
Docket No. 08-1065

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,

Petitioners,

v.

CURTIS W. MCGHEE JR.,
AND TERRY J. HARRINGTON,

Respondents.

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

BRIEF FOR PETITIONERS

TEAM O

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. Under the doctrine of substantive due process, does a plaintiff have a right to civil damages for procurement of fabricated evidence when no recognized constitutional right is alleged and no actual injury occurred from the act in question?
2. When prosecutors are absolutely immune for trial conduct, can this immunity be nullified based on related pre-trial conduct?

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STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals entered judgment on November 21, 2008. The petition for a writ of certiorari as filed on February 18, 2009, and was granted on April 20, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV, § 1.

42 U.S.C. § 1983 provides, in relevant part:

Every person who . . . 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.

42 U.S.C. § 1983 (2010).

STATEMENT OF THE CASE

John Schweer, a retired police captain, lived in Council Bluffs, Iowa, where he worked as a night security guard at a local car dealership. *McGhee v. Pottawattamie County*, 547 F.3d 922, 926 (8th Cir. 2008). On a July night in 1977, Captain Schweer went to work and was shot and killed during an attempted car theft. *Id.* A witness, Kevin Hughes, identified Respondents Curtis McGhee and Terry Harrington as fellow members of his car theft ring and as Captain Schweer's murderers. *Id.* at 926-27. They were charged and tried, and after corroborating testimony by six other witnesses, the Respondents were found guilty and sentenced to life in prison. *Id.* at 927.

Detectives Lyle Brown and Daniel Larson were the lead detectives on Captain Schweer's murder investigation. *Id.* at 926. Petitioner David Richter was the County Attorney at the time, necessitating his involvement with the investigation. *Id.* Several other county employees wanted to help with the investigation of the captain's murder, including Assistant County Attorney Joseph Hrvol, also a Petitioner, who participated in interviews with witnesses as well as the examination of the area surrounding the car dealership. *Id.* The record is not clear as to how many or with which interviews Petitioner Hrvol was involved.

In September of 1977 the detectives interviewed Hughes, the initial witness, who had been arrested nine days earlier after being stopped in a stolen car. *Id.* He identified McGhee and Harrington as two of three men who were responsible for the theft of four cars from dealerships in Council Bluffs, Fremont, and Lincoln, Nebraska. *Id.*

Hughes, a juvenile, told police that he was at the McIntyre dealership when the murder occurred. *Id.* at 926-27. Hughes was offered a reward as well as help with his other charges in exchange for cooperating with the investigation. Although Hughes was assured he would not be charged with Captain Schweer's murder, the youth's statements still contained some inconsistencies and inaccuracies. *Id.*

Hughes eventually identified McGhee, Harrington, and Anthony Houston as Captain Schweer's killers. *Id.* at 927. Discovering that Houston was in jail at the time of the murder, the Detectives confronted Hughes, who admitted that he was lying about Houston. *Id.* Detective Larson was admittedly suspicious of the veracity of Hughes's statements, however, his statements about the Respondents were eventually corroborated by the other two teens arrested with Hughes, two other friends of Hughes, and jailhouse informants who testified that, while in prison with them, Harrington disclosed that he killed Schweer. *Id.* Additionally, McGhee told three different people that he was with Harrington when Harrington killed an officer in Council Bluffs. *Id.* at 928. The prosecutors decided there was enough evidence to move forward with the case.

The Petitioners were arrested, charged, and convicted of the first degree murder of Captain Schweer in 1978. *Id.* at 927. Years later, an independent investigation by a prison employee uncovered *Brady* violations that occurred during the proceedings, resulting in the overturning of Harrington's conviction and the vacating of McGhee's sentence. *Id.* at 927-28. Respondent McGhee subsequently pled no contest to the second degree murder of Captain Schweer. *Id.* at 928.

