No.

In the Supreme Court of the United States

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

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

JEFFREY W. SARLES
Counsel of Record
STEPHEN SANDERS
VINCENT J. CONNELLY
LORI E. LIGHTFOOT
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Petitioners

QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.

PARTIES TO THE PROCEEDING

Petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter are defendants in the district court and were appellants in a collateral order doctrine appeal in the Eighth Circuit. Matthew Wilber also was an appellant in the Eighth Circuit appeal on a question not related to the issues in this petition, and thus he is not a party before this Court. Respondents Terry J. Harrington and Curtis W. McGhee Jr. are plaintiffs in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit (App., *infra*, 1a-20a) is reported at 547 F.3d 922. The district court's opinion (App. *infra*, 21a-155a) is reported at 475 F. Supp. 2d 862.

JURISDICTION

The Eighth Circuit entered judgment on November 21, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

This petition addresses a critical issue of federal law related to prosecutorial immunity on which, as the following background shows, the circuits are divided.

The plaintiffs in this case, Terry J. Harrington and Curtis W. McGhee Jr. (hereinafter "respondents"), were tried and convicted in 1978 for the murder of an auto dealership security guard in Council Bluffs, Iowa. The Iowa Supreme Court vacated Harrington's conviction in 2003, based on a finding that petitioners had failed to disclose exculpatory evidence of an alternative suspect. *Harrington* v. *State*, 659 N.W.2d 509 (Iowa 2003). Following that decision, McGhee, whose conviction was based on essentially the same facts and evidence, entered an *Alford* plea to second-degree murder in exchange for a sentence of time served. Harrington was not retried.

In 2005, respondents sued petitioners in the United States District Court for the Southern District of Iowa under 42 U.S.C. § 1983 and other causes of action, alleging *inter alia* that former county attorneys Joseph Hrvol and David Richter had coerced false witness testimony during the criminal investigation of respondents; subjected respondents to false arrest; introduced false testimony against respondents at trial; and withheld exculpatory evidence. Respondents did not allege that petitioners had subjected them to malicious prosecution.

Petitioners moved for summary judgment based on absolute immunity, qualified immunity, and other defenses. In an opinion and order on February 23, 2007, the district court dismissed claims against pe-

titioners that were based on withholding of exculpatory evidence. Petitioners were absolutely immune from those claims, the district court held, because "failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial process." App., *infra*, 85a (citing *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.34 (1976)).

However, the district court denied immunity to the extent that respondents' claims arose from allegations that petitioners had coerced false testimony from witnesses that was later introduced at trial. The district court held that such allegations were "sufficient to state a substantive due process claim," App., *infra*, 104a, and that a constitutional right against such conduct by a prosecutor was "clearly established." *Id*. at 114a.

In holding that petitioners could be subjected to trial and potential liability for procurement and use of false testimony, the district court expressly rejected contrary authority from the Seventh Circuit. App., *infra*, 104a. In *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995),[1] the Seventh Circuit held that procurement of false testimony by a prosecutor, without more, does not violate any of a criminal defendant's constitutional rights. Further, the Seventh Circuit explained, the *use* of such testimony in judicial proceedings is shielded by absolute immunity. *Ibid*.

In this case, the district court not only rejected the Seventh Circuit's analysis as "unpersuasive,"

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[1] To avoid confusion with an earlier decision by this Court in the same case, *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), which is discussed elsewhere in this petition, petitioners will refer to the Seventh Circuit decision as "*Buckley II*."

App., *infra*, 104a, it relied on the *dissent* in *Buckley II*. The district court opined that a prosecutor "should not be immune from § 1983 liability" for procuring false testimony, because such conduct "'*ripen[s] into* a § 1983 cause of action * * * *by use of the perjured testimony at trial*.'" *Id*. at 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)) (emphasis added). Thus, although petitioners argued that qualified immunity shielded them from suit because procurement of false evidence does not, in itself, violate any clearly established constitutional right, the district court not only denied that defense, it effectively abrogated *absolute* immunity for the *use* of that testimony *at trial*. As a result, the court allowed respondents to seek to hold petitioners liable for the consequences of the testimony, namely, respondents' convictions and incarcerations.

