Nos. 10-376, 10-377

NOV 18 2010

In The
Supreme Court of the United States

MARK WRISLEY, et al.,

Petitioners,

vs.

MICHAEL CROWE, et al.,

Respondents.

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

COMBINED BRIEF IN OPPOSITION TO PETITIONS OF MARK WRISLEY, ET AL., AND CHRISTOPHER MCDONOUGH

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Respondents, and Plaintiffs below, are individuals Michael Crowe, Stephen Crowe, Cheryl Crowe, Shannon Crowe, and Judith Ann Kennedy (deceased) (the "Crowe" Respondents).

Additional Respondents and Plaintiffs below are Margaret Susan Houser, Gregg Houser, and Aaron Houser. The Houser Respondents are represented by separate counsel and intend to file their own separate opposition to the Petitioners' petitions.

Petitioner, and Defendant below, is individual Christopher McDonough.

Additional Defendants below, who filed a separate petition, are individuals Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phil Anderson (collectively, the "Escondido Defendants").

Petitioner Lawrence Blum, Ph.D., has settled his case with the Crowe Respondents, and the Crowe Respondents are not filing a brief in opposition to Blum's petition.

Other Defendants below, who were dismissed from the case but named in the caption on appeal, are City of Oceanside, City of Escondido, County of San Diego, Summer Stephan, Gary Hoover, Rick Bass and the National Institute for Truth Verification, a Florida limited liability company.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

Additional Plaintiffs below, who were dismissed from the case but named in the caption on appeal, are individuals Zachary Treadway, Joshua David Treadway, Michael Lee Treadway, Tammy Treadway, Janet Haskell, and Christine Huff.

There are no corporations involved in this proceeding.

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I.

INTRODUCTION

In 1998, fourteen-year-old Michael Crowe was coerced by members of the Escondido Police Department[1] into confessing to the murder of his twelve-year-old sister, Stephanie. In fact, Michael was innocent. Pet. App. 9 and 33. The interrogations spanned four days, during which Michael was completely isolated from his parents because, without reasonable cause, police claimed they believed Michael and his sister Shannon were in danger of immediate physical abuse. Pet. App. 190. Michael was vulnerable. He loved Stephanie (20JER4899[2]) and had seen his sister, blood soaked, dead. 20JER4831.

When Michael begged the police to let him see his family, they falsely told him his family hated him because they had seen all the evidence showing he killed Stephanie, never wanted to see him again, and that they were the only friends he had. 43JER10363 ¶ 26.

The last two interrogations were videotaped. The tapes provide an irrefutable record of the psychological torture Michael endured at the hands of his tormentors. The interrogation of Michael Crowe

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[1] The City of Escondido is thirty miles north-east of San Diego, California.

[2] "JER" references are to the volume and page of the Joint Excerpted Record that was before the Ninth Circuit in deciding this case.

received world-wide attention. Amnesty International featured it in a cover story of *Amnesty Now* on coerced confessions. 43JER10551. It received national attention. It was the subject of a full length television movie (*The Interrogation of Michael Crowe*) and an hour long story on the CBS News program *48 Hours*. 43JER10551.

The videotapes and transcripts of Michael's interrogations were part of the record on appeal. The record was reviewed *de novo* by the Ninth Circuit. Testimony of experts and non-experts was also part of the record. An expert in coerced confessions testified the interrogation was the "most psychologically brutal interrogation and tortured confession that I have ever observed." The Director of Child Psychiatry Residence Training Program at U.C.S.D. characterized it as "the most extreme form of emotional child abuse that I have ever observed in my nearly forty years of observing and working with children and adolescents." A former Justice on a California Court of Appeal with extensive prosecutorial experience testified Michael's statements were the product of a "coercive police scheme." A juror in the real killer's trial described Michael's interrogation as "brutal and inhumane" and "psychological torture." Pet. App. 46-47.

The Ninth Circuit said the tapes showed Michael was cajoled, threatened, lied to, and relentlessly pressured by teams of police officers, and concluded: "'Psychological torture' is not an inapt description." Pet. App. 47.

