No. 11-1062

IN THE

Supreme Court of the United States

JOSEPH MICCI, *et. al*,

Petitioners,

v.

RICK ALEMAN,

Respondent.

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

BRIEF IN OPPOSITION

LAWRENCE JACKOWIAK
Counsel of Record
ADELE NICHOLAS
SARA GARBER
JACKOWIAK LAW OFFICES
20 North Clark Street, Suite 1700
Chicago, Illinois 60602
(312) 795-9595
ljackowiak@jackowiaklaw.com

Counsel for Respondent

241943

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

QUESTIONS PRESENTED

Whether Petitioners have presented compelling reasons to grant the petition, where the Seventh Circuit correctly held that:

1. Use of a coerced statement during pre-trial proceedings in a murder case satisfies this Court's requirement that a statement must be used in a "criminal case" for a case to be actionable under §1983; and

2. Based on the unique facts of this case, the interrogators induced Aleman to confess to shaking baby Joshua by lying about the medical evidence and cornering Aleman into believing that the scientific evidence conclusively established that he was responsible.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION ... 5

I. ALEMAN'S STATEMENT WAS USED IN A CRIMINAL CASE..... 5

A) Petitioners' Claim of a Split in the Circuits Is Misleading and Exaggerated 6

B) The Self-Incrimination Clause Does Not Only Apply at Trial..... 14

II. WELL ESTABLISHED BRIGHT-LINE RULES GOVERNING INTERROGATIONS ALREADY EXIST..... 16

III. THE SEVENTH CIRCUIT'S FACTUAL HOLDING ABOUT THE COERCIVE METHODS USED IN THIS CASE FAILS TO RAISE AN ISSUE WORTHY OF THIS COURT'S REVIEW..... 18

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

CASES

Aleman v. Village of Hanover Park,
662 F.3d 897 (7th Cir. 2011) ..... *passim*

Aleman v. Village of Hanover Park,
748 F. Supp. 2d 869 (N.D. Ill. 2010)..... 2-3

Burrell v. Virginia,
395 F.3d 508 (4th Cir. 2005)..... 11, 12, 13

Chavez v. Martinez,
538 U.S. 760 (2003) ..... *passim*

City of Riverside v. Rivera,
477 U.S. 561 (1986) 18

Dickerson v. United States,
530 U.S. 428 (2000)..... 11

Dunning v. Simmons Airlines, Inc.,
62 F.3d 863 (7th Cir. 1995)..... 18

Edwards v. Arizona,
451 U.S. 477 (1981) 3

Eidson v. Owens,
515 F.3d 1139 (10th Cir. 2008) 9

Frazier v. Cupp,
394 U.S. 731 (1969) 19

Cited Authorities

Page

Giuffre v. Bissell,
31 F.3d 1241 (3d Cir. 1994) 11

Higazy v. Templeton,
505 F.3d 161 (2d Cir. 2007) 7, 15

Jocks v. Tavernier,
316 F.3d 128 (2d Cir. 2003) 7

Johnson v. Pollard,
559 F.3d 746 (7th Cir. 2009) 19

Kastigar v. United States,
406 U.S. 441 (1972) 14-15

Marshall v. Columbia Lea Reg'l Hosp.,
345 F.3d 1157 (10th Cir. 2003) 8

McKinley v. Mansfield,
404 F.3d 418 (6th Cir. 2004) 8

Michigan v. Tucker,
417 U.S. 433 (1974). 15

Minnick v. Mississippi,
498 U.S. 146 (1990) 3, 16, 17

Murray v. Earle,
405 F.3d 278 (5th Cir. 2005) 13, 14

Cited Authorities

Page

Renda v. King,
347 F.3d 550 (3d Cir. 2003) 10, 11

Sornberger v. City of Knoxville, Ill.,
434 F.3d 1006 (7th Cir. 2006) . . . . . *passim*

Stoot v. City of Everett,
582 F.3d 910 (9th Cir. 2009), *cert. denied*,
Jensen v. Stoot, 130 S. Ct. 2343 (2010) 6, 7, 15

