No. 08-1065

MAR 17 2009

IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA
JOSEPH HRVOL,
DAVID RICHTER,

Petitioners,

v.

TERRY J. HARRINGTON,
CURTIS W. McGHEE, JR.,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT CURTIS W. McGHEE, JR.

ALAN O. OLSON
OLSON LAW OFFICE, P.C.
3116 Ingersoll Avenue
Des Moines, IA 50312-3910
515-271-9100
515-271-8100 [fax]
aoo@olson-law.net

STEPHEN D. DAVIS
Counsel of Record
WILLIAM H. JONES
CANEL, DAVIS & KING
10 S. LaSalle Street, #3400
Chicago, IL 60603
312-372-4142
312-372-6737 [fax]
sdavis@daviskinglaw.com
wjones@daviskinglaw.com

Counsel for Respondent
Curtis W. McGhee, Jr.

221672

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT

Petitioners were a County Attorney and Assistant County Attorney who, along with police, fabricated evidence during a murder investigation to frame two innocent black teenagers, Terry Harrington and Curtis W. McGhee, Jr., for the killing of a retired white Police Captain during an election year for County Attorney. Harrington and McGhee spent over twenty-five years in prison for something they did not do as a result.

In *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("*Buckley I*"), this Court held that prosecutors do not have absolute immunity during the *investigative* phase of a criminal proceeding. Thus, the courts below correctly applied *Buckley I* to deny absolute immunity protection to petitioners. Indeed, petitioners do not claim absolute immunity here. Pet. at 19.

Instead, petitioners claim qualified immunity based' on the Seventh Circuit's decision in *Buckley v. Fitzsimmons*, 20 F.3d 789 (1994) ("*Buckley II*"), a case that has been followed only once in the last fifteen years, and that eight years ago.[1] They first argue that coercing and coaching witnesses to testify falsely to frame Harrington and McGhee for murder did not violate their constitutional rights. But this claim will not withstand scrutiny. Lies coerced and coached by police and prosecutors do not support the probable cause required for arrest or the initiation of legal proceedings under the Fourth Amendment. The fabrication of evidence by

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[1] Justice Thomas expressed the view that *Buckley II* was wrongly decided in *Michaels v. McGrath*, *infra*.

these governmental officials to deprive two innocent teens of a fair trial on murder charges – and ultimately deprive them of their liberty for over twenty-five years each - shocks the conscience, and constitutes a violation of Harrington and McGhee's right to substantive due process.

Harrington and McGhee's right to the equal protection of the laws was also violated in that their race was a factor in the misconduct. Pottawattamie County, Iowa was and is over 99% white. Petitioners needed a conviction in the worst way in a high-profile murder case during an election year. They framed Harrington and McGhee rather than investigate their real suspects for the murder – principally a local white man named Charles Richard Gates – at least in part because they knew a white jury in Council Bluffs, Iowa would readily convict two black teens from Omaha for killing a retired white Council Bluffs police officer.

Finally, petitioners argue that holding them liable for all of Harrington and McGhee's detention from their arrest in November 1977 until their release from prison in 2003 would improperly deprive them of the absolute immunity afforded to prosecutors for the knowing use of fabricated evidence at trial. But this Court held in *Buckley I* that the absolute immunity afforded prosecutors during the *judicial* phase of criminal proceedings does not extend "retrospectively" to immunize their misconduct during the *investigative* phase. 509 U.S. at 276. Petitioners concede this fact in their petition. Pet. at 18. Police are liable under Section 1983 for all of the natural consequences of their actions when they fabricate evidence during a criminal

investigation, and so are these prosecutors under *Buckley I*. Indeed, this Court cited this principle with approval a little over one month ago. *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (January 26, 2009).

REASONS FOR DENYING THE PETITION

The decisions below are correct and trial should not be further delayed for this Court to review them. The Seventh Circuit's *Buckley II* decision is an isolated aberration and does not represent a true conflict among the circuits which this Court need address, especially when the delay required to produce the almost certain result – reaffirmation of *Buckley I* – would be so hurtful to plaintiffs who have already waited too long for their day in court. Nor would a ruling in petitioners' favor on the immunity issue avoid a trial. The County would still have to go to trial because County Attorney Richter, its highest law enforcement officer, was personally involved in the unconstitutional misconduct. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The County has no immunity against this claim. *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit*, 507 U.S. 163 (1993).

Plaintiffs have been waiting for justice for more than thirty years. At long last, the judicial system owes Terry Harrington and Curtis W. McGhee, Jr., a trial with all deliberate speed.

I. Petitioners do not enjoy absolute immunity under *Buckley I*.

A. Petitioners fabricated evidence to frame two innocent black teens for murder.

The facts of this case are set forth at some length in the district court opinion. Pet. Appx. B at pages 24a-47a. Petitioners admit these facts here. Pet. Appx. B at 24a, n. 1 ("The Defendants, with very few exceptions, do not resist the facts set forth in the Plaintiffs' Complaints for purposes of the pending motions.").

In summary, County Attorney David Richter and Assistant County Attorney Joseph Hrvol fabricated testimony in order to frame two innocent teenagers for first degree murder. They did so because it was a "heater" case – the murder of a retired white Council Bluffs Police Captain, John Schweer – and County Attorney Richter – who had been appointed to the office – had his first election coming. Petitioners wanted to get a conviction in the worst way, and that is what they did.

Petitioners admit they never had probable cause to believe Harrington and McGhee were guilty of the murder. They further admit that, along with Council Bluffs police, they used threats, intimidation and offers of reward to get a known liar, Kevin Hughes, to make false statements against them anyway. Petitioners admit they coached Hughes to dress up his story by deleting things from his prior statements that were demonstrably false and adding things to make his lies seem more plausible. They offered Hughes a reward to

sweeten the pot. They intimidated Hughes's friends – Jones, Jacobs, Pride and Lee – into lying that they saw Hughes with Harrington and McGhee on the night of the murder to give the appearance of "corroboration" for part of Hughes's story. After having Harrington and McGhee arrested pursuant to warrant in November 1977, but before the True Informations were filed, petitioners offered leniency to teenage prisoners facing adult charges – Pierce, Plater and Hartwell – if they would state that McGhee had confessed involvement in the Schweer murder to them.[2] All of these witnesses have admitted they told lies they were told to tell by petitioners and police.

Petitioners not only failed to investigate Gates. They also concealed him from the defense. The Iowa Supreme Court vacated Harrington's conviction on account of this *Brady* violation, and the State agreed to vacate McGhee's 1978 conviction for the same reason. The district court held the *Brady* violation was protected by absolute immunity, but the concealment of Gates, a real suspect who had not been eliminated, provides further evidence that petitioners knew they lacked probable cause to believe Harrington and McGhee were guilty.

Racial prejudice against McGhee and Harrington as African-Americans was a motivating force in this

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[2] Pierce and Plater's statements were obtained in February 1978 before the February 17, 1978 True Information against McGhee for the murder. Hartwell's statement was obtained in April 1978 before McGhee's May 1978 trial and the May 8, 1978 True Information against Harrington for the murder.

misconduct. Petitioners wanted a conviction, and they framed Harrington and McGhee because they cared little for blacks – their County was over 99% white -- and because they knew a white Council Bluffs jury would readily convict two black teenagers from across the Missouri River in Omaha, Nebraska for the killing of a white Council Bluffs, Iowa police officer. Indeed, they preferred framing two innocent black teenagers to conducting a proper investigation of white suspects like Gates.

Without the fabricated testimony, there was no evidence connecting plaintiffs to the murder. That is an admitted fact for the purposes of this appeal. It is also undisputed that Harrington and McGhee were each imprisoned from their arrest pursuant to warrant in November 1977 until their release in 2003. Each man spent more than twenty-five years in prison for something he did not do.

B. This Court's decision in *Buckley I*.

This Court's decision in *Buckley I* governs the absolute immunity issue presented here. In that case, the Court was asked to decide whether absolute immunity protected prosecutors when, as here, they fabricate evidence during the preliminary investigation of a crime. The Court applied the functional approach it had adopted in earlier cases to draw the line between those acts protected by qualified immunity and those protected by absolute immunity. 509 U.S. at 269. This inquiry focuses on the nature of the function performed rather than the identity of the person who performed it. *Id.*

The Court noted in *Buckley I* that, while a prosecutor's activity as an advocate is protected by absolute immunity, he only enjoys qualified immunity for administrative and investigative work that does not relate to an advocate's preparation for the initiation of a prosecution or judicial proceedings. *Id.* at 273. The Court explained:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. [citation omitted].

The Court used probable cause to divide a prosecutor's role as investigator from his role as advocate. It found that the advocate's role does not begin until probable cause exists. As absolute immunity only protects the prosecutor as advocate, the lack of probable cause at the time of the alleged prosecutor misconduct means that there is no absolute immunity for that conduct:

> A careful examination of the allegations concerning the conduct of the prosecutors

> during the period before they convened a special grand jury to investigate the crime provides the answer. The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings during that period. Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.

Id.[3]

As the prosecutor's acts in *Buckley I* "occurred well before they could properly claim to be acting as advocates," the Court found that absolute immunity did not protect them against the plaintiff's allegations. *Id.* at 275. And the fact that the prosecutors later used the evidence in court did not cloak their involvement in fabricating that evidence during the investigation with absolute immunity:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might

[3] In footnote 5, the Court observed that a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. A prosecutor would still only have qualified immunity for administrative/investigative work done after probable cause was determined. 509 U.S. at 274.

> then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When 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. See also *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000) (Prosecutor who participated in fabrication of evidence in his investigatory role and then used it in court is not protected by absolute or qualified immunity); *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001) (prosecutor involved in fabricating evidence before charges are filed not protected by absolute immunity); *Moore v. Valder*, 65 F.3d 189, 195 (D.C. Cir. 1995) ("Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of *investigative* techniques . . . [and] therefore relates to a typical police function . . .").