After the Respondents' convictions were overturned, Hughes, the others arrested with Hughes, and the jailhouse informants recanted their testimony. *Id.* Hughes admitted that he lied in hopes of obtaining the reward and to avoid being charged with the car thefts and the murder. *Id.* The Petitioners were then sued for violation of the Respondents' substantive due process rights for procuring the false testimony and using it at trial. *Id.* The Respondents are seeking civil damages. *Id.*

The district court held that the Petitioners violated the Respondents substantive due process rights, and further held that they were not entitled to absolute immunity. *McGhee v. Pottawattamie County*, 475 F. Supp. 2d 862 (S.D. Iowa 2007). The Eighth Circuit affirmed the district court's decision. 547 F.3d at 933. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Petitioners cannot be held civilly liable for a violation of the Respondents' substantive due process rights because no actual right was violated in procuring the fabricated evidence. No injury was caused when the evidence was obtained, rather, the deprivation of the Respondents' rights occurred at trial when the evidence was used against them. The Supreme Court has not recognized a constitutional right "not to be framed," and even if such a right exists, it was not clearly established at the time of the alleged violation. Furthermore, recognizing the claim would effectively amount to a pleading requirement under which a plaintiff must simply allege conspiracy or preparation to deprive an individual of life, liberty, or property.

Even if the Court finds that the Respondents did suffer a constitutional injury based on the Petitioners' pre-trial conduct, this conduct is shielded by prosecutorial immunity because the resulting injury occurred within the judicial process. Furthermore, the pre-trial conduct was "intimately associated with the judicial phase of the criminal process" because it was "directly connected with the conduct of a trial." Holding the Petitioners liable for their pre-trial actions would set a dangerous precedent that would severely hinder the overall prosecution function, and such a holding would subject prosecutors to a flood of civil litigation. The Court's historical recognition of these policy rationales underlying prosecutorial immunity should guide its reversal of the Eighth Circuit's decision.

ARGUMENT

I. THE COURT SHOULD REVERSE THE EIGHTH CIRCUIT'S RULING BECAUSE THE PRE-TRIAL CONDUCT OF THE PETITIONERS DOES NOT AMOUNT TO A VIOLATION OF THE RESPONDENTS' "SUBSTANTIVE DUE PROCESS" RIGHTS.

The Due Process Clause of the Fourteenth Amendment protects life, liberty, and property, as well as certain "fundamental liberty interests," from deprivation by the government without due process of law. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Court has stated that such interests qualify for protection under the doctrine of substantive due process only when the fundamental rights are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (quoting *Glucksberg*, 521 U.S. at 721). "Nothing short of an unambiguously conferred right will support a cause of action brought under § 1983; it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002).

The allegation that the Petitioners violated the Respondents' substantive due process rights by procuring fabricated evidence simply cannot be supported by an action under § 1983. The ambiguous façade of a substantive due process violation cannot hide the fact that no deprivation of liberty occurred as a result of mere procurement of the evidence, nor can it mask the nonexistence of such a right or precedent for it. Furthermore, it cannot satisfy the requirement of a clearly established right. The violation of the Respondents' rights resulting from the use of the fabricated evidence at trial does not

translate into an injury occurring during the interview of a witness. When recognizing that the facts of this case are not exceptionally unique, it becomes apparent that the Respondents' "right" is no more than clever pleading, and cannot pass muster under the standing requirements of the Court.

A. Respondents do not allege a violation of a specific constitutional right, therefore their claim fails the threshold requirement of an action under § 1983.

Section 1983 provides a cause of action against any person whom, acting under the color of state law, causes any citizen the "deprivation of any rights, privileges or immunities." 42 U.S.C. § 1983 (2010). In any § 1983 suit, the first inquiry is to identify the right "secured by the Constitution and the laws" of which the plaintiff has allegedly been deprived. *Graham v. Connor*, 490 U.S. 386, 394 (1989). This requirement necessitates specificity in assertion of the right: "vague generalities, such as 'the right not to be talked to,' will not suffice." *Chavez*, 538 U.S. at 776 (quoting *Glucksberg*, 521 U.S. at 721). The right asserted must not be "'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (quoting *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 431-32 (1987)). For a § 1983 claim to survive, the right must also be "clearly established." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Respondents' claim cannot satisfy the threshold requirement because there is no substantive due process right "not to be framed."

Essentially, they assert a right to be free from others corresponding with one another, outside of their presence or knowledge, without their detention or interference with their property, if the correspondence may or may not harm one of their interests at a later date. Not only would enforcement of such a right be outside the competence of a judiciary, it is vague at best.

Nor do the Respondents allege any specific deprivation of life, liberty, or property. The Eighth Circuit affirmed their claim without any attempt to identify the right with specificity. *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922, 933 (2008). Rather, the court cited two cases that are currently the source of a circuit split, and, without analysis, conclusively repeated the Respondents' claim, that procuring fabricated evidence violates a person's substantive due process rights. *Id.*

The Court has "always been reluctant to expand the concept of substantive due process." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). Thus far, the protections recognized by the Court under the doctrine of substantive due process have been "matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266 (1994); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 847-49 (1992). To date, the Court has not recognized any substantive due process rights that give rise to liability where no tangible injury has been inflicted.