Sparado v. Boone,
212 Fed. Appx. 831 (11th Cir. 2006), *cert. denied*,
Boone v. Sparado, 552 U.S. 822 (2007) 9, 15

United States v. Hubbel,
530 U.S. 27 (2000) 15

United States v. Rutledge,,
900 F.2d 1127 (7th Cir. 1990) 19

United States v. Villalpando,
588 F.3d 1124 (7th Cir. 2009) 19

Wright v. Dodd,
438 Fed. Appx. 805, 2011 WL 3611972
(11th Cir. 2011) 9

Wrisley v. Crowe,
131 S. Ct. 905 (2011) 15, 16

Cited Authorities

Page

STATUTES

42 U.S.C. § 1983 . . . . . *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V . . . . . *passim*

This is a case about an innocent day-care provider who tried to save the life of a baby in his care and as a result was charged with murder. The causes of the false charges are numerous, including a botched police investigation and the fabrication of evidence. In addition, the police obtained a false confession through coercion and the blatant violation of numerous constitutional "bright-line" rules that this Court has repeatedly affirmed regarding interrogations.

STATEMENT OF THE CASE

Danielle Schrick is a very violent and disturbed person who was known to have regularly beaten and abused her baby, Joshua Schrick. One of the beatings was deadly. Around Labor Day weekend in 2005, Joshua began displaying classic signs of shaken-baby syndrome, including fever, lethargy, refusing to eat, difficulty sleeping, irritability, and aloofness. (Shaken-baby syndrome and subdural hematoma, which Joshua was also suffering from, is typically a slow-onset injury.) Danielle brought Joshua to see a doctor on Tuesday, September 6, and Thursday, September 8. Joshua had been scheduled to begin at Aleman's day-care center on Tuesday, September 6, but because Joshua was sick and had a doctor's appointment, Joshua's first day at Aleman's was on Wednesday.

On Wednesday, Thursday, and Friday, Joshua was observed by Aleman and the parents of other children at Aleman's day-care center to be constantly displaying the classic symptoms of shaken-baby syndrome described above. Early in the morning of Friday, September 9, Aleman found Joshua in a lifeless state. Having been

trained in CPR, Aleman went through the proper procedures to try to resuscitate Joshua. He gently shook Joshua, while stating, "Josh! Josh!" Then Aleman heroically performed mouth-to-mouth while fluid was rushing out of Joshua's nose and mouth. *Aleman v. Village of Hanover Park*, 662 F.3d 897, 901 (7th Cir. 2011).

Police, fire and ambulance soon arrived. Joshua was taken to a hospital. Aleman and his wife were taken to the local police station for questioning. About an hour later, Aleman asked if he could leave. The police told him no. Aleman was under arrest. *Aleman*, 662 F.3d at 901.

At the hospital, the doctors indicated that Joshua appeared to be suffering from shaken-baby syndrome. It was explained that the underlying trauma was likely recent, meaning probably sometime in the week before Joshua first began displaying shaken-baby syndrome symptoms. Defendant-officer Carlson was also at the hospital. Carlson interviewed Joshua's mother Danielle, who told Carlson that she never hit Joshua.

Based on that, Carlson immediately ruled out Danielle as a suspect. Carlson was also the same cop who was later seen sobbing with Danielle and holding her hand at Joshua's funeral. And Carlson was the one who gave the medical examiner fabricated evidence about baby Joshua's health to get her to falsely opine that Aleman was the cause of Joshua's death. (The medical examiner had previously stated that it was "highly unlikely" that Joshua's injuries occurred at Aleman's.) There is also evidence that Carlson tried to shield Danielle from suspicion and questioning. Both the district court and the court of appeals found that there was ample evidence in the record that Carlson had developed a sexual interest in Danielle. *Aleman v. Village*

of Hanover Park, 748 F. Supp. 2d 869, 883 (N.D. Ill. 2010); *Aleman*, 662 F.3d at 903.