The "coercive police scheme" will be briefly summarized. The Lieutenant (Bass) and Sergeant (Anderson) in charge of the investigation assembled a team. Dr. Lawrence Blum,[3] a psychologist, was hired to come up with an overall plan and teach the interrogators. *See* generally, Pet. App. 66. Lead Detective Ralph Claytor and Detective Mark Wrisley played the roles of bad cop (Claytor) and good cop (Wrisley). Oceanside Police detective Chris McDonough was brought in from a neighboring agency to administer the CVSA (Computerized Voice Stress Analyzer), a so-called lie detection machine.

Lt. Bass and Sgt. Anderson (40JER9687, 34:27-35:16) decided to use CVSA (40JER9687, 34:27-35:1; 35:15-16) even though the Department had never used it before in a criminal case (40JER9687, 34:23-26). The polygraph was standard procedure for new police hires (40JER9701, 106:6-12) and criminal suspects (40JER9686, 30:16-20). The Escondido Police Department had three polygraphers (39JER9523), two already assigned to the Crowe case (Bass [39JER9524]; Martin [40JER9686, 32:3-8]). Anderson requested the CVSA, but could not remember why (40JER9701, 107:24-108:1). Even though he had never seen it used and did not know if it detected truth or deception (40JER9701, 107:6-16), he contacted Oceanside Police detective and CVSA operator Chris McDonough

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[3] During the pendency of the Petitions for Writ of Certiorari, Dr. Blum settled with the Crowe plaintiffs.

(40JER9702, 109:7-15), but did not remember if he asked him if the CVSA was reliable (40JER9702, 109:21-110:2). Anderson did not even remember if he *cared* if it was reliable. 40JER9702, 110:4-5.

Claytor and Wrisley at times worked together, at others, alone. Team members monitored proceedings on closed circuit television in another room. Claytor and Wrisley falsely told Michael they had irrefutable physical evidence of his guilt. Among other things, they told him his hair was found in Stephanie's hand (21JER4968), her blood was found in his room (21JER5018), her blood had been washed down the bathroom sink (21JER4979), and all the doors and windows were locked. 21JER4960. They told him, "So, it's either Shannon, or it's your grandma, or it's your mom, or it's your dad, or it's you." 21JER5117.

McDonough presented himself as an outside, objective party brought in to verify Michael's story (20JER4864) by a machine so accurate it was "spy stuff . . . controlled by the government for a long time." 20JER4865. McDonough's representations were false. 41JER9901-02. Since 1966, Department of Defense and other studies available in the public domain showed the CVSA did not work. 41JER9902.[4]

McDonough told Michael his subconscious mind might be blocking what he did, which explained why

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[4] During the pendency of this case, the manufacturer of the CVSA settled with the Crowes.

he could not remember committing the murder. After McDonough exited, Claytor and Wrisley appeared, emphasizing the irrefutable physical evidence proving Michael's guilt. McDonough's blocking suggestion and Claytor and Wrisley's irrefutable proof caused Michael to doubt his own memory. He was told there were two Michael's, a good Michael and a bad Michael. Pet. App. 21. Michael was told they wanted to bring out the bad Michael so they could "help" by getting the bad Michael treatment. Pet. App. 32. Michael was repeatedly told he wasn't a bad person and they wanted to help him. Pet. App. 16.

Michael was told there were two paths, one leading to prison and punishment, the other to treatment and rehabilitation. 21JER5140. If Michael wanted to take the right path he had to show he was sorry by confessing. 21JER5140.

Prodded by questions, Michael described his sister in tender terms ("she loved God," 21JER5083) and then was told to write a letter of apology to her for murdering her. 17JER4011-212.

The letter writing ploy failed because it did not provide details about how the murder was committed. Michael said he wanted to take the right path but since he did not know what happened, he would have to lie. "Let's try that" Claytor responded. 37JER8988. Michael warned what he was going to say would be a complete lie. Claytor replied: "Tell us the story." 37JER9008.