About one month ago, a unanimous Court again noted that absolute immunity does not apply when a prosecutor is engaged in investigative or administrative tasks. *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (Jan. 26, 2009).

C. The Eighth Circuit correctly applied *Buckley I*.

Petitioners do not claim in their petition that they had probable cause to believe Harrington and McGhee were guilty of the murder. They admit that they were acting as investigators when they allegedly fabricated

the evidence, and that absolute immunity does not apply. They state at page 19 of their petition:

> 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.

Given this admission, there can be no doubt that the courts below were correct to deny absolute immunity protection to petitioners.

II. Petitioners do not enjoy qualified immunity against plaintiffs' claims.

Petitioners argue that they have qualified immunity against Harrington and McGhee's Section 1983 claims. Their first argument is the strange notion that manufacturing evidence to frame a defendant for murder does not violate the defendant's Constitutional rights. Their second argument is that the only injury they caused to Harrington and McGhee occurred when they presented the false evidence at their criminal trials, conduct for which they enjoy absolute immunity. Petitioners base this argument on the Seventh Circuit's decision in *Buckley II*. But that decision is in conflict with this Court's decision in *Buckley I* and other established Supreme Court precedent.

A. The fabrication of evidence violated plaintiffs' constitutional rights.

In *Buckley II*, two judges of that court began by finding that coercing witnesses to testify against a criminal defendant does not violate the defendant's constitutional rights. But this Court has never so held. A finding that petitioners' manufacture of evidence does not violate Harrington and McGhee's constitutional rights would fly in the face of this Court's decision in *Mooney v. Holohan*, 294 U.S. 103 (1935).

In that case, Mooney was serving a life sentence after being convicted of first degree murder in 1917. He brought a petition for *habeas corpus* alleging that the state was holding him in confinement without due process of law. He alleged that the evidence against him was fabricated and that the authorities had deliberately suppressed evidence which would have impeached and refuted the testimony against him. Like petitioners, the defendants in *Mooney* did not challenge the truth of these allegations. Instead, they argued that due process only required the prosecuting authorities to give notice to the defendant so that he had an opportunity to present his evidence. This Court disagreed:

> Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental

> conceptions of justice which lie at the base of our civil and political institutions. [citation omitted]. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

294 U.S. at 112.

In *Mooney*, the Court specifically discussed the government's use of the false evidence at trial. But certainly "fundamental conceptions of justice" include the notion that government officials will not fabricate evidence or use other tricks to try to deprive an American of his liberty. Other decisions of this Court since *Mooney* support this view, as the Court has held on several occasions that a criminal defendant's constitutional rights are violated when the government knowingly uses false evidence or deliberate deception to obtain his conviction and imprisonment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (When the

reliability of a given witness may well be determinative of guilt or innocence, the prosecution must disclose evidence affecting the credibility of that witness); *United States v. Agurs*, 427 U.S. 97, 107 (1976) (Duty to disclose material, exculpatory evidence exists even when no request for the information has been made); *Napue v. Illinois*, 360 U.S. 264 (1959) (failure of State to correct testimony known to be false violates due process); *Pyle v. Kansas*, 317 U.S. 213 (1942) (allegations of knowing use of perjured testimony and the suppression of evidence favorable to the accused constitutes charge of violation of constitutional rights). All of these cases show that the Constitution protects against such governmental cheating in criminal cases, and all predate the 1977-78 misconduct at issue here.

There can be no doubt that the State's cheating in criminal cases violates due process, no matter how much process is afforded. As this Court noted in *Brady v. Maryland, supra*, the government wins when justice is done, not by getting a conviction at any cost. The best procedures in the world will not protect a criminal defendant if the prosecutor is determined to violate this ethical obligation and the defendant's constitutional rights.

That is what happened here. County Attorney Richter, the county's highest law enforcement officer, wanted a conviction at all costs. He fabricated evidence along with Assistant County Attorney Hrvol and Council Bluffs police. Richter and Hrvol vouched for the false evidence in court. They conspired with police to hide their fabrication of evidence from the court and jury, just as they conspired to hide Gates and other real

suspects. Their purpose: these facts had to be hidden or the process might prevent their evil plan from succeeding.

The *Buckley II* court offered a clever hypothetical that no constitutional violation would occur if the prosecutor coerced and coached a witness statement and then put it in a drawer. See Pet. at 7. But no one fabricates evidence to put it in a drawer. They fabricate evidence to use it against the defendant. And such conduct violates fundamental justice – and the Constitution – every step of the way.

The *Buckley II* court also was wrong to suggest that a criminal defendant suffers no actual injury until the fabricated evidence is used at trial, as this ignores the fact that the fabricated evidence is often the basis for the defendant's arrest, pretrial detention and for the formal charges brought against him for the crime. That was certainly true here. But for the evidence these petitioners fabricated, no warrant would have been issued for Harrington and McGhee's arrest and they would not have been subjected to pretrial detention, formal charges, conviction or post-trial imprisonment.

B. Petitioners' absolute immunity during the judicial phase does not protect them against liability for fabricating evidence during the investigative phase.

The *Buckley II* court further erred by finding that the plaintiff in that case had no claim against the prosecutor for fabricating the evidence during the investigation because the prosecutor enjoyed absolute immunity for presenting the false evidence at trial.

Even petitioners admit this is error. They write at page 18 of their petition:

> 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.

Yet petitioners argue that they cannot be liable for the wrongful conviction and subsequent imprisonment caused by the evidence they fabricated. The reason? Because they have absolute immunity for presenting at trial the evidence they had fabricated during the earlier investigation. In other words, they claim that their absolute immunity during the judicial phase extends "retrospectively" to immunize earlier wrongful acts. This is the very thing that petitioners admit well-established law forbids.

Specifically, this Court's decision in *Buckley I* forbids it. This Court held that prosecutors who fabricate evidence during a criminal investigation are acting like police and so are to be treated like police. Petitioners do not deny that a police officer who fabricates evidence and supplies it to a prosecutor is liable for all of the plaintiff's damages under Section 1983, including damages for wrongful conviction and imprisonment caused by the fabricated evidence. They cannot. In constitutional torts, a defendant is responsible for the natural consequences of his actions. *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled on other grounds,

Monell v. Dep't of Social Services, 436 U.S. 658 (1978). Under *Buckley I*, a prosecutor has that same liability when, as here, he investigates like a police officer and fabricates evidence.

This is true even if the prosecutor who fabricates the evidence is the one who later uses the fabricated evidence in court. 509 U.S. at 276.[4] Thus, the Eighth Circuit and the district court were exactly right to observe, based on the Second Circuit's decision in *Zahrey*, that "it would be a perverse doctrine of tort and constitutional law that would hold liable the [police officer] fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer [prosecutor] who enlists himself in a scheme to deprive a person of liberty." Pet. Appx. A at 18a; Pet. Appx. B at 108a.

Petitioners say the Eighth Circuit's decision improperly abrogated petitioners' absolute immunity for using fabricated evidence at trial. But again, they are not being sued for using the fabricated evidence at trial as prosecutors. Petitioners are being sued for fabricating the evidence while acting as investigators along with police. Police do not have immunity for such misconduct, and neither do prosecutors under this Court's decision in *Buckley I*.

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[4] Justice Kennedy agreed with the majority in *Buckley I* on this point: "I agree with the Court that the institution of a prosecution 'does not retroactively transform . . . work from the administrative into the prosecutorial . . .'" 509 U.S. at 289.

C. Petitioners' claim of a conflict among the circuits overstates the case.

Not surprisingly, *Buckley II* has not attracted much support since it was decided almost fifteen years ago in 1994. Petitioners have cited no other Seventh Circuit decision which followed *Buckley II*'s reasoning. In fact, Judge Easterbrook, the author of *Buckley II*, acknowledged in *Newsome v. McCabe*, 256 F.3d 747, 754 (7th Cir. 2001), that two circuits had rejected his *Buckley II* analysis, citing the Second Circuit's decision in *Zahrey v. Coffey*, *supra*, and the Tenth Circuit's in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997).

Judge Easterbrook also noted that Justice Thomas "expressed the view that *Buckley II* was wrongly decided" in *Michaels v. McGrath*, 531 U.S. 1118 (2001). *Id.* This refers to Justice Thomas's dissent from the denial of *certiorari* in *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), the only case that petitioners can cite as following *Buckley II* in the last fifteen years.[5]

In short, *Buckley II* is a trial balloon that did not fly, and there is no justification for this Court to further delay trial of this case to address it.

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[5] We note that the Third Circuit decided *Michaels* on June 5, 2000 and that the Second Circuit decided *Zahrey v. Coffey* about six weeks later on July 20, 2000. In this case, the Eighth Circuit reviewed *Zahrey* and found it persuasive. The Third Circuit might well have done the same had it been given the same opportunity.

D. The Court would not retreat from *Buckley I* to adopt *Buckley II*.

Under *Buckley II*, a prosecutor could fabricate evidence during a criminal investigation and then use it to convict the defendant and give him a long prison sentence. Under *Buckley II*, a court that found the prosecutor did these things would nevertheless have to dismiss the Section 1983 claims because the injury did not occur until trial when the heavy sentence was meted out. Such a result cannot be reconciled with the broad remedial purpose of Section 1983. Nor can it be reconciled with this Court's decision in *Buckley I* that a prosecutor who fabricates evidence during an investigation has the same liability as a police officer who does the same thing.

Another strange thing about the *Buckley II* rationale is that it reserves Constitutional protections for the smallest injuries while denying it to the most serious. Under *Buckley II*, Section 1983 would provide a remedy when a prosecutor uses excessive force and breaks a person's nose during a criminal investigation, or when he causes a short pretrial detention without probable cause. But if he fabricates evidence during the investigation which later causes the defendant to be wrongfully convicted and imprisoned for twenty-five years – or perhaps wrongfully executed – the victim has no remedy. Under those circumstances, the injury only occurred at trial, and that's protected by absolute immunity. Surely that is not and cannot be the law.