As recognized by the Seventh Circuit, the recording (audio and video) of Aleman's interrogation shows that Aleman asked to speak to an attorney on at least two occasions, and arguably four. *Aleman*, 662 F.3d at 905. On each occasion, the defendants ignored Aleman's request. Instead, they continued the interrogation and kept badgering Aleman to sign a Miranda waiver. As recognized by the Seventh Circuit, this was a blatant violation of this Court's repeated holdings and "bright-line" rule that interrogation must *stop* once a person asks to speak to an attorney. *Aleman*, 662 F.3d at 904-905. *See also*, *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Minnick v. Mississippi*, 498 U.S. 146, 151-52 (1990).

Defendants admittedly allowed Aleman to speak to an attorney on the telephone after he asked for a lawyer. But the video shows defendant-officer Villanueva standing right next to Aleman while he is "consulting" with his attorney. Aleman's conversation with his attorney was also monitored and recorded by the police. In the recording, Aleman is heard explaining to his attorney, "I need your help. I can't help myself in here." After that conversation, the defendants told Aleman that he would no longer be able to use the phone. Then defendant Micci told Aleman that he would not be able to go home unless he signed the waiver and agreed to talk. *Aleman*, 662 F.3d at 901.

Shortly thereafter, Aleman finally capitulated and signed the defendants' Miranda waiver. During the subsequent interrogation, Aleman explained how he had tried to revive Joshua by performing CPR, which began with mild shaking (which even the defendants admit is

proper procedure). Defendant Micci then falsely claimed that three different doctors had told him that Joshua had been shaken in such a way that he would have become immediately unresponsive. Micci later admitted that was a lie. But when cornered by Micci's lie, Aleman confessed to improperly shaking Joshua. *Aleman*, 662 F.3d at 902.

Aleman was charged with aggravated battery to a child. At the bond hearing, his confession was presented and relied upon by the judge in setting the conditions of bail. Subsequently, Joshua died and the charges were upgraded to murder. Aleman had been released on bail. Aleman was arrested again, now for the murder charge. At the bond hearing for the murder case, Aleman's confession was again introduced. *Aleman*, 662 F.3d at 902. Posting bond broke Aleman. In addition, his day-care center was forced to shut down. His life was destroyed by these false charges.

The case against Aleman slowly came apart over the next year. The state finally dropped the case on November 13, 2006. The prosecutor later stated that among the reasons she dropped the case was because the statement was coerced. Assistant State's Attorney Karen Crothers explained that she thought it was improper to continue the interrogation after Aleman had asserted his Fifth Amendment right to counsel, and also because he was told he could not go home until he talked to the officers. Crothers also explained that she thought Aleman was innocent and the mother, Danielle Schrick, was responsible for Joshua's death. *Aleman*, 662 F.3d at 902 .

This lawsuit followed. After all of his claims were dismissed by the district court, Aleman filed an appeal to the Seventh Circuit. In a unanimous opinion, Judge

Posner (joined by Judges Wood and Cudahy) held that Aleman had an actionable claim for the violation of his Fifth Amendment rights during the interrogation. *En banc* review was denied.

REASONS FOR DENYING THE PETITION

As basis for *certiorari*, Petitioners contend that the defendants should not be liable for the Fifth Amendment violations in this case because Aleman's statement was not used against him at trial (the charges were dismissed prior to trial). As explained below, there is not a substantial conflict among the courts of appeals on this question. Moreover, this issue rarely arises and several circuits have never even addressed the issue, and several others have only addressed the issue in dictum. Finally, the Seventh Circuit holding in this case is consistent with this Court's decision in *Chavez v. Martinez*, 538 U.S. 760 (2003).

Petitioners also contend that the Seventh Circuit improperly found that the coercive lies and tricks used by the defendants induced a confession. This holding in the *Aleman* decision is factually driven and completely consistent with precedent. Petitioners attempt to manufacture an important question of federal law by citing factually distinguishable and totally inapposite cases.

I. ALEMAN'S STATEMENT WAS USED IN A CRIMINAL CASE

The Fifth Amendment of the United States Constitution provides that "No person ... shall be compelled *in any criminal case* to be a witness against himself." As explained above, the statement obtained from Aleman was used repeatedly in the criminal case that resulted

from his interrogation and confession, including at the separate bond hearings for both the aggravated battery and murder charges.