Petitioners brought an appeal under the collateral order doctrine to the Eighth Circuit. See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). In accordance with the Seventh Circuit's decision in *Buckley II*, they argued that only the use of false testimony, not merely its procurement, could have violated Harrington and McGhee's constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. See App., *infra*, 17a-18a.

The Eighth Circuit rejected this argument. *Id.* at 18a-19a. Instead, with only brief discussion, it affirmed the district court's analysis, holding that a prosecutor's procurement of false testimony "violates a [criminal defendant's] substantive due process rights." *Id*. at 19a.

Relying on a case from the Second Circuit, *Zahrey* v. *Coffee*, 221 F.3d 342 (2d Cir. 2000), the

Eighth Circuit further held that a prosecutor is not immune for procurement of false evidence "where the prosecutor was accused of *both* fabricating evidence *and then using the fabricated evidence at trial*," resulting in a post-trial "deprivation of liberty." App., *infra*, 18a (citing *Zahrey*, 221 F.3d at 344, 349) (emphasis added and internal quotation marks omitted). The Eighth Circuit acknowledged that this reasoning was "in tension, if not conflict, with" the Seventh Circuit's *Buckley II* decision. *Ibid.* (internal quotation marks omitted).

Thus, in ostensibly denying *qualified* immunity for *procurement* of false testimony during an *investigation*, the Eighth Circuit effectively abrogated *absolute* immunity for the *use* of that testimony *at trial*, thereby making petitioners potentially liable in damages for wrongful conviction and incarceration.

The Eighth Circuit refused to stay its mandate, and the case has now returned to the district court, where petitioners are being subjected to the burdens of time-consuming and expensive trial preparations from which they would be shielded under ordinary immunity principles. Trial is scheduled to begin on August 3, 2009.

REASONS FOR GRANTING THE PETITION

This Court has recognized that prosecutorial immunity is an "important and recurring issue." *Imbler*, 424 U.S. at 417; see also *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 860 (2009) (calling prosecutorial immunity a "serious" concern). "[T]he absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because

any lesser degree of immunity could impair the judicial process itself." *Kalina* v. *Fletcher*, 522 U.S. 118, 127 (1997) (internal quotation marks and citation omitted).

The Eighth Circuit held that a prosecutor has no immunity from suit where he allegedly procured false testimony during an investigation, then introduced the same testimony at trial, resulting in a post-trial deprivation of liberty. The Eighth Circuit supported that decision by finding a "substantive due process" right against procurement of false evidence — a right that, far from being "clearly established," has no basis whatsoever in this Court's precedents. This ruling widens and deepens a circuit split on a critical question of federal law, misapprehends both the constitutional protections and the immunities applicable at distinct stages of the criminal process, and violates this Court's "function test" for prosecutorial immunity.

The Eighth Circuit's decision creates a dramatic and unprecedented new rule infringing prosecutorial immunity, a rule whose ramifications extend far beyond this case. Review is warranted to resolve a serious conflict among the circuits and to prevent prosecutors from being exposed to damages liability in violation of this Court's precedents.

I. The Eighth Circuit's Decision Widens And Deepens A Split Among The Circuits On The Critical Issue Of Prosecutorial Immunity.

The decision below squarely conflicts with authority from another circuit—the Seventh Circuit's decision in *Buckley II*—on a critical question of federal law: whether a prosecutor (1) may be sued on al-

legations that he procured false testimony, and then (2) face liability for a wrongful conviction because he introduced that same testimony at trial. What's more, the decision below widens and deepens what has become a *multi-circuit* split: the Eighth Circuit relied on the Second Circuit's *Zahrey* decision, which itself had rejected *Buckley II*. Meanwhile, the Third Circuit has followed *Buckley II*.

The relevant facts in *Buckley II* are virtually identical to the facts in this case. In *Buckley II*, the plaintiff, Stephen Buckley, alleged that prosecutors had violated his constitutional rights by coercing false statements from third parties through use of reward money, including co-defendant Rolando Cruz, then using this false testimony in Buckley's indictment and trial. 20 F.3d at 794-795.