This Court observed in *Buckley I* that "we have been 'quite sparing' in recognizing absolute immunity

for state actors in this context." 509 U.S. at 269. This is the correct approach, as absolute anything leads to trouble. If this Court found that prosecutors could not be held liable under Section 1983 for fabricating evidence during a criminal investigation under any rationale (because absolute immunity protects everything a prosecutor does; because coercing a witness does not violate the defendant's rights; because the defendant only suffers injury from coerced testimony in the immunized setting of a trial), then a fundamental conception of justice – that the Constitution protects Americans and their liberty against cheating by prosecutors sworn to uphold the law – would no longer be fundamental. Immunity would become impunity. Prosecutors would be free to fabricate evidence during criminal investigations because they would know there was virtually no possibility of ever being punished for it. Indeed, prosecutors might choose to displace police when dirty work is required to take advantage of such a loophole.

True, there is a theoretical possibility of a prosecutor being prosecuted criminally, but such cases are rarer than hen's teeth. Who would have arrested petitioners in this case? Surely not the police they conspired with. Who would have prosecuted County Attorney Richter? Surely not Assistant County Attorney Hrvol. Police and prosecutors work in concert, and this case shows that, sadly, it is not always to the good. It took more than twenty years for the *Brady* violation to surface, and petitioners' manipulation of the witnesses remained hidden even longer. And even after the Iowa Supreme Court vacated Harrington's conviction on account of the *Brady* violations in 2003, there was still no criminal

investigation to determine whether police and prosecutors obstructed justice or otherwise acted criminally.

The truth is that bad police and bad prosecutors are held accountable in civil rights cases like this one or not at all. If prosecutors cannot be liable under Section 1983 for fabricating evidence during a criminal investigation as *Buckley II* held, impunity reigns. We do not believe that impunity is necessary for good prosecutors to do zealous, honest work. We do believe that the potential for civil liability will prevent some prosecutors from acting unconstitutionally. And we know that justice demands more than Harrington and McGhee's release from prison after twenty-five years. Justice demands that they be compensated for their injuries in full. Justice demands that petitioners be brought to account for what they did.

If this Court were to adopt *Buckley II* and hold that there is no section 1983 cause of action against a prosecutor for the wrongful conviction and imprisonment caused by his fabrication of evidence, it would take that fateful step from absolute immunity to absolute impunity. It would turn away from a fundamental conception of justice that the government will not try to take our liberty with false evidence. It would step back from its holding in *Buckley I* that a prosecutor who fabricates evidence during an investigation shares the same liability as the police officer he conspired with. And were this Court to find that a criminal defendant framed by prosecutors can only get out of prison, and cannot recover damages under Section 1983 for the years stolen from his life, it

would fail to enforce the purpose of Section 1983 to provide full compensation – particularly to African Americans – when they are the victims of unconstitutional actions by government officials.

Certainly this case is not a fit occasion for such steps. Petitioners admit they had no probable cause to believe Harrington and McGhee were guilty. They admit they fabricated evidence during the investigation to frame them anyway. They cannot deny they hid material exculpatory evidence as well; the Iowa Supreme Court so found. By this despicable conduct, petitioners doomed two innocent black teenagers to life sentences when they were set before an all-white jury for killing a retired white Police Captain. Each was falsely arrested, wrongfully convicted and wrongfully imprisoned for over twenty-five years as a result.

It is hard for us to imagine a more fitting case for the application of Section 1983. The facts shock the conscience. The only thing that would be more shocking is if this Court were to hold that Harrington and McGhee have no Section 1983 cause of action against prosecutors for their injuries. It is respectfully submitted that *Buckley I* is good law; the Eighth Circuit correctly applied it; and this case should proceed to trial.

III. The Eighth Circuit decision is supported by Supreme Court precedent.

Petitioners claim the Eighth Circuit erred in its November 21, 2008 decision when it based its decision on substantive due process. They did not always take this position. The Eighth Circuit's February 1, 2008

decision included the very same substantive due process analysis, and petitioners made no objection. Indeed, they conceded in footnote 2 of their petition for rehearing *en banc* after the February 1 ruling that plaintiffs were entitled to trial on their Section 1983 claims and only asked for dismissal of plaintiffs' state law claims on Eleventh Amendment grounds.[6]

Petitioners were right then and wrong now. The Eighth Circuit's substantive due process analysis is well-grounded in Supreme Court precedent. This Court has also assumed there is a Fourth Amendment malicious prosecution cause of action which fits the facts of this case. Thus, whether this case is based on substantive due process and/or the Fourth Amendment, it is clear that Harrington and McGhee have valid Section 1983 claims. Those claims should proceed to trial. There is no justification for this Court to further delay trial to review this case.

This Court held in *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality opinion), that there is no substantive right of due process to be free from criminal prosecution

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[6] Petitioners do not seek *certiorari* on the Eleventh Amendment issue, and with good reason. This Court has held that the "most salient factor" in determining whether a person or entity is an "arm of the State" protected by the Eleventh Amendment is whether the judgment in the case will be paid from the State treasury. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1994). There is absolutely no evidence that the State of Iowa will pay any judgment against petitioners in this case. Iowa statutes also show that County Attorney is a county office, and the Iowa Supreme Court has so held.

except upon probable cause. 510 U.S. at 268. But only a bad arrest, criminal charge and short pre-trial detention were at issue in that case. Albright was arrested for selling a substance that looked like cocaine on the basis of an allegedly unreliable witness. He voluntarily surrendered when he learned of the warrant for his arrest; bonded out; and the charges were dropped before trial. *Id.* There was no allegation that the defendants had fabricated the evidence used against Albright. Seven Justices saw *Albright* as a Fourth Amendment case, pure and simple, and refused to recognize a duplicative substantive due process violation on such facts.

But the facts of this case go far beyond those in *Albright*. Here, petitioners and police fabricated evidence and used that false evidence to cause not only a wrongful arrest pursuant to warrant, but also wrongful convictions and long imprisonments of innocent men. Such facts implicate the Due Process Clause. As Justice Stevens observed in his *Albright* dissent:

> Had petitioner's [Albright's] prosecution resulted in his conviction and incarceration, then there is no question but that the Due Process Clause would have been implicated; a central purpose of the Fourteenth Amendment was to deny States the power to impose this sort of deprivation of liberty until after completion of a fair trial.

510 U.S. at 294.

Justice Stevens correctly cited *Mooney* and the other cases cited above for the proposition that a state's compliance with facially valid procedures is not by itself sufficient to meet the demands of due process. When state actors knowingly use false testimony and other deliberate deception to deprive a criminal defendant of his liberty, they violate that defendant's right to substantive due process. That is exactly what petitioners did to Harrington and McGhee.

Further support is found in this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In that case, the Court rejected petitioners' view that all constitutional claims must be analyzed under a specific constitutional provision rather than substantive due process. Instead, the Court held that a claim must be analyzed under a specific constitutional provision if it "covers" that claim like the Fourth Amendment covered Albright's. But substantive due process is available if the claim is not "covered" by one specific provision. 523 U.S. at 843-44.

That is true here. Surely the Fourth Amendment is implicated by Harrington and McGhee's wrongful arrest pursuant to warrant and the wrongful initiation of legal proceedings against them. Both require probable cause under the Fourth Amendment, and probable cause requires "reasonably trustworthy information," *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Lies coerced and coached by police and prosecutors do not constitute "reasonably trustworthy information."

The Fourth Amendment has typically applied to pretrial arrests and detentions. *Albright v. Oliver*, 510

U.S. at 274 ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."). But the misconduct here went beyond that. Police and prosecutors also used the fabricated evidence to deprive Harrington and McGhee of a fair trial and to cause their wrongful convictions and imprisonments of over twenty-five years each. Further, Harrington and McGhee allege their constitutional right to the equal protection of the laws was violated in that they were singled out to be framed for the murder, at least in part, because of their race. Thus, the misconduct in this case is not covered by any single constitutional provision and so is appropriate for substantive due process analysis.

In *Moran v. Clarke*, 296 F.3d 638 (2002), the Eighth Circuit found a Section 1983 cause of action based on substantive due process arising from facts similar to those presented here, i.e., a law enforcement conspiracy to fabricate evidence to frame an innocent person for a crime. Relying on this Court's decision in *County of Sacramento*, the Eighth Circuit distinguished *Albright* and found that the fabrication of evidence is not "covered" by the Fourth Amendment and so is subject to substantive due process analysis:

> Unlike the facts of *Albright*, Moran, in his due process claim, offers evidence of a purposeful police conspiracy to manufacture, and the manufacture of, false evidence. Instead of simply allowing a weakly supported prosecution to proceed, Moran correctly asserts that the evidence can be read to show acts designed to falsely formulate a pretense

> of probable cause. Although the Fourth Amendment covers seizures, which would be satisfied by Moran's arrest, law enforcement's intentional creation of damaging facts would not fall within its ambit. *Cf. Albright*, 510 U.S. at 274-75, 114 S.Ct. 807; *Rogers v. City of Little Rock*, 152 F.3d 790, 796 (8th Cir. 1998) (stating that the violation there was "different in nature from one that [could] be analyzed under the fourth amendment reasonableness standard" because "[n]o degree of sexual assault by a police officer acting under color of statelaw could ever be proper"). Here, we see no specifically applicable constitutional remedy that provides Moran with explicit protection to a level sufficient to exclude substantive due process analysis.

296 F.3d at 647.

Like plaintiffs here, Moran also alleged that race played a role in the alleged misconduct. He claimed that black defendants conspired to frame him at least in part because he was white. The Eighth Circuit found that "[s]ingling out an individual for investigation or punishment because of race is suspect," citing *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 305 (1978). 296 F.3d at 645. There was no error in applying substantive due process analysis to such facts in *Moran*, or here.