What Michael did not know was the police had a motive to make the murder an inside job. It is undisputed that Stephanie was stabbed to death in her bedroom between 10 and 11 p.m. on January 20, 1998. In the preceding three hours, residents in the immediate vicinity (a remote, rural area) of the Crowe house reported a prowler on both sides of the street. Police were dispatched twice in response to 911 calls. Officer Scott Walters responded to a 911 call made at 9:28 p.m. (39JER9430) by the Crowe's neighbor, Reverend West. West waited for the police to arrive, but no one did. 29JER6917. Shortly before 9:56 (*Crowe* at 417), Walters was on the Crowe end of a common driveway West shared with the Crowe house. Walters squad car was lit up: alley lights, high beams, spotlight, take-down lights (9JER2030-2031). Walter saw a door almost completely open (29JER6933), a light was on inside (29JER6934), but no one standing at the door (29JER6934). Then, according to Walters, the door closed "normally." 29JER6935.

Seeing nothing "unusual" (39JER9464, 49:23), Walters reported the prowler "gone on arrival" (39JER9464, 50:2-5), took himself out of service and headed to town for dinner. 29JER6937. Within the

hour, perhaps within moments, Stephanie Crowe was stabbed to death.[5]

Excessive and unwarranted police behavior was not confined to Michael. Family members were taken to the station and told they had to strip and be photographed. Father Stephen was photographed front, back and side completely nude, mother Cheryl without her underwear, and ten-year old Shannon wearing only panties. Pet. App. 12.

After taking Michael and Shannon from them, Stephen and Cheryl were told they were free to leave. When they tried to, police confronted them at the front door, shouting for them to get back inside. Detective Wrisley did so while pointing a gun at them. Pet. App. 65.

The effect of what the Ninth Circuit said could be aptly described as psychological torture is plainly visible on the videotape. Michael cries out, writhes, contorts, weeps, and expresses pain. When Claytor asked what the greatest fear he can imagine was, Michael replied: "I'm afraid there is someone else inside of me." 37JER8919.

Michael's confession was used before the grand jury, which indicted him for murder. The transcript of this proceeding was entitled *The People of the State of*

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[5] "It is undisputed Stephanie died between 10 and 11 pm." (303 F.Supp.2d 1050 at 1058). Walters was eating at Spires Restaurant from 10:10 to 10:42. (29JER6937).

California v. Michael Stephan Crowe and bears criminal case number SCD 130983. 42JER10266. Michael's confession was also used at a 707 hearing[6] in order to convince a Superior Court judge that he should be tried as an adult.

Shortly before trial, an independent forensic laboratory examined the shirt of Richard Tuite, the prowler whom neighbors reported seeing in the Crowes' neighborhood the night of the murder. His shirt had been collected as part of the initial investigation, but never fully tested. Pet. App. 9. Blood was found and positively identified as Stephanie's by DNA. Pet. App. 9.

The criminal case was dismissed without prejudice. The Escondido Police Department continued its investigation, but on February 5, 2000, San Diego County Sheriffs Homicide took over. After a two year investigation, Tuite was arrested (May 26th, 2004) for Stephanie's murder. The California Attorney General prosecuted the case after the San Diego County District Attorney stepped aside. Tuite was found guilty of voluntary manslaughter by a jury on May 26, 2004 and sentenced to thirteen years in prison. His earliest parole date is February 23, 2017.

Six years elapsed from the date the civil complaint was filed by the Crowes until the District

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[6] A 707 Hearing is held to determine whether a minor should be tried in juvenile or adult court. *See Cal. Welf. & Inst. Code* § 707.

Court issued its ruling on qualified immunity adverse to the Crowes. Another five years elapsed from the time the Crowes were allowed to file a notice of appeal with the Ninth Circuit, until the Ninth Circuit issued its opinion. Eleven years after filing the complaint, this case has not moved beyond the qualified immunity stage.

The purpose of qualified immunity is the speedy resolution of suits against government officials for the alleged violation of constitutional rights. Its goal is to assure that government officials are free to go about their duties without being hindered by the time, worry, and expense of defending lawsuits.

Twelve years after Stephanie's murder, and eleven years after seeking redress under § 1983 in federal court, the issue of qualified immunity has not yet been finally resolved. At the rate this case is going, Tuite may be out of jail before this case is concluded.

II.