The lead case on this issue is *Chavez v. Martinez*. Although it was a fractured decision with multiple opinions, it is well settled that at a minimum *Chavez* stands for the principle that for a Miranda violation to be actionable as a §1983 case, the statement obtained must be used in a "criminal case." 538 U.S. at 766-67. In *Chavez*, the Court held that a §1983 action could not be brought for violation of the self-incrimination clause because the statement was never used in court. Actually, charges were never filed against Martinez. Thus there was no "criminal case." 538 U.S. at 767. Following *Chavez*, numerous circuits have recognized that where the statement at issue is used in pre-trial proceedings, including a bond hearing as in this case, the requirement that the statement be used in a "criminal case" is satisfied.

A) Petitioners' Claim of a Split in the Circuits Is Misleading and Exaggerated

One of the leading cases on this issue is *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006). In *Sornberger*, as in the instant case, the court held that use of a coerced statement at a bond hearing and preliminary hearing satisfied the *Chavez* requirement that a statement be used in a criminal case. 434 F.3d at 1024-26.

More recently, in *Stoot v. Everett*, 582 F.3d 910, 925 (9th Cir. 2009), the Ninth Circuit reached the same result. In *Stoot*, the court held that a coerced confession was actionable under §1983 since the statement was used in an

affidavit in support of the information, at a bail hearing, and at another pre-trial hearing. *Id.* The defendant in *Stoot* filed a petition for a writ of *certiorari*, which was denied. *Jensen v. Stoot*, 130 S.Ct. 2343 (2010).

The Petitioners try to support their circuit-split argument by asserting that: "At least five circuits (the Second, Sixth, Eighth, Tenth, and Eleventh) would have rejected respondent's claim that the Miranda violation entitled him to damages, as these courts have held that Miranda violations are never actionable under § 1983." (Petition at 19.) This assertion is part false, and part misleading.

The Second Circuit

For the Second Circuit, the Petitioners cite *Jocks v. Tavernier*, 316 F.3d 128, 138 (2nd Cir. 2003). This argument fails miserably. One problem is that the Petitioners cite dicta in *Jocks* to support their claim that the Second Circuit would have rejected Aleman's case. But the bigger problem with the argument is that *Jocks* was decided before *Chavez*. Subsequently, in *Higazy v. Templeton*, 505 F.3d 161, 171 (2nd Cir. 2007), the Second Circuit explicitly held that a coerced statement did not have to be used at trial to violate the Fifth Amendment. Following a thorough analysis on the issue, the *Higazy* court held that a Fifth Amendment claim is actionable under §1983 if the statement was simply used at a bail hearing and grand jury proceeding. *Id.* at 171. "Use or derivative use of a compelled statement at any criminal proceeding against the declarant violates that person's Fifth Amendment rights; use of the statement at trial is not required." *Higazy*, 505 F.3d at 171. Thus, contrary to

the Petitioners's misrepresentation, the Second Circuit is in accord with the Seventh Circuit on this issue.

The Sixth Circuit

The Petitioners' attempt to construct a deep conflict in the circuits didn't stop with their misstatement about the Second Circuit. The Defendants' argument that the Sixth Circuit would have "rejected" Aleman's claim is also a false assertion. Indeed, in *McKinley v. Mansfield*, 404 F.3d 418 (6th Circ. 2004), the Sixth Circuit explicitly held that a §1983 case alleging a coerced confession is viable if the statement was used during a criminal case. *Id.* at 430-31. "We reject the district court's position that the police may never be liable for violating someone's Fifth Amendment rights." *Id.* at 439.

The Tenth Circuit

Following their pattern, the Petitioners also misrepresent the Tenth Circuit's position on this issue. As stated above, according to the Petitioners, the Tenth Circuit also would have "rejected" Aleman's claim. (Pet. at 19, 21, *citing Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157 (10th Cir. 2003).) *Marshall* was a *pro se* case in which the plaintiff alleged he was questioned by police without first being warned. The *Marshall* court recognized that the issue was not properly before it since the plaintiff did not make the allegation in his complaint in the district court. In dicta, the *Marshall* court cited a 1976 (pre-*Chavez*) decision that Miranda violations do not subject police to liability. Most importantly, the *Marshall* court did not even mention *Chavez*, which had just been decided a few months before. But since *Marshall,* the Tenth Circuit expressly recognized that it had not

yet addressed how a coerced statement must be used in a criminal case in order for it to be actionable under §1983. The Tenth Circuit recognized that under some circumstances, a Fifth Amendment violation is actionable under § 1983. *Eidson v. Owens*, 515 F.3d 1139, 1149 (10th Cir. 2008).