1. No deprivation of life, liberty, or property occurred as a result of the alleged procurement of fabricated evidence.

The Respondents' assertion that their substantive due process rights were violated when the evidence was obtained begs (but does not answer) the question: what aspect of their lives, liberty, or property was denied or taken away from them at the stage of procurement? No right against such behavior has ever been recognized by the Court, with good reason, because the Constitution does not recognize a right to prohibit the activity of the state if it does not interfere with the liberties of its citizens.

The Seventh Circuit held in *Buckley v. Fitzsimmons* that procurement of false testimony, without more, does not violate any constitutional rights, and use of false testimony in judicial proceedings is protected by absolute immunity. 20 F.3d 789, 795 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995).¹ Addressing a similar situation, the court explained that "[c]oercing witnesses to speak, rather than loosening their tongues by promises of reward, is a genuine constitutional wrong, but the persons aggrieved would be [the witnesses] rather than [the defendant]." *Id.* at 794. Even though here the Petitioners offered a reward and help with other charges in exchange for the witness's cooperation, "overbearing tactics violate the right[s] of the person being interrogated," not the rights of persons discussed during the interview. *Id.*

Although the Second Circuit appears to endorse a right against the procurement of false evidence in *Zahrey v. Coffey*, this case is distinguishable by the deprivation of liberty caused by a prosecutor's

¹ Hereinafter *Buckley II*.

pre-trial actions. 221 F.3d 342, 344 (2d Cir. 2000). The deprivation of liberty occurred during the defendant's pre-trial incarceration after the prosecutor had fabricated evidence against him, but he was acquitted at trial. *Id.* at 352. Therefore, the deprivation of the defendant's right was a direct result of the prosecutor's fabrication.

In the present case, the Respondents' rights were implicated at trial when the evidence was used against them in order to obtain a conviction; only then were they deprived of liberty by incarceration. The mere procurement of evidence did not implicate their rights, and the Due Process Clause only protects against actions that "deprive any person of life, liberty, or property." U.S. CONST. amend. XIV.

2. Even if such a right exists and was properly asserted, the right was not clearly established at the time of the alleged infringement.

In *Anderson*, the Court emphasized that in an action alleging the violation of a right by state officials, the right must have been clearly established at the time of alleged infringement. 483 U.S. 635, 640 (1987). Foreseeing issues with indulging vague assertions of rights, the Court warned of plaintiffs converting clear precedent of qualified immunity into unbridled liability "simply by alleging violation of extremely abstract rights." *Id.* at 639.

The existence of a "right not to be framed," or the right not to be implicated or discussed in pre-trial interviews with potentially adverse witnesses is at issue today. If found to be a right, it may be classified as nothing short of "extremely abstract." However, there is no precedent to establish or even suggest such a right. Even

if the Court was to recognize the right that the Respondents allege, the Petitioners still cannot be held liable for violation of a right that was not clearly established over thirty years ago when the violation allegedly took place.

B. The injury, deprivation of liberty, occurred as a result of the prosecutor's use of the fabricated evidence at trial; its mere procurement had no bearing on the Respondents' liberty interests.

As the Supreme Court reserved in *Buckley v. Fitzsimmons*,² "[t]he location of the injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages." 509 U.S. 259, 275 (1993). Perhaps in foresight of plaintiffs attempting to use § 1983 where common law provides no remedy, the Court carefully noted the relevance of the location of the injury.

1. Section 1983 was passed in light of existing common law tort doctrine, which allows no recovery for an act that does not produce an injury.

Congress intended § 1983 "to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); see also *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983); *Tenney v. Brandhove*, 341 U.S. 367 (1951). As common law has long reflected, especially in the area of torts, an actual injury or damages are necessary to sustain a claim for recovery. The Fifth Circuit confirmed this requirement for § 1983 claims, stating that conspiracy or "agreement" to deprive someone of a

² Hereinafter *Buckley I*.

constitutional right will not suffice to support a claim. *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir. 1984). Preparation to commit an injury, such as the procurement of evidence, cannot satisfy the common-law requirements of an actual injury and damages.