On the issue of procuring false testimony, the Seventh Circuit noted that Buckley had not been able to identify "any case holding that this practice violates the Constitution. * * * His contention that the [reward money] payments [to witnesses] themselves violate the due process clause does not state a claim on which relief may be granted." 20 F.3d at 794.

> Let us suppose the prosecutors put Cruz on the rack, tortured him until he named Buckley as his confederate, and then put the transcript in a drawer, or framed it and hung it on the wall but took no other step, or began a prosecution but did not introduce the statement. Could Buckley collect damages under the Constitution? Surely not; Cruz himself would be the only victim.

Id. at 795.

If a prosecutor actually *used* such false testimony in judicial proceedings, the Seventh Circuit went on to explain, then absolute immunity would shield him from a damages suit.

> [I]f the constitutional entitlement is a right to prevent use of the confession at trial (or before the grand jury), then absolute immunity under *Imbler* defeats Buckley's claim. *Obtaining* the confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity. * * * Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs.

20 F.3d at 795 (citing *Buckley* v. *Fitzsimmons,* 509 U.S. 259, 267 n.3 (1993); *Burns* v. *Reed*, 500 U.S. 478, 489-490 & n.6 (1991)) (emphases in original).

In this case, the Eighth Circuit provided a much different analysis.

First, it said that a prosecutor's procurement of false testimony, without more, violates a criminal defendant's "substantive due process rights." App., *infra*, 19a. Not only does this notion directly conflict with Seventh Circuit law, but such a "substantive due process" right against procurement of false evidence, far from being "clearly established," has no basis in this Court's precedents.

Then, drawing on the Second Circuit's *Zahrey* decision, the Eighth Circuit reasoned that a prosecutor has no immunity where a "'deprivation of liberty * * * can be shown to be the result of [the prosecu-

tor's] fabrication of evidence' where the prosecutor was accused of both fabricating evidence and *then using the fabricated evidence at trial*." App., *infra*, 18a (quoting *Zahrey*, 221 F.3d at 344, 349) (bracketed alteration in original, emphasis added).

Although it nominally recognized that the county attorneys in this case had absolute immunity for their use of evidence at trial, the Eighth Circuit effectively abrogated that immunity by conflating *procurement* and *use at trial* into one undifferentiated "constitutional violation" that results in a post-trial "deprivation of liberty." App., *infra*, 17a-18a. This result is completely at odds with the longstanding principle that a prosecutor may not be held liable in damages for a wrongful conviction based on actions he took at trial.

The Eighth Circuit let stand the district court's reasoning, drawn from the dissent in *Buckley II*, that "prosecutors should not be immune from § 1983 liability 'for their non-advocacy wrongful conduct if [a former criminal defendant] can prove that indictment and trial would not have occurred in the absence of the product of the wrongful conduct.'" App., *infra*, 107a. But this conclusion too finds no support in this Court's precedents. Such but-for reasoning might, at most, support a claim for wrongful *institution* of criminal proceedings. But respondents have not alleged malicious prosecution against petitioners, and even if they had, petitioners would be immune, because a prosecutor's decision to initiate a prosecution is shielded by absolute immunity. *Imbler*, 424 U.S. at 421-424. Such speculative reasoning cannot bear the weight of the holdings below that *procurement* of false evidence during an *investigation* later "ripens" into a *trial* violation, thus exposing a prose-

cutor to potential liability for conviction and incarceration.

The circuit split in this case involves not just the Seventh and Eighth circuits, but the Second and Third circuits as well.

Like the Eighth Circuit here, the Second Circuit in *Zahrey* rejected the Seventh Circuit's analysis in *Buckley II* and instead followed the *Buckley II* dissent. See *Zahrey*, 221 F.3d at 354-355. *Zahrey* involved a prosecutor who allegedly fabricated evidence against a New York City police officer for use in criminal and police disciplinary proceedings. The target of the proceedings, Zaher Zahrey, was indicted and arrested based on the false evidence, but was subsequently acquitted.

Zahrey announced what the Second Circuit called a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." 221 F.3d at 349. The Second Circuit reasoned that if a prosecutor fabricated evidence during the investigative phase of a proceeding, when he had only qualified immunity, then "it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that Zahrey would be indicted and arrested." *Id.* at 354.