The Eleventh Circuit

Further trying to support their imaginary "fractured circuits" contention, the Petitioners also falsely contend that the Eleventh Circuit would have rejected Aleman's claim. (Pet. at 19, 21.) Trying to support their misstatement, the Petitioners cite *Wright v. Dodd*, 438 Fed. Appx. 805, 807, 2011 WL 3611972 at *1 (11th Cir. 2011). But *Wright* was a *pro se* case in which the plaintiff simply alleged that he was questioned without first being read his Miranda rights. It was not alleged that a statement was taken, nor that it was used in a criminal case. Under those facts, the *Wright* court correctly held that the plaintiff did not have a viable Fifth Amendment claim. Although there is no published decision from the Eleventh Circuit addressing the instant issue, in *Sparado v. Boone*, 212 Fed. Appx. 831, 831 (11th Cir. 2006), the Eleventh Circuit allowed a Fifth Amendment coerced confession case to proceed, and this Court later denied *certiorari*. *Boone v. Sparado*, 552 U.S. 822 (2007).

Petitioners also try to support their "huge fracture in the circuits" argument by citing cases from the Third, Fourth and Fifth circuits which they claim hold that a §1983 claim only lies if the statement was used at trial, and that simple use in a pretrial proceeding is not enough. (Petition at 19, 21.)

It must be initially pointed out that a rule which requires that a statement taken in violation of the Fifth Amendment must be used at trial to be actionable under § 1983 is illogical. Generally, if there is a Fifth Amendment violation, the statement *cannot* be used at trial. During typical pre-trial criminal proceedings, when there is any evidence of a constitutional violation during an interrogation, the defendant will file a motion seeking to have the statement suppressed. If the court finds that the person's Fifth Amendment rights were violated, the statement will be suppressed, meaning it *will not be used at trial*. Therefore, the more obvious and egregious the Fifth Amendment violation is, the less likely it is to be actionable under § 1983. If there is to be any rationality to the law, it is not debatable that a rule which requires a coerced statement to be used at trial for a §1983 claim to be viable cannot stand.

The Third Circuit

Petitioners cite the Third Circuit decision of *Renda v. King*, 347 F.3d 550, 553 (3rd Cir. 2003), as support for their contention of a circuit split. (Pet. at 21, 22.) In *Renda*, the plaintiff was charged with giving false reports to law enforcement authorities. The Court of Common Pleas suppressed the plaintiff's statements due to Miranda violations and the case was nolle prossed by the district attorney for lack of evidence. *Id.* The plaintiff filed a § 1983 action alleging a violation of her Fifth Amendment rights.

The Third Circuit held that the plaintiff's Fifth Amendment rights were not violated because her statements were never used against her at trial. *Id.* at 559. In doing so, however, the Third Circuit failed to engage

in any substantive analysis of the issue now presented to the Court. The decision simply stated: "[O]ur prior decision in *Giuffre* compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.* Notably, however, *Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994), upon which *Renda* relied, was a pre-*Chavez* case. Additionally, as correctly pointed out by the Seventh Circuit in the subsequent, post-*Chavez* decision of *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, *Giuffre* was "decided before the Supreme Court determined in *Dickerson v. United States*, 530 U.S. 428 (2000), that the Miranda warnings themselves have constitutional status." *Id.* at 1025. The Seventh Circuit concluded that therefore "little weight" should be placed on the holding in *Giuffre*, given the subsequent change in the law. *Id.*

In short, the *Renda* decision relied entirely on a distinguishable pre-*Chavez* decision which failed to set forth any detailed analysis to support its conclusion that a Fifth Amendment violation occurs only when a statement has been used at trial. As such, *Renda* does not present a "split" among the Circuits at all, let alone one that is sufficiently mature to warrant this Court's attention. Indeed, faced with facts similar to those presented in this case, it cannot be said with any degree of certainty that the Third Circuit would not agree with the Seventh Circuit decision in this case.