2. There is no violation of a person's due process rights until that person is deprived of life, liberty, property, or certain privacy rights.

The Court has suggested that an investigative act, in and of itself, does not violate the Constitution until it is introduced at trial. *Chavez*, 538 U.S. at 767 (holding that a plaintiff's civil rights were not violated when police coerced a confession from him because it was not introduced at trial); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("Although conduct...prior to trial may ultimately impair [the right against self-incrimination], a constitutional violation occurs only at trial."). That is because the constitutional right cannot be violated until a liberty is deprived. In *Lee v. Willins*, the Second Circuit explained that when the injury occurs as a result of prosecution, i.e. conviction, prosecutors are protected by absolute immunity; civil damages are only available when "the alleged harm is inflicted *independently* of the prosecution." 617 F.2d 320, 322 (2d Cir. 1980) (emphasis added).

Although some courts have denied immunity for some pre-trial acts, these cases are distinguishable because the acts resulted in deprivations of liberty that were completely independent of the convictions. In *Buckley I*, the prosecutor made statements to the press about a defendant, causing direct injury to his reputation in

the community. 509 U.S. at 278. There was no conviction, therefore the injuries suffered were a direct result of the pre-trial conduct. *Id.* Similarly, a prosecutor who acted as a complaining witness in a warrant application was not afforded absolute immunity because his testimony resulted in the injury of a warrant being issued against the defendant. *Kalina*, 522 U.S. at 131.

Analogized with an infamous substantive due process case, *Griswold v. Connecticut*, rights to privacy were not violated when a Connecticut legislator planned and drafted the legislation prohibiting the use of contraceptives. See 381 U.S. 479, 480 (1965). Rather, the injury occurred when individuals were prevented from obtaining contraceptives. *Id.* at 485. Similarly, the Respondents' rights were not violated when the testimony was fabricated; their rights were violated when it was used at trial to deprive them of liberty. Just as the legislation on paper did not violate any rights until it was employed by the Connecticut legislature, the testimony here violated no constitutional rights until its application *at trial*.

The present issue turns on the fact that there is simply no injury resulting from the procurement of the evidence to sustain the claim. The Respondents' rights were deprived when the prosecutors used the evidence at trial to convince the jury to convict the criminal defendants. No amount of scheming, planning, or conspiracy involving the procurement of the evidence can establish a deprivation of the Respondents' rights before they were actually deprived by a conviction. It is well-established that prosecutors are afforded only qualified immunity when a defendant's rights are violated by actions

that are administrative or investigative in nature. However, attempts to classify the pre-trial actions of the prosecutors as administrative or investigative rather than prosecutorial (thus giving rise to qualified rather than absolute immunity), cannot override the basic common law and constitutional principle that without an injury, there may be no liability and no recovery.

As Justice Scalia noted, "I am aware of [] no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley I*, 509 U.S. at 281 (Scalia, J., concurring).

C. The alleged "right not to be framed," standing alone, cannot satisfy the Article III standing requirement of an injury in fact, and recognizing such a right will amount to a specificity of pleading requirement.

Fabrication of evidence is not a new occurrence in the criminal justice system, yet the Court has never recognized a substantive due process right not to be framed. The facts at hand are not isolated episodes; they parallel those often seen in claims of malicious prosecution and wrongful conviction. The cleverly pled claims have attempted to evade the well-established precedent of prosecutorial immunity to seek relief for injuries incurred at trial. If defendants were to base a claim solely on procuring false evidence, the case would not make it past the standing requirement of "injury-in-fact."

To have standing to bring a controversy before the Court, Article III of the Constitution requires a plaintiff to establish an injury

that is concrete and particularized, as well as causation that is fairly traceable to challenged conduct of the defendant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff bears the burden of showing that he has Article III standing for each type of relief sought. *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

The Respondents have failed to show a concrete injury resulting from the procurement of evidence. They have not established invasion of a legally protected interest, or even identified which interest is at issue; therefore they have not established causation. Rather, the Respondents have asserted an invasion of their substantive due process rights based upon some illusory injury that stripped them of some form of liberty during the span of witness Hughes's interview.

Despite the fact that § 1983 allows suits for deprivations of rights or liberties granted by the Constitution, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). The requirement of a concrete injury prevents plaintiffs from attempting to conjure new civil rights. Recognizing a claim of deprivation of rights before an injury occurs will effectively override the injury-in-fact standing requirement with a pleading requirement. Plaintiffs would be on notice that they must allege preparation, conspiracy, or some other pre-trial action to fulfill the standing requirement.