The Second Circuit's analysis essentially erased the important distinction between a prosecutor's investigative and advocacy roles—a distinction central to what this Court has called the "functional approach" to immunity. *Burns*, 500 U.S. at 486. The *Zahrey* court's reasoning elides the fact that a prosecutor is absolutely immune for presentations to a grand jury. *Imbler*, 424 U.S. at 430-431. Hence, it is

irrelevant whether it was "reasonably foreseeable" that the prosecutor in *Zahrey* would place before the grand jury false evidence that he had earlier procured. In *Zahrey*, the Second Circuit bypassed the "functional approach" and carved out an exception to fundamental immunity principles based on nothing more than an improvised and fallacious theory of proximate cause.

Significantly, the deprivation of liberty in *Zahrey* was limited to the period between arrest and trial. Because Zahrey was acquitted and thus suffered no post-trial deprivation of liberty, the Second Circuit had no basis to consider whether a prosecutor who procures false evidence could also, in effect, be held liable for wrongful conviction and post-trial incarceration. Yet that is the context in which the Eighth Circuit applied *Zahrey* here, exposing petitioners to potential liability for a murder conviction and a long period of incarceration.

While *Buckley II* has been rejected by the Second and Eighth Circuits, it has been followed by the Third Circuit. In *Michaels* v. *New Jersey*, 222 F.3d 118 (3d Cir. 2000), a criminal defendant alleged that her constitutional rights were violated when a prosecutor and other investigators employed coercive techniques against witnesses, then used the evidence to obtain an indictment and conviction (which was later reversed). Relying on *Buckley II*, the Third Circuit said that the techniques used to interview the witnesses "did not violate [the plaintiff's] constitutional rights," and that the prosecutor "was entitled to absolute immunity in offering the unreliable evidence." *Id.* at 122. Thus, the Eighth Circuit's decision in the present case also directly conflicts with law from the Third Circuit.

In summary, review is warranted to resolve what has become a four-circuit split on a critical question of federal law.

II. The Eighth Circuit's Decision Cannot Be Reconciled With This Court's Precedents.

A. The decision below fails to analyze constitutional violations with particularity.

The Eighth Circuit and the district court theorized that when a prosecutor procures false testimony during a criminal investigation when he has only qualified immunity, such conduct works a "substantive due process" violation, which the courts below apparently understood as an injury that begins before a criminal defendant is even arrested, "ripens" into a § 1983 violation when the testimony is used at trial, and extends through a post-trial deprivation of liberty. The only support from this Court's cases offered for this proposition in either of the decisions below was the district court's citation to *Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993). App., *infra*, 104a. *Reno*, however, had nothing to do with false evidence or criminal proceedings but rather with an unsuccessfully asserted liberty interest on the part of detained juvenile aliens to be released into a "'noncustodial setting.'" 507 U.S. at 302.

The decisions below fly in the face of this Court's teaching that constitutional violations must be described with particularity, then evaluated in light of specific constitutional guarantees.

Where immunity defenses are involved, "it is important to determine the precise claim that [a plaintiff] has made against [a prosecutor] concerning [the prosecutor's] role in the" particular phase of the criminal proceeding at issue. *Burns*, 500 U.S. at 487.

Moreover "if a constitutional claim is covered by a specific constitutional provision * * * the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States* v. *Lanier*, 520 U.S. 259, 272 n.7 (1997); accord *Albright* v. *Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims") (internal quotation marks omitted). The Eighth Circuit failed to perform this careful, particularized analysis of respondents' alleged injuries.

First, it is highly doubtful that the act of procuring false testimony, in and of itself, is a "substantive due process" violation, as the Eighth Circuit held. That is because there is "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*, 509 U.S. at 281 (Scalia, J., concurring).

In this case, respondents allege harms at two distinct phases of the criminal process: that petitioners (1) subjected them to wrongful arrest based on false testimony the county attorneys had procured, and then (2) wrongfully introduced that same testimony at respondents' murder trials. Both of these injuries fall under well recognized constitutional rubrics. By lumping them together as one undifferentiated "constitutional violation," the Eighth Circuit failed to "determine the precise claim[s]" and the

immunity principles applicable to each injury. *Burns*, 500 U.S. at 487.