The Fourth Circuit

The Petitioners also cite the Fourth Circuit decision of *Burrell v. Virginia*, 395 F.3d 508, 510 (4th Cir. 2005), as evidence of a circuit split. In *Burell*, an officer approached

the plaintiff at the scene of a traffic accident. When the plaintiff refused to answer any of the officer's questions, he was charged with obstruction of justice and operating an uninsured motor vehicle. *Id.* at 511. When the plaintiff's conviction on those charges was later overturned on appeal, he brought a § 1983 action alleging that his Fifth Amendment rights were violated by the state compelling him to produce evidence of insurance. *Id.*

The Fourth Circuit analyzed the plaintiff's claim under *Chavez* noting that this Court's plurality conclusion that a violation of the constitutional right of self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case. *Id.* at 513. The *Burrell* court then focused on Justices Souter's and Breyer's concurrence in *Chavez* which concentrated on whether a violation required "courtroom use of a criminal defendant's compelled, self-incriminating testimony...." *Id.*, *citing Chavez*, 538 U.S. at 777 (emphasis in original). Based on that reasoning alone, *Burrell* concluded "[Plaintiff] does not allege any trial action that violated his Fifth Amendment rights: thus, *ipso facto*, his claim fails on the plurality's reasoning." *Id.*

But closer scrutiny reveals that *Burrell*'s statement regarding requirement of a "trial" action is pure dicta. Indeed, the plaintiff in *Burrell* never alleged any "courtroom use" of statements since he only asserted a violation occurred at the time summonses were issued by the state. *Id.* Thus, that language, as it related to the question presented by the limited facts of that particular case, went well beyond those facts and consequently, would not be binding on subsequent cases. In fact, in *Sornberger*, the Seventh Circuit explained why that isolated language in *Burrell* created no conflict with its own holding:

> We do not see 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."

Sornberger, 434 F.3d at 1027.

Accordingly, the Fourth Circuit's decision in *Burrell* does not present a split among the Circuits, but must be viewed as limited to the facts before it, which are clearly distinguishable from those found in this case.

The Fifth Circuit

Finally, the Defendants also cite the Fifth Circuit decision in *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), as another case holding that a statement must be used at trial for the interrogation to be actionable under §1983. In *Murray*, plaintiff, a juvenile, was charged with capital murder and injury to a child. Plaintiff's statements, obtained without taking her before a magistrate or notifying her parents or an attorney as required by Texas law, were used against her during two different trials leading to her conviction. *Id.* at 284. The Texas Court of Appeals reversed the convictions due to improperly acquired statements. *Id.* Plaintiff brought an action pursuant to § 1983 alleging a violation of her

Fifth Amendment rights. *Id.* The Fifth Circuit Court of Appeals stated, "The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." *Id.* at 285.

The *Murray* court provided no analysis regarding the question presented in this case. Morevoer, the court's statement was dicta given the fact that the plaintiff's confession had been used two different times against her at trial. *Murray* was decided on a finding of qualified immunity and not on whether the statements were used at trial. *Murray*, 405 F.3d at 293. The court's holding went beyond the facts before the court and any statement that a violation of one's Fifth Amendment rights required the use of such statements at "trial" would not be binding on subsequent cases that were distinguishable on the facts. The Fifth Circuit's decision does not present a split among the circuits that is sufficiently mature to warrant this Court's attention.

B) The Self-Incrimination Clause Does Not Only Apply at Trial

The Petitioners' position that the Fifth Amendment privilege against self-incrimination only applies at a trial is also directly contrary to well-established precedent. For example, this Court has stated that the Fifth Amendment Right against self-incrimination, "... can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*,

406 U. S. 441, 444-445 (1972) (footnotes omitted) (emphasis added). *See also, e.g.*, *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Hubbel*, 530 U.S. 27, 37-38 (2000).

With great hyperbole, Petitioners claim that a "deep circuit split" exists. As explained above, they do so by blatantly misrepresenting the holdings in the various circuits, and also by cherry-picking language from a small collection of cases in those Circuits which have never squarely addressed the "criminal case" question post-*Chavez*.

