Nos. 10-376, 10-377, 10-420

In The
Supreme Court of the United States

CHRISTOPHER MCDONOUGH,

Petitioner,

vs.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

Blank Page

REASONS TO GRANT PETITION

Fifth Amendment. The Court should grant review to resolve the circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. Respondents' suggestion there is no conflict is belied by the case law. And Respondents' insistence this case is a poor vehicle for resolving the conflict since it involves minors, is belied by logic: That minors are involved has no bearing on whether pretrial use of coerced testimony constitutes a "use" violation of the Fifth Amendment.

The Court should also grant review to delineate what constitutes coercive interrogation of a minor under the Fifth Amendment. Respondents' claims against Petitioner Christopher McDonough are very narrow, largely confined to his having deceived the minor plaintiffs during interrogation – a well established, judicially sanctioned interrogation technique. If such tactics violate the Fifth Amendment, or if there are special rules for minors, police departments and their officers must know. Can officers ever deceive minor suspects? If so, when? Such interrogations are a daily part of law enforcement practice and clear guidelines are essential, both to avoid potential liability and to assure admissible evidence in criminal proceedings.

Fourteenth Amendment. Review is also necessary to resolve what type of conduct violates the Fourteenth Amendment. McDonough did not raise his

voice or threaten the suspects in any way. As noted, Respondents' chief complaint is that McDonough lied to the minor plaintiffs. The Ninth Circuit concluded this alleged conduct "shocked the conscience" and thus exposed McDonough to liability under the Fourteenth Amendment. In response, Respondents neglect even to mention the bevy of cases establishing that, in so holding, the Ninth Circuit has parted company with this Court's precedents and the law of other circuits.

Finally, review is necessary to bring the Ninth Circuit into line with every other circuit regarding the standards for establishing a substantive due process claim for deprivation of familial companionship. The Ninth Circuit expressly repudiated this Court's holding that *any* Fourteenth Amendment substantive due process claim hinges on whether the challenged conduct "shock[s] the contemporary conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 836, 847 n.8 (1998). Respondents' only answer is that even if the Ninth Circuit applied the incorrect standard, it was not prejudicial because the result would have been the same under the correct standard. As noted however, even under the "shocks-the-conscience" standard there should be no liability here. But in any event, the confusion sowed by the Ninth Circuit's published opinion exists regardless of prejudice. The Court should eliminate that confusion by resolving the conflict.

I. THIS CASE PRESENTS A PROPER VEHICLE TO RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHETHER USE OF COERCED TESTIMONY IN PRETRIAL PROCEEDINGS VIOLATES THE FIFTH AMENDMENT.

To provide government officials with guidance regarding the circumstances under which they may use a suspect's testimony, the Court should resolve the circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. (McDonough Cert. Petition ["McDonough"] 16-22.)

Respondents insist that there is no split among the circuits or, in any event, that this case presents a poor vehicle for resolving it. They are wrong.

A. The Third And Fourth Circuits Have Rejected Fifth Amendment Claims Based On Pretrial Use Of A Suspect's Statements.

Respondents agree that the Second, Seventh and Ninth Circuits have held that use of a suspect's coerced statement at *any* criminal proceeding violates the Fifth Amendment. (Houser Opp. 20-27.) But they insist the Third and Fourth Circuits have never taken the opposite view. (*Id.*)

In fact, the Third and Fourth Circuits have squarely held that pretrial use of coerced testimony

does not violate the Fifth Amendment. (*See* McDonough 17-18, citing *Renda v. King*, 347 F.3d 550 (3d Cir. 2003); *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005).)

Boiled down, Respondents' response is that one circuit got the law wrong and the other dealt with distinguishable facts. Respondents argue that review is unnecessary because both circuits might agree with the Ninth Circuit if confronted with the facts here. (Houser Opp. 21-24.)

But it is far from clear that the Third and Fourth Circuits would have found a violation here. Both Circuits considered *Chavez v. Martinez*, 538 U.S. 760 (2003) and then rejected use violation claims in *broad* language limiting the Fifth Amendment to use of testimony at trial. *Renda*, 347 F.3d at 559 ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution"); *Burrell*, 395 F.3d at 514 (plaintiff's claim failed under the *Chavez* plurality opinion because "[h]e does not allege any *trial* action that violated his Fifth Amendment rights").