If an investigating prosecutor uses false testimony to fabricate probable cause and thereby obtain a false arrest, that act may constitute an illegal seizure in violation of the Fourth Amendment. *Albright*, 510 U.S. at 274 ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it"). In such circumstances, the prosecutor would have only qualified immunity. *Buckley*, 509 U.S. at 274 (prosecutor does not have absolute immunity "before he has probable cause to have anyone arrested"). But the injury from such a violation is temporally limited. Damages for false arrest "cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself." *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (citation and internal quotation marks omitted).

Thus, in this case, should respondents' false-arrest claim survive[2] and should they be able to prove that the county attorneys had them arrested based on false testimony, petitioners could be subject to trial and liability for respondents' brief detention following their arrests, but nothing more. The scope of the issues and evidence necessarily would be sharply circumscribed and limited to the allegations of false arrest. (Respondents have not alleged malicious prosecution against petitioners.)

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[2] The district court has not yet acted on petitioners' pending motion to dismiss the false-arrest claims on statute of limitations grounds, based on *Wallace* v. *Kato*, 549 U.S. 384 (2007).

By contrast, if a prosecutor knowingly introduces false testimony in judicial proceedings, that act constitutes a completely different constitutional violation—a violation of the 14th Amendment's guarantee of *procedural* due process related to trial. *Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942); *Mooney* v. *Holohan*, 294 U.S. 103, 112-113 (1935). Such a trial violation may, of course, entitle a criminal defendant to post-conviction relief such as a new trial. See *Napue* v. *Illinois*, 360 U.S. 264, 272 (1959). But absolute immunity applies with "full force" when a prosecutor engages in activities that are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Such absolute immunity applies even to the "willful use" by a prosecutor at trial of perjured or false testimony, *id.* at 431 n.34—precisely what respondents allege in this case.

Given this absolute immunity, the fact and consequences of any use that petitioners made of allegedly false testimony at respondents' criminal trials could not properly be an issue—indeed, it could not properly be discussed or entered into evidence—in the pending district court trial.

As a matter of simple logic, the only way petitioners' alleged *procurement* of false testimony could have caused respondents' convictions and post-trial incarcerations was through *use* of that testimony at trial. Yet neither the district court nor the Eighth Circuit provided any authority from this Court that a prosecutor may be held answerable in damages for such a trial violation. Instead, the courts below simply conflated procurement and use into one undifferentiated "constitutional violation" based on "substantive due process." The district court went astray in

its analysis (an analysis the court of appeals let stand) by pointing to precedents such as *Mooney* and *Napue*, which are about *post-conviction relief* for *trial violations*, as support for the proposition that respondents had a "clearly established" right to seek *damages* for an investigating prosecutor's mere *procurement* of false evidence. App., *infra*, 114a.

The theory that procurement followed by use at trial of false testimony works one continuous constitutional violation also cannot be reconciled with this Court's teaching that a discrete violation at an early point in a criminal proceeding does not automatically trigger further constitutional harms at later stages of the process.

For example, in *Wallace*, this Court emphasized the difference between false arrest and torts related to prosecution and trial, and it explained that a false arrest in violation of the Fourth Amendment does not "set the wheels in motion for [a] subsequent conviction and detention." 549 U.S. at 391. By the same token, a prosecutor's procurement of false testimony, even if that act were in itself a constitutional violation, does not "set the wheels in motion" for a later violation at trial.

The notion that a prosecutor who procured false evidence during an investigation must be answerable in damages for a post-conviction deprivation of liberty disregards any analysis of causation and the requirement that false testimony at trial must be evaluated for harmless error. See *Arizona* v. *Fulminante*, 499 U.S. 279, 295 (1991); WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 1110 (3d ed. 2000) ("Because the *Mooney* principle is based upon the defendant's right to a fair trial, the Court has refused to go so far as to hold that the knowing failure to correct

false testimony produces a due process violation without regard to whether the false testimony was likely to have had an impact upon the outcome of the trial"). Under harmless error analysis, the weight of evidence may support a conviction even though a prosecutor relied in part on false testimony that he procured.[3] Yet under the Eighth Circuit's ruling, the mere act of procuring false testimony not only subjects a prosecutor to suit, it potentially exposes him to damages liability for all the harmful consequences suffered by the criminal defendant, including conviction and incarceration. Absolute immunity may not be effectively abrogated based on such an overreaching conclusion.