In *County of Sacramento*, the Court stated that it has "emphasized time and again '[t]hat the touchstone of due process is protection of the individual against

arbitrary action of government." 523 U.S. at 845. The "threshold question is whether the behavior of the governmental officer is so egregious, so outrageous that it may fairly be said to shock the contemporary conscience." 523 U.S. at 847, n.8. The behavior which most probably supports a substantive due process claim is "conduct intended to injure in some way unjustifiable by any government interest," "deliberate decisions of government officials to deprive a person of life, liberty or property." 523 U.S. at 849.

Surely there is no error in the Eighth Circuit's finding that the conduct at issue here "shocks the conscience." Petitioners and police had a "cop killing" they needed to close with a conviction in an election year. They lacked probable cause to believe that Harrington and McGhee were guilty of the murder, but black defendants would be easiest to convict in Pottawattamie County. So they coerced and coached testimony to frame Harrington and McGhee for the murder rather than to pursue a real suspect like Gates. They hid their fabrication of the testimony tying Harrington and McGhee to the murder. They also hid the real suspects. In short, petitioners used the false evidence they manufactured to arrest, charge, convict and imprison two innocent black teens for over twenty-five years for a crime they did not commit. Nor was this a momentary lapse in judgment. Petitioners and their police co-conspirators worked for months on coercing and coaching the witnesses to lie against Harrington and McGhee. And they kept it secret for over twenty years. Every American is outraged by what they did. Every American would also be outraged if this Court were to find that such facts do not support a Section 1983 cause of action for all of Harrington and McGhee's injuries.

Petitioners claim that allowing Harrington and McGhee to recover damages for their entire injury under the Eighth Circuit's "continuous substantive due process violation theory" completely disregards any analysis of causation, as well as the requirement that false testimony at trial be evaluated for harmless error. Pet. at 16. We need not waste time on whether petitioners' conduct was harmless. The false testimony that petitioners manufactured was the only evidence tying McGhee to the murder. And, as that false evidence caused his wrongful arrest, conviction and long imprisonment, petitioners and the police did indeed cause a continuous injury extending from McGhee's November 1977 arrests through his release from prison in 2003. The broad remedial purpose of Section 1983 demands no less than full compensation for this injury.

This Court recognized the continuous, interconnected nature of injuries like McGhee's in *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, a plaintiff cannot bring suit under Section 1983 based on a claim that would render a conviction invalid until after that conviction has been overturned in other proceedings. 512 U.S. at 486-487. McGhee's claims are of that nature: He claims that he was arrested, detained, charged, convicted and imprisoned on the basis of evidence fabricated by police and prosecutors. Under *Heck*, their Section 1983 cause of action did not even accrue until after his conviction was vacated. 512 U.S. at 489-90.

Petitioners suggest that, at most, plaintiffs have claims under the Fourth Amendment and that their Section 1983 damages are limited to the detention from

arrest until the issuance of process or arraignment. Pet. at 14. But petitioners are again in error. This Court has suggested that there may be a Fourth Amendment malicious prosecution cause of action for wrongful conviction and post-trial imprisonment based on the wrongful institution of legal process. *Wallace v. Kato*, 549 U.S. 384, 389-90, 390 n. 2 (2007). McGhee states such a cause of action. He claims that legal proceedings were wrongfully instituted against him for the Schweer murder when he was arrested pursuant to warrant in November 1977. The Tenth Circuit observed in *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008), *cert. denied*, __ S.Ct. __, 2009 WL 498175 (March 2, 2009), that detention pursuant to arrest warrant is considered the institution of legal process at common law:

> In this case, Plaintiffs were detained pursuant to arrest warrants. At common law, the issuance of an arrest warrant represents a classic example of the institution of legal process. *See Restatement (Second) of Torts § 654* cmt. c (1977) ("Criminal proceedings are usually instituted by the issuance of some sort of process, *generally a warrant for arrest*, the purpose of which is to bring the accused before a magistrate in order for him to determine whether the accused shall be bound over for further action by a grand jury or for trial by a court." (emphasis added)). Plaintiffs' detention was thus preceded by the institution of legal process, triggering the malicious prosecution cause of action. *See* Michael Avery et al., *Police Misconduct: Law and Litigation* §2:10

> (2007 Westlaw; POLICEMISC database) ("The Supreme Court's analysis in *Wallace* . . . indicates that such claims should not be characterized as false arrest or false imprisonment, because detention of the subject is pursuant to legal process."). In challenging that process by alleging the officers knowingly supplied false information in affidavits for the warrants, Plaintiffs based their malicious prosecution claim on the Fourth Amendment right against unreasonable seizures.

528 F.3d at 799.

McGhee's entire detention came after that wrongful arrest pursuant to warrant in November 1977. It continued until his conviction was vacated in 2003 and he was released from prison. The Fourth Amendment prohibits unreasonable seizures, and McGhee remained unlawfully seized on the basis of fabricated evidence for more than twenty-five years.

Petitioners would like this Court to believe that Harrington and McGhee's claims are just like Wallace's. But this is untrue. First, Wallace's claim was only for detention without legal process: He was arrested without warrant. 549 U.S. at 389. This Court found that his false arrest claim would only support damages from his detention from arrest until he was brought before a magistrate and bound over for trial. 549 U.S. at 391. Further, Wallace abandoned his malicious prosecution claim under both state and federal law. 549 U.S. 390, n. 2. McGhee has not. He has sued prosecutors for all of

his injuries under Section 1983 based on violations of his rights under the Fourth Amendment, the Due Process Clause and the equal protection of the laws. His claims include the deprivation of liberty from his unlawful arrest in November 1977 until his release from prison in 2003.[7]

Thus, there can be no doubt that Harrington and McGhee have section 1983 claims against petitioners for their entire deprivation of liberty under substantive due process and/or the Fourth Amendment, as well as equal protection. There is also no doubt that petitioners have no immunity, absolute or qualified, against these claims. Harrington and McGhee's claims are ready for trial.

IV. This case needs to be tried as scheduled on August 3, 2009.

This case is here on a collateral order appeal. The district court denied petitioners' motion for summary judgment over two years ago, finding that Harrington and McGhee have Section 1983 causes of action and that petitioners have no immunity against them. The Eighth

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[7] In footnote 2, petitioners refer to their pending limitations motion in the district court based on *Wallace*. But Harrington and McGhee's Section 1983 claims are governed by *Heck*, not *Wallace*. They claim under Sec. 1983 that their arrests pursuant to legal process (warrants) *and* convictions were based on the fabricated evidence. Thus, they could not prove their Section 1983 claims without necessarily implying the invalidity of their convictions. Under *Heck*, their Sec. 1983 cause of action did not accrue, and the limitations period did not commence, until their convictions were overturned in 2003. They filed these suits within the applicable statute of limitations after that occurred.

Circuit agreed, first on February 1, 2008, and again after reconsideration on November 21, 2008. Yet here we sit, still writing briefs, our second trial date in jeopardy.[8]

Nor would a ruling in petitioners' favor on the immunity issue avoid trial. The district court denied the County's motion for summary judgment on plaintiffs' Section 1983 claim against it under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Pet. Appx. B at 148a-150a. The claim is based on the fact that the County's final policymaker for law enforcement, County Attorney Richter, was personally involved in the unconstitutional conduct. The County did not appeal this ruling.

Petitioners claim that Richter has absolute immunity against plaintiffs' claims. But absolute immunity only applies to Richter individually. The County does not enjoy absolute or qualified immunity. See *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit*, 507 U.S. 163, 166 (1993) ("These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983."). Thus, plaintiffs are entitled to go to trial against the County regardless of the outcome of

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[8] The district court denied petitioners' motion for summary judgment on February 23, 2007, about one week before trial, and the collateral order appeal ensued. After its November 21, 2008 opinion, the Eighth Circuit denied petitioners' motion to stay the mandate. At a January 8, 2009 status conference, the district court set the case for trial on August 3, 2009.

Richter's absolute immunity defense. *Certiorari* would be inappropriate under these circumstances.[9]

If I represented a corporate client, the two-year delay of this case at the pleadings stage probably would not matter so much. But McGhee is struggling. To him, our victories in the courts below have produced no benefits. He spent a long time in prison as an innocent man. He has a hard time getting a good job with a twenty-five year hole in his resume. He filed suit in federal court for compensation, for justice. And he waits and waits and waits while the lawyers argue about legal technicalities, seeming to ignore his catastrophic injuries and current suffering. It is as if he was brought to the emergency room with life-threatening traumatic injuries and been left in the waiting room to fill out forms.

A lawyer can always find something he would change in another lawyer's brief, and a judge can surely say the same about another judge's opinion. Respectfully, there is nothing about the decisions below to justify making these men wait any longer for their day in court. The facts of this case are already over 30 years old and they are not getting better with age. Sufficient time, money and effort have been expended to decide whether this is a case. There is no doubt that it is. It is time – past time – to give Harrington and McGhee a chance to prove it.

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[9] Plaintiffs also sued the police officers involved in the fabrication of evidence, as well as the City of Council Bluffs which employed them. The police did not appeal the denial of their qualified immunity defense, but the district court stayed trial of those claims until petitioners' appeal was concluded. These claims are also overdue for trial.

CONCLUSION

We respectfully ask that the petition for *certiorari* be denied so that trial can proceed as scheduled on August 3, 2009.

Respectfully submitted,

STEPHEN D. DAVIS
Counsel of Record
WILLIAM H. JONES
CANEL, DAVIS & KING
10 S. LaSalle Street, #3400
Chicago, IL 60603
312-372-4142
312-372-6737 [fax]
sdavis@daviskinglaw.com
wjones@daviskinglaw.com

ALAN O. OLSON
OLSON LAW OFFICE, P.C.
3116 Ingersoll Avenue
Des Moines, IA 50312-3910
515-271-9100
515-271-8100 [fax]
aoo@olson-law.net

Counsel for Respondent
Curtis W. McGhee Jr.

