions. *Aguirre v. State*, 202 So.3d 785 (Fla. 2016) ("*Aguirre v. State, II*"). (Resp., p. 15). But under any standard of proof the only inference to be drawn from

Birks' print match conclusion and Aguirre's criminal trial testimony is exactly the same: Aguirre picked up and held the bloodied knife. And the later vacating of the conviction in *Aguirre II* had nothing to do with Birks' palm print match evidence.<sup>2</sup>

Aguirre devotes the first seven pages of his Response to the Petition complaining about the adequacy of the 2004 murder investigation, ignoring the role of the Grand Jury that indicted him and trying to convince the Court of his actual innocence or that Samantha Williams should have been considered an alternative suspect. But the Eleventh Circuit reviewed all of these same criticisms of the investigation and determined in the opinion under review that, even if one removed Birks' palm print match from the 2004 murder investigation, the probable cause bar for Aguirre's arrest "was easily met" and that there was still "ample evidence indicating Aguirre's involvement in the murders." *Aguirre*, 158 F.4th at 1307.

Aguirre has now lost the Fourth Amendment claims against all defendants, including Birks. The Court should not be distracted by Aguirre's re-litigation of those claims in his Response while deliberating on the central question of whether Birks' request to have McQuay review her conclusion as to the print match was a clearly established due process violation, and if so whether that constitutional violation caused a deprivation of Aguirre's liberty.

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2. Aguirre mischaracterizes himself as having been exonerated. "Exonerate," BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014), at 696 ("to clear of all blame, **to officially declare** a person to be free of guilt") (emphasis added). Aguirre's conviction was vacated but there has been no official declaration that Aguirre is free of guilt.

**III. CAUSATION IS A NECESSARY COMPONENT OF A FOURTEENTH AMENDMENT CLAIM FOR MONEY DAMAGES BASED ON LOSS OF LIBERTY. IT IS THEREFORE A NECESSARY PART OF A QUALIFIED IMMUNITY APPEAL AND IS NOT THE SUBJECT OF PENDENT JURISDICTION.**

Aguirre begins his “Reasons For Denying The Petition” section by characterizing Birk’s causation argument as a garden-variety protestation that the Eleventh Circuit should have exercised pendent jurisdiction over the causation issue. (Resp., p. 12). This is completely off the mark. Birks’ Petition for Writ of Certiorari urges not that the Eleventh Circuit should have exercised pendent jurisdiction over the causation issue, but that causation is a integral component of, and an essential element of, Aguirre’s Fourteenth Amendment claim which must be addressed in her qualified immunity appeal.

“The Fourteenth Amendment forbids a state from depriving a person of life, liberty, or property, without due process of law. To prevail on a procedural due process claim, ‘a plaintiff must establish that a state actor deprived him of a constitutionally protected liberty or property interest without due process of law.’” *Hinkle v. White*, 793 F.3d 764, 767 (7th Cir. 2015) (quoting *Dupuy v. Samuels*, 397 F.3d 493, 503 (7th Cir. 2005)). “*Only after* finding the deprivation of a protected interest do we look to see if the State’s procedures comport with due process.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (emphasis added), citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Aguirre unwittingly concedes at page 15 of his response that “every circuit treats causation as an element of a fabrication-of evidence-claim”; but Aguirre then

elsewhere contradicts himself and incorrectly argues to this Court that causation is a pendent jurisdiction matter.

This is why Birks' Petition suggests that one course of action in this case is for this Court to grant the Petition for Writ of Certiorari and remand the case to the Eleventh Circuit to reconsider whether, even if Birks' request to have McQuay review her palm print match was a due process violation, the due process violation did not cause a deprivation of Aguirre's liberty as his Fourteenth Amendment claim requires. Aguirre argues that Birks' Petition is a "singularly poor vehicle" to raise the causation issue because neither the district court nor the Eleventh Circuit Court of Appeals resolved the causation question. (Resp., p. 14). But that is exactly the point – the lower courts have erred in failing to address the causation element of Birks' qualified immunity claim.

Aguirre contends that "A civil jury could reasonably find that the State's forensic centerpiece [Birks' conclusion of a print match] was a substantial cause of Respondent's conviction, of his death sentence, and indeed of his decision to testify at all." (Resp., p. 16). But Birks' 2006 criminal trial testimony is not actionable under 42 U.S.C. §1983. *Briscoe v. LaHue*, 460 U.S. 325 (1983). Even where the claim is that Birks' trial testimony relied on fabricated evidence, "trial testimony, standing alone, cannot subject officers to liability." *Savory v. Andrews*, \_\_\_ F.4th \_\_\_, Case No. 24-2947, 2026 WL 2364361 \*8 (7th Cir. August 14, 2026).

If Aguirre's contention is that, had Birks not testified to the palm print match, then he would not have testified in the 2006 criminal trial and admitted that he picked up and held the knife, his contention fails. First, Birks is immune from suit for her testimony. *Briscoe*. Second,

Aguirre has testified in this case that the decision was made to have him testify *before* the 2006 trial even began. (Dist. Ct. Doc. 187, p. 185).

Third, the state criminal court judge ruled that even without Birks' palm print match evidence Aguirre would have had to testify in the 2006 trial to address the other, overwhelming evidence of his guilt: the murder weapon in his yard with the victims' blood on it, his lies over the course of the first day of the investigation, and his concealing his clothes with the blood of the victims on the roof of his shed, to name but a few. *Aguirre*, 158 F.4th at 1288. Aguirre cannot argue that Birks' trial testimony forced him to admit at trial to picking up and discarding the knife when he otherwise would have had to testify to explain away all of the other evidence against him, but that in doing so he either would have somehow avoided testifying about the knife found in his yard with the blood of the victims on it, or that he would have perjured himself to deny possessing it. A criminal defendant does not have a right to commit perjury. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986).

## CONCLUSION

The Court should grant the Petition and hold that Birks is entitled to qualified immunity on the due process component of Aguirre's novel Fourteenth Amendment claim. Her selection of McQuay, a credentialed fellow latent print examiner, to review her finding of a match did not violate Aguirre's due process rights. Birks is at a minimum entitled to qualified immunity because the law was not clearly established that the process she used for verification of her print match conclusion was unconstitutional.

The Court should also hold as to the deprivation of liberty component of Aguirre's Fourteenth Amendment claim that Birks is entitled to qualified immunity. Because Aguirre admitted he picked up the knife and handled it in the murder scene, Birks' palm print match was – as the Florida Supreme Court held – cumulative to Aguirre's own testimony and did not result in a deprivation of Aguirre's liberty.

In the alternative, the Court should grant the Petition and remand the case to the Eleventh Circuit to examine: 1) the causation issue as part of, not ancillary to, the qualified immunity analysis of the Fourteenth Amendment tort; and 2) whether Birks's palm print match was clearly established to be unconstitutional given her subjective belief at the time that the print match result was correct.

Respectfully submitted,

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