ISSUES PRESENTED

Three Petitions have been filed: (1) Escondido (Claytor, et al.), (2) Oceanside (McDonough) and (3) Blum. The Crowes do not respond to the Blum Petition because he settled with the Crowes while his Petition was pending. The Escondido and Oceanside Petitions essentially raise three issues:

1. Whether compelling reasons (required by Supreme Court Rule 10) have been shown to grant a

Petition where Petitioners claim it was not clearly established in December of 1999 that it was a violation of the Fifth Amendment to coerce a confession from an innocent fourteen-year-old boy and use it against him during different phases of his criminal case, including before a grand jury to obtain an indictment for murder, before a court to persuade it to order him to be tried as an adult, and by placing information in the court file showing he had confessed, which court file judges making determinations about bail were required to consult.[7]

2. Whether compelling reasons have been shown to grant a Petition where Petitioners claim it was not clearly established in December of 1999 that it was a violation of the Fourteenth Amendment to psychologically torture an innocent fourteen-year-old boy into falsely confessing to the murder of his sister.

3. Whether compelling reasons have been shown to grant a Petition where Petitioner's claim the test for interference with the Fourteenth Amendments right to be free from governmental interference with a familial relationship is that it must "shock the conscience" rather than constitute "unwarranted interference."

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[7] California law requires that a minor be released within forty-eight hours of arrest unless a petition is filed explaining why he should be declared a ward of the court. *See Cal. Welf. & Inst. Code* § 631. The petition filed with the court said Michael admitted killing his sister. 42JER10089.

III.

ARGUMENT

A. Compelling Reasons Do Not Exist on the Fifth Amendment Issue

Petitioners claim the Supreme Court's ruling in *Chavez v. Martinez* 583 U.S. 760 (2003) created confusion about whether the Fifth Amendment's implicit "use" requirement was satisfied only when introduced against the suspect at his trial or whether "criminal case" included pre-trial judicial proceedings.

Six cases are cited as evidence of a conflict. On the one hand, Petitioners assert, the Second (*Higazy*),[8] Seventh (*Sornberger*),[9] and Ninth (*Stoot*)[10] Circuits have held use at trial is *not* required, merely use in judicial pre-trial proceedings, while the Third (*Renda*),[11] Fourth (*Burrell*),[12] and Fifth (*Murray*) Circuits[13] hold use at trial *is* required. Petition, pps. 12-13.

Renda, *Burrell* and *Murray* do not show a conflict in the Circuits because none decide whether "use" in a "criminal case" is required. The only issue decided

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[8] *Higazy v. Templeton*, 505 F.3d 161 (2nd Cir. 2007).

[9] *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006).

[10] *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009).

[11] *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003).

[12] *Burrell v. Virginia*, 396 F.3d 508 (4th Cir. 2005).

[13] *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005).

in *Renda* was whether the mere failure to give a *Miranda* warning would support a later civil rights claim under § 1983. *Renda* holds it would not. Everything said about "use" and "criminal case" in *Renda* is *dicta*.

Renda lived with her boyfriend, Sonafelt, a state trooper. They had an argument, she left. The police were called, two state troopers investigated. Renda told them Sonafelt hit her but she did not want to press charges.

Sonafelt was questioned and denied Renda's accusation. Renda was questioned again and asked to write a statement. She did, but it did not mention the battery. The state troopers later claimed when they asked about this, she admitted lying to them earlier.[14] Renda was charged with making a false statement to the police. The trial court suppressed her statement because she was not given her *Miranda* rights. The criminal case against Renda was dismissed.

Renda filed a § 1983 action. Although her original complaint alleged violations of the First, Fourth, Fifth and Fourteenth Amendments, the only claim which survived[15] sought to impose liability for failure

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[14] Renda denied this. She said she told the two state troopers she left it out of her statement because she did not want Sonafelt charged.

[15] "During the trial, the District Court dismissed the coerced interrogation claim." *Renda, supra* at 553.

to give her a *Miranda* warning.[16] The Third Circuit held the mere failure to give a *Miranda* warning would not support a cause of action under § 1983. *Renda*'s language about the use of a statement at "trial" (*see Renda* at 558, 559) is *dicta*.

The fact *Renda* was *charged* is beside the point. The issue actually decided was that a mere failure to provide a *Miranda* warning would not support a § 1983 claim. In light of the Supreme Court's later decision in *Chavez*, so holding (*Chavez* at 761), there is little chance of a conflict arising on this issue.