No. 08-1065

MAR 17 2009

IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA
JOSEPH HRVOL,
DAVID RICHTER,

Petitioners,

v.

TERRY J. HARRINGTON,
CURTIS W. McGHEE, JR.,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT CURTIS W. McGHEE, JR.

ALAN O. OLSON
OLSON LAW OFFICE, P.C.
3116 Ingersoll Avenue
Des Moines, IA 50312-3910
515-271-9100
515-271-8100 [fax]
aoo@olson-law.net

STEPHEN D. DAVIS
Counsel of Record
WILLIAM H. JONES
CANEL, DAVIS & KING
10 S. LaSalle Street, #3400
Chicago, IL 60603
312-372-4142
312-372-6737 [fax]
sdavis@daviskinglaw.com
wjones@daviskinglaw.com

Counsel for Respondent
Curtis W. McGhee, Jr.

221672

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT

Petitioners were a County Attorney and Assistant County Attorney who, along with police, fabricated evidence during a murder investigation to frame two innocent black teenagers, Terry Harrington and Curtis W. McGhee, Jr., for the killing of a retired white Police Captain during an election year for County Attorney. Harrington and McGhee spent over twenty-five years in prison for something they did not do as a result.

In *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("*Buckley I*"), this Court held that prosecutors do not have absolute immunity during the *investigative* phase of a criminal proceeding. Thus, the courts below correctly applied *Buckley I* to deny absolute immunity protection to petitioners. Indeed, petitioners do not claim absolute immunity here. Pet. at 19.

Instead, petitioners claim qualified immunity based' on the Seventh Circuit's decision in *Buckley v. Fitzsimmons*, 20 F.3d 789 (1994) ("*Buckley II*"), a case that has been followed only once in the last fifteen years, and that eight years ago.[1] They first argue that coercing and coaching witnesses to testify falsely to frame Harrington and McGhee for murder did not violate their constitutional rights. But this claim will not withstand scrutiny. Lies coerced and coached by police and prosecutors do not support the probable cause required for arrest or the initiation of legal proceedings under the Fourth Amendment. The fabrication of evidence by

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[1] Justice Thomas expressed the view that *Buckley II* was wrongly decided in *Michaels v. McGrath*, *infra*.

these governmental officials to deprive two innocent teens of a fair trial on murder charges – and ultimately deprive them of their liberty for over twenty-five years each - shocks the conscience, and constitutes a violation of Harrington and McGhee's right to substantive due process.

Harrington and McGhee's right to the equal protection of the laws was also violated in that their race was a factor in the misconduct. Pottawattamie County, Iowa was and is over 99% white. Petitioners needed a conviction in the worst way in a high-profile murder case during an election year. They framed Harrington and McGhee rather than investigate their real suspects for the murder – principally a local white man named Charles Richard Gates – at least in part because they knew a white jury in Council Bluffs, Iowa would readily convict two black teens from Omaha for killing a retired white Council Bluffs police officer.

Finally, petitioners argue that holding them liable for all of Harrington and McGhee's detention from their arrest in November 1977 until their release from prison in 2003 would improperly deprive them of the absolute immunity afforded to prosecutors for the knowing use of fabricated evidence at trial. But this Court held in *Buckley I* that the absolute immunity afforded prosecutors during the *judicial* phase of criminal proceedings does not extend "retrospectively" to immunize their misconduct during the *investigative* phase. 509 U.S. at 276. Petitioners concede this fact in their petition. Pet. at 18. Police are liable under Section 1983 for all of the natural consequences of their actions when they fabricate evidence during a criminal

investigation, and so are these prosecutors under *Buckley I*. Indeed, this Court cited this principle with approval a little over one month ago. *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (January 26, 2009).

REASONS FOR DENYING THE PETITION

The decisions below are correct and trial should not be further delayed for this Court to review them. The Seventh Circuit's *Buckley II* decision is an isolated aberration and does not represent a true conflict among the circuits which this Court need address, especially when the delay required to produce the almost certain result – reaffirmation of *Buckley I* – would be so hurtful to plaintiffs who have already waited too long for their day in court. Nor would a ruling in petitioners' favor on the immunity issue avoid a trial. The County would still have to go to trial because County Attorney Richter, its highest law enforcement officer, was personally involved in the unconstitutional misconduct. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The County has no immunity against this claim. *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit*, 507 U.S. 163 (1993).

Plaintiffs have been waiting for justice for more than thirty years. At long last, the judicial system owes Terry Harrington and Curtis W. McGhee, Jr., a trial with all deliberate speed.

I. Petitioners do not enjoy absolute immunity under *Buckley I*.

A. Petitioners fabricated evidence to frame two innocent black teens for murder.

The facts of this case are set forth at some length in the district court opinion. Pet. Appx. B at pages 24a-47a. Petitioners admit these facts here. Pet. Appx. B at 24a, n. 1 ("The Defendants, with very few exceptions, do not resist the facts set forth in the Plaintiffs' Complaints for purposes of the pending motions.").

In summary, County Attorney David Richter and Assistant County Attorney Joseph Hrvol fabricated testimony in order to frame two innocent teenagers for first degree murder. They did so because it was a "heater" case – the murder of a retired white Council Bluffs Police Captain, John Schweer – and County Attorney Richter – who had been appointed to the office – had his first election coming. Petitioners wanted to get a conviction in the worst way, and that is what they did.

Petitioners admit they never had probable cause to believe Harrington and McGhee were guilty of the murder. They further admit that, along with Council Bluffs police, they used threats, intimidation and offers of reward to get a known liar, Kevin Hughes, to make false statements against them anyway. Petitioners admit they coached Hughes to dress up his story by deleting things from his prior statements that were demonstrably false and adding things to make his lies seem more plausible. They offered Hughes a reward to

sweeten the pot. They intimidated Hughes's friends – Jones, Jacobs, Pride and Lee – into lying that they saw Hughes with Harrington and McGhee on the night of the murder to give the appearance of "corroboration" for part of Hughes's story. After having Harrington and McGhee arrested pursuant to warrant in November 1977, but before the True Informations were filed, petitioners offered leniency to teenage prisoners facing adult charges – Pierce, Plater and Hartwell – if they would state that McGhee had confessed involvement in the Schweer murder to them.[2] All of these witnesses have admitted they told lies they were told to tell by petitioners and police.

Petitioners not only failed to investigate Gates. They also concealed him from the defense. The Iowa Supreme Court vacated Harrington's conviction on account of this *Brady* violation, and the State agreed to vacate McGhee's 1978 conviction for the same reason. The district court held the *Brady* violation was protected by absolute immunity, but the concealment of Gates, a real suspect who had not been eliminated, provides further evidence that petitioners knew they lacked probable cause to believe Harrington and McGhee were guilty.

Racial prejudice against McGhee and Harrington as African-Americans was a motivating force in this

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[2] Pierce and Plater's statements were obtained in February 1978 before the February 17, 1978 True Information against McGhee for the murder. Hartwell's statement was obtained in April 1978 before McGhee's May 1978 trial and the May 8, 1978 True Information against Harrington for the murder.

misconduct. Petitioners wanted a conviction, and they framed Harrington and McGhee because they cared little for blacks – their County was over 99% white -- and because they knew a white Council Bluffs jury would readily convict two black teenagers from across the Missouri River in Omaha, Nebraska for the killing of a white Council Bluffs, Iowa police officer. Indeed, they preferred framing two innocent black teenagers to conducting a proper investigation of white suspects like Gates.

Without the fabricated testimony, there was no evidence connecting plaintiffs to the murder. That is an admitted fact for the purposes of this appeal. It is also undisputed that Harrington and McGhee were each imprisoned from their arrest pursuant to warrant in November 1977 until their release in 2003. Each man spent more than twenty-five years in prison for something he did not do.

B. This Court's decision in *Buckley I*.

This Court's decision in *Buckley I* governs the absolute immunity issue presented here. In that case, the Court was asked to decide whether absolute immunity protected prosecutors when, as here, they fabricate evidence during the preliminary investigation of a crime. The Court applied the functional approach it had adopted in earlier cases to draw the line between those acts protected by qualified immunity and those protected by absolute immunity. 509 U.S. at 269. This inquiry focuses on the nature of the function performed rather than the identity of the person who performed it. *Id.*

The Court noted in *Buckley I* that, while a prosecutor's activity as an advocate is protected by absolute immunity, he only enjoys qualified immunity for administrative and investigative work that does not relate to an advocate's preparation for the initiation of a prosecution or judicial proceedings. *Id.* at 273. The Court explained:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. [citation omitted].

The Court used probable cause to divide a prosecutor's role as investigator from his role as advocate. It found that the advocate's role does not begin until probable cause exists. As absolute immunity only protects the prosecutor as advocate, the lack of probable cause at the time of the alleged prosecutor misconduct means that there is no absolute immunity for that conduct:

> A careful examination of the allegations concerning the conduct of the prosecutors

> during the period before they convened a special grand jury to investigate the crime provides the answer. The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings during that period. Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.

Id.[3]

As the prosecutor's acts in *Buckley I* "occurred well before they could properly claim to be acting as advocates," the Court found that absolute immunity did not protect them against the plaintiff's allegations. *Id.* at 275. And the fact that the prosecutors later used the evidence in court did not cloak their involvement in fabricating that evidence during the investigation with absolute immunity:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might

[3] In footnote 5, the Court observed that a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. A prosecutor would still only have qualified immunity for administrative/investigative work done after probable cause was determined. 509 U.S. at 274.

> then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When 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. See also *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000) (Prosecutor who participated in fabrication of evidence in his investigatory role and then used it in court is not protected by absolute or qualified immunity); *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001) (prosecutor involved in fabricating evidence before charges are filed not protected by absolute immunity); *Moore v. Valder*, 65 F.3d 189, 195 (D.C. Cir. 1995) ("Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of *investigative* techniques . . . [and] therefore relates to a typical police function . . .").