Furthermore, the injury of the Respondents occurred when the evidence was used, so any claim for recovery must be based on the conduct at trial that actually caused the injury.

II. THE COURT SHOULD REVERSE THE EIGHTH CIRCUIT'S RULING BECAUSE THE PETITIONERS' ARE ABSOLUTELY IMMUNE FROM LIABILITY FOR PRE-TRIAL ACTS THAT RESULTED IN A TRIAL INJURY.

In 1976, the Court first addressed § 1983 liability of a prosecutor in the seminal case of *Imbler v. Pachtman*. 424 U.S. 409 (1976). A civil rights action was brought against a prosecutor who knowingly used perjured testimony, resulting in the defendant's conviction and incarceration for nine years. *Id.* at 415-16. The Court relied on policy concerns and common-law tradition in determining that prosecutors should have absolute immunity for "activities intimately associated with the judicial phase of the criminal process." *Id.* at 430. Thus, the prosecutor was found to be absolutely immune for knowingly presenting perjured testimony at trial. *Id.*

As explained in part I *supra*, the Respondents did not suffer a constitutional injury as a result of the Petitioners' fabrication of evidence before trial; the only injury resulted from the introduction of this fabricated evidence at trial. It was established in *Imbler* that prosecutors are not liable for introducing fabricated evidence at trial. *Id.* The Eighth Circuit's holding strips the Petitioners of their immunity based on their pre-trial conduct which, standing alone, did not cause a constitutional injury. Since Petitioners are shielded by absolute immunity for the only valid constitutional injury that the Respondents suffered, the Court should hold that Respondents' § 1983 claim fails and reverse the decision of the Eighth Circuit.

However, even if the Court finds that the Respondents did suffer a constitutional injury based on the Petitioners' pre-trial conduct,

this conduct is shielded by prosecutorial immunity because the resulting injury occurred within the judicial process. This conclusion is consistent with the Court's findings for prosecutorial immunity in *Imbler* and its progeny as well as the policy rationales underlying the decisions.

A. The Petitioners' pre-trial conduct is shielded by absolute prosecutorial immunity.

In *Imbler*, the Court did not specify if or when absolute immunity should be extended to the investigative or administrative acts of a prosecutor, but held only that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from civil suit for damages under § 1983." *Id.* at 430-31. However, the Court did recognize that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.* at 431 n.33. Ultimately, the Court held that the facts of the case did not require a decision as to where the line should be drawn. *Id.*

In *Burns v. Reed*, the Court held that giving legal advice to police is not shielded by prosecutorial immunity. 500 U.S. 478 (1991). In *Burns*, a prosecutor in a murder investigation authorized police officers to put Burns under hypnosis, suspecting that she had multiple personalities. *Id.* at 482. Under hypnosis, Burns referred to herself and the assailant by the name "Katie." *Id.* Based on this reference, the prosecutor told the officers they had probable cause, and she was arrested. *Id.* The charges were eventually dropped before trial when the judge granted Burns's motion to suppress the statements. However,

in the interim Burns lost her job, lost custody of her sons, and spent four months in the psychiatric ward of a state hospital. *Id.* at 483.

The Court held that the administrative duties and investigatory functions "that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id.* at 494-96. The Court further explained: "Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* at 494.

In *Buckley I*, the Court described the application of the "functional approach" employed by the Court to determine "whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity." 509 U.S. 259 (1993). The plaintiff brought a civil rights action alleging that the prosecutor's fabrication of evidence during the investigation stage caused him to spend three years in jail. *Id.* at 262. The complaint alleged that the fabricated evidence (regarding a footprint at the scene of the crime some ten months before he was actually arrested) violated his constitutional rights because it was used to wrongfully incarcerate him. *Id.* at 273-75. The Court held that "[w]hen the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Id.* at 276. In a split decision, the Court ultimately held that the prosecutors' fabrication of false evidence

was only afforded qualified immunity because it was acquired during the "preliminary investigation" of an unsolved crime. *Id.* at 275.