The district courts in eight states are bound by that language. If, as Respondents contend, that language results from weak reasoning or dictates the wrong result, this Court's review is necessary to correct it. But the fact remains: The split among the circuits is real and requires the Court's attention.

Moreover, the Third and Fourth Circuit cases conflict more directly with the Ninth Circuit's opinion in this case than Respondents acknowledge.

Renda v. King. The Third Circuit recognized that *Chavez* left open the question of when a criminal proceeding commences for purposes of the Fifth Amendment "use" violation inquiry. *Renda*, 347 F.3d at 559. Without guidance from this Court, the Third Circuit based its decision on its own precedent, *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994), holding that use of coerced statements to obtain an indictment does not violate the Fifth Amendment. Respondents' attacks on that conclusion go to the merits of the issue that McDonough has presented for review, not to whether the issue warrants this Court's attention.

In any event, Respondents' attacks on *Renda*'s reasoning lack merit. Specifically, Respondents emphasize that *Giuffre* predates *Dickerson v. United States*, 530 U.S. 428 (2000), a *Miranda* case. (Houser Opp. 21.) But *Renda* expressly held that *Giuffre* remained good law after *Dickerson* and *Chavez*. *Renda*, 347 F.3d at 557-58. ("[I]n light of the Supreme Court's recent decision in *Chavez*, it is clear that *Giuffre* still is good law following *Dickerson*, and that the District Court properly ruled that questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim as long as the plaintiff's statements are not used against her at trial").

Respondents also emphasize that in *Giuffre*, the charges were dropped prior to the filing of a criminal case. (Houser Opp. 21.) But it is the facts of *Renda*, not of *Giuffre*, that matter here. And in *Renda*, the plaintiff was arrested, arraigned, and incarcerated based on her coerced testimony. *Renda*, 347 F.3d at 553; *see also id.* at 559-60. Thus, *Renda* stands in stark contrast to the present case, where the Ninth Circuit held that pretrial use of coerced testimony violates the Fifth Amendment.

Burrell v. Virginia. The Fourth Circuit case, *Burrell*, also creates a clear circuit split. Contrary to Respondents' description, *Burrell* expressly relied on the *Chavez* plurality's reasoning: The Fourth Circuit explained that the *Chavez* plurality found no "use" violation because the compelled testimony was not admitted in court, and that Justice Souter's concurrence found no use violation because the plaintiff had failed to make a showing justifying the attachment of civil liability to police interrogations. 395 F.3d at 513. *Burrell* then concluded, "[o]n the reasoning of either the *Chavez* plurality or Justice Souter's concurrence in the judgment, Burrell's Fifth Amendment section 1983 claim fails to state a claim." *Id.* at 514.

Thus, *Burrell*'s conclusion that the plaintiff's Fifth Amendment claim failed under the *Chavez* plurality's reasoning because he "does not allege any *trial* action that violated his Fifth Amendment rights" (*id.*), directly conflicts with the Ninth Circuit's conclusion here.

B. This Case Presents An Excellent Vehicle For Resolving The Circuit Conflict.

Respondents suggest this case is a poor vehicle for reviewing the Fifth Amendment questions because it involves juvenile suspects, who are subject to different – and more stringent – interrogation standards than their fully emancipated adult counterparts. (Houser Opp. 19.)

Respondents' argument is a non sequitur. The fact that police must take great care when interrogating minors to avoid coercing confessions has no bearing on whether pretrial use of coerced testimony constitutes a "use" violation under the Fifth Amendment. Whether pretrial use of coerced testimony is permissible depends on how the Court construes the word "use" in the Fifth Amendment, not on the age of the suspects.

Finally, Respondents point out that just seven months ago, this Court declined to grant a petition for writ of certiorari in *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied, April 5, 2010. (Houser Opp. 19.) But the fact that the same issue has arisen in two cases from a single Circuit in consecutive terms illustrates the recurring nature of Fifth Amendment claims premised on pretrial use of a suspect's testimony.

In the seven years since *Chavez*, five circuits have split on whether pretrial proceedings constitute a "criminal case" for purposes of the Fifth Amendment.