About one month ago, a unanimous Court again noted that absolute immunity does not apply when a prosecutor is engaged in investigative or administrative tasks. *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (Jan. 26, 2009).

C. The Eighth Circuit correctly applied *Buckley I*.

Petitioners do not claim in their petition that they had probable cause to believe Harrington and McGhee were guilty of the murder. They admit that they were acting as investigators when they allegedly fabricated

the evidence, and that absolute immunity does not apply. They state at page 19 of their petition:

> 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.

Given this admission, there can be no doubt that the courts below were correct to deny absolute immunity protection to petitioners.

II. Petitioners do not enjoy qualified immunity against plaintiffs' claims.

Petitioners argue that they have qualified immunity against Harrington and McGhee's Section 1983 claims. Their first argument is the strange notion that manufacturing evidence to frame a defendant for murder does not violate the defendant's Constitutional rights. Their second argument is that the only injury they caused to Harrington and McGhee occurred when they presented the false evidence at their criminal trials, conduct for which they enjoy absolute immunity. Petitioners base this argument on the Seventh Circuit's decision in *Buckley II*. But that decision is in conflict with this Court's decision in *Buckley I* and other established Supreme Court precedent.

A. The fabrication of evidence violated plaintiffs' constitutional rights.

In *Buckley II*, two judges of that court began by finding that coercing witnesses to testify against a criminal defendant does not violate the defendant's constitutional rights. But this Court has never so held. A finding that petitioners' manufacture of evidence does not violate Harrington and McGhee's constitutional rights would fly in the face of this Court's decision in *Mooney v. Holohan*, 294 U.S. 103 (1935).

In that case, Mooney was serving a life sentence after being convicted of first degree murder in 1917. He brought a petition for *habeas corpus* alleging that the state was holding him in confinement without due process of law. He alleged that the evidence against him was fabricated and that the authorities had deliberately suppressed evidence which would have impeached and refuted the testimony against him. Like petitioners, the defendants in *Mooney* did not challenge the truth of these allegations. Instead, they argued that due process only required the prosecuting authorities to give notice to the defendant so that he had an opportunity to present his evidence. This Court disagreed:

> Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental

> conceptions of justice which lie at the base of our civil and political institutions. [citation omitted]. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

294 U.S. at 112.

In *Mooney*, the Court specifically discussed the government's use of the false evidence at trial. But certainly "fundamental conceptions of justice" include the notion that government officials will not fabricate evidence or use other tricks to try to deprive an American of his liberty. Other decisions of this Court since *Mooney* support this view, as the Court has held on several occasions that a criminal defendant's constitutional rights are violated when the government knowingly uses false evidence or deliberate deception to obtain his conviction and imprisonment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (When the

reliability of a given witness may well be determinative of guilt or innocence, the prosecution must disclose evidence affecting the credibility of that witness); *United States v. Agurs*, 427 U.S. 97, 107 (1976) (Duty to disclose material, exculpatory evidence exists even when no request for the information has been made); *Napue v. Illinois*, 360 U.S. 264 (1959) (failure of State to correct testimony known to be false violates due process); *Pyle v. Kansas*, 317 U.S. 213 (1942) (allegations of knowing use of perjured testimony and the suppression of evidence favorable to the accused constitutes charge of violation of constitutional rights). All of these cases show that the Constitution protects against such governmental cheating in criminal cases, and all predate the 1977-78 misconduct at issue here.

There can be no doubt that the State's cheating in criminal cases violates due process, no matter how much process is afforded. As this Court noted in *Brady v. Maryland, supra*, the government wins when justice is done, not by getting a conviction at any cost. The best procedures in the world will not protect a criminal defendant if the prosecutor is determined to violate this ethical obligation and the defendant's constitutional rights.

That is what happened here. County Attorney Richter, the county's highest law enforcement officer, wanted a conviction at all costs. He fabricated evidence along with Assistant County Attorney Hrvol and Council Bluffs police. Richter and Hrvol vouched for the false evidence in court. They conspired with police to hide their fabrication of evidence from the court and jury, just as they conspired to hide Gates and other real

suspects. Their purpose: these facts had to be hidden or the process might prevent their evil plan from succeeding.

The *Buckley II* court offered a clever hypothetical that no constitutional violation would occur if the prosecutor coerced and coached a witness statement and then put it in a drawer. See Pet. at 7. But no one fabricates evidence to put it in a drawer. They fabricate evidence to use it against the defendant. And such conduct violates fundamental justice – and the Constitution – every step of the way.

The *Buckley II* court also was wrong to suggest that a criminal defendant suffers no actual injury until the fabricated evidence is used at trial, as this ignores the fact that the fabricated evidence is often the basis for the defendant's arrest, pretrial detention and for the formal charges brought against him for the crime. That was certainly true here. But for the evidence these petitioners fabricated, no warrant would have been issued for Harrington and McGhee's arrest and they would not have been subjected to pretrial detention, formal charges, conviction or post-trial imprisonment.

B. Petitioners' absolute immunity during the judicial phase does not protect them against liability for fabricating evidence during the investigative phase.

The *Buckley II* court further erred by finding that the plaintiff in that case had no claim against the prosecutor for fabricating the evidence during the investigation because the prosecutor enjoyed absolute immunity for presenting the false evidence at trial.

Even petitioners admit this is error. They write at page 18 of their petition:

> 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.

Yet petitioners argue that they cannot be liable for the wrongful conviction and subsequent imprisonment caused by the evidence they fabricated. The reason? Because they have absolute immunity for presenting at trial the evidence they had fabricated during the earlier investigation. In other words, they claim that their absolute immunity during the judicial phase extends "retrospectively" to immunize earlier wrongful acts. This is the very thing that petitioners admit well-established law forbids.

Specifically, this Court's decision in *Buckley I* forbids it. This Court held that prosecutors who fabricate evidence during a criminal investigation are acting like police and so are to be treated like police. Petitioners do not deny that a police officer who fabricates evidence and supplies it to a prosecutor is liable for all of the plaintiff's damages under Section 1983, including damages for wrongful conviction and imprisonment caused by the fabricated evidence. They cannot. In constitutional torts, a defendant is responsible for the natural consequences of his actions. *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled on other grounds,

Monell v. Dep't of Social Services, 436 U.S. 658 (1978). Under *Buckley I*, a prosecutor has that same liability when, as here, he investigates like a police officer and fabricates evidence.

This is true even if the prosecutor who fabricates the evidence is the one who later uses the fabricated evidence in court. 509 U.S. at 276.[4] Thus, the Eighth Circuit and the district court were exactly right to observe, based on the Second Circuit's decision in *Zahrey*, that "it would be a perverse doctrine of tort and constitutional law that would hold liable the [police officer] fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer [prosecutor] who enlists himself in a scheme to deprive a person of liberty." Pet. Appx. A at 18a; Pet. Appx. B at 108a.

Petitioners say the Eighth Circuit's decision improperly abrogated petitioners' absolute immunity for using fabricated evidence at trial. But again, they are not being sued for using the fabricated evidence at trial as prosecutors. Petitioners are being sued for fabricating the evidence while acting as investigators along with police. Police do not have immunity for such misconduct, and neither do prosecutors under this Court's decision in *Buckley I*.

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[4] Justice Kennedy agreed with the majority in *Buckley I* on this point: "I agree with the Court that the institution of a prosecution 'does not retroactively transform . . . work from the administrative into the prosecutorial . . .'" 509 U.S. at 289.

C. Petitioners' claim of a conflict among the circuits overstates the case.

Not surprisingly, *Buckley II* has not attracted much support since it was decided almost fifteen years ago in 1994. Petitioners have cited no other Seventh Circuit decision which followed *Buckley II*'s reasoning. In fact, Judge Easterbrook, the author of *Buckley II*, acknowledged in *Newsome v. McCabe,* 256 F.3d 747, 754 (7th Cir. 2001), that two circuits had rejected his *Buckley II* analysis, citing the Second Circuit's decision in *Zahrey v. Coffey*, *supra*, and the Tenth Circuit's in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997).

Judge Easterbrook also noted that Justice Thomas "expressed the view that *Buckley II* was wrongly decided" in *Michaels v. McGrath*, 531 U.S. 1118 (2001). *Id.* This refers to Justice Thomas's dissent from the denial of *certiorari* in *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), the only case that petitioners can cite as following *Buckley II* in the last fifteen years.[5]

In short, *Buckley II* is a trial balloon that did not fly, and there is no justification for this Court to further delay trial of this case to address it.

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[5] We note that the Third Circuit decided *Michaels* on June 5, 2000 and that the Second Circuit decided *Zahrey v. Coffey* about six weeks later on July 20, 2000. In this case, the Eighth Circuit reviewed *Zahrey* and found it persuasive. The Third Circuit might well have done the same had it been given the same opportunity.

D. The Court would not retreat from *Buckley I* to adopt *Buckley II*.

Under *Buckley II*, a prosecutor could fabricate evidence during a criminal investigation and then use it to convict the defendant and give him a long prison sentence. Under *Buckley II*, a court that found the prosecutor did these things would nevertheless have to dismiss the Section 1983 claims because the injury did not occur until trial when the heavy sentence was meted out. Such a result cannot be reconciled with the broad remedial purpose of Section 1983. Nor can it be reconciled with this Court's decision in *Buckley I* that a prosecutor who fabricates evidence during an investigation has the same liability as a police officer who does the same thing.

Another strange thing about the *Buckley II* rationale is that it reserves Constitutional protections for the smallest injuries while denying it to the most serious. Under *Buckley II*, Section 1983 would provide a remedy when a prosecutor uses excessive force and breaks a person's nose during a criminal investigation, or when he causes a short pretrial detention without probable cause. But if he fabricates evidence during the investigation which later causes the defendant to be wrongfully convicted and imprisoned for twenty-five years – or perhaps wrongfully executed – the victim has no remedy. Under those circumstances, the injury only occurred at trial, and that's protected by absolute immunity. Surely that is not and cannot be the law.