In contrast, every Circuit which has squarely addressed pre-trial use of self-incriminating statements in the "criminal case" has uniformly followed this Court's guidance in *Chavez* and found such use to violate the Fifth Amendment. *See, Sornberger*, 434 F.3d at 1026; *Higazy v. Templeton*, 505 F.3d at 172; *Stoot*, 582 F.3d at 925-926. There is no reason to believe the results would be any different if (and when) the other circuits have the opportunity to confront that same issue. But until they do—and render a decision on similar facts which is actually at odds with the decisions of the Second, Seventh, and Ninth Circuits—any alleged "conflict" raised by the Petitioners is simply non-existent, let alone sufficiently mature at this juncture to warrant this Court's attention. (Notably, Respondent's research indicates that the D.C. Circuit and the First Circuit have not addressed the issue of civil liability for using a coerced statement in a criminal case, which underscores Respondent's argument that the issue rarely arises.) Unsurprisingly, as noted above, the Supreme Court has denied *certioria* on this exact issue three times in recent years. *See*, *Jensen v. Stoot*, 130 S.Ct. 2343 (2010); *Wrisley v. Crowe*, 131 S.Ct. 905 (2011); *Boone v. Sparado*, 552 U.S. 822 (2007). Nothing has changed

since the Court denied cert in *Wrisley*. Here, the Seventh Circuit merely reaffirmed *Sornberger*.

II. WELL ESTABLISHED BRIGHT-LINE RULES GOVERNING INTERROGATIONS ALREADY EXIST

Predictably, the Petitioners assert that the (fictitious) fracture in the circuits is confusing for law enforcement and there is a need for guidance and "bright-line rules." The shade of this particular herring is bright red. To be sure, there is a bright-line rule that was applicable to the interrogation in this case. During the interrogation, Aleman repeatedly asked for an attorney. But that didn't deter the defendants. Instead of stopping the interrogation as constitutionally required, they kept badgering Aleman until he signed their waiver. This scenario has been repeatedly addressed by this Court. For example, in *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court held:

> [W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.... *Edwards v. Arizona*, 451 U.S. 477 (1981), is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights. The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application. We have confirmed that the *Edwards* rule provides "clear and unequivocal" guidelines to the law enforcement profession. Even before

> *Edwards*, we noted that *Miranda*'s relatively rigid requirement that interrogation must cease upon the accused's request for an attorney has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation.

Id. at 151.

Unquestionably, this bright-line rule was violated in this case. So to be clear, when the Petitioners (and amici) are asking for guidance and bright-line rules, they are simply talking about what kind of constitutional violation will subject them to civil liability. Is that really important for law enforcement training? Moreover, law enforcement's blatant violation of this Court's bright-line rules by continuing to question Aleman after he repeatedly asked for an attorney squarely contradicts their argument that they must have bright-line rules to guide them in interrogations.

What the Petitioners are trying to do is escape liability for a blatant violation of well established bright-line rules. This Court should not allow it. As a result of the unconstitutional interrogation in this case, Aleman was falsely charged with the heinous murder of a small child in his care. His life and reputation were ruined. He was jailed until he was able to post bond. At the bond hearing, the prosecution asserted that Aleman could face the death penalty. His day-care center business was forced to close. He paid a substantial sum to hire a lawyer. The murder prosecution and possibility of conviction dominated his life for over one year. Aleman's emotional damages and suffering were extreme. Nonetheless, Petitioners

audaciously contend that he is not entitled to damages and should not be allowed to pursue a §1983 case.

It is well-established that an important purpose of §1983 is to provide compensation for injuries resulting from civil rights violations. *See, e.g.*, *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 873, n.13 (7th Cir. 1995), quoting *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("as Congress has recognized, a plaintiff in any civil rights suit acts not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest importance.")

Indeed, even if a victim only suffered nominal damages, the Court has recognized the importance of vindication of constitutional rights and accountability. *See City of Riverside v. Rivera*, 477 U.S. 561, 574-75 (1986) (internal citations omitted) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff.") Adopting the Petitioners' argument would be contrary to these venerable principles.