The only issue decided by *Burrell* was whether the issuance of summons by a police officer in the field to a motorist involved in an accident ordering him to appear in traffic court violated the Fifth Amendment. *Burrell* held it did not. *Burrell* does not involve a coerced confession. In fact, it involves the opposite – silence. Burrell refused a police officer's request to produce proof of insurance (required under state law of a motorist involved in an accident) on the ground he had a Fifth Amendment right not to incriminate himself.

The police officer served Burrell with two summonses: (1) operating an uninsured motor vehicle without paying an uninsured motorist fee, and (2) obstruction of justice. A Virginia traffic court convicted

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[16] " . . . Renda claims . . . defendants violated . . . her right under *Miranda* to be free from custodial interrogation." *Renda, supra* at 557.

Burrell of obstructing justice, but dismissed the charge of failure to maintain insurance. The charge of obstructing justice was dismissed on appeal.

Several key facts in *Burrell* are unclear. The opinion says it is not clear from the record whether Burrell's assertion of his Fifth Amendment right was used against him in traffic court. It is hard to see how Burrell could have been convicted of obstruction of justice without evidence at trial that he exercised his Fifth Amendment right to remain silent.

Burrell does not decide whether Burrell had a Fifth Amendment right to refuse the police officer's request. It does not discuss whether evidence of Burrell's exercise of his right to remain silent at trial would violate his Fifth Amendment right not to be compelled to be a witness against himself in any criminal case. It does not explain whether a traffic court has jurisdiction over crimes or only infractions, and if the offenses Burrell was charged with were infractions, whether trial on an infraction was a "criminal case."

Burrell's fact pattern presents these interesting issues, none of which were resolved. The reason: the issue decided by the Fourth Circuit was extremely narrow. Footnote 4 says:

> Unlike in *Chavez*, criminal charges *were* ultimately brought against Burrell. The record does not disclose whether the prosecution attempted to introduce evidence of Burrell's failure to respond at the trial for obstruction

> of justice or whether such evidence was in fact admitted. At oral argument, Burrell's counsel affirmed in response to the court's question that Burrell *only* claims that his constitutional rights were violated at the time the summonses were issued, not at the time of trial. *Burrell* at 513, n.4.

Hence, everything which occurred after the issuance of the summonses was irrelevant because Burrell's counsel told the Court his sole claim was that Burrell's constitutional rights had been violated at the time the summonses were issued. The only issue *Burrell* decided was that mere issuance of a summons – in effect, the equivalent of a traffic ticket – following an exercise of the right to remain silent, did not compel a person to be a witness against himself in any criminal case. Everything *Burrell* says about "trial" and "courtroom use" is *dicta*.

Significantly, *Sornberger v. City of Knoxville*, 484 F.3d 1006 (7th Cir. 2006), holding a violation of the Fifth Amendment occurred when a coerced statement was used at a probable cause hearing, bail hearing and an arraignment (*id.* at 1027), denied that its decision was in conflict with *Burrell*:

> We do not see any conflict between our holding today and that of our sister circuit in *Burrell*. There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of a summons was not a "*courtroom use*

> of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to indict, to arraign and to set her bail. *Id.* at 1027.

Murray did involve the "use" of a confession "at trial," but its holding rested entirely on the issue of causation. *Murray* held the erroneous admission of a confession by the trial court was a superseding cause which broke the chain of causation required to impose civil liability in a later civil rights action under § 1983.

Eleven-year-old LaCresha Murray lived with her grandparents, R.L. and Shirley Murray, who also provided daycare at their home. Two-year-old Jayla was routinely cared for by the Murrays. LaCresha told R.L. that Jayla was throwing up. At around 5:00 p.m. Jayla was sweating profusely. She was pronounced dead at a hospital at about 5:30 p.m. The medical examiner concluded Jayla sustained severe liver injury as a result of a blunt force blow causing four ribs to break which split Jayla's liver in two, resulting in Jayla's death within five to fifteen minutes.

Three days later, LaCresha was in the Texas Baptist Children's Home when detectives questioned her. They did not take her to a magistrate, as required by Texas law, before questioning her because

of advice from a prosecutor that LaCresha was not in custody. However, they gave LaCresha a *Miranda* warning, then interrogated her for two hours. LaCresha admitted dropping Jayla and kicking her. She was charged with capital murder and injury to a child.