The dissenting opinion in *Buckley I* argued that the prosecutors were entitled to absolute immunity for claims arising out of their fabrication of evidence that linked the defendant with the crime. *Id.* at 282 (Kennedy, J., dissenting). The dissent labeled the actions of the prosecutors as "preparation for trial" rather than "investigative." *Id.* at 284. Justice Kennedy noted that "[p]retrial and even preindictment consultation can be intimately associated with the judicial phase of the criminal process." *Id.* The dissent further stated that *Imbler* requires:

[T]hat the steps leading to [the decision to use a witness] must be free of the distortive effects of potential liability, at least to the extent that the prosecutor is engaged in trial preparation. Actions in "obtaining, reviewing, and evaluating" witness testimony . . . are a classic function of the prosecutor as advocate. Pretrial and even preindictment consultation can be "intimately associated with the judicial phase of the criminal process."

Id. at 284 (quoting *Imbler*, 424 U.S. at 426, 430) (internal citation omitted). The Court held that "the only constitutional violations these actions are alleged to have caused occurred within the judicial process." *Id.* at 285.

The reasoning of the *Buckley I* dissent is more consistent with the realities of the prosecution function, the policy rationales underlying the *Imbler* decision, and the Court's recent holding in *Van de Kamp v. Goldstein*. See 129 S. Ct. 855 (2009). Furthermore, the fact that the Respondents are alleging that the Petitioners' pre-trial conduct resulted in a *trial* injury (wrongful conviction) is telling;

Petitioners' pre-trial conduct should be afforded absolute immunity because it was "intimately associated with the judicial phase of the criminal process" because the injury occurred within the judicial proceedings.

In the present case, the Petitioners were similarly interviewing witnesses in preparation for a potential criminal trial. As noted in *Imbler*, the duties of a prosecutor "in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, 424 U.S. at 431 n.33. When the Petitioners were engaged in investigatory interviews, they were in the process of determining whether to pursue criminal charges and which suspects should be implicated in the murder. These actions were not merely investigatory, but were necessary precursors to the Petitioners' decision to proceed with the judicial phase of the criminal case. Furthermore, the only constitutional injury alleged by the Respondents occurred as a result of the Petitioners presenting the fabricated evidence at trial. This buttresses the conclusion that the Petitioners pretrial acts are absolutely immunized as activities intimately associated with the judicial phase of the criminal process.

In contrast, *Burns* is distinguishable and illustrates when a prosecutor may be held liable for pre-trial conduct that is not associated with judicial proceedings. This is the type of conduct that *Imbler* sought to punish because it occurred outside of the judicial phase. "The premise of *Burns* was that, in providing advice to the police, the prosecutor acted to guide the police, not to prepare his own case." *Buckley I*, 509 U.S. at 285 (Kennedy, J., dissenting).

The prosecutors in *Burns* were not personally engaged in reviewing or evaluating witnesses or evidence, unlike the Petitioners in the present case, but instead were acting to control police conduct. Advising police is the type of "litigation-inducing conduct" that the *Burns* Court held was not absolutely immunized because such conduct is disconnected from the prosecutor's role in judicial proceedings.

The Court's 2009 decision in *Van de Kamp* is parallel to the reasoning in Justice Kennedy's *Buckley I* dissent, and reinforces a reversal of the Eighth Circuit's decision. In *Van de Kamp*, the defendant was convicted of murder, based in part on the testimony of a jailhouse informant known for giving information in return for favorable treatment. *Van de Kamp*, 129 S. Ct. at 859 (2009). This fact was not revealed to the defense, and, upon release, he filed a § 1983 action, alleging that the supervisor in the prosecutor's office had failed to establish sufficient training and procedures to ensure that information about informants was provided to defense counsel. *Id.*

The Court unanimously held that the prosecutors were absolutely immune for these administrative acts because they were "directly connected with the conduct of a trial." *Id.* at 862. The Court held that the type of administrative acts in question were "the types of activities . . . which necessarily require legal knowledge and the exercise of related discretion." *Id.* This reasoning is similar to Justice Kennedy's dissent in *Buckley I*, which categorized the prosecutor's conduct as "preparation for trial" rather than "investigatory." 509 U.S. at 284. Both analyses reject the *Buckley I* majority's rigid functional approach and support the finding that

certain administrative and investigative acts that occur outside of trial are absolutely immunized because of their intimate relationship with "the judicial phase of the criminal process."

Van de Kamp should guide the Court's application of absolute immunity to the Petitioners' pre-trial conduct. The Petitioners' alleged fabrication was not a mere investigatory act because it was directly connected to their overall efforts in pursuing a conviction for the murder. The fact that the Respondents' injuries did not occur until trial is further evidence that the Petitioners' pre-trial conduct was "directly connected with the conduct of a trial."