The Court should resolve the conflict and bring certainty to an area of the law impacting the daily work of police departments and prosecutors across the country.

II. REVIEW IS NECESSARY TO RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHAT CONSTITUTES COERCIVE INTERROGATION OF A MINOR SUSPECT UNDER THE FIFTH AMENDMENT.

The Court should also grant review to resolve the circuit split regarding whether the routine interrogation techniques that McDonough employed here constitute coercion for Fifth Amendment purposes. (McDonough 22-29.) McDonough's tactics – accusing the suspect of lying, implying that others have implicated the suspect and touting the accuracy of the CVSA machine – have garnered widespread judicial acceptance. By concluding these techniques run afoul of the Fifth Amendment, the Ninth Circuit's decision has thrown the law into disarray.

Respondents argue – without any case citations – that Petitioners' arguments "presuppose that law enforcement officers do not have to follow the rules applicable to interrogations and that if they do not, there will be no repercussions." (Houser Opp. 29.) But what those "rules applicable to interrogations" might be, Respondents do not say.

And, in fact, while the Court has spoken generally of the need to treat the interrogation of minors with greater sensitivity than the interrogation of adults, it has *never* delineated whether and when the routine techniques that McDonough employed here constitute coercion.

The Ninth Circuit's decision even casts doubt on what constitutes compelled testimony. As Respondents correctly acknowledge, "freedom from compulsion lies at the heart of the Fifth Amendment." (Houser Opp. 31.) Yet here, the *sine qua non* of compulsion – overriding the suspect's will – is absent. McDonough's interrogations yielded no confession from either suspect.

Respondents take McDonough to task for using deception in his interrogations. (*See* Houser Opp. 9-10, 11-12.) But lying to a suspect is a judicially-sanctioned interview technique. So the question remains: What kind of rule do the Respondents and the Ninth Circuit propose? Can an officer never lie to a minor? Sometimes? And if so, when? The answers to these questions are essential to the day-to-day work of police across the country, both for purposes of avoiding civil liability and assuring admissibility of evidence in criminal proceedings. The "I-know-it-when-I-see-it-standard" that the Ninth Circuit has effectively imposed here does not help officers in practice. To avoid inadvertently violating the Fifth Amendment, officers need clear guidance on what interrogation techniques are permissible.

At the very least, the Court should grant review to reaffirm that officers who use routine police interrogation techniques and who do not actually compel testimony are entitled to qualified immunity. Ample case law approves the interrogation techniques used in the present case. (*See* McDonough 24-25.) Accordingly, no reasonable police officer would have known in advance that the type of accepted police practices utilized here would subsequently be deemed improper. (*Id.* at 28-29.)

In response, Respondents ignore the case law condoning the exact interrogation techniques used in the present case. Instead, they state *ipse dixit* that "no purpose would be advanced by making the police immune, as a matter of law, from the protections that [the Fifth] Amendment provides." (Houser Opp. 31.) This is no response at all.

III. THE COURT SHOULD RESOLVE THE INTER-CIRCUIT CONFLICT REGARDING WHETHER PURELY VERBAL CONDUCT NOT INCLUDING THREATS VIOLATES THE FOURTEENTH AMENDMENT.

The Ninth Circuit's opinion also represents a stark departure from the voluminous case law of this Court and of other circuits establishing that purely verbal conduct devoid of any threats of harm does not "shock the conscience" and therefore subject a police officer to Fourteenth Amendment liability. (*See* McDonough 29-41.)

In response, Respondents *ignore* the voluminous case law establishing that where the police conduct at issue is not physical, the "conscience-shocking" standard is nearly impossible to meet. (*See* Crowe Opp. 24-25; Houser Opp. 32-36.) Instead, they cite a series of cases discussing whether a given statement by a juvenile suspect was admissible at trial. (Houser Opp. 32-36, citing *Haley v. Ohio*, 332 U.S. 596 (1948) (reversing conviction where suspect's coerced testimony was used at trial); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (same); *In re Gault*, 387 U.S. 1 (1967) (same).)