In summary, the outcome below rests on a fundamentally flawed premise: that a prosecutor may be held liable for a wrongful conviction and detention because the procurement of false testimony during an investigation "'ripen[s] into a § 1983 cause of action * * * by use of the perjured testimony at trial.'" App., *infra*, 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)). This proposition directly conflicts with this Court's jurisprudence.

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[3] In this case, the Iowa Supreme Court vacated Harrington's conviction based not on the county defendants' alleged procurement of false evidence or the role that evidence played at trial, but rather on a *Brady* violation for withholding of exculpatory evidence. *Harrington* v. *State*, 659 N.W.2d 509, 525 (Iowa 2003). Because such a *Brady* violation occurs during the trial process, the district court has held that the county defendants have absolute immunity from this allegation.

B. The decision below violates this Court's "function test" for prosecutorial immunity.

It is well established that a prosecutor does not have absolute immunity during the *investigative* phase of a criminal proceeding, and that absolute immunity during the *judicial* phase does not "retrospectively" immunize earlier wrongful acts. *Buckley*, 509 U.S. at 276. But according to the Eighth Circuit's ruling, under which a prosecutor is answerable in damages for a wrongful conviction and incarceration, a prosecutor's liability for procuring false testimony during an investigation (assuming that such an act violates some constitutional right) *spreads forward* and effectively abrogates absolute immunity when the prosecutor later introduces that testimony at trial.

This result contravenes the "functional approach" to prosecutorial immunity this Court has prescribed. *Burns*, 500 U.S. at 486; see also *Buckley*, 509 U.S. at 273 (describing the "function test"). The key determinant for immunity is whether a prosecutor is performing a function that is "intimately associated with the judicial phase of the criminal process." *Buckley*, 509 U.S. at 270. Accordingly, a prosecutor receives only qualified immunity when he "performs the investigative functions normally performed by a detective or police officer." *Id.* at 273. But this Court has "not retreated * * * from the principle that acts undertaken by a prosecutor * * * which occur in the course of his role as an advocate for the State[] are entitled to the protections of absolute immunity." *Ibid.* This rule is "categorical[]." *Kalina*, 522 U.S. at 126.

In *Buckley*, Justice Scalia anticipated the exact scenario presented here and explained why a criminal defendant in such a case could have no claim of any sort against a prosecutor.

> Insofar as [Buckley's claims] are based on [prosecutor]s' supposed knowing *use* of fabricated evidence * * * at trial — acts which might state a claim for denial of due process, see, *e.g.*, *Mooney* — the traditional defamation immunity provides complete protection from suit under § 1983. If reframe[d] * * * to attack the preparation of that evidence the claims are unlikely to be cognizable under § 1983, since petitioner cites, and 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, 509 U.S. at 281 (Scalia, J., concurring) (citations and internal quotation marks omitted, bracketed alteration in original).

Petitioners do not dispute that the county attorneys were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly, only qualified immunity applied. But since the mere act of procuring false evidence does not violate any "clearly established" constitutional right, petitioners can have no claim at this stage. Later, when the county attorneys introduced that testimony at trial, they plainly were functioning as "advocate[s] for the State," and that conduct was covered by *absolute* immunity. Thus, there is no basis for *any* liability stemming from the alleged false testimony.

To hold, as the Eighth Circuit did, that a prosecutor effectively forfeits immunity "where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial," App., *infra*, 18a, elides the functional analysis that this Court has mandated. It is simply an example of "allow[ing] * * * particular policy concerns to erase the function test." *Buckley*, 509 U.S. at 274 n.5.

In summary, review is warranted because the Eighth Circuit's decision conflicts with this Court's precedents on fundamental points of constitutional criminal procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY W. SARLES
Counsel of Record
STEPHEN SANDERS
VINCENT J. CONNELLY
LORI E. LIGHTFOOT
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Petitioners

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