Furthermore, the underlying policy rationales for prosecutorial immunity also support a reversal of the Eighth Circuit's decision.

B. The policy considerations underlying the absolute immunity doctrine support a holding that Petitioners are not liable for their pre-trial conduct.

The Eighth Circuit's decision denying absolute immunity should be reversed because an affirmance would set a dangerous precedent severely hindering the overall prosecution function. Policy dictates that prosecutors must be able to perform their duties without fear of retaliation. These policy rationales were of paramount importance in the *Imbler* Court's decision to adopt absolute immunity for prosecutors sued in actions under § 1983. 424 U.S. at 424-30. The benefits that society realizes through the prosecution's role in the investigatory stages leading up to trial outweigh the potential for misconduct.

An opposite holding would allow criminal defendants turned civil plaintiffs to circumvent immunity in the pleadings by connecting some

aspect of their trial injury to the prosecution's pre-trial conduct. There are already adequate safeguards in place in the adversary system to deter this conduct. Applying qualified immunity, rather than absolute immunity, to the Petitioners' pre-trial acts would provide little additional deterrence for misconduct and would squander prosecutors' vigorous pursuit of justice.

1. Holding the Petitioners liable for their pre-trial conduct would severely hinder the prosecutorial functions of the judicial process.

In *Imbler*, the Court gave a detailed discussion of the public policy reasons for adopting prosecutorial immunity in § 1983 actions. *Id.* at 424-29. The Court held that applying only qualified immunity to prosecutorial misconduct would expose even honest prosecutors to civil litigation, stating that prosecutors "inevitably [make] many decisions that could engender colorable claims of constitutional deprivation." *Id.* at 425.

Additionally, the Court noted that affording only qualified immunity to prosecutors would prevent "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-28. These same policy rationales were restated with emphasis in the Court's recent decision in *Van de Kamp*. 129 S. Ct. at 859-62.

Imbler also discussed policy concerns that directly relate to the present case. With respect to the pre-trial evaluation of witnesses, the Court stated:

The veracity of witnesses in criminal cases frequently is subject to doubt *before* and after they testify, . . . If

prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about personal liability, the triers of fact in criminal cases often would be denied relevant evidence.

424 U.S. at 426 (emphasis added).

This policy reasoning strongly supports a reversal of the Eighth Circuit's decision. An affirmance might deter a small amount of misconduct, but it would also affect the conduct of all honest prosecutors in their vigorous pursuit of justice. The Eighth Circuit's decision denying the Petitioners absolute immunity was based in part on the assumption that a contrary holding would allow prosecutor's to fabricate evidence and then shield themselves from liability by using the fabricated evidence at trial. The court stated "it would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty." *McGhee*, 547 F.3d at 932 (8th Cir. 2008) (quoting *McGhee v. Pottawattamie County*, 475 F. Supp. 2d. 862, 907 (S.D. Iowa 2007)).

This assertion ignores the Court's long history of recognizing the unavoidable consequences inherent in the doctrine of prosecutorial immunity. The Court has never pretended that prosecutorial immunity is perfect, but has described it as a "balance between evils." *Imbler*, 424 U.S. at 994 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

Not only does the Eighth Circuit's holding ignore these significant policy rationales, it ignores the consequences of holding prosecutors liable for actions connected to trial.

2. Holding the Petitioners liable for their pre-trial conduct would cause a flood of litigation.

The Eighth Circuit's holding should be reversed because it opens the door for criminal defendants to bring civil suits against prosecutors by connecting their trial injury to some aspect of the prosecutor's pre-trial conduct. Indeed, *Imbler* noted that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." 424 U.S. at 431 n.33. As Justice Kennedy observed in his dissenting opinion in *Buckley I*:

Almost all decisions to initiate a prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.

Buckley I, 509 U.S. at 283 (Kennedy, J., dissenting).

If a civil action against a prosecutor can survive the pleadings based on such a rule, then the purpose of immunity is defeated. Absolute immunity is intended to free prosecutors from the burdens of litigation at the earliest possible stage.

CONCLUSION

Because the procurement of evidence does not constitute a violation of substantive due process, and because absolute immunity extends to conduct at trial as well as actions in preparation for that conduct, the Court should reverse the ruling of the Eighth Circuit.