This Court observed in *Buckley I* that "we have been 'quite sparing' in recognizing absolute immunity

for state actors in this context." 509 U.S. at 269. This is the correct approach, as absolute anything leads to trouble. If this Court found that prosecutors could not be held liable under Section 1983 for fabricating evidence during a criminal investigation under any rationale (because absolute immunity protects everything a prosecutor does; because coercing a witness does not violate the defendant's rights; because the defendant only suffers injury from coerced testimony in the immunized setting of a trial), then a fundamental conception of justice – that the Constitution protects Americans and their liberty against cheating by prosecutors sworn to uphold the law – would no longer be fundamental. Immunity would become impunity. Prosecutors would be free to fabricate evidence during criminal investigations because they would know there was virtually no possibility of ever being punished for it. Indeed, prosecutors might choose to displace police when dirty work is required to take advantage of such a loophole.

True, there is a theoretical possibility of a prosecutor being prosecuted criminally, but such cases are rarer than hen's teeth. Who would have arrested petitioners in this case? Surely not the police they conspired with. Who would have prosecuted County Attorney Richter? Surely not Assistant County Attorney Hrvol. Police and prosecutors work in concert, and this case shows that, sadly, it is not always to the good. It took more than twenty years for the *Brady* violation to surface, and petitioners' manipulation of the witnesses remained hidden even longer. And even after the Iowa Supreme Court vacated Harrington's conviction on account of the *Brady* violations in 2003, there was still no criminal

investigation to determine whether police and prosecutors obstructed justice or otherwise acted criminally.

The truth is that bad police and bad prosecutors are held accountable in civil rights cases like this one or not at all. If prosecutors cannot be liable under Section 1983 for fabricating evidence during a criminal investigation as *Buckley II* held, impunity reigns. We do not believe that impunity is necessary for good prosecutors to do zealous, honest work. We do believe that the potential for civil liability will prevent some prosecutors from acting unconstitutionally. And we know that justice demands more than Harrington and McGhee's release from prison after twenty-five years. Justice demands that they be compensated for their injuries in full. Justice demands that petitioners be brought to account for what they did.

If this Court were to adopt *Buckley II* and hold that there is no section 1983 cause of action against a prosecutor for the wrongful conviction and imprisonment caused by his fabrication of evidence, it would take that fateful step from absolute immunity to absolute impunity. It would turn away from a fundamental conception of justice that the government will not try to take our liberty with false evidence. It would step back from its holding in *Buckley I* that a prosecutor who fabricates evidence during an investigation shares the same liability as the police officer he conspired with. And were this Court to find that a criminal defendant framed by prosecutors can only get out of prison, and cannot recover damages under Section 1983 for the years stolen from his life, it

would fail to enforce the purpose of Section 1983 to provide full compensation – particularly to African Americans – when they are the victims of unconstitutional actions by government officials.

Certainly this case is not a fit occasion for such steps. Petitioners admit they had no probable cause to believe Harrington and McGhee were guilty. They admit they fabricated evidence during the investigation to frame them anyway. They cannot deny they hid material exculpatory evidence as well; the Iowa Supreme Court so found. By this despicable conduct, petitioners doomed two innocent black teenagers to life sentences when they were set before an all-white jury for killing a retired white Police Captain. Each was falsely arrested, wrongfully convicted and wrongfully imprisoned for over twenty-five years as a result.

It is hard for us to imagine a more fitting case for the application of Section 1983. The facts shock the conscience. The only thing that would be more shocking is if this Court were to hold that Harrington and McGhee have no Section 1983 cause of action against prosecutors for their injuries. It is respectfully submitted that *Buckley I* is good law; the Eighth Circuit correctly applied it; and this case should proceed to trial.

III. The Eighth Circuit decision is supported by Supreme Court precedent.

Petitioners claim the Eighth Circuit erred in its November 21, 2008 decision when it based its decision on substantive due process. They did not always take this position. The Eighth Circuit's February 1, 2008

decision included the very same substantive due process analysis, and petitioners made no objection. Indeed, they conceded in footnote 2 of their petition for rehearing *en banc* after the February 1 ruling that plaintiffs were entitled to trial on their Section 1983 claims and only asked for dismissal of plaintiffs' state law claims on Eleventh Amendment grounds.[6]

Petitioners were right then and wrong now. The Eighth Circuit's substantive due process analysis is well-grounded in Supreme Court precedent. This Court has also assumed there is a Fourth Amendment malicious prosecution cause of action which fits the facts of this case. Thus, whether this case is based on substantive due process and/or the Fourth Amendment, it is clear that Harrington and McGhee have valid Section 1983 claims. Those claims should proceed to trial. There is no justification for this Court to further delay trial to review this case.

This Court held in *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality opinion), that there is no substantive right of due process to be free from criminal prosecution

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[6] Petitioners do not seek *certiorari* on the Eleventh Amendment issue, and with good reason. This Court has held that the "most salient factor" in determining whether a person or entity is an "arm of the State" protected by the Eleventh Amendment is whether the judgment in the case will be paid from the State treasury. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1994). There is absolutely no evidence that the State of Iowa will pay any judgment against petitioners in this case. Iowa statutes also show that County Attorney is a county office, and the Iowa Supreme Court has so held.

except upon probable cause. 510 U.S. at 268. But only a bad arrest, criminal charge and short pre-trial detention were at issue in that case. Albright was arrested for selling a substance that looked like cocaine on the basis of an allegedly unreliable witness. He voluntarily surrendered when he learned of the warrant for his arrest; bonded out; and the charges were dropped before trial. *Id.* There was no allegation that the defendants had fabricated the evidence used against Albright. Seven Justices saw *Albright* as a Fourth Amendment case, pure and simple, and refused to recognize a duplicative substantive due process violation on such facts.

But the facts of this case go far beyond those in *Albright*. Here, petitioners and police fabricated evidence and used that false evidence to cause not only a wrongful arrest pursuant to warrant, but also wrongful convictions and long imprisonments of innocent men. Such facts implicate the Due Process Clause. As Justice Stevens observed in his *Albright* dissent:

> Had petitioner's [Albright's] prosecution resulted in his conviction and incarceration, then there is no question but that the Due Process Clause would have been implicated; a central purpose of the Fourteenth Amendment was to deny States the power to impose this sort of deprivation of liberty until after completion of a fair trial.

510 U.S. at 294.

Justice Stevens correctly cited *Mooney* and the other cases cited above for the proposition that a state's compliance with facially valid procedures is not by itself sufficient to meet the demands of due process. When state actors knowingly use false testimony and other deliberate deception to deprive a criminal defendant of his liberty, they violate that defendant's right to substantive due process. That is exactly what petitioners did to Harrington and McGhee.

Further support is found in this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In that case, the Court rejected petitioners' view that all constitutional claims must be analyzed under a specific constitutional provision rather than substantive due process. Instead, the Court held that a claim must be analyzed under a specific constitutional provision if it "covers" that claim like the Fourth Amendment covered Albright's. But substantive due process is available if the claim is not "covered" by one specific provision. 523 U.S. at 843-44.

That is true here. Surely the Fourth Amendment is implicated by Harrington and McGhee's wrongful arrest pursuant to warrant and the wrongful initiation of legal proceedings against them. Both require probable cause under the Fourth Amendment, and probable cause requires "reasonably trustworthy information," *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Lies coerced and coached by police and prosecutors do not constitute "reasonably trustworthy information."

The Fourth Amendment has typically applied to pretrial arrests and detentions. *Albright v. Oliver*, 510

U.S. at 274 ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."). But the misconduct here went beyond that. Police and prosecutors also used the fabricated evidence to deprive Harrington and McGhee of a fair trial and to cause their wrongful convictions and imprisonments of over twenty-five years each. Further, Harrington and McGhee allege their constitutional right to the equal protection of the laws was violated in that they were singled out to be framed for the murder, at least in part, because of their race. Thus, the misconduct in this case is not covered by any single constitutional provision and so is appropriate for substantive due process analysis.

In *Moran v. Clarke*, 296 F.3d 638 (2002), the Eighth Circuit found a Section 1983 cause of action based on substantive due process arising from facts similar to those presented here, i.e., a law enforcement conspiracy to fabricate evidence to frame an innocent person for a crime. Relying on this Court's decision in *County of Sacramento*, the Eighth Circuit distinguished *Albright* and found that the fabrication of evidence is not "covered" by the Fourth Amendment and so is subject to substantive due process analysis:

> Unlike the facts of *Albright*, Moran, in his due process claim, offers evidence of a purposeful police conspiracy to manufacture, and the manufacture of, false evidence. Instead of simply allowing a weakly supported prosecution to proceed, Moran correctly asserts that the evidence can be read to show acts designed to falsely formulate a pretense

> of probable cause. Although the Fourth Amendment covers seizures, which would be satisfied by Moran's arrest, law enforcement's intentional creation of damaging facts would not fall within its ambit. *Cf. Albright*, 510 U.S. at 274-75, 114 S.Ct. 807; *Rogers v. City of Little Rock*, 152 F.3d 790, 796 (8th Cir. 1998) (stating that the violation there was "different in nature from one that [could] be analyzed under the fourth amendment reasonableness standard" because "[n]o degree of sexual assault by a police officer acting under color of statelaw could ever be proper"). Here, we see no specifically applicable constitutional remedy that provides Moran with explicit protection to a level sufficient to exclude substantive due process analysis.

296 F.3d at 647.

Like plaintiffs here, Moran also alleged that race played a role in the alleged misconduct. He claimed that black defendants conspired to frame him at least in part because he was white. The Eighth Circuit found that "[s]ingling out an individual for investigation or punishment because of race is suspect," citing *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 305 (1978). 296 F.3d at 645. There was no error in applying substantive due process analysis to such facts in *Moran*, or here.