III. THE SEVENTH CIRCUIT'S FACTUAL HOLDING ABOUT THE COERCIVE METHODS USED IN THIS CASE FAILS TO RAISE AN ISSUE WORTHY OF THIS COURT'S REVIEW

Petitioner contends that the Seventh Circuit decision "fundamentally changes existing professional standards

of police work by concluding that Aleman's statement was coerced because police lied about the strength of the evidence." This significantly overstates the breadth of the Seventh Circuit's decision. In reality, the decision was fact-based, fact-specific, and does not warrant review by this Court.

It is not debatable that the police may lie and misstate the evidence during an interrogation. This is routine police work that this Court and every circuit has repeatedly recognized as constitutional. *See, e.g.*, *United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) (Detective's statement that she would try to get district attorney and probation officer to be lenient in return for suspect's cooperation did not render confession involuntary); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (false statement by police that a co-defendant had already confessed was permissible); *Johnson v. Pollard*, 559 F.3d 746, 754-55 (7th Cir. 2009) (officers' false statement that the suspect had failed a polygraph test did not render the statement involuntary).

But it has also been recognized that a fact-finder can find coercion if the officers' lies cross the line, and prohibit the suspect from making a rational choice. *See, e.g., United States v. Rutledge*, 900 F.2d 1127, 1129-30 (7th Cir. 1990) (question was "whether the government has made it impossible for the defendant to make a rational choice as to whether to confess"); *Johnson v. Pollard*, 559 F.3d 746 (7th Cir. 2009) ("when an interrogator makes a false statement to a defendant, we must evaluate the extent to which the misrepresentation overcame the defendant's will by distorting an otherwise rational choice.")

Here, the Seventh Circuit found that under the unique factual circumstances of this particular interrogation, the police officers' tactics had exactly that prohibited effect. The officers did not merely lie about the evidence against Aleman, rather they told Aleman that they had conclusive medical evidence that irrefutably implicated him in injuring the child. When combined with the other coercive elements of the interrogation, including repeated badgering to speak despite multiple requests for counsel and promises that Aleman would be going home if he spoke to the officers, Judge Posner recognized that the coercive tactics left Aleman with no choice but to agree that he had caused Joshua Shrick's injuries:

> Not being a medical expert, Aleman could not contradict what was represented to him as settled medical opinion. He had shaken Joshua, albeit gently; but if medical opinion excluded any other possible cause of the child's death, then, gentle as the shaking was, and innocently intended, it must have been the cause of death. Aleman had no rational basis, given his ignorance of medical science, to deny that he had to have been the cause. ... If a question has only two answers — A and B — and you tell the respondent that the answer is not A, and he has no basis for doubting you, then he is compelled by logic to 'confess' that the answer is B. That was the vise the police placed Aleman in. They told him the only possible cause of Joshua's injuries was that he'd been shaken right before he collapsed; not being an expert in shaken-baby syndrome, Aleman could not deny the officers' false representation of medical opinion.

> And since he was the only person to have shaken Joshua immediately before Joshua's collapse, it was a logical necessity that he had been responsible for the child's death.

Aleman v. Village of Hanover Park, 662 F.3d at 906-07.

Clearly Judge Posner's reasoning is unique to the facts of this case. And whether police tactics during an interrogation cross the line and remove rational choice is a case-by-case factual determination. Thus, this issue does not warrant review by this Court.

Moreover, the Seventh Circuit decision didn't disturb the well-established line of cases which hold that misstating the evidence is permissible during an interrogation. Far from "fundamentally changing" the law as Petitioner contends, the Seventh Circuit actually cited these cases and expressly recognized that "the law permits the police to pressure and cajole, conceal material facts, and actively mislead" suspects, unless the deception goes so far as to "seriously distort" the suspect's ability to make a rational choice. *Aleman*, 662 F. 3d at 906.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Lawrence Jackowiak
Counsel of Record
Adele Nicholas
Sara Garber
Jackowiak Law Offices
20 North Clark Street, Suite 1700
Chicago, Illinois 60602
(312) 795-9595
ljackowiak@jackowiaklaw.com

Counsel for Respondent