The juvenile court ruled her confession admissible, the jury convicted her of negligent homicide and injury to a child. Extensive publicity followed. The juvenile court, perhaps influenced by publicity, ordered a new trial on its own motion. LaCresha was charged with injury to a child, her confession was again admitted, and a second jury convicted her. The juvenile court adjudicated her delinquent and sentenced her to twenty-five years.

The Texas Court of Appeals reversed, holding LaCresha had been in state custody and should have been taken before a magistrate before being questioned and that her confession was inadmissible.

The Fifth Circuit held the admission (though erroneous) of LaCresha's confession was an independent, superseding cause of the violation of her Fifth Amendment rights (*id.* at 290) and "[i]n this circuit, it was not well-established at the time of LaCresha's interrogation that an official's pre-trial interrogation of a suspect could subsequently expose that official to liability for violation of a suspect's Fifth Amendment rights at trial." *Id.* at 293.

In contrast, this principle *was* well established in the Ninth Circuit (Pet. App. 44). This distinguishes

Crowe from *Murray*. *Murray* was decided solely on the issue of causation. The Court found the chain of causation was broken when a trial court erroneously admitted the defendant's statements. Whether this reasoning is correct is debatable,[17] but this is beside the point, because Murray's statements were erroneously admitted by the trial court. Crowe's coerced statements were suppressed by the state criminal court. Pet. App. 31-32. *Murray* sheds no light on, and provides no precedent for, the question of whether use of LaCresha's confession in pre-trial judicial proceedings would have constituted "use" in a "criminal case." Everything *Murray* says about "trial," "at trial," "trial right" (*see Murray* at 285) "criminal case," and "at trial" is *dicta*.

In contrast *Sornberger*, *Higazy* and *Stoot*, all decided later, squarely decide the issue of "use" in any "criminal case." *Higazy* (use at a bail hearing), *Sornberger* (use to initiate criminal proceedings), *Stoot* (use to initiate criminal proceedings) and other cases[18] remain faithful to the pluralities' statement in

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[17] At common law, the future (1) event and (2) injury must both be unforeseeable to constitute a superseding cause. There are many reported cases where trial courts have erroneously admitted confessions and been reversed on appeal. Hence, at the time a suspect is being questioned it is foreseeable that his statement will be used against him, or excluded by the trial court, or erroneously admitted by the trial court.

[18] Like *Weaver v. Brenner*, 40 F.3d 527 (2nd Cir. 1994), holding use of a coerced confession before a grand jury violates the Fifth Amendment. *Id.* at 536.

Chavez that "criminal case" is a general term for "an action, cause, suit, or controversy at law . . . a question contested before a court of justice." *Chavez* at 766 citing *Blyew v. United States*, 13 Wall. 581, 595, 20 L.Ed. 638 (1872).

Sornberger, *Higazy* and *Stoot* all follow the Fifth Amendment's text and the Supreme Court's guidance in *Chavez* requiring "use" in a "criminal case." They are consistent with the historical meaning of "criminal case" at the time the Fifth Amendment was ratified. Sir James Stephen's *A History of the Criminal Law of England* shows "criminal case" referred to the entire criminal judicial process: "These are the indictment or information, the arraignment of the prisoner, and his trial down to the verdict and judgment." Stephen, *A History of the Criminal Law of England* at 273. Sir Stephen explains the "indictment is the foundation of the record in all criminal cases, and is indeed the only document connected with the trial which in all cases is in writing." *Id.* at 274. "It is enough to say that in all common cases the pleadings in a criminal trial have always consisted, and still consist, of an indictment engrossed on parchment, and a plea given of the accused person orally in open court, of guilty or not guilty." *Id.* at 275.