In *County of Sacramento*, the Court stated that it has "emphasized time and again '[t]hat the touchstone of due process is protection of the individual against

arbitrary action of government." 523 U.S. at 845. The "threshold question is whether the behavior of the governmental officer is so egregious, so outrageous that it may fairly be said to shock the contemporary conscience." 523 U.S. at 847, n.8. The behavior which most probably supports a substantive due process claim is "conduct intended to injure in some way unjustifiable by any government interest," "deliberate decisions of government officials to deprive a person of life, liberty or property." 523 U.S. at 849.

Surely there is no error in the Eighth Circuit's finding that the conduct at issue here "shocks the conscience." Petitioners and police had a "cop killing" they needed to close with a conviction in an election year. They lacked probable cause to believe that Harrington and McGhee were guilty of the murder, but black defendants would be easiest to convict in Pottawattamie County. So they coerced and coached testimony to frame Harrington and McGhee for the murder rather than to pursue a real suspect like Gates. They hid their fabrication of the testimony tying Harrington and McGhee to the murder. They also hid the real suspects. In short, petitioners used the false evidence they manufactured to arrest, charge, convict and imprison two innocent black teens for over twenty-five years for a crime they did not commit. Nor was this a momentary lapse in judgment. Petitioners and their police co-conspirators worked for months on coercing and coaching the witnesses to lie against Harrington and McGhee. And they kept it secret for over twenty years. Every American is outraged by what they did. Every American would also be outraged if this Court were to find that such facts do not support a Section 1983 cause of action for all of Harrington and McGhee's injuries.

Petitioners claim that allowing Harrington and McGhee to recover damages for their entire injury under the Eighth Circuit's "continuous substantive due process violation theory" completely disregards any analysis of causation, as well as the requirement that false testimony at trial be evaluated for harmless error. Pet. at 16. We need not waste time on whether petitioners' conduct was harmless. The false testimony that petitioners manufactured was the only evidence tying McGhee to the murder. And, as that false evidence caused his wrongful arrest, conviction and long imprisonment, petitioners and the police did indeed cause a continuous injury extending from McGhee's November 1977 arrests through his release from prison in 2003. The broad remedial purpose of Section 1983 demands no less than full compensation for this injury.

This Court recognized the continuous, interconnected nature of injuries like McGhee's in *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, a plaintiff cannot bring suit under Section 1983 based on a claim that would render a conviction invalid until after that conviction has been overturned in other proceedings. 512 U.S. at 486-487. McGhee's claims are of that nature: He claims that he was arrested, detained, charged, convicted and imprisoned on the basis of evidence fabricated by police and prosecutors. Under *Heck*, their Section 1983 cause of action did not even accrue until after his conviction was vacated. 512 U.S. at 489-90.

Petitioners suggest that, at most, plaintiffs have claims under the Fourth Amendment and that their Section 1983 damages are limited to the detention from

arrest until the issuance of process or arraignment. Pet. at 14. But petitioners are again in error. This Court has suggested that there may be a Fourth Amendment malicious prosecution cause of action for wrongful conviction and post-trial imprisonment based on the wrongful institution of legal process. *Wallace v. Kato*, 549 U.S. 384, 389-90, 390 n. 2 (2007). McGhee states such a cause of action. He claims that legal proceedings were wrongfully instituted against him for the Schweer murder when he was arrested pursuant to warrant in November 1977. The Tenth Circuit observed in *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008), *cert. denied*, __ S.Ct. __, 2009 WL 498175 (March 2, 2009), that detention pursuant to arrest warrant is considered the institution of legal process at common law:

> In this case, Plaintiffs were detained pursuant to arrest warrants. At common law, the issuance of an arrest warrant represents a classic example of the institution of legal process. *See Restatement (Second) of Torts § 654* cmt. c (1977) ("Criminal proceedings are usually instituted by the issuance of some sort of process, *generally a warrant for arrest*, the purpose of which is to bring the accused before a magistrate in order for him to determine whether the accused shall be bound over for further action by a grand jury or for trial by a court." (emphasis added)). Plaintiffs' detention was thus preceded by the institution of legal process, triggering the malicious prosecution cause of action. *See* Michael Avery et al., *Police Misconduct: Law and Litigation* §2:10

> (2007 Westlaw; POLICEMISC database) ("The Supreme Court's analysis in *Wallace* . . . indicates that such claims should not be characterized as false arrest or false imprisonment, because detention of the subject is pursuant to legal process."). In challenging that process by alleging the officers knowingly supplied false information in affidavits for the warrants, Plaintiffs based their malicious prosecution claim on the Fourth Amendment right against unreasonable seizures.

528 F.3d at 799.

McGhee's entire detention came after that wrongful arrest pursuant to warrant in November 1977. It continued until his conviction was vacated in 2003 and he was released from prison. The Fourth Amendment prohibits unreasonable seizures, and McGhee remained unlawfully seized on the basis of fabricated evidence for more than twenty-five years.

Petitioners would like this Court to believe that Harrington and McGhee's claims are just like Wallace's. But this is untrue. First, Wallace's claim was only for detention without legal process: He was arrested without warrant. 549 U.S. at 389. This Court found that his false arrest claim would only support damages from his detention from arrest until he was brought before a magistrate and bound over for trial. 549 U.S. at 391. Further, Wallace abandoned his malicious prosecution claim under both state and federal law. 549 U.S. 390, n. 2. McGhee has not. He has sued prosecutors for all of

his injuries under Section 1983 based on violations of his rights under the Fourth Amendment, the Due Process Clause and the equal protection of the laws. His claims include the deprivation of liberty from his unlawful arrest in November 1977 until his release from prison in 2003.[7]

Thus, there can be no doubt that Harrington and McGhee have section 1983 claims against petitioners for their entire deprivation of liberty under substantive due process and/or the Fourth Amendment, as well as equal protection. There is also no doubt that petitioners have no immunity, absolute or qualified, against these claims. Harrington and McGhee's claims are ready for trial.

IV. This case needs to be tried as scheduled on August 3, 2009.

This case is here on a collateral order appeal. The district court denied petitioners' motion for summary judgment over two years ago, finding that Harrington and McGhee have Section 1983 causes of action and that petitioners have no immunity against them. The Eighth

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[7] In footnote 2, petitioners refer to their pending limitations motion in the district court based on *Wallace*. But Harrington and McGhee's Section 1983 claims are governed by *Heck*, not *Wallace*. They claim under Sec. 1983 that their arrests pursuant to legal process (warrants) *and* convictions were based on the fabricated evidence. Thus, they could not prove their Section 1983 claims without necessarily implying the invalidity of their convictions. Under *Heck*, their Sec. 1983 cause of action did not accrue, and the limitations period did not commence, until their convictions were overturned in 2003. They filed these suits within the applicable statute of limitations after that occurred.

Circuit agreed, first on February 1, 2008, and again after reconsideration on November 21, 2008. Yet here we sit, still writing briefs, our second trial date in jeopardy.[8]

Nor would a ruling in petitioners' favor on the immunity issue avoid trial. The district court denied the County's motion for summary judgment on plaintiffs' Section 1983 claim against it under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Pet. Appx. B at 148a-150a. The claim is based on the fact that the County's final policymaker for law enforcement, County Attorney Richter, was personally involved in the unconstitutional conduct. The County did not appeal this ruling.

Petitioners claim that Richter has absolute immunity against plaintiffs' claims. But absolute immunity only applies to Richter individually. The County does not enjoy absolute or qualified immunity. See *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit*, 507 U.S. 163, 166 (1993) ("These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983."). Thus, plaintiffs are entitled to go to trial against the County regardless of the outcome of

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[8] The district court denied petitioners' motion for summary judgment on February 23, 2007, about one week before trial, and the collateral order appeal ensued. After its November 21, 2008 opinion, the Eighth Circuit denied petitioners' motion to stay the mandate. At a January 8, 2009 status conference, the district court set the case for trial on August 3, 2009.

Richter's absolute immunity defense. *Certiorari* would be inappropriate under these circumstances.[9]

If I represented a corporate client, the two-year delay of this case at the pleadings stage probably would not matter so much. But McGhee is struggling. To him, our victories in the courts below have produced no benefits. He spent a long time in prison as an innocent man. He has a hard time getting a good job with a twenty-five year hole in his resume. He filed suit in federal court for compensation, for justice. And he waits and waits and waits while the lawyers argue about legal technicalities, seeming to ignore his catastrophic injuries and current suffering. It is as if he was brought to the emergency room with life-threatening traumatic injuries and been left in the waiting room to fill out forms.

A lawyer can always find something he would change in another lawyer's brief, and a judge can surely say the same about another judge's opinion. Respectfully, there is nothing about the decisions below to justify making these men wait any longer for their day in court. The facts of this case are already over 30 years old and they are not getting better with age. Sufficient time, money and effort have been expended to decide whether this is a case. There is no doubt that it is. It is time – past time – to give Harrington and McGhee a chance to prove it.

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[9] Plaintiffs also sued the police officers involved in the fabrication of evidence, as well as the City of Council Bluffs which employed them. The police did not appeal the denial of their qualified immunity defense, but the district court stayed trial of those claims until petitioners' appeal was concluded. These claims are also overdue for trial.

CONCLUSION

We respectfully ask that the petition for *certiorari* be denied so that trial can proceed as scheduled on August 3, 2009.

Respectfully submitted,

STEPHEN D. DAVIS
Counsel of Record
WILLIAM H. JONES
CANEL, DAVIS & KING
10 S. LaSalle Street, #3400
Chicago, IL 60603
312-372-4142
312-372-6737 [fax]
sdavis@daviskinglaw.com
wjones@daviskinglaw.com

ALAN O. OLSON
OLSON LAW OFFICE, P.C.
3116 Ingersoll Avenue
Des Moines, IA 50312-3910
515-271-9100
515-271-8100 [fax]
aoo@olson-law.net

Counsel for Respondent
Curtis W. McGhee Jr.