But whether a statement has been coerced and thus is inadmissible at trial is a distinctly different question than that posed here: Whether purely verbal conduct devoid of any threats can subject an officer to liability for civil damages under the Fourteenth Amendment. The standards for the two questions are decidedly different. A statement can be coerced, and thus inadmissible pursuant to the Fifth Amendment's guarantee against self-incrimination, without rising to the level of a violation of the Fourteenth Amendment. *Compare Cunningham v. Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003) (interview is coercive where "the officer's tactics undermined the suspect's ability to exercise his free will") *with Fontana v. Haskin*, 262 F.3d 871, 882 n.7 (9th Cir. 2001) (to violate Fourteenth Amendment, interview tactics must be "'so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience'").

These different standards make sense. Where a suspect's coerced testimony is used at trial, the Fifth Amendment provides the avenues for redress – either by providing a basis for reversing the conviction or by providing a basis for the suspect to seek civil damages. But where the suspect's testimony is *not* used at trial, the more stringent standards embodied by the Fourteenth Amendment must be met before he can obtain civil damages.

Given these different standards, the case law cited by Respondents discussing whether an interrogation resulted in coerced testimony that was inadmissible at trial, provides no basis for concluding that the Ninth Circuit's opinion here – holding that purely verbal conduct is sufficient to constitute a Fourteenth Amendment violation – is anything other than a departure from this Court's precedents and the precedents of the other circuits.

The confusion wrought by such amorphous due process claims is underscored by Respondents' claims against McDonough. Respondents fault McDonough for deceiving the juvenile suspects. (*See* Houser Opp. 32.) But case law sanctions lying to a suspect. Thus, the Ninth Circuit's decision radically lowers the bar for what violates the Fourteenth Amendment – it casts doubt on whether conduct that may not even constitute coercion suffices. By suggesting that an officer cannot lie to a juvenile suspect without exposing himself to liability under the Fourteenth Amendment, the Ninth Circuit's opinion creates uncertainty

regarding what police can do. Can an officer ever lie? If it is sometimes permissible for an officer to lie, under what circumstances is it permissible? What kind of deception rises to the level of a substantive due process violation?

Respondents are correct (Houser Opp. 36), that the Ninth Circuit concluded that these interrogations could violate the Fourteenth Amendment. But both the district court and the trial court (in the underlying criminal case) listened to the same tape recordings of the interviews and found that McDonough's conduct was not extreme or outrageous. This disparity evidences the problem with the Ninth Circuit's decision: Law enforcement agencies and officers across the country will be subject to litigation on the basis of vague standards that vary from courtroom to courtroom. The Court should grant review to eliminate the amorphous tort the Ninth Circuit created here.

At least, the Court should grant review to make it clear that McDonough, and police officers like him, are entitled to qualified immunity for the conduct at issue here. No reasonable officer would have believed that McDonough's calm, measured tone and relatively innocuous questions constituted a "conscience-shocking" interrogation. (McDonough 38-41.) Respondents offer no response to McDonough's contention that he is entitled to qualified immunity.

IV. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT REJECTED THE WELL-ESTABLISHED "SHOCKS-THE-CONSCIENCE" STANDARD AS TO FOURTEENTH AMENDMENT CLAIMS FOR DEPRIVATION OF FAMILIAL RELATIONSHIP.

The Court should grant review because the Ninth Circuit has expressly rejected the "shocks the conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. *See Lewis*, 523 U.S. at 846-49 & n.8. (*See* McDonough 41-43.)

The Crowe Respondents respond by stating *ipse dixit* that, "The Ninth Circuit used the correct legal standard ('unwarranted interference') for interference with family relations and the Petition does not show compelling reasons to grant certiorari to decide this question." (Crowe Opp. 25.) But as demonstrated, this isn't true.

The Houser Respondents respond to the Ninth Circuit's rejection of the "shocks-the-conscience" standard by arguing that even if the Ninth Circuit erred, "the outcome would have been exactly the same" had it used the correct standard. (Houser Opp. 37-38 (emphasis omitted).) However, as noted, the Ninth Circuit's application of the "shocks the conscience" test is dubious here. And in any event, regardless of prejudice, the fact remains that the Ninth Circuit has espoused a standard in a published

opinion that is squarely at odds with the "shocks-the-conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. It is essential that the Court resolve the conflict and eliminate the confusion.

CONCLUSION

For the foregoing reasons, Petitioner urges that the petition be granted.

DATED: November 30, 2010

Respectfully submitted,

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