England's Bill of Rights (1689) shows bail was part of a criminal case: "And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects. *English Bill of Rights*, 1689. The Judiciary Act of 1789 also shows bail was considered part of

a criminal case: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . " *The Judiciary Act of 1789*, 1 Stat. 73, Chap. XX, Section 33.[19]

Hence, "criminal case," at the time the Fifth Amendment was ratified, referred to the entire criminal judicial process up to and including sentencing, including proceedings before a grand jury. *Counselman v. Hitchcock*, 142 U.S. 547 (1892), unanimously held proceedings before a grand jury were part of a "criminal case." It has never been overruled.[20]

When a crime is committed, there is an "investigatory" and "judicial" phase. The investigatory phase involves gathering evidence, finding witnesses, and questioning suspects. The judicial phase involves presenting evidence to a grand jury, obtaining an indictment, bringing the defendant before the court, setting bail, hearing and deciding motions, trial, sentencing and appeal. When a grand jury or juvenile court receives evidence, the line has been crossed

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[19] The Fifth Amendment was ratified in 1791, two years after the Judiciary Act.

[20] Westlaw incorrectly says *Counselman* was "overruled in part" by *Kastigar v. United States*, 406 U.S. 441 (1972). Westlaw confuses what a case *holds* with what it says. *Kastigar* explains: "Our holding is consistent with the conceptual basis of *Counselman*. *Id.* at 444. Elsewhere, *Kastigar* merely says the "broad language" of *Counselman*, implying an immunity statute must afford *greater* protection than the Fifth Amendment is *dicta*. *Id.* at 444-445.

from the "investigatory" phase and has moved into the "judicial" phase. The contours of this line have been elucidated in a different but analogous context in cases like *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and its progeny.

The holding in *Sornberger*, *Higazy*, *Stoot*, and *Crowe* are consistent with the historical meaning of "criminal case," the unanimous holding of the Supreme Court in *Counselman*, and the guidance provided by *Chavez*. *Chavez* explained that "criminal case" at the very least required initiation of legal proceedings (*id.* at 766), and was a "general term for an action, cause, suit or controversy at law" (*id.* at 766).

To the extent *Chavez* and other Supreme Court decisions use the word "trial" in connection with the Fifth Amendment's "use" requirement, it is submitted that, like "criminal case," it is being used in a general sense to refer to judicial proceedings over which a trial court has jurisdiction. *Black's Law Dictionary* defines the "trial court" as "[t]he court of original jurisdiction; the first to consider litigation. Used in contrast to appellate courts." *Black's Law Dictionary*, Fifth Edition. In California, the court exercising original jurisdiction over Michael's criminal case was the Superior Court. It was empowered to, and exercised authority over, every phase of Michael's criminal case, from grand jury, indictment, arraignment, bail, determining whether he should be tried as an adult, as well as hearing and ruling on pre-trial motions.

A grand jury is a competent tribunal (*California Penal Code* § 888) authorized by the law of the land (*id.*) to hear evidence and bring indictments (Witkin, 4 *California Criminal Law* (3d), p. 46, § 31). Grand jurors must possess specified qualifications (*id.* p. 47, § 32), are required to take an oath (*California Penal Code* § 911) and are "charged by the court" (*California Penal Code* § 914(a)) concerning their responsibilities.

The California Supreme Court has held "there is no doubt that a grand jury is part of the court by which it is convened, and that is under the control of the court . . . " *People v. Superior Court (1973 Grand Jury)*, 13 Cal.3d 430 at 438 (1975). *California Penal Code* § 888 makes clear that a grand jury acts under the authority of the judicial branch: "A grand jury is a body of the required number of persons returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."

Witnesses in Michael's criminal case, bearing case number SCD 130983 (42JER10266), testified before the grand jury, which indicted him for murder. Proceedings before the grand jury were part of Michael's "criminal case" because the grand jury acted pursuant to judicial authority and was subject to judicial oversight, and the subject matter was "an action, cause, suit or controversy at law" (*Chavez* at 766).

A Superior Court judge presided over Michael's 707 hearing, the purpose of which was to decide

whether Michael should be tried as an adult. A 707 hearing is a critical phase in a criminal case. *People v. Chi Ko Wong*, 18 Cal. 3d 698, 718 (1976) held it must comport with due process:

> " . . . [T]he certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'" (*Id.* at 810).

The Ninth Circuit's *Crowe* decision is correct. Michael's confession was used against him in a criminal case. The Ninth Circuit cited its decision in *Stoot v. City of Everett*[21] (holding when a confession was used to file criminal charges in juvenile court it constituted use in a criminal proceeding, *Stoot* at 912) to support its decision in *Crowe*. Before *Crowe* was decided by the Ninth Circuit, but after a Petition for Certiorari had been filed with the Supreme Court in *Stoot*, Escondido filed an *amicus* brief in *Stoot* (2010 WL 304259) essentially arguing the same thing it does in the instant Petition. The Supreme Court denied certiorari in *Stoot*.[22] It should deny it here as well.

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[21] *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied in *Jensen v. Stoot*, 130 S.Ct. 2343, 176 L.Ed.2d 577, 78 USLW 3375, 78 USLW 3576, 78 USLW 3580 (U.S. Apr. 05, 2010) (No. 09-728).

[22] *Id.*

B. Compelling Reasons Do Not Exist on the Fourteenth Amendment Issue

Petitioners claim what the police did to Michael does not shock the conscience. The videotape of his interrogation refutes this. Petitioners create the erroneous impression the District Court was in a better position to decide the Fourteenth Amendment issue than the Ninth Circuit because the District Court judge reviewed all the videotapes and transcripts of the interrogations. This ignores the fact the Ninth Circuit's review was *de novo* and it also reviewed them.

> "One need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience' . . . 'Psychological torture' is not an inapt description." (Pet. App. 47).

The Ninth Circuit faithfully followed the Supreme Court's guidance (for example, citing *In re Gault*, 387 U.S. 1 (1967)) in finding Michael's interrogation shocked the conscience in violation of the Fourteenth Amendment.

In addition to the videotapes of the interrogations, the Ninth Circuit also had before it the testimony of lay and expert witnesses who described the interrogation as "psychologically brutal," "tortured," "extreme . . . emotional child abuse" the product of a "coercive police scheme," "brutal," "inhumane," and "psychological torture."

The Ninth Circuit's decision was unanimous, one of the panel members had extensive experience as a prosecutor,[23] and a motion for re-hearing was denied *en banc*. The Ninth Circuit followed the proper legal standard in finding Michael's interrogation violated the Fourteenth Amendment.

C. Compelling Reasons Do Not Exist on the Legal Standard Used for Interference with Familial Relations

The Ninth Circuit used the correct legal standard ("unwarranted interference" Pet. App. 70) for interference with family relations and the Petition does not show compelling reasons to grant certiorari to decide this question.

IV.

CONCLUSION

Eleven years after the Crowes filed their § 1983 civil rights action, the issue of qualified immunity has not yet been finally resolved because Petitioners are asking the Supreme Court to grant Certiorari from the decision of the Ninth Circuit. In this time span,

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[23] As Chief of the Los Angeles County District Attorney's Office, United States Attorney for the Central District of California, Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, and Associate Attorney General. *Federal Judicial Center*, Trott, Stephen S.

the trial judge, a plaintiff (Mrs. Kennedy), and a plaintiff's expert witness (Justice Puglia) have died.

The Crowes recognize that government officials, discharging their duties in good faith, should not have to be constantly looking over their shoulders or distracted by time consuming, expensive, and emotionally draining litigation.

However, the Crowes urge that the maxim "Justice delayed is justice denied" should be more than a platitude. The time, expense, and emotional toll of litigation affects them as well. While they recognize qualified immunity serves an important societal purpose, they contend some consideration should be given to them.

More than a decade has passed since the Crowes filed their case. The record before the Ninth Circuit was extensive, carefully considered, and thoroughly reviewed. The Ninth Circuit's decision faithfully followed Supreme Court precedent. There is no conflict in the Circuits on the issues decided in *Crowe*; in fact, there is uniformity in the Circuits on those issues. *Crowe* adheres to the historical meaning of "criminal case" and Supreme Court precedent, like *Counselman*. It is consistent with the historical understanding of "criminal case" reflected in England's Bill of Rights (1689) and the Judiciary Act of 1789. The record provided ample evidence for the Ninth Circuit to hold that the interrogation of Michael Crowe shocked the conscience in violation of the Fourteenth Amendment.

Petitioners have had ample opportunity to make their case for qualified immunity. The time has come to allow the Crowes to make their case on the merits to a jury.

Respectfully submitted,

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